

NO. 36374-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LAKE UNION DRYDOCK COMPANY, INC.,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL RESOURCES,

Defendant-Respondent.

RESPONSE BRIEF

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I. INTRODUCTION

This case concerns compensation for private use of public aquatic lands. Appellant Lake Union Drydock Company, Inc. (“LUDC”) challenges a rent calculation made by Respondent State of Washington, Department of Natural Resources (“DNR”) for tenancy of state-owned aquatic lands in Seattle’s Lake Union. The matter is before this Court under a constitutional writ of certiorari.

DNR calculates rent by a statutory formula based on the assessed value of an upland tax parcel. LUDC wants the basis of its rent to be the parcel LUDC owns and uses in conjunction with aquatic lands. LUDC’s parcel is so contaminated that King County dropped its assessment value from \$8.57 million to a nominal \$1,000. This value results in rent of less than \$6 a year to operate a commercial business on 2.8 acres of public land. Instead of using LUDC’s parcel, DNR relied on the value of an alternative parcel. The alternative results in rent of about \$30,000 a year, which is commensurate with rent paid by other tenants.

The absurd rental rate that results from the value of LUDC’s contaminated parcel is unfair to other tenants, disregards legislative intent, and ignores plain language in statute and rule. Use of an alternative parcel conforms to the statutory procedure for calculating rent, complies with legislative directive to manage public lands for public benefits, and fulfills

legislative intent to establish equitable rents. DNR's decision is not contrary to law or arbitrary and capricious.

Therefore, this Court should affirm the superior court and uphold DNR's decision.

II. STATEMENT OF THE ISSUES

The governing statute directs DNR to base rent on an alternative parcel where the assessed value of the upland tax parcel used in conjunction with the leasehold is inconsistent with the purposes of the lease. DNR's rule requires the assessed value the parcel used in the rent calculation to be consistent with the purposes of the lease. Under the facts of this case, there are two issues:

1. Is DNR's decision to substitute the assessed value of an alternative parcel to calculate LUDC's rent contrary to law?
2. Is DNR's decision to use an alternative parcel in LUDC's circumstances arbitrary and capricious?

III. STATEMENT OF THE CASE

A. Calculating Rent for State-Owned Aquatic Lands.

With certain limits, the Legislature authorizes DNR to issue leases

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of state-owned aquatic lands. RCW 79.90.460.¹ For uses dependent on a water location, DNR calculates rent by a statutory formula based on the assessed land value (without improvements) of an upland tax parcel. RCW 79.90.480. Typically, the tax parcel is the property used in conjunction with the leased aquatic lands. RCW 79.90.480(1)(a). Where such parcel “is not assessed or has an assessed value inconsistent with the purposes of the lease,” DNR substitutes the nearest comparable upland parcel used for similar purposes. RCW 79.90.480(4).

The Legislature directs DNR to adopt rules necessary to implement the rental statutes, “specifically including criteria for determining under RCW 79.90.480(4) when an abutting upland parcel has been inappropriately assessed” RCW 79.90.540. DNR adopted WAC 332-30-123(3)² to address assessments not appropriate for use in establishing rent. At the time of LUDC’s administrative rent appeal, the relevant portions of the rule provide:

WAC 332-30-123 Aquatic land use rentals for water-dependent uses. All requirements in this section shall apply to the department and to port districts managing aquatic lands under a management agreement . . . [the following] covers the typical situations . . . followed by

¹The Legislature directed recodification of the aquatic lands statutes, effective July 24, 2005. To facilitate comparison to the record, this brief cites the codification before 2005. Copies of the 2004 statutes and a recodification chart are attached as Appendix 1.

² The entire text of WAC 332-30-123 is attached as Appendix 2.

alternatives for more unique situations.

...

(3) **Consistent assessment.** In addition to the criteria in subsection (2) [which provides the upland parcel must be waterfront and some portion have upland characteristics] of this section, the upland tax parcel's assessed value must be consistent with the purposes of the lease and method of rental establishment. On this basis, the following situations will be considered inconsistent and shall either require adjustment as specified, or selection of an alternative upland tax parcel under subsection (4) of this section:

(a) The upland tax parcel is not assessed. (See chapter 84.36 RCW Exemptions);

(b) Official date of assessment is more than four years old. (See RCW 84.41.030);

(c) The "assessment" results from a special tax classification not reflecting fair market value. Examples include classifications under: State-regulated utilities (chapter 84.12 RCW), Reforestation lands (chapter 84.28 RCW), Timber and forest lands (chapter 84.33 RCW), and Open space (chapter 84.34 RCW). This inconsistency may be corrected by substituting the full value for the parcel if such value is part of the assessment records;

(d) If the assessed valuation of the upland tax parcel to be used is under appeal as a matter of record before any county or state agency, the valuation on the assessor's records shall be used, however, any changes in valuation resulting from such appeal will result in an equitable adjustment of future rental;

(e) The majority of the upland tax parcel area is not used for a water-dependent purpose. This inconsistency may be corrected by using the value and area of the portion of the upland tax parcel that is used for water-dependent purposes if this portion can be segregated from the assessment records; and

(f) The size of the upland tax parcel in acres or square feet is not known or its small size results in a nominal valuation, e.g., unbuildable lot.

B. DNR's Application of WAC 332-30-123(3).

DNR applies WAC 332-30-123(3) as providing a non-exclusive list of situations with inconsistent values. See Administrative Record³ ("AR") at III-371, 386, 389; IV-543, 612, 614, 630-31, 648, 655. Over a twenty-year period, individual DNR employees occasionally expressed thoughts that another interpretation of the rule might be that it provides an exclusive or limited list of situations. See AR at III-374, 389. During this time, DNR infrequently encountered only two circumstances not on the list but for which DNR selected an alternative parcel to calculate rent. See AR at III-370-77; IV-614, 631, 643, 648, 655. In the first, fluctuating tax assessments in a small geographic area caused inordinately high assessments, a circumstance referred to as "spikes." AR at III-370-77. In the second, contamination of an upland tax parcel substantially reduced its assessed value. AR at III-386-92.

Since 1992, DNR calculated rent for six leaseholds⁴ other than LUDC's for which contamination reduced the value of the upland parcel.

³ Copies of all portions of the Administrative Record cited in this brief are attached as Appendix 3.

⁴ The lessees are: (1) ASARCO, AR at IV-655; (2) Todd Shipyards Corporation (representing two leaseholds), AR at IV-539-44; (3) Unocal Corporation, AR at IV-645-49; (4) Salmon Bay Terminals, Inc., AR at IV-591-93; and (5) Northlake Shipyards, Inc., AR at IV-627-28, 630-32.

For all but one, DNR looked to an alternative parcel to determine rent.⁵ AR at IV-543, 614, 648, 655. For the exception, Northlake Shipyards, Inc. (“Northlake”), other equitable considerations led DNR to conclude the value of Northlake’s upland parcel is consistent with purposes of the lease. AR at IV-630-31. One consideration was that Northlake made “tangible commitments and monetary contribution toward cleanup of the site, which includes portions of the state-owned aquatic lands.” AR at IV-631.

DNR amended WAC 332-30-123 on November 8, 2005.⁶ AR at III-353-68. The amended rule expressly states (1) the list of situations is non-exclusive; (2) an assessed value reflecting contamination is inconsistent, depending on circumstances; and (3) use of the full value of the parcel as if there were no contamination can cure the inconsistency, “if such value is part of the assessment records.” AR at III-364-65.

C. Statement of Facts.

LUDC occupies approximately 2.8 acres of state-owned aquatic land in Lake Union, Seattle, Washington, under an annual tenancy subject

⁵ DNR finally used alternate parcels to determine rent for ASARCO, AR at IV-655; Todd Shipyards Corporation (representing two leaseholds), AR at IV-539-44; and Unocal Corporation, AR at IV-645-49. After DNR amended WAC 332-30-123, Salmon Bay Terminals, Inc. requested DNR base its rental amount on the value of its upland parcel before deduction for the cleanup costs rather than utilizing an alternative parcel. AR at IV-615.

⁶ In the administrative rent appeal, the Parties agreed to use the version of the rule before November 2005.

to the terms of an expired lease as modified by a holdover agreement. AR at I-15-17. LUDC uses the state-owned aquatic lands in conjunction with a partially submerged upland tax parcel owned by LUDC to operate a commercial marine repair and construction business. AR at I-1. LUDC has operated its business on the upland parcel since 1919. AR at II-284.

The King County Assessor's Office assessed the land value of LUDC's upland parcel at \$1,000 following an appeal of the county's 1999 appraisal for tax assessment purposes. AR at II-278-79. The appraiser stated, the "tidelands have been heavily contaminated with heavy metals, paint, PCB's, hydrocarbons and other toxic wastes. Also it has been used as a dumping ground for steel cable, engines, boat parts, etc. The environmental impact is immense" AR at II-278. The appraiser recommended the "land be reduced to nominal value because the cost to cure exceeds the value of the land. Land = \$1,000." AR at II-279.

DNR must revalue rent every four years. RCW 79.90.480(3)(a). On June 2, 2005, DNR notified LUDC of back rent due and revaluation of LUDC's rental rate. AR at II-261-64. DNR stated the agency would use the assessed value of LUDC's upland tax parcel before reduction for contamination, about \$8.57 million, to determine LUDC's rental rate. AR at II-263. DNR derived the assessed value from a report on King County's online assessment system titled "eReal Property System."

See AR at II-177. DNR calculated \$44,269.38 as the rental rate for 2.8 acres for the period from 2005 to 2006. AR at II-263. This is a rental rate of \$15,810.49 per acre per year. In the same month, DNR charged a median rental rate to other water-dependant tenants on Lake Union of \$26,113.28 per acre per year.⁷ See AR at IV-666.

A tenant who disputes a rental rate can seek review within DNR, but also may seek judicial review. RCW 79.90.520. On June 29, 2005, LUDC administratively appealed DNR's rental amount, challenging DNR's use of the assessed value before reduction for contamination. AR at II-243-46. LUDC asserted that the yearly rental payment should be \$5.41 based on the upland parcel's assessed value of \$1,000. AR at II-244. On October 28, 2006, DNR's Rental Dispute Officer ("RDO") responded by finding that the assessed value of LUDC's upland parcel is inconsistent with the purposes of the lease. AR at II-236. The RDO did not use the pre-contamination value of the property to determine rent because the RDO could not confirm that the assessor established an assessed value distinct from the reduction due to contamination. AR at II-

⁷ Before and during this time, DNR calculated rental rates for other revaluations or new leases in Lake Union. Clerk's Papers ("CP") at 252-61. The median rent for these was \$20,418.75. See AR at IV-656-65. In June 2005, the lowest rental rate billed to a Lake Union lessee, \$6,396.39 per acre per year, was to Northlake. See AR at IV-666. Northlake's assessed value reflected contamination, but DNR equitably determined its assessed value to be consistent with the purposes of the lease. See page 6 of this brief.

235. Instead, DNR would select an alternative upland parcel for calculation of rent. AR at II-235.

LUDC continued the appeal until January 10, 2006, when the Board of Natural Resources (“Board”) declined to review the decision.⁸ On June 7, 2006, DNR notified LUDC that the 2004-2005 rental rate is \$29,512.92, based on the selected alternate parcel. AR at I-58. This is a rental rate of about \$10,540 per acre per year. On July 21, 2007, LUDC paid back rent. AR at I-60.

D. Proceedings Below.

On July 27, 2006, LUDC applied to the Superior Court of Thurston County for statutory writ of review or, alternatively, a constitutional writ of certiorari.⁹ Clerk’s Papers (“CP”) at 5-9. Upon the stipulation and agreed order of the parties, the court dismissed the application for the statutory writ¹⁰ and issued the writ for DNR to bring before the court the record of the agency’s decision to base LUDC’s rent on alternative parcel.

⁸ Before the matter went to the Board, there were additional procedural steps not challenged in this petition.

⁹ Review under the Administrative Procedure Act (“APA”) is improper because DNR made a proprietary decision. The APA provides for judicial review of “agency action.” RCW 34.05.510. Under the APA, “[a]gency action does not include an agency decision regarding . . . c) any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests.” RCW 34.05.010(3).

¹⁰ Review under the statutory writ of review is improper because the DNR did not exercise a judicial or quasi-judicial function. To obtain a statutory writ of review, LUDC must prove that (1) an inferior tribunal, board, or officer, (2) exercising judicial functions, (3) exceeded its jurisdiction or acted illegally, and (4) there is no adequate remedy at law. RCW 7.16.40.

CP at 22-24. On May 18, 2007, the court concluded that LUDC's interpretation of the rent statutes and rules would result in disparity among citizens and therefore did not reflect legislative intent. CP at 324-29. The court held that DNR's decision is not arbitrary and capricious or contrary to law. CP at 328.

IV. SUMMARY OF THE ARGUMENT

This Court should uphold DNR's decision to use the value of an alternative parcel to calculate LUDC's rent because the decision is not contrary to law or arbitrary and capricious.

The decision is not contrary to law because it complies with RCW 79.90.480(4) (the "Substitute Parcel Statute") and WAC 332-30-123(3) (the "Consistent Assessment Rule"). First, the plain text of both statute and rule require DNR to use an alternative parcel where an assessed value is inconsistent with the purposes of the lease. An assessed value that results in nearly rent-free use of public land for a private commercial business is patently incongruous—the value is not consistent with the purpose. Second, DNR's decision complies with legislative intent to manage aquatic lands for public benefits while establishing fair, predictable lease rates. LUDC's exclusive, almost free use of public lands for private purposes would thwart all public benefits.

It also would be unfair to other tenants not sharing in the windfall that LUDC would receive from operating a business on contaminated property.

LUDC is wrong to suggest that RCW 79.90.540 (the “Rule Making Statute”) narrows the effect of the Substitute Parcel Statute. The statute does not ask DNR to define “inconsistent.” Instead, it directs DNR to address agency procedure after the Substitute Parcel Statute disallows use of an upland parcel used in conjunction with a leased area. LUDC’s interpretation would lead to the absurd result of hardship for some tenants and windfall for others even though the Legislature intended fair, predictable rents. LUDC’s interpretation also would reward tenants who contaminate.

DNR does not argue that the law at issue is ambiguous. Nonetheless, if a statute or rule is ambiguous, giving weight to DNR’s interpretation is appropriate. DNR’s interpretation conforms to statutory mandate and is within the agency’s authority. LUDC is wrong to rely on the confusion of a few DNR employees about the Consistent Assessment Rule. First, agency policy manifests in DNR’s practice, not in the views of individual employees. Second, such confusion suggests only that DNR was right in 2005 to clarify the rule consistent with its original meaning.

DNR’s decision is not arbitrary and capricious. The rent charged to LUDC is commensurate with rents paid by others. DNR considered

other interpretations of the governing rule and consistently applied it in conformance with statutory mandate.

V. ARGUMENT

A. Standard of Review.

Under a constitutional writ of certiorari, the appellate court stands in the same position as the superior court. See Leavitt v. Jefferson Cy., 74 Wn. App. 668, 677, 875 P.2d 681 (1994). The appellate court reviews the record of the agency decision de novo. Id. The court may consider whether an agency's action is contrary to law or arbitrary and capricious. Pierce Cy. Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983).

B. DNR's Decision to Use an Alternative Parcel Is Not Contrary to Law.

DNR's rent calculation in LUDC's circumstance is not contrary to law because it complies with the Substitute Parcel Statute, RCW 79.90.480(4) and the Consistent Assessment Rule, WAC 332-30-123(3). An agency action is contrary to law where the agency violates rules governing its exercise of discretion. Pierce Cy. Sheriff v. Civil Serv. Comm'n, 98 Wn.2d at 694.

1. The Plain Meaning of the Substitute Parcel Statute Confirms That DNR's Decision Is Not Contrary to Law.

The assessed value of LUDC's upland parcel is inconsistent with the purposes of the LUDC's tenancy under the plain meaning of the Substitute Parcel Statute. If the meaning of a statute is clear, the court gives effect to its plain meaning as an expression of legislative intent. Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

The court's primary objective is to carry out the Legislature's intent. Id.

a. The Substitute Parcel Statute Requires DNR to Substitute an Alternative Parcel.

Using the ordinary meaning of words and basic rules of grammar, the Substitute Parcel Statute requires DNR to substitute an alternative parcel in LUDC's circumstances. A court may determine the plain meaning of a statute by taking into account the ordinary meanings of words and the basic rules of grammar. See Id. at 11. The court may consult with a dictionary for the plain meaning of a term in an unambiguous statute. Sleasman v. City of Lacey, 159 Wn.2d 639, 643, 151 P.3d 990 (2007).

The Substitute Parcel Statute directs DNR to calculate rent by a formula based on the assessed land value of an upland tax parcel used in conjunction with the aquatic land. RCW 79.90.480(1)(a). Nonetheless, the statute also requires that "[i]f the upland parcel used in conjunction

with the leased area . . . has an assessed value inconsistent with the purposes of the lease, the nearest comparable upland parcel . . . shall be substituted . . .” RCW 79.90.480(4). The Legislature does not define “inconsistent.” Its ordinary meaning is “lacking consistency: incompatible, incongruous, inharmonious.” Webster’s Third New International Dictionary 1144 (1993).

LUDC entered into a lease of state-owned aquatic lands for the purpose of conducting a for-profit marine repair and construction business. LUDC is located in a dense urban environment where the median rental rate for state-owned aquatic lands is \$26,113.28 per acre per year. In contrast, use of the value of LUDC’s parcel results in a rental rate of \$1.93 per acre per year. While the contamination of LUDC’s upland parcel may impair LUDC’s ability to sell the property, the contamination has no effect on LUDC’s use of public land for the purpose of operating a private business at a location where other tenants pay substantially more than LUDC wants to pay. The assessed value of LUDC’s parcel is inconsistent—incompatible, incongruous, inharmonious—with the purposes of the LUDC’s lease. Therefore, DNR’s decision to use an alternative parcel to determine LUDC’s rental rate complies with the words and basic grammar of the Substitute Parcel Statute.

b. The Legislature Intended DNR to Manage Aquatic Lands Equitably and for Public Benefits.

The Legislature intended DNR to manage state-owned aquatic lands for public benefits while establishing fair, predictable lease rates. The court may discern the plain meaning from all the terms and words in the statute and from related statutes that disclose legislative intent. Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d at 11. Legislative policy statements play an important role in determining what a statute requires. See Judd v. Am. Tel. & Tel. Co., 152 Wn.2d 195, 201-05, 95 P.3d 337 (2004).

Under RCW Title 79, the Legislature vests authority to manage public lands in DNR. DNR deposits the net revenue from leases in an account used for enhancement of aquatic lands, public access, and fish and game projects. RCW 79.90.245. The Legislature directs DNR to manage state-owned aquatic lands for “a balance of public benefits for all citizens of the state,” including environmental protection and generation of revenue. RCW 79.90.455.

The Legislature enacted the preceding provision as section 2 of the Laws of 1984, ch. 221. This act establishes the framework for DNR’s management of aquatic lands and leasing activities. The Substitute Parcel Statute is in section 7 of the act; the Rule Making Statute is section 19.

The Legislature introduced the act in section 1 with a statement of findings that notes conflicting demands on state-owned aquatic lands, which “are a finite natural resource of great value and an irreplaceable public heritage.” RCW 79.90.450. The Legislature explained “[t]he purpose of [certain sections of the act including the provisions at issue in this case] is to articulate a management philosophy to guide the exercise of the state’s ownership interest and the exercise of the department’s management authority, and to establish standards for determining equitable and predictable lease rates” RCW 79.90.450. In section 5, the Legislature provided for rent-free use of state-owned aquatic lands only for public parks or public recreation facilities “available to the general public on a first-come, first-served basis and . . . not managed to produce a profit for the operator or a concessionaire.” RCW 79.90.470.

DNR’s decision to use an alternative parcel to calculate LUDC’s rent is consistent with legislative directive in RCW 79.90.455 to manage state-owned aquatic lands for a balance of public benefits including environmental protection and generation of revenue. LUDC’s exclusive use of state-owned aquatic lands hinders public access to the waters of urban Lake Union. For LUDC to pay almost nothing to use public land because LUDC’s upland is contaminated would not protect the

environment nor generate revenue. Ironically, it would deprive the State of funds used to enhance aquatic lands.

Moreover, LUDC's desired rental rate would be contrary to legislative directive in RCW 79.90.450 to establish equitable and predictable lease rates. LUDC wants almost free use of public lands even though LUDC's use excludes the public. LUDC wants to pay a tiny fraction of the amount paid by LUDC's neighbors and competitors because of contamination on LUDC's property, even though the contamination does not limit LUDC's use of the leasehold. This would be unfair to other tenants who are working on cleanup or who did not contaminate their properties.

2. DNR Implements the Plain Meaning of the Consistent Assessment Rule, Which Conforms to Statutory Directive.

DNR applied the plain meaning of the Consistent Assessment Rule when deciding to use an alternative parcel to calculate LUDC's rent. The plain meaning of the rule is valid because it is consistent with statutory mandates. Principles of statutory construction apply to administrative rules, particularly where the agency adopts the rules pursuant to express legislative authority. Cannon v. Dep't of Licensing, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). An agency's rule is invalid if it is not reasonably

consistent with the statute it implements. Bostain v. Food Express, Inc., 159 Wn.2d 700, 715, 153 P.3d 846 (2007).

Taking into account the ordinary meanings of words, statutory context, and simple rules of grammar, the Consistent Assessment Rule¹¹ plainly means that the assessed value of an upland tax parcel must be consistent with the purposes of the lease regardless of whether the Consistent Assessment Rule expressly lists the situation in question. DNR regularly applied this plain meaning, which mirrors the statute that the rule implements. See AR at III-371, 386; IV-543, 612, 614, 630-31, 648, 655.

The Consistent Assessment Rule provides that for a parcel's assessment to be appropriate, the "parcel's assessed value must be consistent with the purposes of the lease and the method of rental establishment." The next sentence begins with an introductory modifier, the prepositional phrase "[o]n this basis." "Basis," refers to criteria in the preceding sentence: the assessed value must be consistent with purposes of the lease. Next is a phrase with two clauses: "the following situations will be considered inconsistent and shall either require adjustment as specified, or selection of an alternative . . . parcel." The verb in the first clause, "will be considered," is in the passive form, so the "actor" is

¹¹ The relevant portions are quoted on pages 3-4 of this brief.

unstated. The introductory paragraph to the Consistent Assessment Rule provides that it applies to both DNR and port districts.

Together, the clauses create a presumptive duty for DNR to (1) consider the enumerated situations as inconsistent for the purposes of a lease and (2) require some adjustment or selection of an alternative parcel. This duty does not mean these are the only situations that are inconsistent. The plain text of the rule provides that the basis—or criteria—is that the assessed value must be consistent with purposes of the lease. Therefore, regardless of whether Consistent Assessment Rule lists a specific situation, DNR looks to an alternative parcel to determine rent if the assessed value in that specific situation is inconsistent with the purposes of the lease. This practice complies with the Substitute Parcel Statute.

3. The Rule Making Statute Does Not Narrow the Effect of the Substitute Parcel Statute.

The Rule Making Statute, RCW 79.90.540, directs DNR to adopt rules for implementing the Substitute Parcel Statute, not to define the meaning of “inconsistent” or narrow the scope of legislative directive. Courts read statutes to achieve a harmonious construction that maintains the integrity of all of the respective statutes. State ex rel. Peninsula Neighborhood Ass’n v. Dep’t of Transp., 142 Wn.2d 328, 342, 12 P.3d 134 (2000). The court presumes a difference in intent where the

Legislature uses certain language in one instance but different, dissimilar language in another. Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998).

The Rule Making Statute directs DNR to “adopt such rules as are necessary to carry out the purposes of [sections 1 through 18 of the Laws of 1984, ch. 221], specifically including criteria for determining under [the Substitute Parcel Statute] when an abutting upland parcel has been inappropriately assessed” RCW 79.90.540. The main clause directs DNR to undertake rule making in general. The subordinate clause clarifies that in addition to general rule making, DNR is to adopt a rule specific to the Substitute Parcel Statute.

The Rule Making Statute does not direct DNR to define “inconsistent,” referring instead to parcels that are “inappropriately assessed” under the Substitute Parcel Statute. In contrast, another section in the same act as the Rule Making Statute provides “[i]f a parcel leased for water-dependent rent uses is used for an extended period of time, as defined by rule of the department, for a nonwater-dependent use” RCW 79.90.510 (emphasis added). The difference in terms within the same act indicates a difference in legislative intent. In one instance, the Legislature directs DNR to define a term, “extended period of time,” then limits application of a statutory provision to DNR’s definition. In the

other, the Legislature neither directs DNR to define “inconsistent” nor limits application of a statutory provision to DNR’s definition. Instead, the Legislature directs DNR to describe what DNR will do to acknowledge that the Substitute Parcel Statute disallows use of the upland tax parcel.

In essence, the Rule Making Statute asks for a procedural rule for DNR to comply with legislative directive. The Substitute Parcel Statute requires equitable lease rates—an assessed value cannot be inconsistent with the purposes of a lease. The Consistent Assessment Rule, adopted pursuant to the Substitute Parcel Statute and the Rule Making Statute, provides a guide to predict when a parcel may be inappropriately assessed and thus inequitable. This interplay between the statutes and rule is consistent with legislative intent “to establish standards for determining equitable and predictable lease rates.”

4. LUDC’s Interpretation Leads to Absurd Results.

LUDC suggests a meaning for the Rule Making Statute and the Consistent Assessment Statute that contrasts absurdly with direct statutory mandates and legislative intent for fairness. The court may corroborate the plain language analysis by validating the absence of an absurd result. Tingey v. Haisch, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007). The court presumes the Legislature did not intend absurd results. Id.

LUDC argues a different meaning for the Rule Making Statute; that the Legislature directed DNR to define the term “inconsistent” and then limit application of the Substitute Parcel Statute to DNR’s definition. See Brief of Appellant (“Br. Appellant”) at 18. LUDC also argues a different meaning for the Consistent Assessment Rule; that the enumerated situations are the criteria for determining when a parcel is inappropriately assessed. See Br. Appellant at 17-18. LUDC’s interpretation ignores plain meaning and would have absurd consequences.

First, LUDC’s interpretation that the term “criteria” in the Rule Making Statute requires DNR to limit the application of the Substitute Parcel Statute to a definition of “inconsistent” created by DNR is faulty because it reads into the Rule Making Statute a nonexistent legislative directive to define a term. Second, the word criteria—plural for criterion—means “a characterizing mark[s] or trait[s]” or “standard[s] on which a decision or judgment may be based.” Webster’s Third New International Dictionary 538 (1993). The Consistent Assessment Rule plainly identifies the standard, or “basis,” as “[the] assessed value must be consistent with purposes of the lease” The rule identifies the enumerated situations only as “situations.” All six situations are like one another in that each has the same characterizing trait—an inconsistent assessed value.

Finally, application of LUDC's interpretation would result in an absurd consequence that contravenes legislative intent. Under LUDC's interpretation, DNR would be required to use an incongruously assessed value of an upland parcel just because DNR left the particular situation off the list. In other words, DNR's lack of prescient knowledge would result in a hardship or windfall for some tenants. Tenants with property assessed at an inordinately high value would pay substantially more for lease of state-owned aquatic lands than near neighbors who lease for the same purpose. Tenants who contaminate upland parcels would pay nearly nothing, while near neighbors who did not contaminate their parcel—or are actively engaged in cleanup of their property—would pay substantially more even though they lease for the same purpose. Tenants who contaminate their upland parcels would use state-owned aquatic lands nearly rent-free though not using the property for a public park or public recreation on a non-profit basis as required by RCW 79.90.470. This result does not comply with the Substitute Parcel Statute. It does not provide for a balance of public benefits. Further, it contravenes legislative intent to establish standards for equitable and predictable lease rates.

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5. If a Statute or Rule Is Ambiguous, the Court Construes the Meaning.

DNR applies the plain meaning of the rental statutes and rule. Nonetheless, if the court determines the need to construe either the statutes or rule because of ambiguity, giving weight to DNR's interpretation is proper. If a statute is susceptible to more than one reasonable meaning, it is ambiguous. Cockle v. Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001). The court then resorts to principles of statutory construction, legislative history, and relevant case law. Id.

a. DNR's Interpretation of the Statutes Conforms to Statutory Mandate.

The Substitute Parcel Statute and the Rule Making Statute are not ambiguous. If either statute is ambiguous—or if the interplay between the two creates ambiguity—the court construes the statute to carry out legislative intent. Courts have the ultimate authority to interpret a statute. Cockle v. Labor & Indus., 142 Wn.2d. at 812. A court may defer to an agency's interpretation of a statute to help the court achieve a proper understanding of it. Id. Such deference is proper only if the statute is ambiguous; the agency's interpretation does not conflict with statutory mandate; the agency is responsible for administering and enforcing the

statute; and the statute is within the agency's special expertise. Bostain v. Food Express, Inc., 159 Wn.2d at 716.

If there is statutory ambiguity here, giving weight to DNR's interpretation of the statutes is proper. First, the Legislature vested responsibility for managing and leasing state-owned aquatic lands in DNR. DNR administers and enforces the statutes in question. Second, this responsibility, and the experience it engenders, gives DNR proficiency in the statutory framework governing the leases of public lands. It gives DNR knowledge of the equities between users of aquatic lands. Finally, DNR interprets the statutes as requiring DNR to substitute an alternative parcel when the assessed value of the upland parcel is inconsistent with the purposes of the lease. This matches the directive of the Substitute Parcel Statute. It conforms to legislative intent because DNR's interpretation establishes "standards for determining equitable and predictable lease rates." It also conforms to legislative directive to manage state-owned aquatic lands for a balance of public benefits.

b. DNR's Interpretation of the Rule Conforms to Legislative Intent and Statutory Authority.

DNR applies the Consistent Assessment Rule to LUDC and all tenants in a manner consistent with legislative intent and the agency's authority. Accordingly, the court may grant deference to DNR's

interpretation of its own rule. Deference to an agency's interpretation of its own rule is appropriate if not contrary to legislative intent and within the agency's authority. See Port of Seattle v. Pollution Control Hearings Bd, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

Agency policy manifests in DNR's application of the rule, not in the views of individual DNR employees. That DNR employees expressed confusion and sought assurances on its proper interpretation indicates, at most, that the Consistent Assessment Rule may be ambiguous. If it is, then DNR is entitled to deference for its interpretation as expressed in its actions. This deference is proper because DNR is interpreting its own rule, DNR's interpretation conforms to legislative intent, and the Legislature granted authority to DNR to adopt and enforce this rule.

(1) DNR Employee Confusion Suggests Only the Need for Clarification.

That some DNR staff discussed in internal memoranda a meaning for the Consistent Assessment Rule different from DNR's established policy and practice shows only that DNR should consider clarifying it. An agency must show it adopted its interpretation as a matter of policy and prove an established practice of enforcement. Sleasman v. City of Lacey, 159 Wn.2d 639, 646, 151 P.3d 990 (2007) citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

DNR consistently applied the rule as containing a non-exclusive list of examples, but some DNR staff suggested another way to interpret its meaning; that it contains an exclusive list of examples. For example, two DNR employees prepared a 1991 draft internal memorandum discussing interpretation of the rule with regards to “spikes,” fluctuating tax assessments in small geographic areas causing inordinately high assessments for some parcels. AR at III-370-77. The authors confirm DNR determined in 1987 that the assessed value of the properties affected by “spikes” is inconsistent for the purposes of the lease. AR at III-371. In other words, DNR interpreted the rule as including a non-exclusive list of examples. The employees drafting the internal memorandum express the contrary view. AR at III-374. However, DNR continued to consider assessed values arising from “spikes” to be inconsistent within the scope of the rule. AR at III-379.

In 2003, a DNR employee drafted an internal memorandum concerning drastically reduced assessed values resulting from contamination. AR at III-386-92. The author was “looking for someone to check my assumptions.” AR at III-386. The author acknowledged that DNR’s practice is to consider such assessments to be inconsistent with the purposes of a lease. AR at III-386. He acknowledged that DNR staff previously asserted that the list in Consistent Assessment Rule is

non-exclusive. AR at III-389. He then expresses his own personal belief that the rule is not “absolutely” exclusive, but contamination may not be within its scope. AR at III-389. After expressing personal views in an internal memorandum, the employee subsequently addresses letters to the two lessees who had been the subject of the draft memorandum. See AR at IV-611-14, 630-31. To both, he affirms DNR’s practice: contamination is a situation where the assessed value can be inconsistent with the purposes of the lease. AR at IV-612, 630-31.

(2) DNR’s Clarification of the Rule Did Not Change Its Meaning.

DNR revised the Consistent Assessment Rule, in part, to clarify and assure conformance to DNR’s established practice. Circumstances showing that an amendment to a statute is intended merely to interpret the original may rebut the presumption the modification is intended to change existing law. Bowen v. Statewide City Emp. Ret. Sys., 72 Wn.2d 397, 403, 433 P.2d 150 (1967). A showing of ambiguity or doubt about the statute is an indication the intent is to clarify, rather than change, the law.

Id.

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In November 2004, DNR began working to amend the Consistent Assessment Rule.¹² AR at III-341. The notice of proposed rule making on August 3, 2005, stated the purpose, in part, as “clarifying that the list of examples of inconsistent situations . . . is not an exclusive list” and “specifying that DNR will not use an upland parcel when the assessed value of that parcel is affected by contamination.” AR at III-342. The notice provided reasons supporting the proposal:

The proposed changes are not substantive, and will not change rents paid by lessees of state-owned aquatic lands. Instead, they are designed to clarify the rules, make them easier to understand and apply, and give explicit directions in situations not yet specifically discussed in the rules, consistent with current DNR standard practice.

AR at III-342.

Prior to amending WAC 332-30-123 in 2005, DNR consistently applied the rule as containing a non-exclusive list of situations. Granted, some DNR employees drafting internal memoranda expressed doubts about whether the list was non-exclusive. However, DNR did not depart from the agency’s consistent application of the rule. The fact that DNR

¹² A footnote to LUDC’s brief states that, “for the record,” LUDC disputes that the rule amendment complies with the governing statute. Br. Appellant at 2. LUDC’s petition did not raise this issue and therefore for the purposes of this case the rule amendment must be considered valid. A challenge to a rule’s validity for the first time on appeal is not appropriate. Moreover, it is not appropriate under a constitutional writ, which is available for review of agency action when there is no other adequate remedy at law. Torrance v. King Cy., 136 Wn.2d 783, 787-89, 966 P.2d 891 (1998). The Administrative Procedure Act provides the proper means to challenge the validity of a rule. RCW 34.05.570(2). See Judd v. Am. Tel. & Tel. Co., 152 Wn.2d 195, 204, 95 P.3d 337 (2004).

employees expressed confusion over the proper interpretation of the rule supports the conclusion that DNR intended to clarify, not change the rule when amending it in 2005.

C. DNR's Decision Is Not Arbitrary and Capricious.

DNR's decision to use an alternative parcel to determine LUDC's rent is not arbitrary and capricious. The rent DNR charges LUDC is consistent with the rates paid by others. DNR fully considered the facts and circumstances and proceeded to act equitably and consistent with standard practice. Arbitrary and capricious action is willful and unreasoning, without consideration and in disregard of the facts and circumstances. Pierce Cy. Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). An agency action is not arbitrary and capricious where there is room for two opinions, even if one believes the agency reached an erroneous conclusion. Id.

1. DNR Considered Other Interpretations, But Consistently Applied the Rule in Conformance With Legislative Intent and Statutory Mandate.

DNR applied the Consistent Assessment Rule uniformly since adopting it in 1984. During this time, DNR considered other possible interpretations of the rule and the statutes it implements. DNR always returned to the conclusion that the Legislature directed DNR to establish rents on a fair and equitable basis.

LUDC asserts that DNR's decision to use an alternative parcel is arbitrary and capricious because DNR employees expressed competing views about interpretation of the Consistent Assessment Rule. Br. Appellant at 21. LUDC is wrong. This case concerns DNR's interpretation of law, which is similar to the circumstances in Friends of the Columbia Gorge, Inc. v. Forest Practices Appeals Bd., 129 Wn. App. 35, 118 P.3d 354 (2005). In this case, the Friends of the Columbia Gorge challenged DNR's interpretation of state forest practices rules. Id. at 38. They claimed DNR's final interpretation was arbitrary and capricious because it differed from the action proposed by some DNR employees. See Id. at 58. Division Two of the Court of Appeals disagreed, stating, "That DNR employees expressed divergent views before DNR made a final decision demonstrates, not arbitrariness, but rather that DNR gave the matter due consideration." Id.

Here, before determining LUDC's rent, DNR fully considered other interpretations of the Consistent Assessment Rule before applying the rule in a manner that matches the Legislature's directive in the Substitute Parcel Statute. DNR's decision to follow legislative directive is not arbitrary and capricious.

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2. DNR's Application of the Rule to LUDC's Rent Provides Fair Treatment for All Tenants.

To calculate LUDC's rent, DNR conformed to agency practice and applied the Consistent Assessment Rule to LUDC's circumstances in a manner that treats LUDC fairly and the same as other similarly situated tenants. Although prior decisions do not bind an administrative agency, agencies should strive for equal treatment of similarly situated persons. See Vergeyle v. Empl. Sec. Dep't, 28 Wn. App. 399, 404, 623 P.2d 736 (1981), overruled on other grounds in Davis v. Empl. Sec. Dep't, 108 Wn.2d 272, 275, 737 P.2d 1262 (1987) (citations omitted). Interpretation and administration of statutes must take into account legislative policy statements. See Judd v. Am. Tel. & Tel. Co., 152 Wn.2d 195, 204-05, 95 P.3d 337 (2004).

The Legislature directs DNR to manage state-owned aquatic lands for a balance of public benefits for all citizens of the state. RCW 79.90.450. The Legislature states that the purpose of the rental statutes is to establish standards for determining equitable and predictable lease rates. RCW 79.90.450. This is a clear legislative policy directive to DNR to strive for fair and equal treatment as the agency accommodates competing demands on a finite public resource, which the agency must

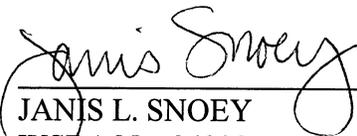
manage for a balance of public benefits. DNR calculated LUDC's rent following standard agency practice established over a period of more than twenty years. DNR treats LUDC the same as other tenants with contaminated upland tax parcels. DNR's treatment of LUDC is fair relative to other neighboring tenants. DNR's decision to use an alternative parcel to calculate LUDC's rent is not arbitrary and capricious.

VI. CONCLUSION

DNR's decision to select an alternative parcel to determine LUDC's rent is not contrary to law, nor is it arbitrary and capricious. This Court should uphold DNR's decision to use an alternative parcel to calculate LUDC's rent.

RESPECTFULLY SUBMITTED this 11th day of October, 2007.

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APPENDIX 1

79.90.230 Sale procedure—Readvertisement of lands not sold. If any tide or shore land, when otherwise permitted under RCW 79.94.150 to be sold, so offered for sale be not sold, the same may again be advertised for sale, as provided in this chapter, whenever in the opinion of the department of natural resources it shall be expedient so to do, and such land shall be again advertised and offered for sale as herein provided, whenever any person shall apply to the commissioner in writing to have such land offered for sale and shall agree to pay, at least the appraised value thereof and shall deposit with the department at the time of making such application a sufficient sum of money to pay the cost of advertising such sale. [1982 1st ex.s. c 21 § 29.]

79.90.240 Sale procedure—Confirmation of sale. (1) A sale of valuable materials or tidelands or shorelands otherwise permitted by RCW 79.94.150 to be sold shall be confirmed if:

(a) No affidavit showing that the interest of the state in such sale was injuriously affected by fraud or collusion, is filed with the commissioner of public lands within ten days from the receipt of the report of the auctioneer conducting the sale;

(b) It shall appear from such report that the sale was fairly conducted, that the purchaser was the highest responsible bidder at such sale, and that the sale price is not less than the appraised value of the property sold;

(c) The commissioner is satisfied that the lands or material sold would not, upon being readvertised and offered for sale, sell for a substantially higher price; and

(d) The payment required by law to be made at the time of making the sale has been made, and that the best interests of the state may be subserved thereby.

(2) Upon confirming a sale, the commissioner shall enter upon his records the confirmation of sale and thereupon issue to the purchaser a contract of sale or bill of sale as the case may be, as is provided for in this chapter. [1990 c 163 § 3; 1982 1st ex.s. c 21 § 30.]

79.90.245 Deposit, use of proceeds from sale or lease of aquatic lands or valuable materials therefrom—Aquatic lands enhancement project grant requirements—Aquatic lands enhancement account. After deduction for management costs as provided in RCW 79.64.040 and payments to towns under RCW 79.92.110(2), all moneys received by the state from the sale or lease of state-owned aquatic lands and from the sale of valuable material from state-owned aquatic lands shall be deposited in the aquatic lands enhancement account which is hereby created in the state treasury. After appropriation, these funds shall be used solely for aquatic lands enhancement projects; for the purchase, improvement, or protection of aquatic lands for public purposes; for providing and improving access to such lands; and for volunteer cooperative fish and game projects.

In providing grants for aquatic lands enhancement projects, the department shall require grant recipients to incorporate the environmental benefits of the project into their grant applications, and the department shall utilize the statement of environmental benefits in its prioritization and selection process. The department shall also develop appropriate outcome-focused performance measures to be used

(2004 Ed.)

both for management and performance assessment of the grants. To the extent possible, the department should coordinate its performance measure system with other natural resource-related agencies as defined in RCW 43.41.270. The department shall consult with affected interest groups in implementing this section.

During the fiscal biennium ending June 30, 2005, the funds may be appropriated for boating safety, settlement costs for aquatic lands cleanup, and shellfish management, enforcement, and enhancement. [2004 c 276 § 914; 2002 c 371 § 923; 2001 c 227 § 7; 1999 c 309 § 919; 1997 c 149 § 913; 1995 2nd sp.s. c 18 § 923; 1994 c 219 § 12; 1993 sp.s. c 24 § 927; 1987 c 350 § 1; 1985 c 57 § 79; 1984 c 221 § 24; 1982 2nd ex.s. c 8 § 4; 1969 ex.s. c 273 § 12; 1967 ex.s. c 105 § 3; 1961 c 167 § 9. Formerly RCW 79.24.580.]

Severability—Effective date—2004 c 276: See notes following RCW 43.330.167.

Severability—Effective date—2002 c 371: See notes following RCW 9.46.100.

Findings—Intent—2001 c 227: See note following RCW 43.41.270.

Severability—Effective date—1999 c 309: See notes following RCW 41.06.152.

Severability—Effective date—1997 c 149: See notes following RCW 43.08.250.

Severability—Effective date—1995 2nd sp.s. c 18: See notes following RCW 19.118.110.

Finding—1994 c 219: See note following RCW 43.88.030.

Severability—Effective dates—1993 sp.s. c 24: See notes following RCW 28A.310.020.

Effective date—1987 c 350: "This act shall take effect July 1, 1989." [1987 c 350 § 3.]

Effective date—1985 c 57: See note following RCW 18.04.105.

Severability—Effective date—1984 c 221: See RCW 79.90.901 and 79.90.902.

79.90.250 Sale procedure—Terms of payment—Deferred payments, rate of interest. All tidelands and shorelands belonging to the state, otherwise permitted under RCW 79.94.150 to be sold, shall be sold on the following terms: One-tenth to be paid on the date of sale; one-tenth to be paid one year from the date of the issuance of the contract of sale; and one-tenth annually thereafter until the full purchase price has been made; but any purchaser may make full payment at any time. All deferred payments shall draw interest at such rate as may be fixed, from time to time, by rule adopted by the board of natural resources, and the rate of interest, as so fixed at the date of each sale, shall be stated in all advertising for and notice of said sale and in the contract of sale. The first installment of interest shall become due and payable one year after the date of the contract of sale and thereafter all interest shall become due and payable annually on said date, and all remittances for payment of either principal or interest shall be forwarded to the department of natural resources. [1982 1st ex.s. c 21 § 31.]

79.90.260 Sale procedure—Certificate to governor of payment in full—Deed. When the entire purchase price of any tidelands or shorelands belonging to the state, otherwise permitted under RCW 79.94.150 to be sold, shall have been fully paid, the department of natural resources shall certify such fact to the governor, and shall cause a deed signed by the

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lands. The department is authorized to execute option contracts for prospecting purposes and leases for the mining and extraction of coal from any aquatic lands owned by the state or from which it may hereafter acquire title, or from any aquatic lands sold or leased by the state the minerals of which have been reserved by the state. The procedures contained at RCW 79.14.470 through 79.14.580, inclusive, shall apply thereto. [2003 c 334 § 604; 1982 1st ex.s. c 21 § 40.]

Intent—2003 c 334: See note following RCW 79.02.010.

79.90.350 Subdivision of leases—Fee. Whenever the holder of any contract to purchase any tidelands or shorelands belonging to the state, otherwise permitted under RCW 79.94.150 to be sold, or the holder of any lease of any such lands, except for mining of valuable minerals, or coal, or extraction of petroleum or gas, shall surrender the same to the department of natural resources with the request to have it divided into two or more contracts or leases, the department may divide the same and issue new contracts, or leases: **PROVIDED,** That no new contract or lease shall issue while there is due and unpaid any rental, taxes, or assessments on the land held under such contract or lease, nor in any case where the department is of the opinion that the state's security would be impaired or endangered by the proposed division. For all such new contracts, or leases, a fee as determined by the board of natural resources for each new contract or lease issued, shall be paid by the applicant and such fee shall be paid into the state treasury to the resource management cost account in the general fund, pursuant to RCW 79.64.020. [1982 1st ex.s. c 21 § 41.]

79.90.360 Effect of mistake or fraud. Any sale or lease of tidelands or shorelands belonging to the state, otherwise permitted under RCW 79.94.150 to be sold, made by mistake, or not in accordance with law, or obtained by fraud or misrepresentation, shall be void, and the contract of purchase, or lease, issued thereon shall be of no effect, and the holder of such contract, or lease, shall be required to surrender the same to the department of natural resources, which, except in the case of fraud on the part of the purchaser, or lessee, shall cause the money paid on account of such surrendered contract, or lease, to be refunded to the holder thereof, provided the same has not been paid into the state treasury. [1982 1st ex.s. c 21 § 42.]

79.90.370 Assignment of contracts or leases. All contracts of purchase of tidelands or shorelands belonging to the state, otherwise permitted under RCW 79.94.150 to be sold, and all leases of tidelands, shorelands, or beds of navigable waters belonging to the state issued by the department of natural resources shall be assignable in writing by the contract holder or lessee. The assignee shall be subject to the provisions of law applicable to the purchaser, or lessee, of whom he is the assignee, and shall have the same rights in all respects as the original purchaser, or lessee, of the lands, but only if the assignment is first approved by the department and entered upon the records in the office of the commissioner of public lands. [1982 1st ex.s. c 21 § 43.]

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79.90.380 Abstracts of state-owned aquatic lands. The department shall cause full and correct abstracts of all aquatic lands, to be made and kept in the same manner as provided for in RCW 79.02.200. [2003 c 334 § 605; 1982 1st ex.s. c 21 § 44.]

Intent—2003 c 334: See note following RCW 79.02.010.

79.90.390 Distraint or sale of improvements for taxes. Whenever improvements have been made on state-owned tidelands, shorelands or beds of navigable waters, in front of cities or towns, prior to the location of harbor lines in front of such cities or towns, and the reserved harbor area as located include such improvements, no distraint or sale of such improvements for taxes shall be had until six months after said lands have been leased or offered for lease: **PROVIDED,** That this section shall not affect or impair the lien for taxes on said improvements. [1982 1st ex.s. c 21 § 45.]

79.90.400 Aquatic lands—Court review of actions. Any applicant to purchase, or lease, any aquatic lands of the state, or any valuable materials thereon, and any person whose property rights or interest will be affected by such sale or lease, feeling himself or herself aggrieved by any order or decision of the board, or the commissioner, concerning the same, may appeal therefrom in the manner provided in RCW 79.02.030. [2003 c 334 § 606; 1982 1st ex.s. c 21 § 46.]

Intent—2003 c 334: See note following RCW 79.02.010.

79.90.410 Reconsideration of official acts. The department of natural resources may review and reconsider any of its official acts relating to the aquatic lands of the state until such time as a lease, contract, or deed shall have been made, executed, and finally issued, and the department may recall any lease, contract, or deed issued for the purpose of correcting mistakes or errors, or supplying omissions. [1982 1st ex.s. c 21 § 47.]

79.90.450 Aquatic lands—Findings. The legislature finds that state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage. The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the department of natural resources the responsibility to manage these lands for the benefit of the public. The legislature finds that water-dependent industries and activities have played a major role in the history of the state and will continue to be important in the future. The legislature finds that revenues derived from leases of state-owned aquatic lands should be used to enhance opportunities for public recreation, shoreline access, environmental protection, and other public benefits associated with the aquatic lands of the state. The legislature further finds that aquatic lands are faced with conflicting use demands. The purpose of RCW 79.90.450 through 79.90.545 is to articulate a management philosophy to guide the exercise of the state's ownership interest and the exercise of the department's management authority, and to establish standards for determining equitable and predictable lease rates for users of state-owned aquatic lands. [1984 c 221 § 1.]

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79.90.455 Aquatic lands—Management guidelines.

The management of state-owned aquatic lands shall be in conformance with constitutional and statutory requirements. The manager of state-owned aquatic lands shall strive to provide a balance of public benefits for all citizens of the state. The public benefits provided by aquatic lands are varied and include:

- (1) Encouraging direct public use and access;
- (2) Fostering water-dependent uses;
- (3) Ensuring environmental protection;
- (4) Utilizing renewable resources.

Generating revenue in a manner consistent with subsections (1) through (4) of this section is a public benefit. [1984 c 221 § 2.]

79.90.456 Fostering use of aquatic environment—Limitation. The department shall foster the commercial and recreational use of the aquatic environment for production of food, fibre, income, and public enjoyment from state-owned aquatic lands under its jurisdiction and from associated waters, and to this end the department may develop and improve production and harvesting of seaweeds and sealife attached to or growing on aquatic land or contained in aquaculture containers, but nothing in this section shall alter the responsibility of other state agencies for their normal management of fish, shellfish, game, and water. [2003 c 334 § 541; 1971 ex.s. c 234 § 8. Formerly RCW 79.68.080.]

Intent—2003 c 334: See note following RCW 79.02.010.

79.90.457 Authority to exchange state-owned tidelands and shorelands—Rules—Limitation. The department of natural resources may exchange state-owned tidelands and shorelands with private and other public landowners if the exchange is in the public interest and will actively contribute to the public benefits established in RCW 79.90.455. The board of natural resources shall adopt rules which establish criteria for determining when a proposed exchange is in the public interest and actively contributes to the public benefits established in RCW 79.90.455. The department may not exchange state-owned harbor areas or waterways. [1995 c 357 § 1.]

79.90.458 Exchange of bedlands—Cowlitz river. (1) The department is authorized to exchange bedlands abandoned through rechanneling of the Cowlitz river near the confluence of the Columbia river so that the state obtains clear title to the Cowlitz river as it now exists or where it may exist in the future through the processes of erosion and accretion.

(2) The department is also authorized to exchange bedlands and enter into boundary line agreements to resolve any disputes that may arise over the location of state-owned lands now comprising the dike that was created in the 1920s.

(3) For purposes of chapter 150, Laws of 2001, "Cowlitz river near the confluence of the Columbia river" means those tidelands and bedlands of the Cowlitz river fronting and abutting sections 10, 11, and 14, township 7 north, range 2 west, Willamette Meridian and fronting and abutting the Huntington Donation Land Claim No. 47 and the Blakeny Donation

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Land Claim No. 43, township 7 north, range 2 west, Willamette Meridian.

(4) Nothing in chapter 150, Laws of 2001 shall be deemed to convey to the department the power of eminent domain. [2003 c 334 § 454; 2001 c 150 § 2. Formerly RCW 79.08.260.]

Intent—2003 c 334: See note following RCW 79.02.010.

Findings—2001 c 150: "(1) The legislature finds that in the 1920s the Cowlitz river near the confluence of the Columbia river in Longview, Washington was diverted from its original course by dredging and construction of a dike. As a result, a portion of the original bed of the Cowlitz river became a nonnavigable body of shallow water. Another portion of the original bed of the Cowlitz river became part of a dike and is indistinguishable from existing islands. The main channel of the Cowlitz river was diverted over uplands to the south of the original bed and has continued as a navigable channel.

(2) The legislature finds that continued ownership of the nonnavigable portion of the original bed of the Cowlitz river near the confluence of the Columbia river no longer serves the state's interest in navigation. Ownership of the existing navigable bed of the Cowlitz river would better serve the state's interest in navigation. It is also in the state's interest to resolve any disputes that have arisen because state-owned land is now indistinguishable from privately owned land within the dike." [2001 c 150 § 1.]

Severability—2001 c 150: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2001 c 150 § 3.]

79.90.460 Aquatic lands—Preservation and enhancement of water-dependent uses—Leasing authority. (1) The management of state-owned aquatic lands shall preserve and enhance water-dependent uses. Water-dependent uses shall be favored over other uses in aquatic land planning and in resolving conflicts between competing lease applications. In cases of conflict between water-dependent uses, priority shall be given to uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters, and to statewide interests as distinguished from local interests.

(2) Nonwater-dependent use of state-owned aquatic lands is a low-priority use providing minimal public benefits and shall not be permitted to expand or be established in new areas except in exceptional circumstances where it is compatible with water-dependent uses occurring in or planned for the area.

(3) The department shall consider the natural values of state-owned aquatic lands as wildlife habitat, natural area preserve, representative ecosystem, or spawning area prior to issuing any initial lease or authorizing any change in use. The department may withhold from leasing lands which it finds to have significant natural values, or may provide within any lease for the protection of such values.

(4) The power to lease state-owned aquatic lands is vested in the department of natural resources, which has the authority to make leases upon terms, conditions, and length of time in conformance with the state Constitution and chapters 79.90 through 79.96 RCW.

(5) State-owned aquatic lands shall not be leased to persons or organizations which discriminate on the basis of race, color, creed, religion, sex, age, or physical or mental handicap. [1984 c 221 § 3.]

79.90.465 Definitions. The definitions in this section apply throughout chapters 79.90 through 79.96 RCW.

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79.90.455 Aquatic lands—Management guidelines.

The management of state-owned aquatic lands shall be in conformance with constitutional and statutory requirements. The manager of state-owned aquatic lands shall strive to provide a balance of public benefits for all citizens of the state. The public benefits provided by aquatic lands are varied and include:

- (1) Encouraging direct public use and access;
- (2) Fostering water-dependent uses;
- (3) Ensuring environmental protection;
- (4) Utilizing renewable resources.

Generating revenue in a manner consistent with subsections (1) through (4) of this section is a public benefit. [1984 c 221 § 2.]

79.90.456 Fostering use of aquatic environment—

Limitation. The department shall foster the commercial and recreational use of the aquatic environment for production of food, fibre, income, and public enjoyment from state-owned aquatic lands under its jurisdiction and from associated waters, and to this end the department may develop and improve production and harvesting of seaweeds and sealife attached to or growing on aquatic land or contained in aquaculture containers, but nothing in this section shall alter the responsibility of other state agencies for their normal management of fish, shellfish, game, and water. [2003 c 334 § 541; 1971 ex.s. c 234 § 8. Formerly RCW 79.68.080.]

Intent—2003 c 334: See note following RCW 79.02.010.

79.90.457 Authority to exchange state-owned tidelands and shorelands—Rules—Limitation. The department of natural resources may exchange state-owned tidelands and shorelands with private and other public landowners if the exchange is in the public interest and will actively contribute to the public benefits established in RCW 79.90.455. The board of natural resources shall adopt rules which establish criteria for determining when a proposed exchange is in the public interest and actively contributes to the public benefits established in RCW 79.90.455. The department may not exchange state-owned harbor areas or waterways. [1995 c 357 § 1.]

79.90.458 Exchange of bedlands—Cowlitz river. (1) The department is authorized to exchange bedlands abandoned through rechanneling of the Cowlitz river near the confluence of the Columbia river so that the state obtains clear title to the Cowlitz river as it now exists or where it may exist in the future through the processes of erosion and accretion.

(2) The department is also authorized to exchange bedlands and enter into boundary line agreements to resolve any disputes that may arise over the location of state-owned lands now comprising the dike that was created in the 1920s.

(3) For purposes of chapter 150, Laws of 2001, "Cowlitz river near the confluence of the Columbia river" means those tidelands and bedlands of the Cowlitz river fronting and abutting sections 10, 11, and 14, township 7 north, range 2 west, Willamette Meridian and fronting and abutting the Huntington Donation Land Claim No. 47 and the Blakeny Donation

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Land Claim No. 43, township 7 north, range 2 west, Willamette Meridian.

(4) Nothing in chapter 150, Laws of 2001 shall be deemed to convey to the department the power of eminent domain. [2003 c 334 § 454; 2001 c 150 § 2. Formerly RCW 79.08.260.]

Intent—2003 c 334: See note following RCW 79.02.010.

Findings—2001 c 150: "(1) The legislature finds that in the 1920s the Cowlitz river near the confluence of the Columbia river in Longview, Washington was diverted from its original course by dredging and construction of a dike. As a result, a portion of the original bed of the Cowlitz river became a nonnavigable body of shallow water. Another portion of the original bed of the Cowlitz river became part of a dike and is indistinguishable from existing islands. The main channel of the Cowlitz river was diverted over uplands to the south of the original bed and has continued as a navigable channel.

(2) The legislature finds that continued ownership of the nonnavigable portion of the original bed of the Cowlitz river near the confluence of the Columbia river no longer serves the state's interest in navigation. Ownership of the existing navigable bed of the Cowlitz river would better serve the state's interest in navigation. It is also in the state's interest to resolve any disputes that have arisen because state-owned land is now indistinguishable from privately owned land within the dike." [2001 c 150 § 1.]

Severability—2001 c 150: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2001 c 150 § 3.]

79.90.460 Aquatic lands—Preservation and enhancement of water-dependent uses—Leasing author-

ity. (1) The management of state-owned aquatic lands shall preserve and enhance water-dependent uses. Water-dependent uses shall be favored over other uses in aquatic land planning and in resolving conflicts between competing lease applications. In cases of conflict between water-dependent uses, priority shall be given to uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters, and to statewide interests as distinguished from local interests.

(2) Nonwater-dependent use of state-owned aquatic lands is a low-priority use providing minimal public benefits and shall not be permitted to expand or be established in new areas except in exceptional circumstances where it is compatible with water-dependent uses occurring in or planned for the area.

(3) The department shall consider the natural values of state-owned aquatic lands as wildlife habitat, natural area preserve, representative ecosystem, or spawning area prior to issuing any initial lease or authorizing any change in use. The department may withhold from leasing lands which it finds to have significant natural values, or may provide within any lease for the protection of such values.

(4) The power to lease state-owned aquatic lands is vested in the department of natural resources, which has the authority to make leases upon terms, conditions, and length of time in conformance with the state Constitution and chapters 79.90 through 79.96 RCW.

(5) State-owned aquatic lands shall not be leased to persons or organizations which discriminate on the basis of race, color, creed, religion, sex, age, or physical or mental handicap. [1984 c 221 § 3.]

79.90.465 Definitions. The definitions in this section apply throughout chapters 79.90 through 79.96 RCW.

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(1) "Water-dependent use" means a use which cannot logically exist in any location but on the water. Examples include, but are not limited to, water-borne commerce; terminal and transfer facilities; ferry terminals; watercraft sales in conjunction with other water-dependent uses; watercraft construction, repair, and maintenance; moorage and launching facilities; aquaculture; log booming; and public fishing piers and parks.

(2) "Water-oriented use" means a use which historically has been dependent on a waterfront location, but with existing technology could be located away from the waterfront. Examples include, but are not limited to, wood products manufacturing, watercraft sales, fish processing, petroleum refining, sand and gravel processing, log storage, and house boats. For the purposes of determining rent under this chapter, water-oriented uses shall be classified as water-dependent uses if the activity either is conducted on state-owned aquatic lands leased on October 1, 1984, or was actually conducted on the state-owned aquatic lands for at least three years before October 1, 1984. If, after October 1, 1984, the activity is changed to a use other than a water-dependent use, the activity shall be classified as a nonwater-dependent use. If continuation of the existing use requires leasing additional state-owned aquatic lands and is permitted under the shoreline management act of 1971, chapter 90.58 RCW, the department may allow reasonable expansion of the water-oriented use.

(3) "Nonwater-dependent use" means a use which can operate in a location other than on the waterfront. Examples include, but are not limited to, hotels, condominiums, apartments, restaurants, retail stores, and warehouses not part of a marine terminal or transfer facility.

(4) "Log storage" means the water storage of logs in rafts or otherwise prepared for shipment in water-borne commerce, but does not include the temporary holding of logs to be taken directly into a vessel or processing facility.

(5) "Log booming" means placing logs into and taking them out of the water, assembling and disassembling log rafts before or after their movement in water-borne commerce, related handling and sorting activities taking place in the water, and the temporary holding of logs to be taken directly into a processing facility. "Log booming" does not include the temporary holding of logs to be taken directly into a vessel.

(6) "Department" means the department of natural resources.

(7) "Port district" means a port district created under Title 53 RCW.

(8) The "real rate of return" means the average for the most recent ten calendar years of the average rate of return on conventional real property mortgages as reported by the federal home loan bank board or any successor agency, minus the average inflation rate for the most recent ten calendar years.

(9) The "inflation rate" for a given year is the percentage rate of change in the previous calendar year's all commodity producer price index of the bureau of labor statistics of the United States department of commerce. If the index ceases to be published, the department shall designate by rule a comparable substitute index.

(10) "Public utility lines" means pipes, conduits, and similar facilities for distribution of water, electricity, natural gas, telephone, other electronic communication, and sewers, including sewer outfall lines.

(11) "Terminal" means a point of interchange between land and water carriers, such as a pier, wharf, or group of such, equipped with facilities for care and handling of cargo and/or passengers.

(12) "State-owned aquatic lands" means those aquatic lands and waterways administered by the department of natural resources or managed under RCW 79.90.475 by a port district. "State-owned aquatic lands" does not include aquatic lands owned in fee by, or withdrawn for the use of, state agencies other than the department of natural resources. [1984 c 221 § 4.]

79.90.470 Aquatic lands—Use for public utility lines—Recovery of costs—Use for public parks or public recreation purposes—Lease of tidelands in front of public parks—Use granted by easement—Recovery of commodity costs. (1) The use of state-owned aquatic lands for public utility lines owned by a governmental entity shall be granted by an agreement, permit, or other instrument if the use is consistent with the purposes of RCW 79.90.450 through 79.90.460 and does not obstruct navigation or other public uses. The department may recover only its reasonable direct administrative costs incurred in processing and approving the request or application, and reviewing plans for construction of public utility lines. For purposes of this section, "direct administrative costs" means the cost of hours worked directly on an application or request, based on salaries and benefits, plus travel reimbursement and other actual out-of-pocket costs. Direct administrative costs recovered by the department must be deposited into the resource management cost account. Use for public parks or public recreation purposes shall be granted without charge if the aquatic lands and improvements are available to the general public on a first-come, first-served basis and are not managed to produce a profit for the operator or a concessionaire. The department may lease state-owned tidelands that are in front of state parks only with the approval of the state parks and recreation commission. The department may lease bedlands in front of state parks only after the department has consulted with the state parks and recreation commission.

(2) The use of state-owned aquatic lands for local public utility lines owned by a nongovernmental entity will be granted by easement if the use is consistent with the purpose of RCW 79.90.450 through 79.90.460 and does not obstruct navigation or other public uses. The total charge for the easement will be determined under RCW 79.90.575.

(3) Nothing in this section limits the ability of the department to obtain payment for commodity costs, such as lost revenue from renewable resources, resulting from the granted use of state-owned aquatic lands for public utility lines. [2002 c 152 § 2; 1984 c 221 § 5.]

Findings—Severability—2002 c 152: See notes following RCW 79.90.575.

79.90.475 Management of certain aquatic lands by port district—Agreement—Rent—Model management agreement. Upon request of a port district, the department

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and port district may enter into an agreement authorizing the port district to manage state-owned aquatic lands abutting or used in conjunction with and contiguous to uplands owned, leased, or otherwise managed by a port district, for port purposes as provided in Title 53 RCW. Such agreement shall include, but not be limited to, provisions defining the specific area to be managed, the term, conditions of occupancy, reservations, periodic review, and other conditions to ensure consistency with the state Constitution and the policies of this chapter. If a port district acquires operating management, lease, or ownership of real property which abuts state-owned aquatic lands currently under lease from the state to a person other than the port district, the port district shall manage such aquatic lands if: (1) The port district acquires the leasehold interest in accordance with state law, or (2) the current lessee and the department agree to termination of the current lease to accommodate management by the port. The administration of aquatic lands covered by a management agreement shall be consistent with the aquatic land policies of chapters 79.90 through 79.96 RCW and the implementing regulations adopted by the department. The administrative procedures for management of the lands shall be those of Title 53 RCW.

No rent shall be due the state for the use of state-owned aquatic lands managed under this section for water-dependent or water-oriented uses. If a port district manages state-owned aquatic lands under this section and either leases or otherwise permits any person to use such lands, the rental fee attributable to such aquatic land only shall be comparable to the rent charged lessees for the same or similar uses by the department: PROVIDED, That a port district need not itemize for the lessee any charges for state-owned aquatic lands improved by the port district for use by carriers by water. If a port leases state-owned aquatic lands to any person for non-water-dependent use, eighty-five percent of the revenue attributable to the rent of the state-owned aquatic land only shall be paid to the state.

Upon application for a management agreement, and so long as the application is pending and being diligently pursued, no rent shall be due the department for the lease by the port district of state-owned aquatic lands included within the application for water-dependent or water-oriented uses.

The department and representatives of the port industry shall develop a proposed model management agreement which shall be used as the basis for negotiating the management agreements required by this section. The model management agreement shall be reviewed and approved by the board of natural resources. [1984 c 221 § 6.]

79.90.480 Determination of annual rent rates for lease of aquatic lands for water-dependent uses—Marina leases. Except as otherwise provided by this chapter, annual rent rates for the lease of state-owned aquatic lands for water-dependent uses shall be determined as follows:

(1)(a) The assessed land value, exclusive of improvements, as determined by the county assessor, of the upland tax parcel used in conjunction with the leased area or, if there are no such uplands, of the nearest upland tax parcel used for water-dependent purposes divided by the parcel area equals the upland value.

(b) The upland value times the area of leased aquatic lands times thirty percent equals the aquatic land value.

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(2) As of July 1, 1989, and each July 1 thereafter, the department shall determine the real capitalization rate to be applied to water-dependent aquatic land leases commencing or being adjusted under subsection (3)(a) of this section in that fiscal year. The real capitalization rate shall be the real rate of return, except that until June 30, 1989, the real capitalization rate shall be five percent and thereafter it shall not change by more than one percentage point in any one year or be more than seven percent or less than three percent.

(3) The annual rent shall be:

(a) Determined initially, and redetermined every four years or as otherwise provided in the lease, by multiplying the aquatic land value times the real capitalization rate; and

(b) Adjusted by the inflation rate each year in which the rent is not determined under subsection (3)(a) of this section.

(4) If the upland parcel used in conjunction with the leased area is not assessed or has an assessed value inconsistent with the purposes of the lease, the nearest comparable upland parcel used for similar purposes shall be substituted and the lease payment determined in the same manner as provided in this section.

(5) For the purposes of this section, "upland tax parcel" is a tax parcel, some portion of which has upland characteristics. Filled tidelands or shorelands with upland characteristics which abut state-owned aquatic land shall be considered as uplands in determining aquatic land values.

(6) The annual rent for filled state-owned aquatic lands that have the characteristics of uplands shall be determined in accordance with RCW 79.90.500 in those cases in which the state owns the fill and has a right to charge for the fill.

(7)(a) For leases for marina uses only, as of July 1, 2004, lease rates will be a percentage of the annual gross revenues generated by that marina. It is the intent of the legislature that additional legislation be enacted prior to July 1, 2004, to establish the percentage of gross revenues that will serve as the basis for a marina's rent and a definition of gross revenues. Annual rent must be recalculated each year based upon the marina's gross revenues from the previous year, as reported to the department consistent with this subsection (7).

(b) By December 31, 2003, the department will develop a recommended formula for calculating marina rents consistent with this subsection (7) and report the recommendation to the legislature. The formula recommended by the department must include a percentage or a range of percentages of gross revenues, a system for implementing such percentages, and the designation of revenue sources to be considered for rent calculation purposes. The department must also ensure, given the available information, that the rent formula recommended by the department is initially calculated to maintain state proceeds from marina rents as of July 1, 2003, and that if the department does not receive income reporting forms representing at least ninety percent of the projected annual marina revenue and at least seventy-five percent of all marinas, the current model for calculating marina rents, as described in subsections (1) through (6) of this section, will continue to be the method used to calculate marina rents, and the income method, as described in (a) of this subsection, will not be applied. In addition to the percent of marina income the department shall determine its direct administrative cost (cost of hours worked directly on applications and lease: based on salaries and benefits, plus travel reimbursement and

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other actual out-of-pocket costs) to calculate, audit, execute, and monitor marina leases, and shall recover these costs from lessees. All administrative costs recovered by the department must be deposited into the resource management cost account created in RCW 79.64.020. Prior to making recommendations to the legislature, a work session consisting of the department, marina owners, and stakeholders must be convened to discuss the rate-setting criteria. The legislature directs the department to deliver recommendations to the legislature by December 2003, including any minority reports by the participating parties.

(c) When developing its recommendation for a marina lease formula consistent with this subsection (7), the department shall ensure that the percentage of revenue established is applied to the income of the direct lessee, as well as to the income of any person or entity that subleases, or contracts to operate the marina, with the direct lessee, less the amount paid by the sublease to the direct lessee.

(d) All marina operators under lease with the department must return to the department an income reporting form, provided by the department, and certified by a licensed certified public accountant, before July 1, 2003, and again annually on a date set by the department. On the income reporting form, the department may require a marina to disclose to the department any information about income from all marina-related sources, excluding restaurants and bars. All income reports submitted to the department are subject to either audit or verification; or both, by the department, and the department may inspect all of the lessee's books, records, and documents, including state and federal income tax returns relating to the operation of the marina and leased aquatic lands at all reasonable times. If the lessee fails to submit the required income reporting form once the new method for calculating marina rents is effective, the department may conduct an audit at the lessee's expense or cancel the lease.

(e) Initially, the marina rent formula developed by the department pursuant to (b) of this subsection will be applied to each marina on its anniversary date, beginning on July 1, 2004, and will be based on that marina's 2003 income information. Thereafter, rents will be recalculated each year, based on the marina's gross revenue from the previous year.

(f) No marina lease may be for less than five hundred dollars plus direct administrative costs.

(8) For all new leases for other water-dependent uses, issued after December 31, 1997, the initial annual water-dependent rent shall be determined by the methods in subsections (1) through (6) of this section. [2003 c 310 § 1; 1998 c 185 § 2; 1984 c 221 § 7.]

Effective date—2003 c 310: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 14, 2003]." [2003 c 310 § 2.]

Findings—Report—1998 c 185: "(1) The legislature finds that the current method for determining water-dependent rental rates for aquatic land leases may not be achieving the management goals in RCW 79.90.455. The current method for setting rental rates, as well as alternatives to the current methods, should be evaluated in light of achieving management goals for aquatic lands leases. The legislature further finds that there should be no further increases in water-dependent rental rates for marina leases before the completion of this evaluation.

(2) The department of natural resources shall study and prepare a report to the legislature on alternatives to the current method for determination of water-dependent rent set forth in RCW 79.90.480. The report shall be pre-

pared with the assistance of appropriate outside economic expertise and stakeholder involvement. Affected stakeholders shall participate with the department by providing information necessary to complete this study. For each alternative, the report shall:

- (a) Describe each method and the costs and benefits of each;
 - (b) Compare each with the current method of calculating rents;
 - (c) Provide the private industry perspective;
 - (d) Describe the public perspective;
 - (e) Analyze the impact on state lease revenue;
 - (f) Evaluate the impacts of water-dependent rates on economic development in economically distressed counties; and
 - (g) Evaluate the ease of administration.
- (3) The report shall be presented to the legislature by November 1, 1998, with the recommendations of the department clearly identified. The department's recommendations shall include draft legislation as necessary for implementation of its recommendations." [1998 c 185 § 1.]

79.90.485 Log storage rents. (1) Until June 30, 1989, the log storage rents per acre shall be the average rents the log storage leases in effect on July 1, 1984, would have had under the formula for water-dependent leases as set out in RCW 79.90.480, except that the aquatic land values shall be thirty percent of the assessed value of the abutting upland parcels exclusive of improvements, if they are assessed. If the abutting upland parcel is not assessed, the nearest assessed upland parcel shall be used.

(2) On July 1, 1989, and every four years thereafter, the base log storage rents established under subsection (1) of this section shall be adjusted in proportion to the change in average water-dependent lease rates per acre since the date the log storage rates were last established under this section.

(3) The annual rent shall be adjusted by the inflation rate each year in which the rent is not determined under subsection (1) or (2) of this section.

(4) If the lease provides for seasonal use so that portions of the leased area are available for public use without charge part of the year, the annual rent may be discounted to reflect such public use in accordance with rules adopted by the board of natural resources. [1984 c 221 § 8.]

79.90.490 Rent for leases in effect October 1, 1984. For leases in effect on October 1, 1984, the rent shall remain at the annual rate in effect on September 30, 1984, until the next lease anniversary date, at which time rent established under RCW 79.90.480 or 79.90.485 shall become effective. If the first rent amount established is an increase of more than one hundred dollars and is more than thirty-three percent above the rent in effect on September 30, 1984, the annual rent shall not increase in any year by more than thirty-three percent of the difference between the previous rent and the rent established under RCW 79.90.480 or 79.90.485. If the first rent amount established under RCW 79.90.480 or 79.90.485 is more than thirty-three percent below the rent in effect on September 30, 1984, the annual rent shall not decrease in any year by more than thirty-three percent of the difference between the previous rent and the rent established under RCW 79.90.480 or 79.90.485. Thereafter, notwithstanding any other provision of this title, the annual rental established under RCW 79.90.480 or 79.90.485 shall not increase more than fifty percent in any year.

This section applies only to leases of state-owned aquatic lands subject to RCW 79.90.480 or 79.90.485. [1984 c 221 § 9.]

79.90.495 Rents and fees for aquatic lands used for aquaculture production and harvesting. If state-owned aquatic lands are used for aquaculture production or harvesting, rents and fees shall be established through competitive bidding or negotiation. [1984 c 221 § 10.]

79.90.500 Aquatic lands—Rents for nonwater-dependent uses—Rents and fees for the recovery of mineral or geothermal resources. Leases for nonwater-dependent uses of state-owned aquatic lands shall be charged the fair market rental value of the leased lands, determined in accordance with appraisal techniques specified by rule. However, rents for nonwater-dependent uses shall always be more than the amount that would be charged as rent for a water-dependent use of the same parcel. Rents and fees for the mining or other recovery of mineral or geothermal resources shall be established through competitive bidding, negotiations, or as otherwise provided by statute. [1984 c 221 § 11.]

79.90.505 Aquatic lands—Rents for multiple uses. If water-dependent and nonwater-dependent uses occupy separate portions of the same leased parcel of state-owned aquatic land, the rental rate for each use shall be that established for such use by this chapter, prorated in accordance with the proportion of the whole parcel that each use occupies. If water-dependent and nonwater-dependent uses occupy the same portion of a leased parcel of state-owned aquatic land, the rental rate for such parcel shall be subject to negotiation with the department taking into account the proportion of the improvements each use occupies. [1984 c 221 § 12.]

79.90.510 Aquatic lands—Lease for water-dependent use—Rental for nonwater-dependent use. If a parcel leased for water-dependent uses is used for an extended period of time, as defined by rule of the department, for a nonwater-dependent use, the rental for the nonwater-dependent use shall be negotiated with the department. [1984 c 221 § 13.]

79.90.515 Aquatic lands—Rent for improvements. Except as agreed between the department and the lessee prior to construction of the improvements, rent shall not be charged under any lease of state-owned aquatic lands for improvements, including fills, authorized by the department or installed by the lessee or its predecessor before June 1, 1971, so long as the lands remain under a lease or succession of leases without a period of three years in which no lease is in effect or a bona fide application for a lease is pending.

If improvements were installed under a good faith belief that a state aquatic lands lease was not necessary, rent shall not be charged for the improvements if, within ninety days after specific written notification by the department that a lease is required, the owner either applies for a lease or files suit to determine if a lease is required. [1984 c 221 § 14.]

79.90.520 Aquatic lands—Administrative review of proposed rent. The manager shall, by rule, provide for an administrative review of any aquatic land rent proposed to be charged. The rules shall require that the lessee or applicant for release file a request for review within thirty days after the

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manager has notified the lessee or applicant of the rent due. For leases issued by the department, the final authority for the review rests with the board of natural resources. For leases managed under RCW 79.90.475, the final authority for the review rests with the appropriate port commission. If the request for review is made within thirty days after the manager's final determination as to the rental, the lessee may pay rent at the preceding year's rate pending completion of the review, and shall pay any additional rent or be entitled to a refund, with interest thirty days after announcement of the decision. The interest rate shall be fixed, from time to time, by rule adopted by the board of natural resources and shall not be less than six percent per annum. Nothing in this section abrogates the right of an aggrieved party to pursue legal remedies. For purposes of this section, "manager" is the department except where state-owned aquatic lands are managed by a port district, in which case "manager" is the port district. [1991 c 64 § 1; 1984 c 221 § 15.]

79.90.525 Aquatic lands—Security for leases for more than one year. For any lease for a term of more than one year, the department may require that the rent be secured by insurance, bond, or other security satisfactory to the department in an amount not exceeding two years' rent. The department may require additional security for other lease provisions. The department shall not require cash deposits exceeding one-twelfth of the annual rental. [1984 c 221 § 16.]

79.90.530 Aquatic lands—Payment of rent. If the annual rent charged for the use of a parcel of state-owned aquatic lands exceeds four thousand dollars, the lessee may pay on a prorated quarterly basis. If the annual rent exceeds twelve thousand dollars, the lessee may pay on a prorated monthly basis. [1984 c 221 § 17.]

79.90.535 Aquatic lands—Interest rate. The interest rate and all interest rate guidelines shall be fixed, from time to time, by rule adopted by the board of natural resources and shall not be less than six percent per annum. [1991 c 64 § 2; 1984 c 221 § 18.]

79.90.540 Adoption of rules. The department shall adopt such rules as are necessary to carry out the purposes of RCW 79.90.450 through 79.90.535, specifically including criteria for determining under RCW 79.90.480(4) when an abutting upland parcel has been inappropriately assessed and for determining the nearest comparable upland parcel used for water-dependent uses. [1984 c 221 § 19.]

79.90.545 Application to existing property rights—Application of Shoreline Management Act. Nothing in this chapter or RCW 79.93.040 or 79.93.060 shall modify or affect any existing legal rights involving the boundaries of, title to, or vested property rights in aquatic lands or waterways. Nothing in this chapter shall modify, alter, or otherwise affect the applicability of chapter 90.58 RCW. [1984 c 221 § 20.]

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79.90.495 Rents and fees for aquatic lands used for aquaculture production and harvesting. If state-owned aquatic lands are used for aquaculture production or harvesting, rents and fees shall be established through competitive bidding or negotiation. [1984 c 221 § 10.]

79.90.500 Aquatic lands—Rents for nonwater-dependent uses—Rents and fees for the recovery of mineral or geothermal resources. Leases for nonwater-dependent uses of state-owned aquatic lands shall be charged the fair market rental value of the leased lands, determined in accordance with appraisal techniques specified by rule. However, rents for nonwater-dependent uses shall always be more than the amount that would be charged as rent for a water-dependent use of the same parcel. Rents and fees for the mining or other recovery of mineral or geothermal resources shall be established through competitive bidding, negotiations, or as otherwise provided by statute. [1984 c 221 § 11.]

79.90.505 Aquatic lands—Rents for multiple uses. If water-dependent and nonwater-dependent uses occupy separate portions of the same leased parcel of state-owned aquatic land, the rental rate for each use shall be that established for such use by this chapter, prorated in accordance with the proportion of the whole parcel that each use occupies. If water-dependent and nonwater-dependent uses occupy the same portion of a leased parcel of state-owned aquatic land, the rental rate for such parcel shall be subject to negotiation with the department taking into account the proportion of the improvements each use occupies. [1984 c 221 § 12.]

79.90.510 Aquatic lands—Lease for water-dependent use—Rental for nonwater-dependent use. If a parcel leased for water-dependent uses is used for an extended period of time, as defined by rule of the department, for a nonwater-dependent use, the rental for the nonwater-dependent use shall be negotiated with the department. [1984 c 221 § 13.]

79.90.515 Aquatic lands—Rent for improvements. Except as agreed between the department and the lessee prior to construction of the improvements, rent shall not be charged under any lease of state-owned aquatic lands for improvements, including fills, authorized by the department or installed by the lessee or its predecessor before June 1, 1971, so long as the lands remain under a lease or succession of leases without a period of three years in which no lease is in effect or a bona fide application for a lease is pending.

If improvements were installed under a good faith belief that a state aquatic lands lease was not necessary, rent shall not be charged for the improvements if, within ninety days after specific written notification by the department that a lease is required, the owner either applies for a lease or files suit to determine if a lease is required. [1984 c 221 § 14.]

79.90.520 Aquatic lands—Administrative review of proposed rent. The manager shall, by rule, provide for an administrative review of any aquatic land rent proposed to be charged. The rules shall require that the lessee or applicant for release file a request for review within thirty days after the

manager has notified the lessee or applicant of the rent due. For leases issued by the department, the final authority for the review rests with the board of natural resources. For leases managed under RCW 79.90.475, the final authority for the review rests with the appropriate port commission. If the request for review is made within thirty days after the manager's final determination as to the rental, the lessee may pay rent at the preceding year's rate pending completion of the review, and shall pay any additional rent or be entitled to a refund, with interest thirty days after announcement of the decision. The interest rate shall be fixed, from time to time, by rule adopted by the board of natural resources and shall not be less than six percent per annum. Nothing in this section abrogates the right of an aggrieved party to pursue legal remedies. For purposes of this section, "manager" is the department except where state-owned aquatic lands are managed by a port district, in which case "manager" is the port district. [1991 c 64 § 1; 1984 c 221 § 15.]

79.90.525 Aquatic lands—Security for leases for more than one year. For any lease for a term of more than one year, the department may require that the rent be secured by insurance, bond, or other security satisfactory to the department in an amount not exceeding two years' rent. The department may require additional security for other lease provisions. The department shall not require cash deposits exceeding one-twelfth of the annual rental. [1984 c 221 § 16.]

79.90.530 Aquatic lands—Payment of rent. If the annual rent charged for the use of a parcel of state-owned aquatic lands exceeds four thousand dollars, the lessee may pay on a prorated quarterly basis. If the annual rent exceeds twelve thousand dollars, the lessee may pay on a prorated monthly basis. [1984 c 221 § 17.]

79.90.535 Aquatic lands—Interest rate. The interest rate and all interest rate guidelines shall be fixed, from time to time, by rule adopted by the board of natural resources and shall not be less than six percent per annum. [1991 c 64 § 2; 1984 c 221 § 18.]

79.90.540 Adoption of rules. The department shall adopt such rules as are necessary to carry out the purposes of RCW 79.90.450 through 79.90.535, specifically including criteria for determining under RCW 79.90.480(4) when an abutting upland parcel has been inappropriately assessed and for determining the nearest comparable upland parcel used for water-dependent uses. [1984 c 221 § 19.]

79.90.545 Application to existing property rights—Application of Shoreline Management Act. Nothing in this chapter or RCW 79.93.040 or 79.93.060 shall modify or affect any existing legal rights involving the boundaries of, title to, or vested property rights in aquatic lands or waterways. Nothing in this chapter shall modify, alter, or otherwise affect the applicability of chapter 90.58 RCW. [1984 c 221 § 20.]

Disposition of Statutes After Recodification in 2005

Before July 24, 2005	After July 24, 2005
RCW 79.90.245	RCW 79.105.150
RCW 79.90.450	RCW 79.105.020*
RCW 79.90.455	RCW 79.105.030
RCW 79.90.460	RCW 79.105.210
RCW 79.90.480	RCW 79.105.240
RCW 79.90.520	RCW 79.105.320
RCW 79.90.540	RCW 79.105.360

* After recodification, this statute does not appear to reference the rental statute under dispute. However, the Session Law, Laws of 2005, ch. 155 § 101 does reference the rental statute. Where there is a discrepancy between a legislative act and the code, the legislative act controls. Parosa v. City of Tacoma, 57 Wn.2d 409, 413, 357 P.2d 873 (1960).

APPENDIX 2

(i) Any portion of the required security relating to payment of rent or fees shall be limited to an amount not exceeding two year's rental or fees.

(ii) Required security related to other terms of the agreement shall be based on the estimated cost to the department of enforcing compliance with those terms.

(iii) Cash deposits shall not be required in an amount exceeding one-twelfth of the annual rental or fees. If this amount is less than the total required security, the remainder shall be provided through other forms listed in (b) of this subsection.

(d) Security must be provided on a continual basis for the life of the agreement. Security arrangements for less than the life of the agreement shall be accepted as long as those arrangements are kept in force through a series of renewals or extensions.

[Statutory Authority: RCW 79.01.132, 79.01.216, 79.90.520, 79.90.535 and 1991 c 64 §§ 1 and 2, 91-22-079 (Order 580), § 332-30-122, filed 11/5/91, effective 12/6/91. Statutory Authority: 1984 c 221 and RCW 79.90.540, 84-23-014 (Resolution No. 470), § 332-30-122, filed 11/9/84.]

WAC 332-30-123 Aquatic land use rentals for water-dependent uses. All requirements in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114). The annual rental for water-dependent use leases of state-owned aquatic land shall be: The per unit assessed value of the upland tax parcel, exclusive of improvements, multiplied by the units of lease area multiplied by thirty percent multiplied by the real rate of return. Expressed as a formula, it is: $UV \times LA \times .30 \times r = AR$. Each of the letter variables in this formula have specific criteria for their use as described below. This step-by-step presentation covers the typical situations within each section first, followed by alternatives for more unique situations.

(1) Overall considerations.

(a) Criteria for use of formula. The formula:

(i) Shall be applied to all leases having structural uses that require a physical interface with upland property when a water-dependent use occurs on such uplands (in conjunction with the water-dependent use on the aquatic lands);

(ii) Shall be used for remote moorage leases by selecting an upland parcel as detailed in subsection (2) of this section;

(iii) Shall not be used for areas of filled state-owned aquatic lands having upland characteristics where the department can charge rent for such fills (see WAC 332-30-125), renewable and nonrenewable resource uses, or areas meeting criteria for public use (see WAC 332-30-130); and

(iv) Shall cease being used for leases intended for water-dependent uses when the lease area is not actively developed for such purposes as specified in the lease contract. Rental in such situations shall be determined under the appropriate section of this chapter.

(b) Criteria for applicability to leases. The formula shall be used to calculate rentals for:

(i) All new leases and all pending applications to lease or re-lease as of October 1, 1984;

(ii) All existing leases, where the lease allows calculation of total rent by the appropriate department methods in effect at the time of rental adjustment. Leases in this category

previously affected by legislated rental increase limits, shall have the formula applied on the first lease anniversary date after September 30, 1984. Other conditions of these leases not related to rent shall continue until termination or amendment as specified by the lease contract. Leases in this category not previously affected by legislated rental increase limits and scheduled for a rent adjustment after October 1, 1985, shall have the option of retaining the current rent or electing to pay the formula rent under the same conditions as specified in (iii) of this subsection.

(iii) Leases containing specific rent adjustment procedures or schedules shall have the rent determined by the formula when requested by the lessee. Holders of such leases shall be notified prior to their lease anniversary date of both the lease contract rent and formula rent. A selection of the formula rent by the lessee shall require an amendment to the lease which shall include all applicable aquatic land laws and implementing regulations.

(2) Physical criteria of upland tax parcels.

(a) Leases used in conjunction with and supportive of activities on the uplands. The upland tax parcel used shall be waterfront and have some portion with upland characteristics. If no upland tax parcel meets these criteria, then an alternative shall be selected under the criteria of subsection (4) of this section.

(b) Remote moorage leases. The upland tax parcel used shall be waterfront, have some portion with upland characteristics; and

(i) If the remote moorage is associated with a local upland facility, be an appropriate parcel at the facility; or

(ii) If the remote moorage is similar in nature of use to moorages in the area associated with a local upland facility, be an appropriate parcel at the facility; or

(iii) If the remote moorage is not associated with a local upland facility, be the parcel closest in distance to the moorage area.

(c) Priority of selection. If more than one upland tax parcel meets the physical criteria, the priority of selection shall be:

(i) The parcel that is structurally connected to the lease area;

(ii) The parcel that abuts the lease area;

(iii) The parcel closest in distance to the lease area.

If more than one upland tax parcel remains after this selection priority, then each upland tax parcel will be used for its portion of the lease area. If there is mutual agreement with the lessee, a single upland tax parcel may be used for the entire lease area. When the unit value of the upland tax parcels are equal, only one upland tax parcel shall be used for the lease area.

(d) The unit value of the upland tax parcel shall be expressed in terms of dollars per square foot or dollars per acre, by dividing the assessed value of the upland tax parcel by the number of square feet or acres in the upland tax parcel. This procedure shall be used in all cases even if the value attributable to the upland tax parcel was assessed using some other unit of value, e.g., front footage, or lot value. Only the "land value" category of the assessment record shall be used; not any assessment record category related to improvements.

[Title 332 WAC—p. 79]

(3) **Consistent assessment.** In addition to the criteria in subsection (2) of this section, the upland tax parcel's assessed value must be consistent with the purposes of the lease and method of rental establishment. On this basis, the following situations will be considered inconsistent and shall either require adjustment as specified, or selection of an alternative upland tax parcel under subsection (4) of this section:

(a) The upland tax parcel is not assessed. (See chapter 84.36 RCW Exemptions);

(b) Official date of assessment is more than four years old. (See RCW 84.41.030);

(c) The "assessment" results from a special tax classification not reflecting fair market value. Examples include classifications under: State-regulated utilities (chapter 84.12 RCW), Reforestation lands (chapter 84.28 RCW), Timber and forest lands (chapter 84.33 RCW), and Open space (chapter 84.34 RCW). This inconsistency may be corrected by substituting the full value for the parcel if such value is part of the assessment records;

(d) If the assessed valuation of the upland tax parcel to be used is under appeal as a matter of record before any county or state agency, the valuation on the assessor's records shall be used, however, any changes in valuation resulting from such appeal will result in an equitable adjustment of future rental;

(e) The majority of the upland tax parcel area is not used for a water-dependent purpose. This inconsistency may be corrected by using the value and area of the portion of the upland tax parcel that is used for water-dependent purposes if this portion can be segregated from the assessment records; and

(f) The size of the upland tax parcel in acres or square feet is not known or its small size results in a nominal valuation, e.g., unbuildable lot.

(4) **Selection of the nearest comparable upland tax parcel.** When the upland tax parcel does not meet the physical criteria or has an inconsistent assessment that can't be corrected from the assessment records, an alternative upland tax parcel shall be selected which meets the criteria. The nearest upland tax parcel shall be determined by measurement along the shoreline from the inconsistent upland tax parcel.

(a) The alternative upland tax parcel shall be located by order of selection priority:

(i) Within the same city as the lease area, and if not applicable or found;

(ii) Within the same county and water body as the lease area, and if not found;

(iii) Within the same county on similar bodies of water, and if not found;

(iv) Within the state.

(b) Within each locational priority of (a) of this subsection, the priority for a comparable upland tax parcel shall be:

(i) The same use class within the water-dependent category as the lease area use;

(ii) Any water-dependent use within the same upland zoning;

(iii) Any water-dependent use; and

(iv) Any water-oriented use.

(5) **Aquatic land lease area.** The area under lease shall be expressed in square feet or acres.

(a) Where more than one use class separately exist on a lease area, the formula shall only be applied to the water-dependent use area. Other use areas of the lease shall be treated according to the regulations for the specific use.

(b) If a water-dependent and a nonwater-dependent use exist on the same portion of the lease, the rent for such portion shall be negotiated taking into account the proportion of the improvements each use occupies.

(6) **Real rate of return.**

(a) Until July 1, 1989, the real rate of return to be used in the formula shall be five percent.

(b) On July 1, 1989, and on each July 1 thereafter the department shall calculate the real rate of return for that fiscal year under the following limitations:

(i) It shall not change by more than one percentage point from the rate in effect for the previous fiscal year; and

(ii) It shall not be greater than seven percent nor less than three percent.

(7) **Annual inflation adjustment of rent.** The department shall use the inflation rate on a fiscal year basis e.g., the inflation rate for calendar year 1984 shall be used during the period July 1, 1985 through June 30, 1986. The rate will be published in a newspaper of record. Adjustment to the annual rent of a lease shall occur on the anniversary date of the lease except when the rent is redetermined under subsection (9) of this section. The inflation adjustment each year is the inflation rate times the previous year's rent except in cases of stairstepping.

(8) **Stairstepping rental changes.**

(a) Initial increases for leases in effect on October 1, 1984. If the application of the formula results in an increase of more than one hundred dollars and more than thirty-three percent, stairstepping to the formula rent shall occur over the first three years in amounts equal to thirty-three percent of the difference between each year's inflation adjusted formula rent and the previous rent.

Example

Previous rent = \$100.00 Formula rent = \$403.00 Inflation = 5%/yr.

Yr.	Formula Rent	Previous Rent	Difference	33%	Stairstep Rent
1	\$403.00	\$100.00	\$303.00	\$100.00	\$200.00
2	423.15	100.00	323.15	106.64	306.64
3	444.31	100.00	344.31	113.62	420.26
4	466.52	-	-	-	466.52

(b) Initial decreases for leases in effect on October 1, 1984. If the application of the formula results in a decrease of more than thirty-three percent, stairstepping to the formula rent shall occur over the first three years in amounts equal to thirty-three percent of the difference between the previous rent and each year's inflation adjusted formula rent.

Example

Previous rent = \$403.00 Formula rent = \$100.00 Inflation = 5%/yr.

Yr.	Previous Rent	Formula Rent	Difference	33%	Stairstep Rent
1	\$403.00	\$100.00	\$303.00	\$100.00	\$303.00
2	403.00	105.00	298.00	98.34	204.66
3	403.00	110.25	292.75	96.61	108.05
4	-	115.76	-	-	115.76

(c) If a lease in effect on October 1, 1984, contains more than one water-dependent or water-oriented use and the

rental calculations for each such use (e.g., log booming and log storage) result in different rentals per unit of lease area, the total of the rents for those portions of the lease area shall be used to determine if the stairstepping provisions of (a) or (b) of this subsection apply to the lease.

(d) If a lease in effect on October 1, 1984, contains a nonwater-dependent use in addition to a water-dependent or oriented use, the stairstepping provisions of (a) or (b) of this subsection:

(i) Shall apply to the water-dependent use area if it exists separately (see subsection (5)(a) of this section);

(ii) Shall not apply to any portion of the lease area jointly occupied by a water-dependent and nonwater-dependent use (see subsection (5)(b) of this section).

(e) Subsequent increases. After completion of any initial stairstepping under (a) and (b) of this subsection due to the first application of the formula, the rent for any lease or portion thereof calculated by the formula shall not increase by more than fifty percent per unit area from the previous year's per unit area rent.

(f) All initial stairstepping of rentals shall only occur during the term of existing leases.

(g) The annual rental shall be redetermined by the formula every four years or as provided by the existing lease language. If an existing lease calls for redetermination of rental during an initial stairstepping period, it shall be determined on the scheduled date and applied (with inflation adjustments) at the end of the initial stairstep period.

[Statutory Authority: 1984 c 221 and RCW 79.90.540. 84-23-014 (Resolution No. 470), § 332-30-123, filed 11/9/84.]

WAC 332-30-125 Aquatic land use rental rates for nonwater-dependent uses. All requirements in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) The value of state-owned aquatic lands withdrawn from general public use for private nonwater-dependent use shall be recognized by charging lessees the full fair market rental. No rent shall be charged for improvements, including fills, on aquatic lands unless owned by the state. The fair market rental is based on: (a) Comparable non-DNR market rents, whether based on land value exclusive of improvements, a percent of gross revenues, or other appropriate basis, or if not available (b) the full market value (same as true and fair value) multiplied by the use rate percentage as determined under subsection (2) of this section and published in the Washington State Register.

(2) Use rate percentage.

(a) The percentage rate will be based on nondepartmental market rental rates of return for comparable properties leased on comparable terms in the locality, or when such do not exist;

(b) The percentage rate of return shall be based on the average rate charged by lending institutions in the area for long term (or term equivalent to the length of the lease) mortgages for comparable uses of real property.

(3) Appraisals: The determination of fair market value shall be based on the indications of value resulting from the

application of as many of the following techniques as are appropriate for the use to be authorized:

(a) Shore contribution; utilizing differences in value between waterfront properties and comparable nonwaterfront properties. Generally best for related land-water uses which are independent of each other or not needed for the upland use to exist.

(b) Comparable upland use (substitution); utilizing capacity, development, operation, and maintenance ratios between a use on upland and similar use on aquatic land with such ratios being applied to upland value to provide indication of aquatic land value for such use. Generally best for aquatic land uses which are totally independent of adjacent upland yet may also occur on upland totally independent of direct contact with water.

(c) Extension; utilizing adjacent upland value necessary for total use as the value of aquatic lands needed for use on a unit for unit basis. Generally best for aquatic land uses which are integrated with and inseparable from adjacent upland use.

(d) Market data; utilizing verified transactions between knowledgeable buyers and sellers of comparable properties. Generally best for tidelands or shorelands where sufficient data exists between knowledgeable buyers and sellers.

(e) Income; utilizing residual net income of a commercial venture as the indication of investment return to the aquatic land. This can be expressed either as a land rent per acre or as a percent of gross revenues. Generally best for income producing uses where it can be shown that an owner or manager of the operation is motivated to produce a profit while recognizing the need to obtain returns on all factors of production.

(4) Negotiation of rental amounts may occur when necessary to address the uniqueness of a particular site or use.

(5) Rental shall always be more than the amount that would be charged if the aquatic land parcel was used for water-dependent purposes.

[Statutory Authority: 1984 c 221 and RCW 79.90.540. 84-23-014 (Resolution No. 470), § 332-30-125, filed 11/9/84. Statutory Authority: RCW 43.30.150. 80-09-005 (Order 343), § 332-30-125, filed 7/3/80.]

WAC 332-30-126 Sand and gravel extraction fees. This section shall not apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) **Public auction or negotiation.** The royalty for sand, gravel, stone or other aggregate removed from state-owned aquatic lands shall be determined through public auction or negotiation.

(2) **Royalty rate.** A negotiated royalty shall reflect the current fair market value of the material in place.

The "income approach" appraisal technique will normally be used to determine fair market value. Factors considered include, but are not limited to:

(a) The wholesale value of similar material, based on a survey of aggregate producers in the region or market area;

(b) Site specific cost factors including, but not limited to:

(i) Homogeneity of material;

(ii) Access;

(iii) Regulatory permits;

(iv) Production costs.

(3) **Adjustments to initial royalty rate.**

[Title 332 WAC—p. 81]

APPENDIX 3

STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES
Brian J. Boyle
Commissioner of Public Lands
Olympia, Washington 98504

HARBOR AREA LEASE NO. 22-090028

BY THIS LEASE, by and between the STATE OF WASHINGTON, acting by and through the Department of Natural Resources, hereinafter called the Lessor and LAKE UNION DRYDOCK, COMPANY, INC. a Washington Corporation, hereinafter called the Lessee, the Lessor leases to the Lessee on the terms and conditions as hereinafter set forth, the following described harbor area situate in King County, Washington, to wit:

All that portion of the harbor area of Lake Union fronting Lot 9, Block 65, and a portion of Lot 8, Block 66, Lake Union Shorelands, together with vacated East Galer Street, more particularly described as follows:

Beginning at the northwest corner of said Lot 9, Block 65, thence North 49° 59' 13.8" West along the produced northerly line of Lot 9 260.975 feet to the Outer Harbor Line, thence South 0° 02' 26.9" West along the Outer Harbor Line 610.123 feet, thence South 49° 59' 13.8" East a distance of 260.975 feet parallel to and 72.36 feet from the northerly line of Waterway 8 to a point on the lot line of said Lot 8, Block 66, thence North 0° 02' 26.9" East along the westerly lines of Block 66 and Block 65 610.123 feet more or less to the point of beginning.

The above described area contains 122,024 square feet, more or less.

SECTION 1 OCCUPANCY

1.1 Term. This lease shall commence on the 1st day of July, 1985 and continue to the 1st day of July, 1997.

SECTION 2 USE OF PREMISES

2.1 Permitted Use. The Lessee shall have use of the leased premises for the purposes of operation and maintenance of piers and floating drydocks for ship moorage, in conjunction with Lessee's marine repair and construction business as shown on the attached exhibit and approved by the Lessor: Exhibit A - entitled "Lake Union Drydock Company-Plant Layout", revised July 30, 1973.

SECTION 3 PAYMENT

3.1 Rent.

(1) Annual Rent. Initial annual rent in the amount of \$6,406.00, and subsequent annual rent, as determined by the Lessor in accordance with Chapter 221, Laws of 1984 (RCW 79.90.450 - .902), or as amended by subsequent legislation, is due and payable in advance by the Lessee to the Lessor and is the essence of this lease, and is a condition precedent to the continuance of this lease or any rights thereunder. Payment is to be to the Department of Natural Resources, Olympia, Washington, 98504.

(2) Inflation Adjustment. After payment of the initial rent, annual rent shall be adjusted each year thereafter according to the change in the Producer Price Index, as provided by regulations of the Department of Natural Resources.

(3) Interest Penalty for Past Due Rent Balances. A one percent charge, per month, shall be due to Lessor, from Lessee, on any rent balance which is more than thirty days past due.

3.2 Leasehold Tax. The Lessee shall pay to the Lessor at Olympia, Washington 98504, the leasehold tax, if applicable, as set forth in chapter 61, Laws of 1976, 2nd Ex. Sess., or as may be amended. The tax shall be due and payable at the same time the rental charged herein is due and payable. Failure to pay said tax when due and payable shall be considered a breach of the provisions of this lease and the Lessor shall be entitled to all



WASHINGTON STATE DEPARTMENT OF
Natural Resources

Commissioner of Public Lands

REG ✓

RECEIVED
MAR 14 2001
LAND MANAGEMENT DIVISION

March 8, 2001

Lake Union Drydock
Ms. Carole M. Selig Assistant, Vice President
1515 Fairview Avenue East
Seattle, WA 98102

REGION COPY

Subject: Aquatic Resources Lease No. 22-090028 - Holdover

Dear Ms. Selig:

The subject lease, which expired on July 1, 1997, refers to the lease between the State, as Lessor, and Lake Union Drydock, as Lessee. The lease is located at:

See enclosed legal description

Since expiration, Lessee has continued in possession of the above described property ("Property") and Lessee wishes to remain in possession. This letter outlines the terms and conditions for Lessee's continued possession of the Property.

Lessee's continued occupancy shall not be an extension or renewal of the original term of Lease No. 22-090028. The term of the Lessee's continued occupancy shall instead be a year-to-year periodic tenancy beginning on July 1, 1997. This periodic tenancy shall be subject to the same terms and conditions as those stated in Lease No. 22-090028 until terminated as provided for below, or until such time as a new lease instituting new terms commences. All other lease terms and the billing cycle of Lessee's tenancy will be identical to those in Lease No. 22-090028, except as follows:

Ms. Selig
Page 2
March 8, 2001

1. The duration or "Term" of this lease shall be a year-to-year holdover tenancy beginning on July 1, 1997.
2. Either party may terminate the holdover tenancy for any reason by providing thirty (30) days written notice at any time. If the Lessee is not in default under the terms of the Lease, State shall refund the balance of any prepaid rent it received for the executory term of the holdover tenancy beyond the termination date. If the Lessee is in default under the Lease, State shall refund any rent it retained, less the cost of any damage State suffered or funds expended as a result of Lessee's default. The collection of pre-paid rent shall be deemed a matter of administrative convenience and shall not constitute the creation of any periodic tenancy beyond the one identified in this holdover agreement. Nor shall payment of pre-paid rent constitute any waiver of a default under the lease.
3. Lessee-Owned Improvements shall be removed by the Lessee by the termination date of the holdover tenancy unless State notifies Lessee that the Lessee-Owned Improvements may remain. If the State elects to allow the Lessee-Owned Improvements to remain on the Property after the agreed termination date of holdover tenancy, the Lessee then shall have thereby conveyed and quitclaimed to the State all interest in the Lessee-owned improvements allowed to remain on the Property. These improvements shall become the property of State without payment by State.

We are forwarding this letter to confirm our mutual agreement regarding this holdover tenancy from the expiration date of Lease No. 22-090028 and Lake Union Drydock's ability to remain on the premises. The holdover tenancy is acceptable to the state of Washington and Lake Union Drydock, with all conditions thereto remaining the same. The rent and leasehold tax (LHT) to be paid under this holdover agreement by the Lessee shall be as provided by the expired lease as if it continued.

The rent and LHT amount is \$58,939.43 and an invoice with a payment due date is enclosed. Continued rent under the terms of this lease due after June 30, 2001 will be billed as it comes due. This rent and LHT tax must be paid in a timely manner as if the lease were in effect for this holdover agreement to be valid and upon timely payment will represent full payment through June 30, 2001. Late payment will also cause interest to be added to your account at one (1%) percent per month as provided by law.

Finally, the bond of \$30,000.00 required by Lease No. 22-090028 must be returned with your executed copy of this letter. The department will not approve your holdover on the premises without your continued fulfillment of the lease's bond and insurance requirement.

Ms. Selig
Page 3
March 8, 2001

Please acknowledge your agreement to the above by signing this letter where provided and returning it no later than thirty (30) days from the date of this letter. Please send the rent payment to: Financial Management Division, PO Box 47041, Olympia, WA 98504-7041.

Signature of acceptance *JA Francis* 4-18-01
~~Carole M. Selig~~ Date
Jim Francis

If you have any questions or concerns, please call your land manager Lindie Schmidt at (360) 825-1631.

Sincerely,

Clay Sprague
Clay Sprague
Region Manager
South Puget Sound Region

Enclosure

c: Dave Kiehle
Mark Mauren
Region File
Aquatic Resources File

st/Schmidt/22090028.hld



June 7, 2006

CERTIFIED MAIL

Jim Francis, Vice President, Finance
Lake Union Drydock Company
1 515 Fairview Avenue E
Seattle, WA 98102-3718

SUBJECT: Alternate Parcel for Aquatic Lands Lease No. 22-090028

Dear Mr. Francis:

I received the rent appeal decision letter from Rich Doenges, Aquatic Resources Division Manager dated June 5, 2006. Based on that letter I have recalculated the 2001 and 2005 rent revaluations for Lake Union Drydock's Lease No. 22-090028 using the Foss Shipyard parcel, King County Parcel No. 7442001550.

Using this parcel for both the 2005 rent revaluation and the backrent calculations I obtained the following rent amounts:

Backrent

<u>Period</u>	<u>Rent</u>	<u>Leasehold Tax (12.84%)</u>	<u>Total</u>
2003 to 2004	\$19,675.28	\$2,526.31	\$22,201.59
2004 to 2005	\$29,512.92	\$3,789.46	\$33,302.38

We did not include any amounts from the July 1, 2001- June 30, 2003 lease years because you paid the bills that you received, though the amounts billed were in error. The total backrent equals \$55,503.96 minus your payment of:

<u>Check #</u>	<u>Amount</u>	<u>Date</u>
42182	\$ 14,801.05	07/01/05
43772	\$ 14,801.05	02/06/06

This results in a total backrent due of \$25,901.86. We have opted not to charge interest on this amount at this time. I have attached the rent calculation spreadsheets for your reference.

REGION COPY

faxed to file ← Melissa
Region
DIP

LAKE UNION DRYDOCK COMPANY

1515 FAIRVIEW AVENUE EAST
SEATTLE, WASHINGTON 98102-3718
TELEPHONE (206) 323-6400
FAX (206) 324-0124

RECEIVED
JUL 24 2006
DIP-515



Melissa Montgomery
DNR, Natural Resource Specialist
950 Farman Ave. N.
Enumclaw. WA 98022

July 21, 2006

Re: Aquatic Lands lease No. 22-090028

Dear Melissa,

The enclosed rent payment under Aquatic Land Lease No. 22-090028 ("The Lease") is made under protest and shall neither constitute an accord and satisfaction nor a ratification of the Washington Department of Natural Resource's ("DNR") rent valuation under the Lease. By tendering the enclosed check, Lake Union Drydock Company ("LUDC") does not waive any rights or remedies it may have with respect to the DNR's determination of, and its subsequent decisions with respect to, the rent valuation under the Lease, including LUDC's right to appeal the DNR's decision to use an alternative upland tax parcel. In the event it is determined the enclosed payment and/or preceding payments and/or subsequent payments exceed the rent finally determined to be due under the Lease, LUDC shall be entitled to a refund of such excess, with interest as per RCW 79.105.320.

The enclosed check in the amount of \$59,401.16 is the total of the \$53,794.42 per your letter of June 7 plus two monthly payments at \$2,803.37.

Please forward this to the appropriate department and let me know if you have any questions.

Yours truly,

Jim Francis
Vice President, Finance

REGION COPY

From: MELISSA MONTGOMERY
To: Alan Hashimoto
Date: 3/22/2006 8:27:33 AM
Subject: RE: follow up

Thanks Alan,

Just to let you know, freshwater cleanup standards have been developed recently (within last 6 months?) for the Gas Works Park sediments cleanup. John Keeling is the Ecology project manager for that project and he could get you a copy of that document if you wanted (425-649-7052; jkee461@ecy.wa.gov). I asked him if the cleanup standards would be applicable to the rest of the lake. He said no because they are based on biological standards which are highly variable based on local conditions; however I would imagine they will be relevant at least for the Northlake clean up which is right next door.

Melissa

Melissa Montgomery
Natural Resource Specialist
Washington Department of Natural Resources
950 Farman Ave N
Enumclaw, WA 98022-9282
360-825-1631 x2020

>>> "Hashimoto, Alan" <Alan.Hashimoto@METROKC.GOV> 3/22/2006 8:04 AM >>>

Hi Melissa,

The first part is correct. Northlake shipyards' reduction is based on a Board of Tax Appeals Decision which we have used as a guideline for valuing the property. Theirs is a value-in-use appraisal. They do not know if the cleanup would cost more than the value of the land whereas at LUDC it has been established through a lawsuit. There are no freshwater cleanup standards and I have been informed that none are forthcoming in the foreseeable future. So no cleanup standards have been established for anything on Lake Union or Salmon Bay.

Alan

-----Original Message-----

From: MELISSA MONTGOMERY [mailto:melissa.montgomery@wadnr.gov]
Sent: Tuesday, March 21, 2006 1:15 PM
To: Hashimoto, Alan
Subject: follow up

Hi Alan,

I just wanted to follow up on our conversation yesterday and make sure I have accurately summarized it.

You said that full market appraisals are done every year on the contaminated sites in Lake Union and that the full market value is reduced for contamination liability. The financial liability of the potential cleanup at Lake Union Drydock is well in excess of the full market value so that is why it is reduced to \$1000. The \$8,570,800 listed in the e-real property report is the 2005 full market value before reduction for contamination.

The same thing is done at Northlake Shipyard but since their property is worth more overall and their cleanup liability is less uncertain (since they have already started the cleanup and because freshwater cleanup standards have been set for that site) the net value of the upland property is higher.

Does that sound right?



October 28, 2005

CERTIFIED MAIL

Mr. Jim Francis
Vice President, Finance
Lake Union Drydock Company
1515 Fairview Avenue E.
Seattle, WA 98102

Subject: Rent Appeal for Aquatic Lands Lease No. 22-090028

Dear Mr. Francis:

As Rental Dispute Officer (RDO), I have made my final decision on your requests to review the amounts of back rent due, revaluation, and current rent due for Aquatic Lands Lease No. 22-090028. In this letter I will summarize the relevant information submitted as part of your requests for review, respond to the issues raised, and explain my decision with respect to those issues.

The DNR Land Manager sent Lake Union Drydock Company two letters on June 2, 2005. The first letter notified you of back rent due for rent periods 2003-2004 and 2004-2005. DNR calculated an outstanding balance of \$55,503.96 for July 1, 2003 through June 30, 2005. The second letter stated the projected rent amount for the upcoming four-year period, beginning July 1, 2005, based on revaluation of adjacent tax parcel owned by Lake Union Drydock Company. DNR-calculated base rate for July 1, 2005 to June 30, 2006 was \$44,269.38, plus \$5,684.19 for a total of \$49,953.57.

You disputed the calculated amount of back rent billed and due for 2003-2004 and 2004-2005 rent periods in your first appeal letter dated June 29, 2005. You also requested that DNR refund Lake Union Drydock Company for rental payments made in excess of what you believe to be the correct amounts owed for rent periods 2001-2002 and 2002-2003.

Your second appeal letter, also dated June 29, 2005, challenged the rent revaluation and the calculated amount of rent billed and due for rent period 2005-2006. You indicated that Lake Union Drydock Company may wish to occupy less than the entire leasehold area in the future. Since this is a matter beyond the rent appeal under consideration, I encourage you to speak directly with the DNR Land Manager.

Background information on this request for rental review is as follows:

Aquatic Lands Lease No. 22-090028 occupies 2.8 acres of state-owned aquatic lands located in the harbor area fronting Lot 9, Block 65, Lot 8, Block 66, and vacated East Galer Street, Lake Union Shorelands. The permitted use within the leasehold is operation and maintenance of piers and floating drydocks for ship moorage, in conjunction with marine repair and construction. The lease term was from July 1, 1985 to July 1, 1997.

The lease has been in a holdover tenancy status since July 1, 1997, with the same contract terms in effect. Per RCW 79.105.240 (previously RCW 79.90.480(3)(a)) and the contract agreement, the lease rental rate is revalued every four years for the term of the contract.

Information provided to the Department from Lake Union Drydock Company:

- A letter dated June 29, 2005 and received by DNR on June 30, 2005, requesting formal rent review of Aquatic Lands Lease No. 22-090028.
- A map and legal description of the leased area.
- Tax statement for adjoining uplands for tax assessed in 2001, payable in 2002.

The following is a summary of issues raised by Lake Union Drydock Company in the request for rent review, followed by a brief analysis and RDO response on each point.

1) *The valuation used by DNR is not the assessed value as determined by the county assessor. In the past, DNR has asserted that the assessed value is not the fair market value as determined by the assessor. There is no basis for the assessor to value contaminated property below fair market value. The property is in fact assessed at fair market value.*

Response:

Where available, DNR uses the full, assessed property value without adjustments for contamination. Upon review of the record, I understand that the King County Assessor's Office reached a stipulated agreement with Lake Union Drydock Company and reduced the value for parcel number 408880-2755 to \$1,000. I was not able to find documentation that established a distinct assessed value for the parcel separate from the reduction due to contamination. As a result, I agree with your position that DNR did not calculate the rent rate based upon the upland parcel value as stated in the Land Manager's June 2, 2005 correspondence.

Since the King County Assessor's Office has given the adjacent upland parcel a nominal value for tax purposes, DNR will need to select an appropriate alternate parcel.

2) *The correct calculation of rent for 2001 to 2002 in accordance with state laws and regulations, results in an annual rental amount of \$6.88 computed as follows: Assessed value of adjacent lands, \$1,000 divided by area, 342,835 SF times 30% of the area under lease, and we partially and usually use another 19% of the area for moorage, but we never use the other 39% of the area under lease except for transit across it in the same fashion as the general public uses it.*

Response:

Once the DNR Land Manager has selected an appropriate alternate parcel, they will calculate rent for those years not yet paid, including 2003-2004 and 2004-2005. However, DNR does not have the authority to make rent adjustments for prior rent years.

3) *The central issue here is that state law clearly requires the DNR to use the assessed value as determined by the county assessor, and that value was not used.*

Response:

When the assessed value is nominal, DNR must consider alternate parcels for the purposes of calculating rent.

RDO Decision

I find that the current property tax assessment of your upland parcel is inconsistent with the purposes of the lease due to devaluation by the King County Assessors Office. For this reason, I have decided that it is appropriate for the Department to select an alternate upland parcel for the purpose of calculating rent rate.

I will ask the DNR Land Manager for Lake Union to locate an appropriate alternate parcel using the criteria in WAC 332-30-123(4). Alternate parcel criteria to be met are:

- WAC 332-30-123(4)(a)(i): A parcel within the same city.
- WAC 332-30-123(4)(b)(i): A parcel with the same use class as the subject use.

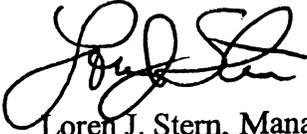
Once selected, the Land Manager will recalculate back rent owed based on the alternate parcel. In addition the Land Manager will calculate the revaluation for the next four-year period beginning July 1, 2005. They will advise you of the revised rent calculations and provide you the same opportunity to appeal the revised, revalued rent amounts to me.

This is my final decision as the Rental Dispute Officer, as required under WAC 332-30-128 (6)(d). Should you wish to appeal this decision, you must follow the procedure outlined in WAC 332-30-128 (copy enclosed). This requires that your written appeal be postmarked within fifteen (15) calendar days of the date you received this decision, as outlined in WAC 332-30-128(7). The Rental Dispute Appeals Officer (RDAO) is Mr. Craig Partridge, Executive Policy Director, Department of Natural Resources, 1111 Washington Street SE, P.O. Box 47001, Olympia, WA 98504-7001.

Jim Francis
Page 4
October 28, 2005

Thank you for your understanding as we work to resolve these challenging matters. If you have questions, please contact Lisa M. Randlette at (360) 902-1085.

Sincerely,



Loren J. Stern, Manager
Aquatic Resources Division

Enclosure: WAC 332-30-128

- c: Region Jacket No.
- Lease Jacket No.
- Rent Appeal File No.
- Melissa Montgomery, DNR Land Manager, Shoreline District

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LAKE UNION DRYDOCK COMPANY

1515 FAIRVIEW AVENUE EAST
SEATTLE, WASHINGTON 98102-3718
TELEPHONE (206) 323-6400
FAX (206) 324-0124



Manager, Marine Lands Division
c/o Melissa Montgomery, Land Manager
Shoreline District Aquatics Region
950 Farman Ave. N
Enumclaw, WA 98022-9282

June 29, 2005

RE Notification of Revalued Rent for Aquatic Lands Lease No. 22-090028
Rent Review of Aquatic Lands Lease No. 22-090028

Dear Melissa and Rental Dispute Officer,

Enclosed, please find the following:

- Our check for \$3,066.18 in compliance with the requirements of WAC 332-30-128(4) and RCW 79.90.530
- A map and legal description of the leased area
- Most recent real estate tax statement for adjoining uplands (There has been no notice of increase in assessed value since this was issued)

The permitted use of the leased area is the same as the actual use, namely for operation and maintenance of piers and floating dry docks for ship moorage in conjunction with our marine repair business.

The revaluation for the four year period beginning July 1, 2005 as proposed in the letter of June 2, 2005 is inappropriate because the calculation of rent in the proposed revaluation is not in accordance with the applicable laws and regulations. RCW 79.90.480 and WAC 332-30-123 both specifically say that the valuation should be based on the assessed value as determined by the county assessor. The valuation used by DNR is not the assessed value as determined by the county assessor for tax purposes. The letter of June 2 indicates that the value before reduction for contamination was used. We find no basis in the laws or regulations for use of that figure. Apparently, DNR is incorrectly applying WAC 332-30-123(3), because DNR now asserts that this WAC section applies. WAC 332-30-123(3) outlines six situations that require adjustment of the valuation or use of a different parcel. None of those situations applies to the subject lease. In the past, DNR has asserted that the assessed value is not the fair market value as determined by the assessor. There is no basis for the assessor to value contaminated property below fair market value. The property is in fact assessed at fair market value.

Besides being the wrong value to use for lease purposes, this value, \$8,570,800 is not by any stretch of imagination the true fair market value of this property even if there was no contamination, but this value has never been used for any purpose, and therefore has never been challenged. The property in question is occupied by a shipyard that has suffered and continues

LUDD
II-00243

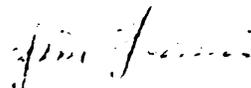
to suffer chronic financial losses despite having experienced management, owning all of its equipment, and despite the fact that it owns most of the real estate so that rental expense is minimal. Virtually the entire shipyard is over water and made of wood that deteriorates rapidly and is increasingly expensive to replace. The cost of repairing piers, which is required about every 15-20 years, is between \$45 and \$50 per square foot. Our facilities are not suitable for ship building as there is no land area for hot work and heavy equipment. Restrictions imposed under the Shorelines Management Act limit use of the property to marine industrial use. Even marinas are not a permitted use on our property. Of course a marina would not work on this property anyway because there is virtually no dry land for parking and parking over water is all but strictly prohibited. We have needed to depend on street parking for our employees and customers, but that parking is rapidly disappearing. As we try to maintain this marine industrial use, financial losses continue, not unlike other shipyards, most of which have experienced financial difficulty with much better facilities. We have tried to find a buyer for the property, but the restrictive shoreline zoning use limitations, (marine industrial) coupled with contamination in the sediments have eliminated all potentially interested parties. We have for many years searched for an alternative use for this property that could make it even a little bit profitable, even without payment of any rent, but to no avail. If we completely close the doors and abandon it, it will deteriorate without any repair and could create major liability and fire hazard. Meanwhile, we struggle along, at least maintaining the facility and providing employment and maritime infrastructure. Ownership of the property comes with liability for clean-up of contaminated sediments. That could cost several million dollars and is a major reason no one wants to own it. Since you can't make any money with it on a sustaining basis and you have great financial risk to ownership, the real market value is near zero.

The correct calculation of rent for 2005 to 2006 in accordance with state laws and regulations, results in an annual rental amount of \$5.41 computed as follows: Assessed value of adjacent uplands, \$1,000 divided by area, 342,835 SF (per Assessor records) times 30% times square footage under lease, 122,024 equals \$106.78. times real capitalization rate of 5.07% equals \$5.41. The enclosed payment is in excess of this, and the excess should be refunded to us.

Actually, we use only a portion of the leased area. If the rental rate was high, we would have to lease only the areas we actually use, not the areas that are always open to the general public for recreational use. We always use 32% of the area under lease, and we partially and usually use another 19% of the area for moorage, but we never use the other 39% of the area under lease except for transit across it in the same fashion as the general public uses it.

The central issue here is that state law clearly requires the DNR to use the assessed value as determined by the county assessor, and that value was not used.

Yours truly,

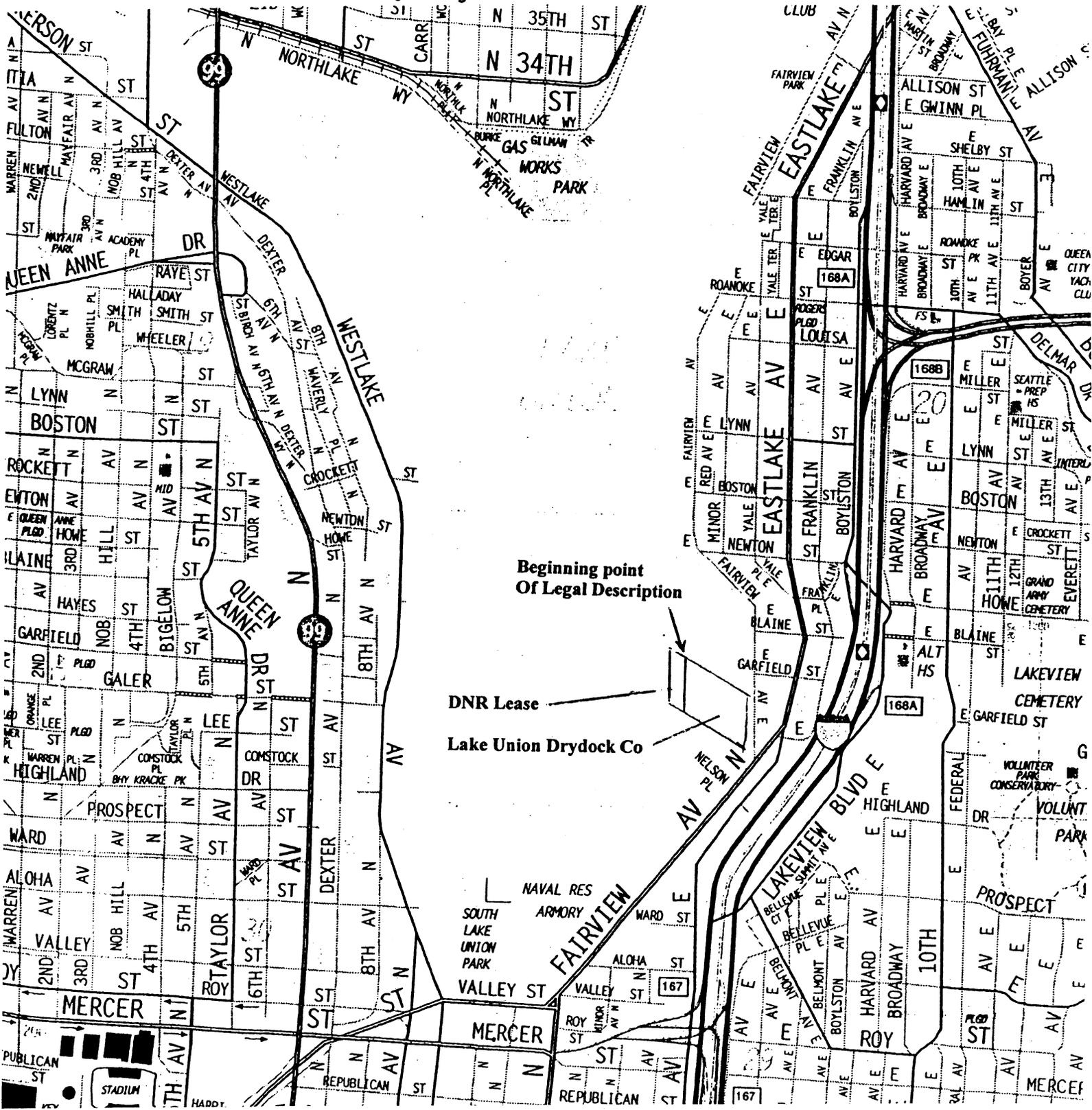


Jim Francis
Vice President, Finance

Legal Description and Map

Beginning at the northwest corner of said Lot 9, Block 65, thence North $49^{\circ} 59' 13.8''$ West along the produced northerly line of Lot 9 260.975 feet to the Outer Harbor Line, thence South $0^{\circ} 02' 26.9''$ West along the Outer Harbor Line 610.123 feet, thence South $49^{\circ} 59' 13.8''$ East a distance of 260.975 feet parallel to and 72.36 feet from the northerly line of Waterway 8 to a point on the lot line of said Lot 8, Block 66, thence North $0^{\circ} 02' 26.9''$ East along the westerly lines of Block 66 and Block 65 610.123 feet more or less to the point of beginning.

LUDD
11-00245





June 2, 2005

CERTIFIED MAIL

Jim Francis, Vice President, Finance
Lake Union Drydock Company
1515 Fairview Avenue E
Seattle, WA 98102-3718

SUBJECT: Notification of Back Rent Due for Aquatic Lands Lease No. 22-090028

Dear Mr. Francis:

Upon reviewing your file for this year's rent revaluation I became aware that you have not been billed for rent for the last few years. I have gone back and reviewed the 2001 rent revaluation conducted by DNR Land Manager Lindie Schmidt (sent to you in a letter dated December 17, 2001). DNR policy decisions since the 2001 revaluation support her decision to use your parcel instead of an alternate parcel and to use the property value before its adjustment for contamination.

The rent that should have been billed for July 1, 2001 through June 30, 2005 is listed below. These are the same base values that were presented in the 2001 rent revaluation letter with the addition of the yearly Producer Price Index adjustments for 2002 through 2004.

<u>Period</u>	<u>Rent</u>	<u>Leasehold Tax (12.84%)</u>	<u>Total</u>
2001 to 2002	\$19,455.44	\$2,498.08	\$21,953.52
2002 to 2003	\$29,183.16*	\$3,747.12	\$32,930.28
2003 to 2004	\$34,928.90*	\$4,484.87	\$39,413.77
2004 to 2005	\$36,794.10*	\$4,724.36	\$41,518.46

*includes Produce Price Index (PPI) adjustments

Because we failed to bill you for the correct amount in 2001 and 2002 and we accepted your rent payments for those lease years I am accepting that those lease years have been paid in full, even though we did notify you that the rent would be increasing. The rent for the 2003-2004 and 2004-2005 lease years will reflect the increases that occurred due to the 2001 rent revaluation. However, RCW 79.90.490 provides that the annual rent established shall not increase more than fifty percent (50%) in any year, therefore the base rent was stair-stepped as follows:

01/25/05

Jim Francis, Vice President, Finance
June 2, 2005
Page 2

<u>Period</u>	<u>Rent</u>	<u>Leasehold Tax (12.84%)</u>	<u>Total</u>
2001 to 2002	\$12,970.29	\$1,665.39	\$14,635.68
2002 to 2003	\$13,116.85	\$1,684.20	\$14,801.05
2003 to 2004	\$19,675.28	\$2,526.31	\$22,201.59
2004 to 2005	\$29,512.92	\$3,789.46	\$33,302.38

We received payments of \$14,635.68 on September 25, 2001 and \$14,801.05 on July 8, 2002 towards the payment of the above listed amounts. There is an outstanding balance of \$55,503.96.

This amount is due within thirty days of the receipt of this letter. If you need to set up a payment plan please let me know.

If you wish to appeal the amount of rent identified above, you must follow the procedure outlined in WAC 332-30-128 (copy enclosed). This procedure requires that within thirty (30) calendar days of your receipt of this letter, the department must have received your written request for review of rent containing all the requirements identified in the regulation. Please address your request to: Manager, Department of Natural Resources, Aquatic Resources Division, 1111 Washington Street SE, Olympia, WA 98504-7027.

If you have any questions, please contact me at 360-825-1631 x2020.

Sincerely,

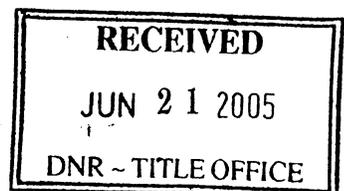
Melissa Montgomery

Melissa Montgomery, Land Manager
Shoreline District Aquatics Region

Enclosure

c: Region File
Aquatic Resources file

gj/22090028BackRent



LUDD
II-00262



June 2, 2005

CERTIFIED MAIL

Jim Francis, Vice President, Finance
Lake Union Drydock Company
1515 Fairview Avenue E
Seattle, WA 98102-3718

SUBJECT: Notification of Revalued Rent for Aquatic Lands Lease No. 22-090028

Dear Mr. Francis:

Your rent has been revalued for the next four (4)- year period beginning July 1, 2005. This revaluation was conducted in accordance with Subsection 3.3 of your aquatic lands lease and the rent calculation methods used were established by the Legislature in RCW 79.90.

Because the assessed value of the upland parcel used to value your lease has increased, your annual rent has increased as well. Please note that the assessed value of the property before reduction for contamination was used in accordance with WAC 132-30-123; the 2005 property value (land only) is \$8,570,800 according to the King County Assessor. Therefore your annual base rent of \$29,512.92 will increase to \$46,399.63; RCW 79.90.490 provides that the annual rent established shall not increase more than fifty percent (50%) in any year, therefore the base rent was stair-stepped as follows for a total payment due of \$49,953.57.

<u>Period</u>	<u>Rent</u>	<u>PPI*</u>	<u>Leasehold Tax (12.84%)</u>	<u>Total</u>
2005 to 2006	\$44,269.38	N/A	\$5,684.19	\$49,953.57
2006 to 2007	\$46,399.63	TBD**	TBD	TBD

*Producer Price Index

**To be determined

A rental billing for your rent from July 1, 2005 to June 30, 2006 will follow under a separate cover. Bills are computer generated and mailed out approximately four (4) weeks before the bill is due. If for some reason you do not receive a bill please let me know. All amounts past due will be charged penalty pursuant to the terms of your lease. A quarterly or monthly payment schedule is available. Please let me know if you would like to set one up.

If you wish to appeal the amount of rent identified above, you must follow the procedure outlined in WAC 332-30-128 (copy enclosed). This procedure requires that within thirty (30) calendar days of your receipt of this letter, the department must have received your written request for review of rent containing all the requirements identified in the regulation. Please address your request to: Manager, Department of Natural Resources, Aquatic Resources Division, 1111 Washington Street SE, Olympia, WA 98504-7027.

QUARTERLY RENTAL BILLING



Jim Francis, Vice President, Finance
June 2, 2005
Page 2

Pursuant to Subsection 6.9 of your lease, your financial security requirement will increase to \$90,000. You may choose a bond, letter of credit or a savings account assignment. This security must be in place within thirty (30) calendar days from the date of this letter.

If you have any questions, please contact me at (360) 825-1631, extension 2020.

Sincerely,

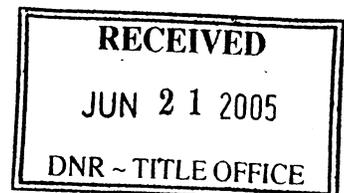
Melissa Montgomery (s)

Melissa Montgomery, Land Manager
Shoreline District Aquatics Region

Enclosure

c: Region File
Aquatic Resources file

gj/22090028Reval



LUDD
11-00264

TO: King County Board Of Equalization
 NAME: Lake Union Dry Dock
 ACCT#: 408880-2755
 B of E#: 9903084

APPRAISER: Alan Hashimoto

This appeal answer (report) is intended for use by the King County Board Of Equalization and the King County Dept. of Assessments. As such it is written in concise form to minimize paperwork. The assessor intends that this report conform to the Uniform Standards of Professional Appraisal Practice (USPAP) requirements for a restricted report as stated in USPAP SR 2-2 (c). To fully understand this report the reader must refer to the specific Area Revalue Report, the Assessor's Property Record Cards, and Assessor's maps. This is the written section of a summary oral report to be presented at the hearing.

Purpose and Use: The purpose of this report is the assessor's formal response to an appeal of the 1999 value of the subject real property to the Washington State Board of Tax Appeals. This is a restricted report and is intended for use only by the Board together with other assessor's records as stated above.

Property Interest Appraised: Fee Simple

The definition of fee simple estate as taken from The Third Edition of *The Dictionary of Real Estate Appraisal*, published by the Appraisal Institute. "Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat."

Market Value:

The basis of all assessments is the true and fair value of property. True and fair value means market value (Spokane etc. R. Company v. Spokane County, 75 Wash. 72 (1913); Mason County Overtaxed, Inc. v. Mason County, 62 Wn. 2d (1963); AGO 57-58, No. 2, 1/8/57; AGO 65-66, No. 65, 12/31/65) . . . or amount of money a buyer willing but not obligated to buy would pay for it to a seller willing but not obligated to sell. In arriving at a determination of such value, the assessing officer can consider only those factors which can within reason be said to affect the price in negotiations between a willing purchaser and a willing seller, and he must consider all of such factors. (AGO 65,66, No. 65, 12/31/65)

Effective Date of Appraisal: January 1, 1999

Assumptions and Limiting Conditions: Contained in the Area Report

This report and value conclusion is intended for sole use of the Washington State Board of Tax Appeals and the King County Department of Assessments. The information and conclusions are only valid for property taxation purposes and cannot be relied upon for other valuation purposes.

SUMMARY: The subject has been in use as a shipyard for over 60 years. During that time the tidelands have been heavily contaminated with heavy metals, paint, PCB's, hydrocarbons and other toxic wastes. Also it has been used as a dumping ground for steel cable, engines, boat parts, etc. The environmental impact is immense and the 1992 cost now seems quite conservative.

The shipyard industry has been in decline in the U.S. for the last twenty years and continues to decline. Economically, the company does not make a profit and barely stays alive with dwindling repair contracts.

PROPERTY DESCRIPTION: The subject is in industrial use as a shipyard. It is located on the SE shore of Lake Union.

HIGHEST AND BEST USE:

As if vacant: As zoned.

As improved: Almost any use under current zoning except the current use.

Based on neighborhood trends, both demographic and current development patterns, the existing buildings represent the highest and best use of this site. The existing use will continue until land value, in its highest and best use, exceeds the sum of the value of the entire property in its existing use and the cost to remove the improvements. We find that the current improvements do add value to the property, and therefore are the highest and best use of the property as improved.

SCOPE AND EXTENT OF DATA: Information was provided by J. Francis, VP, Finance. Data characteristics for the subject are in the Assessor's database.

Page _____ of _____

VALUATION:

Cost: The cost to cure from the contamination has never been investigated however in 1992 a study was performed to just remove waste and this amounts to \$10.7 Mil. This in itself is almost double the value of the subjects land if it were not contaminated.

Sales Comparison: N/A

Income Capitalization: N/A

RECONCILIATION AND CONCLUSION: Recommend that the land be reduced to nominal value because the cost to cure exceeds the value of the land. Land = \$1,000

CERTIFICATION:

I certify that, to the best of my knowledge and belief:

- the statements of fact contained in this report are true and correct.
- the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, unbiased professional analyses, opinions, and conclusions.
- I have no present or prospective interest in the property that is the subject of this report, and I have no personal interest or bias with respect to the owners or occupants of the property
- neither my compensation nor my employment is contingent upon the reporting of a predetermined value or direction in value that favors any cause, the amount of the value estimate, the attainment of a stipulated result, or the occurrence of a subsequent event.
- my analyses, opinions and conclusions were developed, and this report has been prepared, in conformity with Uniform Standards of Professional Appraisal Practice.
- I made a personal inspection of the property that is the subject of this report.
- no one provided significant professional assistance to the persons signing this report except as follows:

Deputy Assessor

Date: 8-3-00

12/94 IS-APPEAL.DOT

PARCEL NO.	BOARD OF EQUALIZATION VALUATION	BOARD OF TAX APPEALS VALUATION
408880-2755	Land: \$ 5,053,400 Impr: \$ 1,000 Total: \$ 5,054,400	Land: \$ 2,000,000 Impr: \$ 1,000 Total: \$ 2,001,000

FACTS AND ISSUES

In this appeal, we revisit the issue of the fair market value of LUDC's commercial boat repair and dry dock facility located at the southeast end of Lake Union in Seattle, Washington. n2 The major issue revolves [*3] around the difficulty of determining the highest and best use of an environmentally contaminated single-purpose industrial facility with a short remaining economic life and limited alternative uses. We find the Assessor's determination of highest and best use -- although made in good faith -- fails to adequately consider the impact of environmental contamination, and is therefore erroneous. We adopt the value contended for by LUDC.

n2 The value of the subject property for the 1988 and 1989 assessment years was considered in *Lake Union Drydock Co. v. Ridder*, BTA Docket No. 37655, CCH Wash. Tax Rep. P 201-840 (1991).

Property Description. The subject property is a privately owned submerged parcel of land 342,835 square feet (7.87 acres) in size, operated as a shipyard/repair facility. n3 It is improved with approximately 160,000 square feet of piers and buildings. The longest pier extends about 1,000 feet from the shore. There are seven floating dry docks ranging in length from 69 to 285 feet. All of the facilities are built over water and are in varying states of disrepair. The site is zoned IG1U/45. The allowable uses for this zoning classification include marine [*4] retail sales and services, commercial moorages, and yacht brokerage businesses. Conditional uses, for which a permit is required by the City of Seattle, include restaurant, retail, and warehouse uses. As a practical matter, many of these conditional uses are unlikely given that the City of Seattle will not approve any use which involves the parking of automobiles on piers over the water. n4

n3 In addition to the subject property, LUDC leases an adjacent portion of one-plus acres of submerged land from Seattle City Light. Capitalization of LUDC's lease payments indicates a value of \$ 4.47 per square foot for the leased land.

n4 Seattle's land use officials understandably frown upon automobile engine oil dripping into Lake Union.

Property Use. The subject property has been owned and operated by LUDC since 1919. LUDC has specialized in construction and repair of wooden boats of all sizes, up to and including Navy mine sweepers. Between 1982 and 1991, 48 percent of its business involved the repair of mine sweepers. That business is phasing out because new mine sweepers are built with fiber glass hulls. The future of the shipyard as a wooden boat repair facility is thus [*5] uncertain. It is not suitable for repairing steel hulls because its piers are of light construction and have limited weight capacity. In addition, the shipyard business in general has been declining in the Pacific Northwest.

Environmental Contamination. The most immediate concern to LUDC is the presence of environmental contamination in the lake bottom sediments on the subject property. Over the years, the majority of work activities at LUDC have involved the sandblasting of vessel hulls to remove old paint and repainting. As a result, the sediment underlying LUDC's facilities is now contaminated with heavy concentrations of arsenic, copper, lead, and zinc. This contamination was first documented in 1989 when the Department of Ecology (DOE) performed an initial site investigation of the LUDC site. LUDC currently operates under a National Pollutant Discharge Elimination Permit (NPDES), which regulates discharges to LUDC and requires the shipyard to monitor the quality of sediments on its property. In 1992, DOE again confirmed the presence of a number of environmental contaminants in the area of the subject property.

As a result of these studies, DOE changed its ranking [*6] of LUDC's property some time in 1991 from a category 4 site (low priority) to a category C-1 site (top priority). Category C-1 does not mean that cleanup is required. Nevertheless, all C-1 sites are engaged in some sort of environmental remediation, assessment, or monitoring. DOE has not



PREPROPOSAL STATEMENT OF INQUIRY

CR-101 (June 2004)

(Implements RCW 34.05.310)
Do NOT use for expedited rule making

Agency: Department of Natural Resources (DNR)

Subject of possible rule making: Lease rates for the water-dependent use of state-owned aquatic land are calculated according to a formula established in RCW 79.90.480 and Chapter 332-30-123 WAC. The formula is based upon the assessed value of the upland tax parcel used in conjunction with the leased area, and includes provisions for selecting an alternate upland tax parcel when the upland parcel used in conjunction with the leased area is not assessed or has an assessed value inconsistent with the purposes of the lease. The DNR Aquatic Resources Division is exploring options to modify the alternate upland parcel selection criteria contained in Chapter 332-30-123 WAC, which imposes limitations on the selection of alternate upland tax parcels in these circumstances, and in certain situations, prevents the establishment of equitable and predictable lease rates as required by RCW 79.90.450.

Statutes authorizing the agency to adopt rules on this subject: RCW 79.90.480, RCW 79.90.540

Reasons why rules on this subject may be needed and what they might accomplish: Chapter 332-30-123 WAC narrows the upland parcel selection criteria established in RCW 79.90.480 and imposes limitations on the selection of alternate upland tax parcels for purposes of calculating lease rates, thereby limiting the number of potential alternate upland parcels upon which to base lease rates. The DNR Aquatic Resources Division is exploring options to modify the alternate upland parcel selection criteria contained in Chapter 332-30-123 WAC to better accomplish the goal of establishing equitable and predictable lease rates for the water-dependent use of state-owned aquatic land, and invites public comment as to how this may best be accomplished.

Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies: Responsibility for administering the proposed rule will lie with the DNR and Ports that have entered into Port Management Agreements with the DNR. No other federal or state agencies participate in the determination of water-dependent lease rates on state-owned aquatic lands.

Process for developing new rule (check all that apply):

- Negotiated rule making
- Pilot rule making
- Agency study
- Other (describe)

The DNR will contact stakeholders and affected parties and entities to solicit their participation in the rule development process.

How interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication:
(List names, addresses, telephone, fax numbers, and e-mail of persons to contact; describe meetings, other exchanges of information, etc.)

The Department of Natural Resources encourages your active participation in the rule-making process. For more information, please contact:

Matt Niles, Aquatic Resources Division, Washington State Department of Natural Resources
PO Box 47027, Olympia, WA 98504-7020
Phone: 360-902-1100
Fax: 360-902-1786, Email: matthew.niles@wadnr.gov

DATE
November 3, 2004

NAME (TYPE OR PRINT)
Doug Sutherland

SIGNATURE

TITLE
Commissioner of Public Lands

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED

NOV 3 2004

TIME 1053

WSR 04-22-124



PROPOSED RULE MAKING

CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Department of Natural Resources

Preproposal Statement of Inquiry was filed as WSR 04-22-124; or
 Expedited Rule Making--Proposed notice was filed as WSR _____; or
 Proposal is exempt under RCW 34.05.310(4).

Original Notice
 Supplemental Notice to WSR _____
 Continuance of WSR _____

Title of rule and other identifying information: (Describe Subject)
 WAC 332-30-123 Aquatic Land Use Rentals for Water-Dependent Uses

Hearing location(s):
 Seattle, Queen Anne Library, 400 W Garfield St., Sept. 8, 6 PM
 Olympia, Timberland Library, Franklin and 8th, Sept. 15, 6 PM
 Mount Vernon, Fire Station #2, 1901 N Laventure Rd., Sept. 19, 6 PM
 Friday Harbor, San Juan Library, 1010 Guard St., Sept. 22, 6 PM

Date: _____ Time: _____

Submit written comments to:
 Name: Matthew Green
 Address: Aquatic Resources Division, Department of Natural Resources, PO Box 47027, Olympia, WA 98504-7020
 e-mail matthew.green@wadnr.gov
 fax (360) 902-1786 by (date) ~~August~~ **September 26, 2005**

Assistance for persons with disabilities: Contact
 Matthew Green by three work days prior to hearing
 TTY (800) 833-6388 or (360) 902-1116

Date of intended adoption: November 1, 2005
 (Note: This is NOT the effective date)

Purpose of the proposal and its anticipated effects, including any changes in existing rules:
 The proposed changes to WAC 332-30-123 address the selection of upland parcels for calculating rent for water-dependent leases on state-owned aquatic lands. State law says that rents for such leases are determined by the assessed value of the upland parcel used in conjunction with the leased aquatic lands. When something is wrong with that upland parcel or with its assessment, the Department of Natural Resources (DNR) must select an alternate parcel. WAC 332-30-123 details when and how DNR selects an alternate parcel.

The proposed changes relate to: how to select an upland parcel for "remote moorages" (that is, leases that do not abut the upland); the definition of "upland characteristics" (for when filled tidelands and shorelands can be considered an "upland" parcel); clarifying that the list of examples of inconsistent situations (that is, of when DNR needs to select an alternate parcel) is not an exclusive list; specifying that DNR will not use an upland parcel when a county assessor assesses a parcel at something other than fair market value; clarifying that the upland parcel selected must be used "in conjunction with a water-dependent use"; specifying that DNR will not use an upland parcel when the assessed value of that parcel is affected by contamination; and, specifying examples of "use classes" (used when selecting an alternate parcel).

Reasons supporting proposal:
 The proposed changes are not substantive, and will not change rents paid by lessees of state-owned aquatic lands. Instead, they are designed to clarify the rules, make them easier to understand and apply, and give explicit directions in situations not yet specifically discussed in the rules, consistent with current DNR standard practice.

Statutory authority for adoption: RCW 79.90.540

Statute being implemented: RCW 79.90.480

Is rule necessary because of a:

Federal Law? Yes No
 Federal Court Decision? Yes No
 State Court Decision? Yes No
 If yes, CITATION:

DATE
 August 2, 2005

NAME (type or print)
 Doug Sutherland

SIGNATURE

TITLE
 Commissioner of Public Lands

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
 STATE OF WASHINGTON
 FILED

AUG 3 2005

TIME 8:40 AM PM
 WSR 05-16-112



RULE-MAKING ORDER

CR-103 (June 2004) (Implements RCW 34.05.360)

Agency: Department of Natural Resources

Permanent Rule
 Emergency Rule

Effective date of rule:
Permanent Rules
 31 days after filing.
 Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Effective date of rule:
Emergency Rules
 Immediately upon filing.
 Later (specify) _____

Any other finding _____ in _____ as a condition to adoption or effectiveness of rule?
 Yes

Purpose: WAC _____ the rents for water-dependent leases. Over the years, some _____ interpretations have been settled by court cases, and some _____ the rule. This change will bring the rule up-to-date, and make _____ changing the basic way rents are calculated.

Citation of existing rule:
Repealed: _____
Amended: _____
Suspended: _____

Statutory authority: _____

Other authority: _____

PERMANENT RULE ONLY
Adopted under _____
Describe any _____ in Section 2(a), instead of deleting the waterfront _____ The intent remains the same, namely to allow the use _____ circumstances. Section 3(g) specifies that assessed value _____ consistent. This was clarified to make clear that it is in _____ of the lease of the aquatic lands. If a preliminary _____ final cost-benefit analysis is available by contacting _____

Name: _____
Address: _____
e-mail: _____

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding: _____

Date adopted:
November 3, 2005

NAME (TYPE OR PRINT)
Doug Sutherland

SIGNATURE

TITLE
Commissioner of Public Lands

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED

NOV 8 2005

TIME: 3:29 AM
WSR: 05.23.033 PM

(COMPLETE REVERSE SIDE)

LUDD
III-00353



RULE-MAKING ORDER

CR-103 (June 2004)
(Implements RCW 34.05.360)

Agency: Department of Natural Resources

Permanent Rule
 Emergency Rule

Effective date of rule:

Permanent Rules

31 days after filing.
 Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Effective date of rule:

Emergency Rules

Immediately upon filing.
 Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

Yes No If Yes, explain:

Purpose: WAC 332-30-123 describes how DNR selects upland parcels to calculate rents for water-dependent leases. Over the years, some people have interpreted the same rule in different ways, some interpretations have been settled by court cases, and some new or unusual situations have arisen not directly addressed by the rule. This change will bring the rule up-to-date, and make it easier to understand and follow in these situations, without changing the basic way rents are calculated.

Citation of existing rules affected by this order:

Repealed:
Amended: WAC 332-30-123
Suspended:

Statutory authority for adoption: RCW 79.90.540

Other authority :

PERMANENT RULE ONLY (Including Expedited Rule Making)

Adopted under notice filed as WSR 05-16-112 on August 3, 2005.

Describe any changes other than editing from proposed to adopted version: In Section 2(a), instead of deleting the waterfront criterion, there is now a narrow exception to the waterfront criterion. The intent remains the same, namely to allow the use of an upland parcel behind the waterfront parcel in limited circumstances. Section 3(g) specifies that assessed value based on contamination on an upland parcel is considered inconsistent. This was clarified to make clear that it is inconsistent only when that upland contamination impairs the use of the lease of the aquatic lands.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: _____ phone () _____
Address: _____ fax () _____
e-mail _____

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

Date adopted:

November 3, 2005

NAME (TYPE OR PRINT)

Doug Sutherland

SIGNATURE

TITLE

Commissioner of Public Lands

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED

8 2005

3:29

05-23-033

AM
PM

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	_____	Repealed	_____
Federal rules or standards:	New	_____	Amended	_____	Repealed	_____
Recently enacted state statutes:	New	_____	Amended	_____	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted in the agency's own initiative:

New	_____	Amended	<u>1</u>	Repealed	_____
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	<u>1</u>	Repealed	_____
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The number of sections adopted using:

Negotiated rule making:	New	_____	Amended	_____	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	_____	Amended	_____	Repealed	_____

CONCISE EXPLANATORY STATEMENT

Must be prepared for all rules before a CR-103 is filed (RCW 34.05.325). Prepare at the same time as the Public Hearing Summary memo.

<p>1. Identify reasons for adopting this rule</p>	<p>The Washington State Department of Natural Resources (DNR) is adopting changes to WAC 332-30-123, which describes how DNR selects upland parcels to calculate rents for water-dependent leases. The changes are designed to clarify the rule and make it easier to understand and apply. The changes do not alter the way water-dependent rents are calculated.</p> <p>DNR has been using the current rule since 1984. Since then, circumstances around aquatic leases and upland parcels have changed, and people have interpreted this rule in different ways. Some interpretations of this rule have been settled by court cases. DNR staff have also noticed some unusual situations that are not directly addressed by the rule. This proposed rule change is DNR's way to bring the rule up-to-date, and make it easier to understand and follow in all situations.</p>
<p>2. Discuss any legislative background, federal laws, and statutory authority</p>	<p>In 1984, the state legislature passed a set of laws (Aquatic Lands Act, RCW 79.90 through 79.96) which provided specific guidance for DNR on how to manage and protect state-owned aquatic lands,, including calculating water-dependent lease rates. In RCW 79.90.540, the legislature provides the statutory authority for DNR to adopt rules that provide specific criteria for calculating water-dependent rents using upland parcels.</p>
<p>3. Identify adoption date and effective date of rule</p>	<p>Adoption on November 3, 2005. Effective date of December 8, 2005.</p>
<p>4. Describe differences between proposed as published in the State Register and the final rule as adopted. Attach text to identify additions or deletions. Explain rationale for change</p>	<p>Section 2(a) has been amended. The original proposal was to delete the requirement that an upland parcel be on the waterfront, to allow for limited circumstances when a non-waterfront parcel is the appropriate upland parcel to use. In response to public comments, DNR has instead addressed this issue in the form of a narrow exception to the waterfront criterion. The intent of the rule change remains the same, namely to allow the use of an upland parcel behind the waterfront parcel, but only when the waterfront parcel is inconsistent and the parcel behind it is used in conjunction with the lease.</p>

	<p>Section 3(g) has been amended. This section specifies that contamination on an upland parcel makes the assessed value of that parcel be considered inconsistent. In response to public comments, this was clarified to make clear that contamination makes an upland parcel inconsistent only when that upland contamination impairs the use of the lease of the aquatic lands.</p>
<p>4. Attach a summary of all comments and agency response to each. Indicate how final rule reflects agency consideration of comment or why it fails to do so.</p> <p>Please see Attachment A.</p>	
<p>5. Attach a list or description of all public involvement opportunities, including workshop dates and locations, hearing dates and locations, news releases, fact sheets, newspaper announcements, website info. Attach copies of all related documents. Include the number of people who attended, received mailings, etc.</p> <p>Please see Attachment B.</p>	
<p>Name and Date</p>	<p>Prepared by Matthew Green, 11/3/05</p>

ATTACHMENT A: Consiise Explanatory Statement

Public Comments on Upland Parcel Proposed Rule

In September 2005, the Department of Natural Resources (DNR) held public hearings and solicited written comments about proposed changes to WAC 332-30-123. Hearings were held in Seattle, Olympia, Mount Vernon, and Friday Harbor. Twenty-five people total attended the hearings, and nine testified. Seven people submitted written comments, including two who also testified.

This document summarizes the testimony and comments received, and offers DNR's response. It also explains some amendments to the proposed rule changes suggested by DNR after the public input.

- 1. Comment:** DNR should not remove the criterion that the upland parcel must be waterfront. Instead, if there are limited circumstances when a non-waterfront parcel is the appropriate upland parcel to use, then the rule should include a narrow exception from the waterfront criterion.

Response: We agree. DNR has amended the proposed changes to address this issue in the form of an exception to the waterfront criterion. The intent of the rule changes remains the same, namely to allow the use of an upland parcel behind the waterfront parcel, but only when the waterfront parcel is inconsistent and the parcel behind it is used in conjunction with the lease.

- 2. Comment:** The definition of upland characteristics (relating to when a filled tideland or shoreland can be considered as the upland parcel) is incorrect. In particular, it should not reference whether the county assessor values the parcel as developable upland property.

Response: The purpose of using an upland property value, and of requiring that upland property value to be consistent with the purposes of the lease, is to identify a value that reflects property that can be developed for a use associated with the lease (such as marina offices for a marina lease). Thus, having the county assessor value a filled tideland or shoreland parcel as developable property (that is, for example, it can be developed to have a marina office) is the clearest indicator that it is an appropriate parcel to use for setting aquatic rent.

- 3. Comment:** DNR should not use the upland parcel when that parcel is not used in conjunction with the lease, including when the upland parcel is used merely for access to the leased aquatic lands.

Response: We agree. This issue is already part of the rule, but could be clearer. DNR has amended the proposed changes to clarify the meaning of "used in conjunction with," including that it does not mean use merely for access without other support.

4. **Comment:** The list of inconsistent situations in Section 3 should be exclusive. Only those situations specifically listed in the rule should be considered inconsistent.

Response: The statute says that, whenever a parcel is inconsistently assessed, DNR must select an alternate parcel. While the rule lists some situations, DNR cannot anticipate every situation during rule-making. When a situation previously unrecognized in rule arises where the upland parcel presents as inconsistently assessed, DNR considers itself mandated by statute to select an alternate parcel. Therefore, the list should be considered only a list of examples, not an exclusive list.

5. **Comment:** Contamination on an upland parcel should not make the assessed value of that parcel be considered inconsistent.

Response: Contamination can greatly reduce the market value, and hence the assessed value, of the upland parcel. If the contamination does not likewise reduce the ability to use the aquatic lands, then the reduced upland value is inconsistent with the purposes of the lease. Otherwise, there would be, in effect, a discount on aquatic rents in exchange for the lessee polluting its own upland property.

6. **Comment:** The rule defines a current assessment as done within four years. However, some counties assess properties on a six-year cycle. The rule should require a "current" assessment, which may even be less than four years old.

Response: The statute requires DNR to recalculate water-dependent rent every four years. The rule requiring an assessment within the last four years is designed to ensure that the county assessor has reviewed the property value at least since the previous calculation.

7. **Comment:** DNR should not select an alternate parcel that is too far away, and especially should avoid using urban land values for leases in rural areas.

Response: We agree. The statute calls for using the "nearest comparable parcel," and the current rule says to seek an alternate parcel first within the same city, then within the same waterbody, then within the same county. This is not proposed to be changed.

8. **Comment:** It seems that DNR is not trying to increase rents, but that the changes would reduce confusion about the rule.

Response: *We agree. The proposed changes are designed to make the rule easier to understand and implement, not to increase nor decrease rents.*

9. **Comment:** The rule is not the problem. The problem is that the statute should not use the value of the upland parcel to set aquatic rents at all, OR the problem is that shoreline regulations overly restrict development of property, OR the problem is that the market value of upland property is too high, OR the problem is that county assessors improperly value upland properties.

Response: *DNR cannot change the statute, and has no authority over these other issues.*

10. **Comment:** DNR should require baseline environmental studies and sampling before leasing properties.

Response: *DNR encourages such studies, but does not have authority to require them. This will not be affected by this rule.*

11. **Comment:** The attitude of DNR in recent years is "delightful."

Response: *We appreciate the comment.*

ATTACHMENT B: Consise Explanatory Statement

Public Involvement Opportunities

- Four public hearings were held, and a total of 23 people attended:

Seattle

September 8, 6 PM

Queen Anne Community Center, 1901 First Ave W

Olympia

September 15, 6 PM

Timberland Library, Franklin and 8th

Mount Vernon

September 19, 6 PM

Police Station, 1805 Continental Place

Friday Harbor

September 22, 6 PM

San Juan Island Library, 1010 Guard St.

- Comments could be mailed or e-mailed to DNR through September 26.
- The text of the proposed rule changes, as well as a question & answer sheet, were posted on the DNR website at www.dnr.wa.gov/aquaticrules.
- A postcard announcing the proposed rule changes, the public hearings, and the website was mailed to all lessees of state-owned aquatic lands who pay water-dependent rent (approximately 700).
- A press release was provided to newspapers across the state.

AMENDATORY SECTION (Amending Resolution No. 470, filed 11/9/84)

WAC 332-30-123 Aquatic land use rentals for water-dependent uses. All requirements in this section shall apply to the department and to port districts managing aquatic lands under a management agreement (WAC 332-30-114). The annual rental for water-dependent use leases of state-owned aquatic land shall be: The per unit assessed value of the upland tax parcel, exclusive of improvements, multiplied by the units of lease area multiplied by thirty percent multiplied by the real rate of return. Expressed as a formula, it is: $UV \times LA \times .30 \times r = AR$. Each of the letter variables in this formula have specific criteria for their use as described below. This step by step presentation covers the typical situations within each section first, followed by alternatives for more unique situations.

(1) **Overall considerations.**

(a) Criteria for use of formula. The formula:

(i) Shall be applied to all leases (~~having structural uses that require a physical interface with upland property when a water dependent use occurs on such uplands (in conjunction with the water dependent use on the aquatic lands))~~) for water-dependent uses, except as otherwise provided by statute;

(ii) (~~Shall be used for remote moorage leases by selecting an upland parcel as detailed in subsection (2) of this section;~~

~~(iii))~~) Shall not be used for areas of filled state-owned aquatic lands having upland characteristics where the department can charge rent for such fills (see WAC 332-30-125), renewable and nonrenewable resource uses, or areas meeting criteria for public use (see WAC 332-30-130); and

~~((iv))~~) (iii) Shall cease being used for leases intended for water-dependent uses when the lease area is not actively developed for such purposes as specified in the lease contract. Rental in such situations shall be determined under the appropriate section of this chapter.

(b) Criteria for applicability to leases. The formula shall be used to calculate rentals for:

(i) All new leases and all pending applications to lease or re-lease as of October 1, 1984;

(ii) All existing leases, where the lease allows calculation of total rent by the appropriate department methods in effect at the time of rental adjustment. Leases in this category previously affected by legislated rental increase limits, shall have the formula applied on the first lease

anniversary date after September 30, 1984. Other conditions of these leases not related to rent shall continue until termination or amendment as specified by the lease contract. Leases in this category not previously affected by legislated rental increase limits and scheduled for a rent adjustment after October 1, 1985, shall have the option of retaining the current rent or electing to pay the formula rent under the same conditions as specified in (iii) of this subsection.

(iii) Leases containing specific rent adjustment procedures or schedules shall have the rent determined by the formula when requested by the lessee. Holders of such leases shall be notified prior to their lease anniversary date of both the lease contract rent and formula rent. A selection of the formula rent by the lessee shall require an amendment to the lease which shall include all applicable aquatic land laws and implementing regulations.

(2) **Physical criteria of upland tax parcels.**

(a) (~~Leases used in conjunction with and supportive of activities on the uplands.~~) The upland tax parcel used shall be (~~waterfront~~) used in conjunction with the leased area and have some portion with upland characteristics. The upland tax parcel shall be waterfront, except that if the waterfront parcel's assessed value is inconsistent with the purposes of the lease as described in subsection (3) of this section, and there is a landward parcel also used in conjunction with the leased area that meets all the criteria in this subsection (2) and is consistent with the purposes of the lease as described in subsection (3) of this section, then such landward parcel shall be used. If no upland tax parcel meets these criteria, then an alternative shall be selected under the criteria of subsection (4) of this section. For the purposes of this section, "upland characteristics" means fill or other improvements or alterations that allow for development of the property as if it were uplands and that have been valued by the county assessor as uplands.

(b) (~~Remote moorage leases. The upland tax parcel used shall be waterfront, have some portion with upland characteristics, and~~) For leases without a physical connection with upland property (for example, open water moorage and anchorage areas, or mitigation or conservation sites not abutting the shoreline), the upland tax parcel used shall:

(i) If the (~~remote moorage~~) lease is associated with a local upland facility, be an appropriate parcel at the facility; or

(ii) If the (~~remote moorage is similar in nature of use to moorages in the area~~) lease is of the same use class within the water-dependent category (as listed in subsection (4) of this section) as at least one other lease within the county that is associated with a local upland facility, be an appropriate parcel at the nearest such facility; or

(iii) If ~~((the remote moorage is not associated with a))~~ there is no such local upland facility, be ~~((the parcel closest in distance to the moorage area))~~ an alternate parcel selected under the criteria of subsection (4) of this section.

(c) Priority of selection. If more than one upland tax parcel meets the physical criteria, the priority of selection shall be:

(i) The parcel that is structurally connected to the lease area;

(ii) The parcel that abuts the lease area;

(iii) The parcel closest in distance to the lease area.

If more than one upland tax parcel remains after this selection priority, then each upland tax parcel will be used for its portion of the lease area. If there is mutual agreement with the lessee, a single upland tax parcel may be used for the entire lease area. When the unit value of the upland tax parcels are equal, only one upland tax parcel shall be used for the lease area.

(d) The unit value of the upland tax parcel shall be expressed in terms of dollars per square foot or dollars per acre, by dividing the assessed value of the upland tax parcel by the number of square feet or acres in the upland tax parcel. This procedure shall be used in all cases even if the value attributable to the upland tax parcel was assessed using some other unit of value, e.g., front footage, or lot value. Only the "land value" category of the assessment record shall be used; not any assessment record category related to improvements.

(3) **Consistent assessment.** In addition to the criteria in subsection (2) of this section, the upland tax parcel's assessed value must be consistent with the purposes of the lease (~~and method of rental establishment~~). On this basis, the following situations are examples, but are not an exclusive list, of what the department will (~~be considered~~) consider inconsistent and shall either require adjustment as specified, or selection of an alternative upland tax parcel under subsection (4) of this section:

(a) The upland tax parcel is not assessed. (See chapter 84.36 RCW Exemptions);

(b) Official date of assessment is more than four years old. (See RCW 84.41.030);

(c) The "assessment" results from a special tax classification or other adjustment by the county assessor not reflecting fair market value as developable upland property. Examples include classifications under: State-regulated utilities (chapter 84.12 RCW), Reforestation lands (chapter 84.28 RCW), Timber and forest lands (chapter 84.33 RCW), and Open space (chapter 84.34 RCW). This inconsistency may be corrected by substituting the (~~full~~) fair market value for the

parcel if such value is part of the assessment records;

(d) If the assessed valuation of the upland tax parcel to be used is under appeal as a matter of record before any county or state agency, the valuation on the assessor's records shall be used, however, any changes in valuation resulting from such appeal will result in an equitable adjustment of future rental;

(e) The majority of the upland tax parcel area is not used ~~((for))~~ in conjunction with a water-dependent ~~((purpose))~~ use. This inconsistency may be corrected by using the value and area of the portion of the upland tax parcel that is used ~~((for))~~ in conjunction with water-dependent ~~((purposes))~~ use if this portion can be segregated from the assessment records; and

(f) The size of the upland tax parcel in acres or square feet is not known or its small size results in a nominal valuation, e.g., unbuildable lot; and

(g) The assessed value reflects the presence of contamination on the uplands, when the contamination on the uplands does not impair the use of the leasehold. This inconsistency may be corrected by substituting the full value for the upland parcel as if there were no contamination, if such value is part of the assessment records.

(4) Selection of the nearest comparable upland tax parcel. When the upland tax parcel does not meet the physical criteria or has an inconsistent assessment that can't be corrected from the assessment records, an alternative upland tax parcel shall be selected which meets the criteria. The nearest upland tax parcel shall be determined by measurement along the shoreline from the inconsistent upland tax parcel.

(a) The alternative upland tax parcel shall be located by order of selection priority:

(i) Within the same city as the lease area, and if not applicable or found;

(ii) Within the same county and water body as the lease area, and if not found;

(iii) Within the same county on similar bodies of water, and if not found;

(iv) Within the state.

(b) Within each locational priority of (a) of this subsection, the priority for a comparable upland tax parcel shall be:

(i) The same use class within the water-dependent category as the lease area use. For the purposes of this section, some examples of use classes include:

(A) Marinas and recreational moorage, including recreational boat launches and local upland facilities for open water moorage;

(B) Industrial and commercial shipping terminals and moorage;

(C) Conservation and natural resource protection areas;

(D) Mitigation sites; and

(E) For water-oriented floating homes, the same use class means any floating home;

- (ii) Any water-dependent use within the same upland zoning;
- (iii) Any water-dependent use; and
- (iv) Any water-oriented use.

(5) **Aquatic land lease area.** The area under lease shall be expressed in square feet or acres.

(a) Where more than one use class separately exist on a lease area, the formula shall only be applied to the water-dependent use area. Other use areas of the lease shall be treated according to the regulations for the specific use.

(b) If a water-dependent and a nonwater-dependent use exist on the same portion of the lease, the rent for such portion shall be negotiated taking into account the proportion of the improvements each use occupies.

(6) **Real rate of return.**

(a) Until July 1, 1989, the real rate of return to be used in the formula shall be five percent.

(b) On July 1, 1989, and on each July 1 thereafter the department shall calculate the real rate of return for that fiscal year under the following limitations:

(i) It shall not change by more than one percentage point from the rate in effect for the previous fiscal year; and

(ii) It shall not be greater than seven percent nor less than three percent.

(7) **Annual inflation adjustment of rent.** The department shall use the inflation rate on a fiscal year basis e.g., the inflation rate for calendar year 1984 shall be used during the period July 1, 1985 through June 30, 1986. The rate will be published in a newspaper of record. Adjustment to the annual rent of a lease shall occur on the anniversary date of the lease except when the rent is redetermined under subsection (9) of this section. The inflation adjustment each year is the inflation rate times the previous year's rent except in cases of stairstepping.

(8) **Stairstepping rental changes.**

(a) Initial increases for leases in effect on October 1, 1984. If the application of the formula results in an increase of more than one hundred dollars and more than thirty-three percent, stairstepping to the formula rent shall occur over the first three years in amounts equal to thirty-three percent of the difference between each year's inflation adjusted formula rent and the previous rent.

Example

Previous rent = \$100.00 Formula rent = \$403.00 Inflation = 5%/yr.

Yr.	Formula Rent	Previous Rent	Difference	33%	Stairstep Rent
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1	\$403.00	\$100.00	3.00	\$30	\$100.00	0.00	\$20
2	423.15	100.00	.15	323	106.64	64	306.
3	444.31	100.00	.31	344	113.62	26	420.
4	466.52					52	466.

(b) Initial decreases for leases in effect on October 1, 1984. If the application of the formula results in a decrease of more than thirty-three percent, stairstepping to the formula rent shall occur over the first three years in amounts equal to thirty-three percent of the difference between the previous rent and each year's inflation adjusted formula rent.

Example

Previous rent = \$403.00 Formula rent = \$100.00 Inflation = 5%/yr.

Yr.	Previous Rent	Formula Rent	Difference	33%	Stairstep Rent	\$
1	403.00	100.00	303.00	00.00	303.00	\$
2	03.00	05.00	98.00	34	04.66	2
3	03.00	10.25	92.75	61	08.05	1
4	-	15.76	1	-	15.76	1

(c) If a lease in effect on October 1, 1984, contains more than one water-dependent or water-oriented use and the rental calculations for each such use (e.g., log booming and log storage) result in different rentals per unit of lease area, the total of the rents for those portions of the lease area shall be used to determine if the stairstepping provisions of (a) or (b) of this subsection apply to the lease.

(d) If a lease in effect on October 1, 1984, contains a nonwater-dependent use in addition to a water-dependent or oriented use, the stairstepping provisions of (a) or (b) of this subsection:

(i) Shall apply to the water-dependent use area if it exists separately (see subsection (5)(a) of this section);

(ii) Shall not apply to any portion of the lease area jointly occupied by a water-dependent and nonwater-dependent use (see subsection (5)(b) of this section).

(e) Subsequent increases. After completion of any initial stairstepping under (a) and (b) of this subsection due to the first application of the formula, the rent for any lease or portion thereof calculated by the formula shall not increase by more than fifty percent per unit area from the previous year's per unit area rent.

(f) All initial stairstepping of rentals shall only occur during the term of existing leases.

(9) The annual rental shall be redetermined by the formula

every four years or as provided by the existing lease language. If an existing lease calls for redetermination of rental during an initial stairstepping period, it shall be determined on the scheduled date and applied (with inflation adjustments) at the end of the initial stairstep period.

TO: JOHN J. MORGAN

THROUGH: JOHN ESSKO DRAFT

FROM: BOB PALZER, GARRY GIDEON

SUBJECT: BRIEFING FOR SAN JUAN COUNTY "SPIKES" ISSUES

Timeline: Your Response is requested for use in drafting the RDO decision due by July 14, 1992 on the FIEMC rent appeal and in completing the KDT Marina rent revaluation. If more time is needed, we will need to extend the review period by July 14.

The purpose of this briefing memo is to achieve internal consensus on issues that directly impact our course of action on current and future leasing business in San Juan County.

EXECUTIVE SUMMARY:

The department currently has one rent appeal, Friday Island Estates Maintenance Commission (FIEMC), lease # 20-012685, located in San Juan County. This appeal occurred during the rent revaluation process. The primary reason for this appeal is a substantial increase in the water-dependent rent. The present course of events will likely lead to more appeals and is related to the issues discussed below.

The FIEMC appeal contained documentation (Exhibit A) that required division staff to investigate certain actions taken by the department in 1987 and the reasoning and interpretations behind such actions.

There are two main issues associated with this rent appeal that are the subject of discussion herein:

1. "Spikes" or fluctuations in the county assessed value per acre of the abutting waterfront upland parcels used to value the water-dependent rent.
2. The actions taken by the division in 1987 to resolve the "spikes" issue in San Juan County. These actions differ from the division's direction and interpretations in 1992.

The "spikes" issue potentially effects all marina leases in San Juan County and the San Juan County Assessor. The department should expect direct contact and appeal for assistance to executive management from the lessees and possibly the San Juan County Assessor. Depending upon our decided course of action, an united internal position may be needed to weather the almost certain appeals and to successfully execute our business within a reasonable amount of time.

BACKGROUND:

Immediately after the 1984 aquatic lands legislation went into effect, the division was extremely busy converting leases to the new water-dependent rent schedule. In proceeding with this effort in San Juan County, an unexpected problem arose. Large differences in assessed upland per acre values, even within close vicinities, caused many lessees to complain of unfair or uneven rent schedules. The resulting fluctuations in rent or assessed upland value per acre became known as 'spikes'. This issue (occurring mainly in San Juan and Skagit counties) began to pick up momentum in 1986.

The Friday Harbor lessees, as well as other marina lessees in the county, contacted the San Juan County assessor, Paul Dossett, to inquire about their upland parcel values. He maintained (and still does) that their property had been properly assessed and that the problem rested totally with the water-dependent formula being linked directly to county assessed values (exhibit B, B-3, B-8, B-13). In 1987 Paul Dossett lobbied the department, the Aquatic Land Lease Committee (county assessors), and the legislative subcommittee on aquatic land leasing to consider changes to the water-dependent formula to "fix" the 'spikes' problem. The department, still heavily occupied in the very difficult task of implementing the 1984 legislation, chose to take what was viewed as the necessary action to avoid additional legislative challenges to the newly adopted water-dependent rent schedule.

The department assured Paul Dossett and the county assessors (exhibit B-4, B-5, B-6) that the aquatic land statutes allowed the flexibility to correct the inconsistent rents created by the 'spikes'. Justification was that the upland parcels involved in the 'spikes' issue were inconsistently assessed because of the dramatic differences in assessed values, which then required selection of alternate parcels for rent calculation purposes. The department then examined all of the marinas in San Juan County for association with the 'spikes' issue. Many upland parcels previously used to determine rent were then rejected and a process for selection of alternate parcels was begun. The department worked with Paul Dossett in compiling a list of parcel values in San Juan County. From this list, two parcels (Deer Harbor and Jensen marinas) were selected to value many of the San Juan marinas. ~~It should be noted that if the alternate parcel selection criteria in WAC 332-30-125 (4) is used, selection of these parcels for valuation is not appropriate in many instances.~~ The division essentially chose "average value" parcels. As a result, many leases were revalued at a lower rent and rent was refunded in order to treat all the marinas in San Juan County equally. None of the lessees that were revalued had submitted a formal rent appeal. Though the staff file relating to this work has been lost, this account has been verified from other existing documentation and recent conversations with Paul Dossett and John DeMeyer.

*But that does not mean the
is consisted of some analysis
was in progress.
2D file in file.*

This issue lay dormant until recently, when some of the San Juan marina leases were revalued. The rent for Aquatic Lands Lease #20-010072, Deer Harbor Marina Resort (McIntyre), was revalued in the summer of 1991. At this time it was discovered that the abutting waterfront upland parcel used to value the lease rent, decreased in assessed value. Since waterfront property values in San Juan County had risen as much as 100% in recent years, this appeared

unusual. The land manager for San Juan County, Celia Barton, investigated the cause for this drop in value.

After several discussions with the San Juan County Assessor's Office, it was determined that a method of assessment different from previous assessments, had been applied to the waterfront parcel. This method distributed the total value of multiple parcels owned by the marina resort. In a conversation with Garry Gideon about the Deer Harbor parcel assessment, Paul Dossett stated that this was a legitimate method on which to form a basis of valuation for the assessed value. However, there was no explanation offered as to why the individual waterfront parcel used to value the Deer Harbor lease had decreased in value, while the other non-waterfront parcels had substantially increased in value. The Deer Harbor lease rent was revalued using the new (lower) assessment for the abutting waterfront upland parcel, as it met the criteria as outlined in WAC 332-30-123.

Further investigations showed that the same upland parcel in Deer Harbor had been used by the department in 1987 as a comparable alternate parcel to value the rent for multiple aquatic leases (marinas) on Orcas Island. Another comparable alternate parcel was discovered, Jensen's Marina on San Juan Island near Friday Harbor. The Jensen parcel also had been used by the department in 1987 to value the rents for multiple aquatic leases (marinas) on San Juan Island. Jensen's county assessed value in both 1987 and 1992 is lower than that of the majority of other marina upland parcels and is lower than the neighboring parcel's assessed value, Barnhill dba... Shipyard Coves Marina (See exhibit C for 1991 assessment information).

Aquatic Lands Lease #20-010313 (Barnes), whose rent had been valued using the Deer Harbor parcel, was then revalued. The upland parcel selection process was followed per statute. The waterfront upland parcel determined to value their lease rents shifted from the Deer Harbor parcel to the waterfront upland parcel abutting and supporting the lease area. This consequently raised the rent in comparison to continuing use of the Deer Harbor parcel. Mr. Barnes objected to the rent, did not appeal, and eventually paid.

During the revaluation of the Barnes lease, the county assessor's office was contacted in order to obtain the current upland tax parcel assessments for the abutting waterfront parcel used to value the Barnes lease. After obtaining the information, the land manager received a phone call from Paul Dossett, the San Juan County assessor. Mr. Dossett requested information regarding the impacts of combining the abutting waterfront upland parcel being used to value the Barnes rent with several adjacent non-waterfront parcels also owned by Mr. Barnes. The land manager advised Mr. Dossett that this action would not effect the current revaluation of the Barnes rent as it did not change the current year's tax assessment upon which the department's water-dependent formula is based. The land manager indicated that such an action would effect the Barnes rent at the next revaluation period in 1995. Mr. Dossett advised the land manager to be careful in the selection of parcels used to value aquatic leases in San Juan County.

Three aquatic land leases came up for rent revaluation in early 1992: aquatic lands lease # 20-012693, KDT Marina; aquatic lands lease # 20-010492, Barnhill

d.b.a... Shipyard Coves Marina; and aquatic lands lease # 20-012685. Friday Island Estates Maintenance Commission (FIEMC). All leases had previously been valued on the Jensen Marina parcel. The upland parcel selection process was followed per statute. The waterfront upland parcel determined to value their lease rents shifted from the Jensen Marina parcel to the waterfront upland parcel abutting and supporting their lease area. This consequently raised their rents in comparison to continuing use of the Jensen Marina parcel. The KDT and FIEMC rents were appealed. FIEMC's appeal was based on the same reasoning that was used in 1987, requesting continued use of the Jensen parcel for revaluation. Thus the division revisited those 1987 issues and will use the resulting decisions to resolve the FIEMC and KDT rent revaluations.

A June 12, 1992 Friday Harbor site visit confirmed the division's appropriate use of the abutting parcel for the FIEMC lease but revealed that the KDT parcel use was inappropriate because the majority of the abutting KDT parcel did not support the water-dependent use of the lease.

*More
Details
on KDT
parcel?*

During the review and analysis of these rent appeals it became apparent that substantial differences in the aquatic values (rents) existed within the same geographical location i.e., Friday Harbor (exhibit C). These differences are directly related to the water-dependent formula used to calculate rent (RCW 79.90.480 and WAC 332-30-123) and its relationship to the county assessed value per acre. The 'spikes' issue that was present in 1987 is still present in 1992 but presently appears to be unique to San Juan County (exhibit C). It is important to note that all of the above mentioned Friday Harbor vicinity upland parcels that the department intends to use, have gone through the appeal process with the county board of equalization. Exhibit C figures represent the results of that process.

!!

The division's current interpretation and use of WAC 332-30-123 does not support the 1987 actions. In deciding a course of action, the division must consider the following questions:

1. What constitutes an inconsistent assessment of upland parcels?
2. What criteria should be used to determine assessed upland parcel values as inconsistent?
3. What authority does the department have to use an "average" parcel as an alternate comparable parcel?

DISCUSSION

RCW 79.90.480 specifically requires the department to use the upland tax parcel used in conjunction with the leased area for rent calculation unless there is no such parcel, the parcel is not assessed, or the parcel has an assessed value inconsistent with the purposes of the lease. The key to this entire discussion revolves around situations and criteria where the department would consider waterfront upland parcels as inconsistently assessed, necessitating the selection of the nearest comparable upland parcel. The only documentation that exists in this area is found within WAC 332-30-123 (3), which specifically defines those situations where the assessed upland parcel

value will be considered inconsistent with the purposes of the lease and method of rental establishment. None of the described situations allow for significant differences between assessed values in a geographic location (proposed by FIEMC and used by the division in 1987).

But, the list is not an "ideal" list!

Ron Holtcamp, who was closely involved with implementation of the 1984 legislation and the resulting administrative codes (including 332-30-123), recently stated that although the situations described in WAC 332-30-123 (3) may not list every situation, the intent was to list all of the situations that would be considered. John DeMeyer stated in 1987 and recently that he feels the statute allows the flexibility to do whatever is necessary to arrive at a fair and equitable rent. This may be true, but interpretations of the law and administrative codes must be done within their meaning and intent.

Yes

The intent of the water-dependent formula was to provide predictable lease rents that were not based upon arbitrary appraisal methods (See exhibit D). The rent formula was specifically designed to circumvent the need for establishing a market value for leased parcels of aquatic land. As such, it depends totally upon the assessed upland value of the selected upland parcel. This design was intended to give a clear rent advantage to water-dependent uses.

*Wrong
Intent includes inconsistent assessment analysis*

In using the assessed value of upland parcels, the formula assumes that these parcels are assessed at a fair market value. This is supported by the situation and criteria in WAC 332-30-123 (3)(c), exhibit E, which states "The 'assessment' results from a special tax classification not reflecting fair market value..." The intent is to specifically exclude those parcels that do not have a fair market value assessment (none of the parcels under consideration have a special tax classification).

*Wrong
Analysis is not whether assessment "technique" was proper*

WAC 458-12-330 directs the county to establish property values on highest and best use. The assessor can consider zoning but is not bound by it in exercising judgment as to highest and best use. The San Juan County assessor has verified, as an example, that the FIEMC parcel value was established using the highest and best use concept. Namely, this parcel's value is based upon its value as the water-dependent access point for the Friday Island Estates residences. It is important to repeat that the upland parcel values that are currently under the division's consideration have been reviewed by the county board of equalization.

E.G. Contaminated parcels have a correct technique but are still inconsistent assessment

Hypothetically, if the division was to currently accept the argument that significant differences in assessed upland values within a geographic vicinity was appropriate for defining an inconsistently assessed parcel, interpretation and application would be very difficult. Definition of the geographic vicinity and the percentage differences between assessed values would be extremely arbitrary. Without specific written guidelines or rules, this would be open to debate every time this situation was encountered. Without specific rules, it would be very difficult to identify when the situation was even at issue. If the inconsistent situation was definable, the nearest comparable upland tax parcel would be selected by WAC 332-30-123 (4). The method of selection used in 1987 would not be authorized unless this WAC subsection was modified. Lastly, one would also have to assume that if "high" assessments

The exercise of discretion is always difficult, but that's no excuse.

*True, and DUK
does readily thus
with contaminated
parcels.*

were rejected. "low" assessments would have to be rejected as well. This is necessary to also be fair to the public's interest. Since this problem presently appears to be isolated to San Juan County, a change in the WAC may not be appropriate.

The hypothetical situation above was done to a certain extent in 1987. Of the two "comparable parcels" that were ultimately selected for rent valuations, one (Jensen) has remained low in value (compared to other properties) and the other (Deer Harbor) actually went down in value. Whether coincidence or not, future use of this same criteria in San Juan County, as well as other locations, would indirectly subject lease rents to arbitrary external influences.

ALTERNATIVES

1. Stick with present interpretation of WAC 332-30-123 and reject the 1987 argument of inconsistent assessment. The result would be that most San Juan marina leases would be valued by their abutting upland tax parcel and many rents would increase significantly at revaluation. The division could expect formal rent appeals or other informal methods of appeal from any of these lessees.

Pros:

- a. The department would have full authority under existing law and administrative code.
- b. This would be consistent in application with the rest of the state.
- c. This alternative avoids a very arbitrary, potentially time-consuming process.
- d. The department is not placed in the arbitrary position of questioning whether property assessments are properly done.
- e. Lease rents are not influenced by potentially arbitrary external influences.
- f. The department is not placed in the situation of indirectly appraising the value of marina leases in different geographic locations. This aligns with the intent of the water-dependent formula.
- g. This is consistent with recent rent appeals such as Berg.

Cons:

- a. Numerous rent appeals may occur in San Juan County. This alternative could also result in the filing of a lawsuit.
- b. The department may appear inconsistent to San Juan lessees in its application of water-dependent rents in San Juan County.

c. Lessees may apply pressure to county assessor's office which may result in negative feedback or action from the assessor's office.

d. This alternative does not address the unique "spikes" situation in San Juan County, which will be viewed as unfair by the San Juan lessees.

2. Find an average marina value, based on geographical location, and apply to lease rent revaluations. Current and future controversy may be resolved without litigation or appeal. However, the process to define the average marina value within a defined geographic location would be hard to define and be subject to scrutiny and interpretation every time a marina lease was revalued.

Pros:

a. May satisfy needs of lessees (at least those who would otherwise have a higher rent).

b. May avoid litigation or lengthy appeals.

Cons:

a. Process to establish "average" marina value would be arbitrary and difficult and would be necessary every time a marina lease was revalued.

b. It is doubtful that the department has the authority for this option under the current law.

c. Some lessees would have higher rents which may result in rent appeals or a lawsuit.

d. This alternative could potentially involve a large amount of staff time, both now and every time a marina lease is revalued.

d. This is an indirect appraisal method which is not the intent of the water-dependent formula.

e. This is inconsistent with the way water-dependent rents are established in the rest of the state.

3. Continue use of the parcels selected in 1987 to revalue the San Juan marina leases. The results would be that rent revaluation in San Juan County would probably be uncontroversial. Rents received by the department would be lower than amounts received by using the abutting upland parcels for revaluation.

Pros:

- a. It is unlikely that there would be any rent appeals, lawsuits, or negative feedback.
- b. The department would appear fair and consistent in its application of water-dependent rents in the eyes of lessees and the assessor.
- c. Less staff time would be spent on lease administration.

Cons:

- a. It is questionable whether the department has the authority to pursue this option.
- b. This is not consistent with the way water-dependent rents are set in the rest of the state.
- c. Rent levels could potentially be influenced by external factors (assessment values for selected alternate parcels).
- d. Revenue received would be the lowest for any of the alternatives.

RECOMMENDATION

Given that the 'spikes' issue is most prevalent in San Juan County and specifically appears more pronounced in the Friday Harbor vicinity, option number two would result in a lot of work for very few leases and minimal benefits. Both option two and three are questionable as to whether the department has the current authority for their implementation. Both option two and three are more viable for political reasons than any other.

Our recommendation is to use alternative number one. This alternative coincides with how we do business in the rest of the state. It will likely result in more rent appeals and possibly a lawsuit, but overall will give the department the most defensible, consistent long-term position.

If the division feels that the 'spikes' situation in Friday Harbor is unfair, we recommend that it be made a priority for review. Alternative solutions should be reviewed by management for overall impacts to the program. Any change in policy or the way we calculate water-dependent rents should be done after any necessary changes in the law or administrative code have been executed.

*Probably O.K. so long as
if they don't throw out the
inconsistent assessment analysis
entirely.*

August 7, 2002

DRAFT
**For internal policy
discussion only**
Do Not Disclose

MEMORANDUM

TO: Loren Stern, Aquatic Resources Division Manager

FROM: Rich Phipps, Program Support Section

SUBJECT: Deer Harbor Rent Appeal –
Use of Alternate Parcels to Alleviate Assessment “Spikes”

We have a rent appeal that may force a decision on the long-standing issue of using alternate parcels to adjust for the large variations in the per-acre assessed value of upland tax parcels—the “spikes” issue. The issue, in a nutshell:

When applying the water-dependent rent formula to similar uses in single bay or shoreline, “spikes” in the assessed value sometimes result in obvious rental inequities between similar neighboring leases. In some geographic areas, such as the San Juan Islands, the resulting rental inequities have been so glaring that we have routinely used one “representative” upland tax parcel to calculate the aquatic rent for a number of similar leases in that particular embayment or shoreline.

The problems are:

- 1) This practice has not been done uniformly or consistently across the state, nor is there any protocol or direction as to when we would or would not do this.
- 2) While the RCWs seem to recognize that we will need to make adjustments for inconsistent assessments, the supporting WAC doesn't recognize this as one of the circumstances justifying use of an alternate upland tax parcel, nor do the WAC instructions for selection of an alternate parcel (i.e., closest qualifying parcel, as measured along the shoreline) allow for targeting a particular representative parcel.

A Legal Services Request on this will follow, but I felt it was important for us to first determine a preferred strategy for this, as this general subject has been the subject of AG opinions in the past, without leading to resolution . . . our legal questions and desired outcome should be clearly focused and placed in the context of a desired strategy.

Attached are three documents:

[REDACTED]

- E-mail, June 3, 2002, JoAnn Gustason (NW) to Kristin Swenddal (Aq. Res.), Subject: *Anchor Jensen parcel and leases in SJ* [San Juan Islands].

[REDACTED]

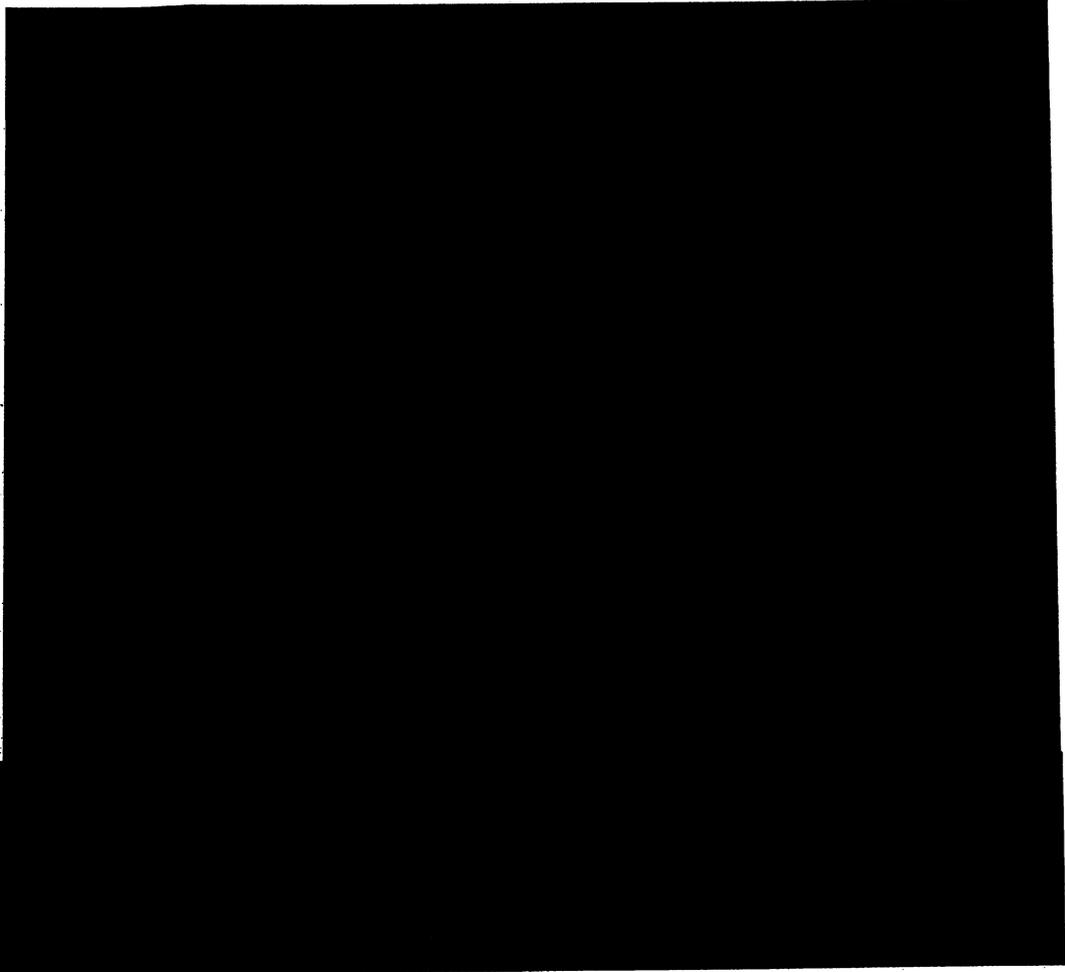
Though not related to this specific rent appeal, these three documents provide additional insight on the issue of our historical and current uses of alternate parcels to address assessment inconsistencies that would otherwise result in dramatically different rental rates for similar uses of SOAL in the same geographic locale. Synopsis of each follows:

[REDACTED]

JoAnn Gustafson to Kristin Swenddal (June 3, 2002)

In this e-mail exchange, Kristin tells how a San Juan County Assessor (Paul Dossett) attended a Marina Rent Study meeting with DNR staff and several marina owners. At this meeting, he raised the point that at several marinas in the San Juans, rent is calculated using one common alternate parcel, rather than the various upland tax parcels abutting the leaseholds. Kristin notes that some marina owners were rather surprised by this. She also recalls this to be an issue that Michelle Dewey was trying to address, with no clear options for resolution. JoAnn responds that this has been a historical practice for dealing with exceptionally high per-acre values and/or highly variable assessment values. She suggests that this has been the practice for at least one site for the last 10 years¹. JoAnn also notes that the rent for the Deer Harbor Marina lease (the subject of our current rent appeal), has doubled during the most recent revaluation and speculates that this economic impact may put them out of business.

¹ From personal experience, I know that this practice has been used in some areas of the San Juan Islands, dating back to at least the mid-1980's (nearly 20 years).



Analysis

The problem of highly variable per-acre assessment rates for upland waterfront tax parcels is probably most pronounced in Northwest Region, particularly in the San Juan Islands and LaConnor. It's certainly not unique to this area, but incidence of this problem and our history of trying to deal with it are most prevalent there. Most typically, the problem comes into play when waterfront lots are appraised primarily on a front-foot basis, rather than a per-acre basis. Upland parcels in the same locale, with similar waterfront footage and similar amenities therefore have similar overall assessed values, often without much regard to the overall size of upland tax parcel. This results in

² In discussing the option of "emergency" rule adoption with Dave Dietzman, he notes that this situation probably does not fit the definition of "emergency" rule making (i.e., immediately necessary for the protection of public safety, health or general welfare). However, the situation may lend itself to "expedited" rule making, which can be accomplished over the course of two months and without public hearings, if no objections are received.

drastically different per-acre (or per sq. ft.) assessed values, and consequently different rental rates for similar activities on similar (sometimes even adjacent) aquatic parcels.

The 1984 Aquatic Lands Act seemed to anticipate that equity and consistency issues may arise with regard to the application of the water-dependent rent formula and the criteria for when and how to select an alternate upland tax parcel for determining rent. This is found in RCW 79.90.540, which not only provides us with our authority to promulgate rules to implement the leasing program, but goes on to specifically cite the need for rules to determine when a parcel is inappropriately assessed and for determining the nearest comparable upland parcel, as discussed under RCW 79.90.480(4). In the resulting rule, WAC 32-30-123, a good faith effort was made to provide guidance for when and how to go about this. However, the rule did not address the issue of these assessment spikes. Whether this was an oversight or an intentional omission is hard to say. On one hand, it follows logic that location should significantly influence the value of a lease (e.g., being on Percival Landing in downtown Olympia, as opposed to being in an industrial area on the western shore of Budd Inlet). On the other hand, two similar lease activities, in the same location and with the same amenities should not have markedly different lease rates, merely because of the size of the upland tax parcel abutting the leasehold. Similar inequities come into play between one parcel in which the tidelands are included in the upland tax parcel and another parcel without tidelands included. The latter tends to have a much higher per-acre assessment value, resulting in much higher lease rates.

These problems do not lend themselves to an easy fix, nor are they likely to just go away at any time in the foreseeable future. Rather, the rapid increase of property values in areas such as the San Juan Islands will only exacerbate the existing trend, and efforts such as the Marina Rent Study will bring additional public attention to practices which are arguably out of compliance with our existing rules and inconsistently applied between different geographic areas. Therefore question is not if we will need to address this, but rather, when and perhaps more importantly, under what circumstances. The current rent appeal from Deer Harbor presents an opportunity and a venue to address it at this time. Also, the recent discussions of this issue within the Marina Rent Study group should motivate us to try to deal with this internally, while we still can.

Making clear progress on this would be beneficial to our position on the Marina Rent Study as we enter the next legislative session. Showing substantial progress (e.g., emergency rule & proposed rule revision) to alleviate lease rate inequities among water-dependent uses may help convince legislature that a marina rate "freeze" at an arbitrary point in time (as per the current proposal) would be far less effective in the long run than making the rule changes necessary to get to a fair and equitable method of applying the existing water-dependent rent formula. If such inequities truly exist, freezing the rental rates would only ensure that the inequities are perpetuated on into the future. This should be tied to our business plan and carried forward as a priority measure for administering water-dependent leases.

Options

Scope of Rent Appeal

One of the initial considerations is whether to try to address this whole "spikes" issue within the context of this rent appeal (Deer Harbor Marina, 20-A10072), or segregate the two issues and address them separately. The rent appeal deals with a lease for which an alternate upland tax parcel was previously used, but now because of assessment increases to the alternate parcel, the tenant argues that we should use a different (cheaper) alternate upland tax parcel. Some options:

- 1) As it stands now, even if we extended the rent appeal review period an additional 60 days as allowed by WAC, the rent appeal decision would be due by October 21, 2002. To comprehensively review the rent determination, we would also need to determine if using an alternate upland parcel was ever justified to begin with, irrespective of which alternate parcel was selected. Expedited rule making could probably meet this time frame, but it would still be close. The outcome would be a rent appeal decision that is defensible and addresses the underlying problem. The disadvantage would be that the rule drafting and adoption process would be rushed due to the deadlines imposed by the rent appeal process.
- 2) On the other hand, if we chose to evaluate the merits of the appeal, based only upon the alternate parcel selection criteria provided in WAC 332-30-123 (4), we may be able to untangle the WAC inadequacy issue from the strict review and response deadlines set forth under the rent appeal rule. The outcome would be a rent appeal decision that would be timely, and does not rush the rule drafting and adoption process. It also would allow more time to refine an effective implementation plan for the rule revision. The disadvantage is that it does not address the underlying problem and could be subject to challenge (if, indeed, anyone objected), since it is based on a false assumption that going to any alternate parcel was allowable under the existing rules.
- 3) Although I'm hesitant to mention it, a third option exists. If we fail to issue a rent appeal decision within the time period outlined in the rent appeal procedures (WAC 332-30-128), the tenant is automatically awarded the rent they advocate in their appeal for the next rental revaluation period (four years). In this manner, the decision on the underlying issue is deferred and although the tenant receives the lower rent for revaluation period in question, however, it does not result in a precedent on how the rent should be determined. The obvious disadvantage of this is that it makes the agency look rather inept at performing its administrative responsibilities. The other disadvantage of this is that it is manipulating the system to further what might be seen as a "hidden agenda," rather than being straight-forward with our intentions.

Use of Alternate Upland Tax Parcels

RCW 79.90.450 *Aquatic lands—Findings* states that one of the Aquatic Land Act's key purposes is to "establish standards for determining equitable and predictable lease rates" [emphasis added]. The water-dependent rent statute (RCW 79.90.480) notes the possibility that an upland tax parcel may have "an assessed value inconsistent with the purposes of the lease," however it does not attempt to define this. Rather, RCW 79.90.530 *Adoption of rules* mandates that DNR develop rules to give guidance specifically on the issue of determining when a parcel has been "inconsistently assessed" and for selecting the nearest comparable upland parcel. The resulting rule was a good faith attempt to do this, with the goal of *equitable* and *predictable* lease rates. For the most part the criteria established in rule serves this purpose. However, we have seen over the years that at least in some geographic areas, the rule is inadequate to achieve equitable lease rates between similar leases in the same geographic setting. Predictable - yes; Equitable - no. Therefore, to achieve the statutory goals of the Aquatic Lands Act, this rule would need to be amended.

Some options:

- 1) Follow the rule as it is currently written. Determine where we have acted outside of the limits of the rule and make necessary corrections at the time of next revaluation, giving advance notice of our intentions and why we are doing this. The result will be that a significant number (albeit presently not quantified) of leases will increase greatly in annual rent. Some increases will be beyond the ability of the tenant to absorb, even with the 50% cap and stair-stepping of rent. Some marinas and other water-dependent businesses would probably close. The likely result would be a resounding outcry from water-dependent tenants, especially marina owners. Because of the geographically-clustered nature of the "spikes" issue, the economic impacts would be largely focused on specific locations, many of which would be in Northwest Region (Orca/Straits District). Accordingly, certain legislators will take a keen interest in this and they will likely take this into the next legislative session as an example of how DNR is not being economically reasonable or equitable in applying it's water-dependent rent structure. In short, the situation would get much worse before it ever got better.
- 2) Assign staff (team effort between Rent Study and Program Support?) to develop an amendment to the rule to acknowledge the need for equity of lease rates between similar activities at neighboring sites with similar amenities. Place this into the criteria for "consistent assessment" under WAC 332-30-123 (3). Also, consider whether changes would be needed to the criteria for selection of the nearest comparable upland tax parcel (WAC 32-30-123 (4)), so as to allow equitable and representative value of the comparable upland parcel to be a factor in selection. Propose this for the "expedited rule process," noting that the intent is to implement a fee structure consistent with the standards already put forth under statute. Work with region staff to ensure

that the proposed rule amendment is workable from an administrative perspective. Work with members of the Marina Rent Study group so that they know our goals and objectives in amending this rule. Also, get the word out to key legislators. Prepare implementation guidance for region staff. For stakeholder outreach purposes, be prepared to explain our rationale used in our historical practices, (i.e., striving to meet the goals of the statutes) but acknowledge our decision that the rules needed to be amended to better reflect this in our prescribed methods.

- 3) **Compromise option: Do not amend the rule. Do not immediately correct valuations that were conducted outside of the methods prescribed by rule. Provide clarifying guidance on this issue to staff, for them to implement as revaluations come due. Note that in those cases where the use of the upland parcel will result in a lease rate that is clearly and unambiguously inconsistent with the purposes of the lease (e.g., values at or above NWD rents in the same area), we may opt to use an alternate upland tax parcel, so long as the rationale for doing so is clearly documented in the file. The alternate tax parcel would still have to be the closest upland parcel (as measured along the shoreline) that would meet the criteria stated in the WAC and would not result in a lease rate that was clearly and unambiguously inconsistent with the purpose of the lease. Some sort of threshold criteria would be needed, such as the NWD (fair market value) ceiling, as demonstrated by other leases for NWD purposes in the same area or perhaps by independent appraisals of the upland property. Leases which do not pass this threshold and for which the upland parcel is not deemed inconsistent by any of the other existing criteria would have the rent determined using the abutting upland parcel. The net result of this would probably be a slightly mitigated version of Option #1 (above). It would still result in rental increases to a number of water-dependent leases, however, we would be able to address a few of the worst cases and we would be better able to demonstrate compliance with the existing statutes and rules.**

Summary

This issue paper and the three attached documents lay out the issue, its history, the current problems and some options for addressing the issue. As I stated in the beginning, I feel it is important for us to decide how we want to deal with this before just packaging it up and sending the issue to our attorneys for their opinion.

We need to decide upon a strategy and seek advise on how to best implement that strategy. The range of alternatives, in an abbreviated format, are listed on the following page. After reviewing this, let me know if you would like to meet to discuss this further or if a preferred strategy is clearly evident. Thanks.

For the rent appeal:

- 1) Include the "spikes" issue within the scope of the rent appeal. Extend the review period 60 days (until Oct. 21, 2002). Draft a rule revision and seek expedited processing.
- 2) Do not include the "spikes" issue within the scope of the rent appeal. Issue the rent appeal decision based solely on the merits of the alternate parcel selection criteria in WAC 332-30-123 (4), i.e., without regard to whether or not it was appropriate to go to an alternate parcel to begin with.
- 3) Allow the rent appeal review period to expire without issuing a decision. By default, this means that the tenant's proposed alternate parcel would be used to revalue the lease for the next revaluation period, but it would not constitute a precedent on the use of alternate parcels, one way or the other.

For the rule adequacy issue:

- 1) Follow the rule as it is currently written. Determine where we have acted outside of the limits of the existing rule and make corrections at the time of next revaluation. Expect significant rent increases, especially in Orca/Straits District. Expect significant stakeholder outcry and possible legislative reaction. In essence, this follows the letter of the rule at the risk of disregarding the intent of the statute. Simple directions for staff to follow, but clearly not the best outcome for the program.
- 2) Assign staff to develop an amendment to the rule to acknowledge the need for equity of lease rates between similar activities at neighboring sites with similar amenities. Propose this for the "expedited rule process." Work with members of the Marina Rent Study group so that they know our goals and objectives in amending this rule. Also, get the word out to key legislators. Prepare implementation guidance for region staff. In the long run this is probably the best outcome, but it will require commitment of staff time.
- 3) Compromise approach. Do not amend the rule. Provide clarifying guidance on this issue to staff, for them to implement as revaluations come due. Note that in those cases where the use of the upland parcel will result in a lease rate that is clearly and unambiguously inconsistent with the purposes of the lease (e.g., values at or above NWD rents in the same area), we may opt to use an alternate upland tax parcel, so long as the rationale for doing so is clearly documented in the file. The alternate tax parcel would still have to be the closest upland parcel (as measured along the shoreline). The outcome may be somewhat mitigated from that in Option #1, but at the expense of simplicity of instruction and staff time commitment. Legislative reaction may still occur.

April 25, 2003

DRAFT

For internal policy
discussion only
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MEMORANDUM

TO: Loren Stern, Aquatic Resources Division Manager

FROM: Rich Phipps, Program Support Section

SUBJECT: Use of alternate parcels when the upland tax parcel is contaminated.

This issue is very similar to the assessment "spikes" issue associated with the Deer Harbor rent appeal. Again, we have rent appeals that are forcing a decision on this matter.

Interim direction will be needed.

For the most part, I'm looking for someone to check my assumptions. The first question at hand is under what circumstances can we justify going to an alternate parcel when the assessment of the upland parcel abutting the leasehold is lowered substantially due to contamination and MTCA liabilities. As you know, this situation is not clearly contemplated in either statute or rule.

In the subject rent appeals (Northlake Shipyard, Inc. and Salmon Bay Terminals) the tenants have challenged the county assessment of the upland parcels due to contamination issues and cleanup liabilities. In both cases, the assessment was lowered considerably (about 40%), but not to the point of being a nominal assessment. You might say they are in somewhat of a gray area . . .

We've had rent appeals in the past (e.g., Todd Shipyard) where this issue has been decided against the tenant because the reduction in the assessment was so dramatic that it resulted in a ludicrous lease rate (from >\$10K to <\$10). In these, we justified use of an alternate parcel because:

- 1) It was a nominal assessment as contemplated in WAC 332-30-123 (3) (f); and,
- 2) The resulting rent created clear and unambiguous inequities with leases for similar uses in the same geographic area, demonstrating that the assessed value was not "consistent with the purposes of the lease and method of rental establishment" and therefore contrary to both WAC 332-30-123(3) and RCW 79.90.480 (4).

Therefore, my assumption is that for us to reject an upland parcel due contamination issues driving a low assessment, the case either needs to be very self evident (such as in

Todd) or we need to be able to show a clear and unambiguous inequity with other leases for similar activities in the same geographic area, thus indicating that the upland values do not reflect a proper valuation for the aquatic lands within the legislative framework. The difficulty is determining where we draw the line . . . 50% difference? . . . 100% difference? How and to what extent to do we take into account the increased cost of operation at a contaminated site? Today, the cases before us are more subtle than the Todd Shipyard situation. A synopsis of these two cases follows below:

Salmon Bay Terminals:

This was an appeal that went through both the RDO (Loren) and the RDAO (Bonnie Bunning) before being rejected because it proposed using a private appraisal rather than the tax assessment, which was currently under challenge with the county (but not yet resolved). In both the RDO and RDAO responses we said we would consider the results of any adjustment to the tax assessment, once the decision was issued. They have now sent in the decision of the Board of Tax Appeals. The original assessment was \$9.2MM; the appellant sought an adjustment to \$3.3MM; the appeals board ruled that the assessment should be \$5.5MM. The compromise between the two values was largely attributable to a pre-existing agreement with Champion International to pay 1/2 of the remediation costs. Salmon Bay has come back to the Shoreline District now, seeking a rental adjustment, as follow up to the rent appeal. Comparing the resulting rental value to other rents in the area shows that neighboring leases for similar uses would, on the average, be paying 40% more than Salmon Bay Terminals. However, the Consent Decree does in fact hold Salmon Bay to expending funds on the site while also placing deed restrictions on the property. It is arguable that it is more expensive to conduct business at this site than neighboring (uncontaminated) sites.

Northlake Shipyard, Inc.

In November of 2002, they contacted the region advising them that they have challenged the tax assessment and expect a decision on the matter in the next 30 days. The tenant's submittals in November resembled a rent appeal, except that the papers were sent to the region Land Manager (rather than the Division Manager) and the appeal didn't actually state what the correct rent *should be*. In our response letter, we noted that we would consider the tax adjustment at such time as it is issued and final.

Side note: We also (inadvertently) told them that we would consider this as a formal rent appeal, once we receive the notice of correction from King County. This was somewhat of a miscommunication between the Land Manager and myself. We meant to say that we would consider the assessment change and make an equitable rental adjustment if appropriate (but not as part of the rent appeal and under rent appeal timelines). We opted to consider this a formal appeal (as indicated in the region's letter), with the beginning date of the appeal (April 7, 2003) being the date at which the tenant's attorney provided us with a copy of the "Notification of Correction to Real Property Valuation" by King County.

Their appeal to the Board of Tax Appeals also cited contamination and MTCA/CERCLA liabilities as issues driving the request for corrected assessment. The board, in turn, reduced their assessment from \$639K to \$387K (40% reduction). On a per-unit basis, this equates to a change from \$16/sq ft to \$10/sq ft. There are no shipyards in the immediate vicinity; primarily just marinas and houseboat moorage, with uplands assessed at around \$20-25/sq ft. Again, it is arguable that it's more expensive to conduct business at the site than neighboring (uncontaminated) sites.

In summary of both rent appeals, the primary question is whether or not the use of an alternate parcel is justifiable.

A secondary question that rises from these cases is the application of WAC 332-30-123 (3) (d). This is the portion of the water-dependent rent rule that states that if the upland tax parcel is under appeal, it still may be used, however, any changes in valuation resulting from such appeal will result in an equitable adjustment of future rental [emphasis added]. The terms "equitable adjustment of future rental" could be interpreted a couple of different ways:

- 1) No refunds (or credit) can be provided for past rents already paid, based on an assessment that was later appealed and found to be incorrect. Adjustments will only be made prospectively for rents billed after the action by the Board of Tax Appeals (or county board of equalization).

- or -

- 2) The rule intended to avoid the circumstance of large, unanticipated refunds being due to tenants, prompted by challenges against previous assessments we relied upon to base our rental rates. However, an equitable adjustment may be made to future rental billings, i.e., allow a credit for rent previously paid in excess of the amount that would have been due if the corrected assessment value would have been used. In other words, no refund, but we'd allow credit toward future rent.

Fair play seems to direct us to Option 2...if the assessment that we relied on was incorrect, it seems we should try to adjust this out. However, I don't want to set a bad precedent if our previous position is that we follow option 1.

I'll try to look into some previous rent appeals to see if I can get a better read on previous practices.

Analysis

The water dependent rent formula, as put forth in statute and rule, assumes that the condition of the upland parcel and the activities that take place on it represent an appropriate surrogate for the value of the adjacent aquatic lands within the leasehold.¹

¹ Mike Grossmann, pers comm. April 15, 2003

The most easily available valuation data for the upland parcel is the county tax assessment. However, RCW 79.90.480 (4) anticipated that there would be times when the upland parcel is either not assessed or "has an assessment inconsistent with the purposes of the lease." This is further stressed in RCW 79.90.540, which directs the department to draft rules specifically including criteria for determining when an abutting upland tax parcel has been inappropriately assessed.

The resulting criteria is found in WAC 332-30-123 (3) – Consistent assessment. The criteria provided here are summarized below:

- a) Not assessed;
- b) Assessment is > 4 years old;
- c) Special tax classification not reflecting fair market value;
- d) If assessment is under appeal, the assessor's value will be used, however, any resulting changes will result in an equitable adjustment of future rent;
- e) Upland tax parcel is not used for water dependent purposes;
- f) Acres or square feet is not known or small size results in a nominal valuation.

At first impression, criteria (c) appears to fit the contamination issue, however, the subsection goes on to provide specific examples, along with a cross-reference to the specific subsection of RCW Title 84 (Property Taxes) that establishes them as a special tax classification. A number of staff in the Aquatics program have previously argued that this list is not exclusive. [REDACTED]

Having looked into this a number of times, my interpretation is that it is not absolutely exclusive, but would at least be limited to special tax classifications cited under Title 84 RCW. However, there is no current special tax classification under Title 84 that would apply to these situations.²

Does this mean that there are no other circumstances under which the assessment value would be inconsistent with the purposes of the lease, as contemplated in RCW 79.90.480 (4)?

Answer: No . . . it just means that in some cases, the implementing WAC is inadequate to serve the intentions of the underlying statute. Accordingly, for us to act contrary to the wording of the WAC, there would have to be clear, unambiguous and compelling evidence that following the instructions in the WAC would result in an outcome contrary to the legislative mandate of the statute. In the two cases before us, it is arguable that:

² I have briefly reviewed RCW 84 to see if there is any language that would address properties with hazardous waste liabilities. Albeit a moot point, there is one area—RCW 84.40.039 (copy attached)—that discusses reducing the assessor's valuation after government restriction on land uses. I note this as moot because this would appear to only be applicable where the taxpayer petitioned the assessor to reduce the assessment pursuant to this subsection within three years of the government entity's adoption of the restriction. In both assessment challenges, neither the taxpayer's challenge to the assessment nor the decision of the Tax Appeal Board was linked to RCW 84.40.039 or government restrictions in general. Rather, these were argued on the basis of fair market value, i.e., willing buyer/willing seller.

- 1) The activities on the uplands are similar in nature and consistent with the activities on the leasehold; and,
- 2) The costs, liabilities and regulatory requirements associated with the contamination dictates a lower fair market value, due to the increased cost of doing business at this site.

In conclusion, I believe that lacking any change to the current wording of WAC 332-30-123 or clear, unambiguous and compelling evidence that the assessed valuation is inconsistent with the purpose of the lease as per RCW 79.90.480(4), we do not have adequate legal justification to reject the upland parcel and seek an alternate parcel.

Options

Depending upon whether or not you judge my assumptions and conclusion to be accurate we have two or possibly three options:

- 1) Make the adjustment to the rent, according to the new assessment information provided by the tenants. Note that this type of situation will come up again and try to provide some sort of interim direction to the regions.

The rent appeal decision itself could either address or evade the question of the current rule's adequacy to implement the statutory intent in situations such as this. Thus:

- Option 1-A: Make adjustments, address rule adequacy issue; or
- Option 1-B: Make adjustments, do not address rule adequacy.

The advantage of this option is that it is straight-forward; avoiding the appearance of following a "hidden agenda." The disadvantage is that the RDO decision can be viewed as a precedent confirming that uplands with diminished assessments due to contamination are to be considered consistently assessed, unless clear compelling evidence proves otherwise. Amending the rule will still be feasible, but short of that, it may be more difficult in the future to declare a contaminated upland tax parcel to be inconsistent, except in the most blatantly obvious situations.

- 2) Reject the request for adjustment of rent, arguing that the resulting assessment values are inconsistent with the purposes of the lease as per RCW 79.90.480, irrespective of the wording of WAC 332-30-123. Prepare for subsequent appeal to RDAO in the case of Northlake Shipyards and probably litigation in the case of Salmon Bay Terminals, as they have already gone through an appeal process. They are far beyond short window for appeal of an RDAO

decision (15 days), so presumably they would not have appeal rights to the Board of Natural Resources.³

The advantage of this option is that it is also quite straight-forward and avoids appearance of hidden agendas. However, this would enter us immediately into administrative and judicial appeal situations at a time in which our legal arguments and rationale are not yet well developed. This could also complicate future attempts at rule revision.

- 3) Fail to issue the rent appeal decision within the time period outlined in the rent appeal procedures (WAC 332-30-128). The tenant will be automatically awarded the rent they advocate in their appeal for the next rental revaluation period (four years). In this manner, the decision on the underlying issue is deferred and although the tenant receives the lower rent for revaluation period in question.

The advantage of this option is that it does not result in a precedent on how the rent should be determined. One disadvantage of this is that it could only be applied to Northlake Shipyard, as Salmon Bay is not currently in rent appeal status right now, but rather this is follow up to the RDAO decision. The other (more obvious) disadvantage of this is that it makes the agency look rather inept at performing its administrative responsibilities, especially considering that this will be the second such events in less than a year (the other being Deer Harbor Marina on Orcas Island).

- 4) Within the rent appeal rule, the RDO has the option of ordering a conference between the tenant and department (i.e., Shoreline District) staff. We can provide direction through district management that because these two cases represent gray areas of the rule, we aren't confident that we can justify going to an alternate parcel (short of rule revision). Advise them that they can make the adjustment to the rent, respective to the change in the assessment of the upland tax parcels. As for the secondary question (retroactive adjustments), we will allow future rent credit for any past overpayments respective to the effective date of correction for the assessment, but not issue refunds.

Northlake Shipyards would be dealt with through an RDO-ordered conference with district staff. Salmon Bay would be dealt with directly by the district, without the RDO ordering a conference. In both cases, the direction to the region will be as outlined above. We will not at this time make any statements regarding the adequacy of the WD rent rule; just make the rental adjustments.

³ I say "presumably" because they could argue that the decision of the RDAO was not conclusive or substantive, but rather, effectively differed the decision to time at which the Board of Tax Appeals issued their decision on the correct assessment value.

Irrespective of which option is selected, it seems clear that a necessary element of follow-up should be to revise WAC 332-30-123. In doing so we should address three issues that have impeded the implementation of RCW 79.90.480:

- 1) The contaminated parcel issue we are exploring here;
- 2) The "spikes" issue raised in the Deer Harbor Marina appeal; and,
- 3) The filled tidelands/abutting parcel issue raised in Tyee.

Recommendation and Rationale

I recommend *Option 4*. It takes the issue back out of an official rent appeal decision and, to the extent practical, diminishes the precedential nature of the decision. Because it essentially gives the tenant what they are seeking, I don't expect that they will reject the offer made during the RDO-ordered conference.

If, for some reason, Northlake rejected the offer made at the time of the conference, I recommend for our back-up strategy *Option 1-B—Make adjustments, do not address rule adequacy*.

In either event, as follow up we will need to provide region guidance on how to determine when the assessment of a contaminated upland parcel is or is not inconsistent for the purposes of rental determination on the adjacent leasehold.

Thanks for your time in reading this. I look forward to meeting with you next week to discuss this further and determine how to proceed. If you have any questions in the meantime, send me an e-mail, voice mail, or drop by my cube.



WASHINGTON STATE DEPARTMENT OF
Natural Resources

JENNIFER M. BELCHER
Commissioner of Public Lands

December 9, 1997

CERTIFIED MAIL

^{Mo}
Mr. Jorge E. Florez/Tom Rucher
Todd Pacific Shipyards Corporation
Post Office Box 3806
Seattle, WA 98134

Subject: Rent Appeal for Aquatic Lands Lease No. 22-090038/22-090039/22-002202 and 22-002590

Dear Mr. Florez:

As Rental Dispute Officer (RDO) I have made my final decision on your request for rent review for aquatic leases No. 22-002202, 22-002590, 22-090038 and 22-090039, which were received in our office August 11, 1997. In this letter I will summarize the relevant information submitted as part of the request for review, respond to the issues raised, and explain my decision with respect to those issues.

Background information on this request for rental review is as follows :

- * Lease No. 22-002202 is located in front of vacated street end at Sixteenth Avenue SW, Seattle Tidelands. The permitted use is for ship construction and repair. The term is from March 21, 1985 to March 21, 2001. Per contract agreement between tenant (Todd Shipyards) and the Department of Natural Resource (DNR) and RCW 79.90.480(3)(a) the lease rental rate is redetermined every four years for the term of the contract. The last revaluation notification was sent October 7, 1996, and the base rate, determined by WAC 332-32-123(9) was \$6,279.32. The next scheduled revaluation date is March 21, 2001 (if the lease is renewed).
- * Lease No. 22-002590 is located in front of Block 404, Seattle Tidelands. The permitted use is building and maintaining wharves for the conveniences of navigation. The term is from December 13, 1982 to December 13, 2012. Per contract Clause 3.3 of the lease between Todd Shipyards and the DNR and RCW 79.90.480(3)(a) the lease

rental rate is redetermined every five years for the term of the contract. The last revaluation notification was sent September 5, 1996, and the base rate, determined by WAC 332-32-123(9), was \$35,858.47 . The next scheduled revaluation date is December 13, 2001.

- * Lease No. 22-090038 is a portion of the West Waterway located in the northeast quarter of Section 12, Township 24 North, Range 4 East, W.M., King County. The permitted use is ship construction and maintenance. The term is from September 1, 1986, to September 1, 2003. Per contract agreement between tenant (Todd Shipyards) and the Department of Natural Resource (DNR) and RCW 79.90.480(3)(a) the lease rental rate is redetermined every four years for the term of the contract. The last notification was sent March 4, 1994, and the base rate, determined by WAC 332-32-123(9), was \$12,947.09. The next scheduled revaluation date is September 1, 1998.
- * Lease No. 22-090039 is a portion of the West Waterway located in the northeast quarter of Section 12, Township 24 North, Range 4 East, W.M., King County. The permitted use is ship construction and maintenance. The term is from September 1, 1986 to September 1, 2003. Per your contract agreement between tenant (Todd Shipyards) and the Department of Natural Resource (DNR) and RCW 79.90.480(3)(a) the lease rental rate is redetermined every four years for the term of the contract. The last notification was sent March 4, 1994, and the base rate, determined by WAC 332-32-123(9), was \$23,240.11. The next scheduled revaluation date is September 1, 1998.

Information provided to the Department from Todd Pacific Shipyards:

- * A letter dated August 11, 1997, received by DNR on August 11, 1997, requesting formal rent review of Aquatic Land Lease Nos. 22-090038 and 22-090039 and providing formal notice of intention to appeal rents for Lease Nos. 22-002202 and 22-002590.
- * An order from the King County Board of Appeals/Equalization issued February 7, 1996 outlining the decision of the Board reducing the adjacent upland assessment for the tax years 1995 and 1996 (1994 and 1995 assessments) due to severe soil contamination. This tax appeal was filed on January 10, 1995. We have also reviewed the order from the King County Board of Appeals/Equalization issued September 29, 1997, reducing the upland assessed value for the 1997 tax year (1996 assessment). This tax appeal was filed on November 8, 1996.

- * A letter dated September 18, 1997, providing supporting information for the rent appeal and a map showing the location of each of the authorization areas.
- * A letter dated November 7, 1996 to the King County Board of Equalization requesting appeal of tax assessment for the upland parcels due to contamination.
- * A copy of the Harbor Island Consent Decree issued September 29, 1994 requiring cleanup of the adjacent upland sites.

The following is a synopsis of arguments made by Todd Shipyards in the request for rent review, followed by a brief analysis and RDO response on each.

- 1) *Please accept this letter as Todd's formal appeal of its Rent Revaluation for Aquatic Land Leases Nos. 22-090038 and 22-090039 effective September 1994.*

Analysis and Response: Under WAC 332-30-128(3)(enclosed), a request for review of the rent (an original and two copies) shall be submitted within thirty days of notification by the department of the rent due from the lessee/applicant.

Lease Nos. 22-090038 and 22-090039. According to certified receipt, Todd Shipyards received its rent notification letter March 8, 1994 for Lease Nos. 22-090038 and 22-090039. To qualify for appeal of rent, the request for rent review must have been received within 30 days of that date, which was no later than April 7, 1994. The request for rent review was received August 11, 1997.

Lease No. 22-002202. According to certified receipt, Todd Shipyards received its rent notification letter October 9, 1996 for lease No. 22-002202. To qualify for appeal of rent, the request for rent review must have been received within 30 days of that date, which was no later than November 8, 1996. The request for rent review was received August 11, 1997.

Lease No. 22-002590. According to certified receipt, Todd Shipyards received its rent notification letter September 9, 1996 for lease No. 22-002590. To qualify for appeal of rent, the request for rent review must have been received within 30 days of that date, which was no later than October 9, 1996. The request for rent review was received August 11, 1997.

Once a revaluation has been made, notification has been provided to the lessee, and the appeal period expires, the basis for calculating rent is established for the rent

revaluation cycle. Subsequent changes in the assessment of the upland, whether a decrease or an increase, are not considered until the next revaluation period (with one exception discussed in the next section).

The rent appeals in this case were not timely filed, and the valuation basis for each lease has been established for each valuation cycle.

- 2) *It is Todd's position that DNR's rent revaluation of March 1994 (Lease Nos. 22-090038 and 22-090039) is in need of adjustment as it was based on an inflated assessed amount. Since KCBOE has only recently, and retroactively, lowered its assessment of value for this property, DNR's calculations do not reflect the adjusted value*

Analysis and Response:

The appeal is driven by King county's Board of Equalization ("KCBOE") order of February 1996 adjusting the 1994 and 1995 assessed values (tax years 1995 and 1996) of upland parcel No. 766670-2850 and the subsequent order of September 1996 adjusting the 1996 assessed value (tax year 1997). The first appeal was filed January 10, 1995, with KCBOE. The second appeal was filed November 8, 1996.

The 1994 assessed value of this upland parcel was used by the Department of Natural Resources (DNR) in March of 1994 to determine annual rents for leases 22-090038 and 22-090039. The 1996 assessed value of this upland parcel was used by the DNR in September and October of 1996 to determine annual rents for leases 22-002590 and 22-002202.

WAC 332-30-123(3)(d) Aquatic land use rentals for water-dependent uses states:

"If the assessed valuation of the upland tax parcel to be used is under appeal as a matter of record before any county or state agency, the valuation on the assessor's records shall be used. However, any changes in valuation resulting from such appeal will result in equitable adjustment of future rental." (Emphasis added)

This regulation allows DNR to consider the results of an appealed assessment where the assessment is under appeal at the time of the revaluation. At the time the March 4, 1994 revaluation letter was sent for lease Nos. 22-090038 and 22-090039, there was no tax appeal on record. Accordingly, there will be no evaluation of the assessed value until the next revaluation period in 1998.

The assessed value used for the revaluation of lease Nos. 22-002590 (9/5/96) and 22-002202 (10/7/96) was based upon the 1996 assessed value of \$3,905,800 (tax year 1997). That assessed value was appealed on November 8, 1996. Accordingly, at the time of the revaluation, there was no tax appeal for this assessed value on file.

- 3) *KCBOE's "true and fair value" for assessment years 1994 and 1995 notes the negative impact of severe soil contamination has had on the subject property and the cost required to cure it...and justify a reduced valuation.*

The KCBOE decisions seek to determine the true and fair market value of tax parcel 76670-2850. The final determination establishes the assessed value at \$10,000.00. The evaluation concluded that surface, groundwater and sedimentary contamination present at the Todd facility completely offset the land value.

According to WAC 332-30-123(3) Consistent Assessment. The upland tax parcel's assessed value must be consistent with the purposes of the lease and method of rental establishment. This follows from RCW 79.90.480(4) and RCW 79.90.540. Those statutes provide that if the assessed value of the uplands is "inconsistent with the purposes of the lease," an alternate upland parcel shall be used. DNR is given the authority to determine when a parcel has been "inappropriately assessed."

Although the reassessment of tax parcel 76670-2850 by KCBOE may be true and fair market value it is not considered "consistent with the purposes of the lease" and the method of rental adjustment. The quoted language was used by the legislature on the presumption that the assessed value of the upland parcel would reflect a good surrogate value of the aquatic parcel upon which the state could calculate a fair rental rate. This presumption assumes that the assessed value reflects the relationship between the uplands and the aquatic lands and the purpose for leasing the aquatic lands. In this case, the assessed value is driven solely by the contamination and does not reflect the essential purpose of leasing the aquatic land. The assessed value is inconsistent with the purposes of the lease. Therefore, an alternative parcel will be used to determine future rentals for lease Nos. 22-002202 and 22-002590. When Lease Nos. 22-090038 and 22-090039 are revalued in 1998 an alternative parcel will need to be used as well. I have asked South Puget Sound Land Manager Mary Barrett, (360) 825-1631, to contact you about the rent calculations on this lease and to answer any further questions you may have concerning this decision.

Jorge E. Florez
December 9, 1997
Page 6

RDO Decision

In summary, the appeal was not filed within appropriated time frames, the tax appeals were initiated after the relevant revaluations and the current property tax assessment is inconsistent with the purposes of the lease. For the reasons discussed above, I have decided that it is appropriate for the Department to deny this appeal.

This is the final decision of the Rental Dispute Officer as required in WAC 332-30-128(6)(d). Should you wish to appeal this decision, you must follow the procedure outlined in WAC 332-30-128 (copy enclosed). This requires that your written appeal be postmarked within fifteen (15) calendar days of the date you received this decision, as outlined in WAC 332-30-128(7). The Rental Dispute Appeals Officer (RDAO) is Charles Baum, Department Supervisor, Department of Natural Resources, 1111 Washington Street SE, P.O. Box 47001, Olympia, WA 98504-7001.

Sincerely,



Maria Victoria Peeler, Division Manager
Aquatic Resources Division

Enclosures

c: Bonnie Bunning, SPS Region Manager
Mary Barrett, SPS Region
Dave Bortz, SPS Region
Todd Palzer, Headquarters
Mike Grossmann, AAG



June 17, 2003

Mr. Peter Strong, President
Salmon Bay Terminals
4025 13th Avenue W.
Seattle, WA 98119

CERTIFIED MAIL

SUBJECT: Notification of Change in Assessed Value of Upland Parcel
Waterway Permit 20-012847

Dear Mr. Strong:

We have received the final decision of the Board of Tax Appeals, forwarded by your attorney, George C. Mastrodonato, with his April 3, 2003 letter to Marilyn Mead at our South Puget Sound Region Office in Enumclaw.

As noted in the department's Rental Dispute Appeal letter dated October 2002, the fact that your tax assessment was changed does not automatically result in an adjustment to your rental computation. Any adjusted tax assessment must also be an assessment that is "consistent with the purposes of the lease and method of rental establishment." Put another way, while the assessment may be valid for tax purposes (and DNR does not dispute the assessment in this regard), to be used for the computation of rent the assessment must also be consistent with the purpose of the lease and the method that upland properties are used to compute rent for adjacent state-owned aquatic lands.

The primary assumption of the water-dependent rent formula is that the upland tax parcel can be used as a surrogate for calculating the value of the abutting state-owned aquatic lands and the resulting rent. To dispense with the need for an appraisal, the rent statute generally uses the tax assessment value. However, RCW 79.90.480(4) recognizes that the upland tax parcel used in conjunction with the leased area may not have an assessed value that is consistent with the purposes of the lease. In that case an alternate upland tax parcel will be selected to compute rent.

The question of whether the upland tax value is consistent with the purpose of the lease is determined, in part, by the similarity of uses and circumstances surrounding the upland parcel and the adjacent aquatic land. The legislative history for this statute shows that the method of establishing values and rents for adjacent state aquatic lands is premised on the notion that there is some connection between the activities and circumstances on the uplands and the use being made of the adjacent state-owned aquatic land. Where this connection is diminished, or where the basis for valuing the uplands fails to reflect the value of the aquatic lands, the tax assessment

may be inconsistent with the purpose of the lease. This concept is pursued further in WAC 332-30-123(3), which speaks about the method of rental establishment and which also provides some examples of inconsistent assessments.

We understand that the Board of Tax Appeals has adjusted the tax assessment for the upland property adjacent to the aquatic lands you lease from the state based upon the presence of contamination and taking into account a variety of factors such as restrictive covenants, a consent decree, and the need for long term monitoring of the upland property, to name a few. Before we consider adjusting your rent to reflect the adjusted upland tax assessment we need to understand the adjusted tax assessment in the context of RCW 79.90.480(4). Accordingly, we will need you to provide a response to the following questions to facilitate this review:

Please describe whether the contamination of the upland tax parcel affects your ability to use the state-owned aquatic lands for the permitted use (moorage area) specified under Section 2.1 of Waterway Permit 20-012847 and, if so, the degree to which your use of the property is impacted. Please provide copies of your moorage agreements or sublease agreements for the leased property.

Does the consent decree referred to in the BTA opinion impose obligations on you with respect to the DNR leased aquatic land? Please detail any obligations that exist with regard to the leased land. (Note: In your responses please distinguish between any fee owned aquatic lands and aquatic lands leased from DNR).

How does the contamination of the upland property compare to any contamination of the leased aquatic lands?

If you detail any contamination of the leased aquatic lands, will your use of these aquatic lands include any clean-up or remediation of the site as was undertaken on the upland site? (In other words, is one of the "purposes of the lease" to facilitate clean-up?)

Do you have any agreement with Champion with regard to any potential future clean-up of the aquatic land leased from DNR? If so, please detail this arrangement and provide copies of the agreement.

Once you provide this information, the department will be in a better position to determine the appropriateness of applying the new assessment value of the upland tax parcel to the value of the abutting state-owned aquatic lands for the purposes identified in the waterway permit.

Mr. Peter Strong, Salmon Bay Terminals
June 17, 2003
Page 3 of 3

We hope that this last point of clarification will enable us to make an informed decision. In the meantime, if you have any questions regarding this issue, feel free to contact me at (360) 902-1091.

Sincerely,



Richard Phipps
Project/Section Administrator
Division of Aquatic Resources

Encl. (2)

cc: George C. Mastrodonato
Dave Kiehl
Lance Davisson
Loren Stern
Mike Grossmann
File 20-012847



January 21, 2004

Mr. George C. Mastrodonato
Lane Powell Spears Lubersky LLP
1420 Fifth Ave., Suite 4100
Seattle, WA 98101-2338

CERTIFIED MAIL

SUBJECT: Rent Adjustment to Waterway Permit 20-012847

Dear Mr. Mastrodonato:

I am responding to your letter of November 20, 2003. I am sending this letter direct to you, with a courtesy copy to Peter Strong of Salmon Bay Terminals. I have addressed my previous correspondence to our permittee, Mr. Strong. These include my letters of June 17, July 10, and October 29, 2003. In each of these, we requested information regarding the contamination on your client's upland tax parcel and its effect on the use of the state-owned aquatic lands authorized under this waterway permit. In each of your responses you have stated that your client does not need to provide this information.

In this letter, I will address your arguments in your November 20th letter and document my unsuccessful attempts to answer these questions, based on information that you claim is already in DNR's possession. Lastly, I will confirm that for lack of the information needed to determine if the revised assessment is consistent within the context of RCW 79.90.480(4), the rent for this four-year revaluation period has been recalculated using an alternate upland tax parcel, as described in my previous letters. I believe this was the decision that you wished to confirm with me during your phone call to me on December 18, 2003. However, at that time, I was not yet confident that I had exhausted all reasonable means to gain the information that we requested. Now I am.

I refer to your letter of November 20, 2003:

In paragraph #3, you assert that most of the information we have requested is already in our possession. In particular, you reference a copy of a 1992 Consent Decree that you sent to us with your letter of June 30, 2003. However, after a full review of the consent decree, it is clear that all substantive information dealing with the characterization of the site, the cleanup action plan, and any information that might distinguish between contamination on the upland tax parcel and conditions on the abutting DNR property are referenced to Exhibit A (Cleanup Action Plan), Exhibit B (Engineering Design Document) and Exhibit C (Site Map). None of these documents were included with any of the copies of the Consent Decree. I followed up by researching what additional documents the DNR may have on file with regard to the Champion Ballard Mill site. I was able to locate a Remedial Investigation/Feasibility Study (Kennedy/Jenks/Chilton, March, 1989) and a Phase II sediment sampling report (Jay W. Spearman, August 27, 1990).

In the RI/FS (1989), one sampling station on the abutting DNR property indicated elevated concentrations for total petroleum hydrocarbons (TPH) and priority pollutant metals. However, under "Offshore Sediments" the RI/FS deferred selection of a cleanup remedy due to lack of freshwater cleanup standards.

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IV-00611

The Phase II sampling report (1990) completed implementation of the sampling plan developed in conjunction with the previous year's RI/FS. Groups of sampling stations were located in the waterway/ship canal area, in the waterway permit area (referenced in the report as the "DNR Property"), and under the former mill buildings on the abutting the upland tax parcel. The sediment analysis summary table (Table II) indicated that the concentrations of these pollutants in sediments increases progressively through these three areas, with the lowest concentrations being in the waterway/ship canal area and the highest concentrations at the sampling stations located under the former mill buildings on the abutting the upland tax parcel. Within the waterway permit area, the stations yielding the highest concentrations of metals and priority pollutant compounds were D-6 and D-1; the two stations located closest to the abutting upland tax parcel.

This—albeit summarized—pretty much concludes what I was able to glean from research of documents on file in our office. Of the five specific questions printed in bold in our previous letters, this provides information on but one of them: ***How does the contamination of the upland property compare to any contamination of the leased aquatic lands?*** Furthermore, it only answers the question of what information does DNR have readily available. I don't know if there is any further information that your client—the active user and occupant of both properties—may have regarding the relative contamination of these properties. It most certainly doesn't describe how the contamination issues affect your client's ability to use the state-owned aquatic lands for the permitted use. The documents we have on file describe no institutional controls on the use of the state-owned lands. They do not describe any proposed cleanup actions on the state-owned aquatic lands, nor do they discuss contribution of funds toward any such work. If your client has any such information, we would be glad to consider it. However, in lack of any such information to consider, there is not a clear link between the circumstances driving down the assessment of the upland tax parcel and value of the abutting state-owned lands for the permitted use. Again, we refer to the original five questions in our letter of June 17, 2003 (attached). We believe these questions to be pertinent to the determination of whether or not the assessed upland tax value is "consistent with the purposes of the lease" as contemplated in RCW 79.90.480(4).

In paragraph #5, you note that in the mid-1990's, the State Board of Tax Appeals (BTA) reduced the assessment of the same upland parcel and that DNR adjusted the rent accordingly. In paragraph #8, you follow up on this observation to assert that DNR is bound by its "past" interpretation of RCW 79.90.480, as if to suggest that DNR is required to accept the new tax assessment established by the BTA. Over the last eight years, DNR has evaluated the growing issue of reduced tax assessments on upland parcels due to contamination. DNR has determined that upland assessments that are reduced as a result of contamination may be inconsistent with the purpose of aquatic lease valuation when the upland contamination does not impair the functional use or value of the state-owned aquatic leasehold for the purpose of the lease. DNR's position on the contamination issue has been consistently applied to other leases in similar situations including Todd Shipyard at Harbor Island (22-090038, 22-090039) and Unocal in Edmonds (22-002685). Also, it's important to point out that DNR does not view such situations as a foregone conclusion when it can be demonstrated that the contamination on the upland parcel does, in fact, impair the functional use or value of the leasehold for the purposes of the lease (Northlake Shipyard, 20-012992). Such situations must be considered on a case-by-case basis, relative to the circumstances at the site. The fact that DNR agreed to utilize the BTA's last tax assessment in 1995 does not preclude DNR from applying its recently developed practice regarding tax assessment of contaminated parcels.

In paragraph #6 and #7, you state that Salmon Bay Terminal's position is that the computation of the permit fee is governed solely by RCW 79.90.480(1). In an attempt to support this position you excerpt a

portion of this statute in such a manner as to present it out of context. You quote most of the introductory paragraph of this statute (“*annual rent rates . . . shall be determined*”) then omit the words “*as follows*” and instead of following with subsections (1) through (6) that are subordinate to the introductory paragraph, you only note the existence of subsection (1), i.e., “*utilizing the assessed value . . . of the upland tax parcel used in conjunction with the leased area*” (emphasis yours). If I understand correctly, your assertion is that the compulsory language (“*shall*”) in the introductory paragraph of this statute applies exclusively to the first of six enumerated subsections that follow the words “*as follows*.” If this interpretation were correct, subsection (4)—contemplating the possibility of an inconsistent assessment and the possible need for an alternate parcel—would have no effect whatsoever. This interpretation simply does not make sense. Consequently, we reject the notion that the RCW 79.90.480(1) precludes use of anything other than abutting upland tax parcel for the purposes of calculating water-dependent rent.

In paragraphs #9 and #10, you assert that DNR has abandoned the upland valuation method and resorted to a “pick and choose” approach under which the permit fee would “almost triple.” This implies that DNR searched for an alternate parcel that would result the highest annual rental revenue for DNR, in disregard to applicable statute and rule. We disagree. The instructions for selection of the nearest comparable upland parcel are set forth in WAC 332-30-123. These instructions were followed, as outlined in the alternate parcel analysis provided with our letter of October 29, 2003. The parcel selected was not assessed higher than the majority of other parcels along that section of shoreline; certainly not three times higher as you imply. Actually, the situation is somewhat the reverse—the recent assessment reduction on the upland parcel physically abutting this waterway permit area would result in an upland per-unit assessed value that is approximately one-third that of other properties in the immediate area. As a result, your client would enjoy a lease rate that is approximately one-third that of his competitors, who use substantially similar state-owned aquatic lands in support of their businesses. From this perspective, an argument of equity would seem rather misplaced.

In paragraphs #11 through #16 you discuss legislative intent to foster water-dependent uses through a clear rent advantage. I must point out that the legislature provided for this by prescribing a water-dependent rental formula that discounts the upland value by 70 percent. In contrast, probably the most commonly used method used for determining nonwater-dependent rent is to apply a similar extension method, but not allow any percentage discount from the upland per-unit assessed value and use a higher annual rate of return. It is clear that this was the mechanism by which legislature intended to provide a clear rental advantage to water-dependent uses on a state-wide basis. There is no legislative direction to seek and apply water-dependent rental breaks on a case-by-case basis, outside of the discount provided in the water-dependent rent formula. This discount applies irrespective of whether an alternate parcel is selected or the abutting upland tax parcel is used.

You further assert that it is inappropriate to use the alternate tax parcel because it is “less water dependent” than the abutting upland tax parcel. We understand the alternate upland tax parcel to also be used in conjunction with offloading of fishing vessels and is already used as the upland tax parcel for calculating rent on another existing waterway permit (Washington Fish and Oyster / Ocean Beauty Seafoods). This would qualify as a water-dependent use, for purposes of the alternate parcel selection criteria in WAC 332-30-123(4).

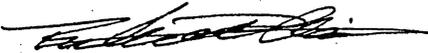
In conclusion and summation, I reiterate that our previous correspondence has asked for information to help us clarify the connection between the circumstances that reduced the assessed value of the abutting upland tax parcel and the value of the state-owned aquatic lands for the permitted use. You have continued to assert that your client does not need to provide any such information to us because either: a)

Mr. George C. Mastrodonato
Waterway Permit 20-012847
January 21, 2004
Page 4 of 4

we may already have the information; b) we are not within our rights to request the information; c) the information is not germane to evaluating if an assessment is consistent with the purposes of the lease; and/or d) there are no circumstances under which the abutting upland parcel used in conjunction with a water-dependent activity would not be used to calculate rent. These arguments do not sway us from the points we expressed in our letter of June 17, 2003 and the series of correspondence that followed. As stated in our letter of October 29, 2003, we will now use an alternate parcel (CPN 766620-0070) to calculate the annual fee for this waterway permit. This will not result in the refund you have requested. Because the rental increase from the previous four-year rental period is greater than 50%, the increase will be stair-stepped. Consequently the resulting rental change will not take effect until the third year of the stair-stepped rental increase (June 15, 2004 to June 15, 2005). That change will be a decrease from \$62,778.35 per year to \$62,774.06 per year, plus leasehold tax at 12.84%.

Please understand that our decision to use an alternate tax parcel on this situation is not simply the opinion of a single DNR staff member, but represents the consensus of DNR's Aquatic Resource program management, following careful review of applicable statutes and administrative rules. Nevertheless, if you have any questions regarding this, I can be contacted at (360) 902-1091. Otherwise, I would redirect your client to Lance Davisson, the DNR Land Manager responsible for routine administration of this waterway permit. Lance can be reached through our Enumclaw office, at (360) 825-1631.

Sincerely,



Richard Phipps
Project/Section Administrator

c: Peter Strong, Salmon Bay Terminals
Mark Mauren, DNR - Shoreline District
Lance Davisson, DNR - Shoreline District
Joe Panesko, Attorney General's Office
File 20-012847



December 8, 2005

CERTIFIED MAIL

Mr. George C. Mastrodonato
Lane Powell PC
1420 5th Ave., Suite 4100
Seattle, WA 98101-2338

Subject: Rent Adjustment to Waterway Permit 20-012847

Dear Mr. Mastrodonato:

I am writing in response to your letter of September 22, 2005, addressed to Mr. Richard Phipps. Due to staff transitions, I apologize for the delay in responding while I reviewed the historical records on this lease. You propose that the Department of Natural Resources (DNR) use the unimpaired value of the upland tax parcel, rather than an alternate land parcel, for the purpose of calculating water dependent rent on the Waterway Permit 20-012847. This has been the DNR's historical approach when necessary. And a recent rule change to WAC 332-30-123(3)(g) has clarified that the DNR may apply the unimpaired value when such value is part of the assessment records.

The assessed value of the upland tax parcel 766620-0129, adjacent to Waterway Permit 20-012847, was reduced due to the presence of contamination. Upon appeal by Salmon Bay Terminals, the State Board of Tax Appeals reduced the assessed value to \$5.4 million for tax years 1999-2000 (January 28, 2003 Final Decision - Dockets Nos. 56053 & 56137). In addition, the Board determined an unimpaired value of \$7.2 million for the tax parcel. King County maintained the same values for the 2002 tax year.

Based on my review of the record and materials you sent DNR in 2004, it appears that the contamination on the upland parcel does not physically impair the Salmon Bay Terminal's ability to use the aquatic leasehold. The upland parcel is consistent with the purpose of the lease. The DNR will make an equitable adjustment to the rental rate as stated in the DNR Rental Dispute Appeals Officer decision (November 7, 2002). As you requested, we will apply the unimpaired assessment value established in the Board decision of \$7.2 million, rather than using the alternate upland tax parcel. In addition, the DNR will exclude the assessed value of \$500,800 for improvements, for a revised amount of \$6,699,200.

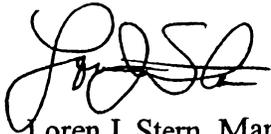
I will ask Rex Thompson, our Shoreline District Manager, to prepare a revised rental rate calculation that reflects the assessment value discussed above. Mr. Thompson will also calculate an equitable adjustment to back rent charged from June 1, 2002 forward, including one percent interest per month on the difference paid to date. The adjustment will be credited toward future rent due.

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Mr. George C. Mastrodonato
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December 8, 2005

If you have further questions or would like to discuss this matter directly, please feel free to contact either Rex Thompson at (360) 825-1631 or me at (360) 902-1240. Thank you for your understanding as we work to resolve this difficult matter.

Sincerely,



Loren J. Stern, Manager
Aquatic Resources Division

c: Peter D. Strong
Fran McNair, Aquatics Steward
Loren Stern, Division Manager
Joe Panesko, Attorney General's Office
Rex Thompson, Shoreline District Manager
File 20-012847

August 16, 1995

MEMORANDUM

TO: David Bortz, Joel Greene
FROM: David Grant *DAG*
SUBJECT: Rental Reduction for Northlake Shipyard

*OK/Approved
Joel 8/30/95*

This memo is a discussion of, and recommendation for the resolution of the rental issue at Northlake Shipyard (NSI). Lease #20-012992 was entered into effective September 16, 1994. During negotiations it was recognized that the value of NSI's upland parcel used to calculate water-dependant rent was under appeal with King County assessors. Subsection 3.1(e) of the document was negotiated to read as follows:

DNR and Lessee acknowledge that the assessed valuation of the upland property upon which the calculation of Rent is based is under appeal as a matter of record before King County. In the event of a successful appeal by Lessee resulting in a reduced valuation of the upland property, Rent will be equitably adjusted based upon the final valuation retroactive to the Commencement Date of this Lease, or the most recent revaluation date, whichever is later, in accordance with RCW 79.90.480 and WAC 332.30.123. Any overpayment made by Lessee based on the revised Rent calculations shall be refunded by DNR to Lessee.

The successful appeal of the parcel valuation resulted in a reduction from \$775,000 to \$294,200 (a 62% reduction). The significance of this reduction led me to question whether this might represent a parcel valuation "inconsistent with the use" as described in RCW 79.90.480 and WAC 332.30.123. Subsection 4 of RCW 79.90.480 reads:

If the upland parcel used in conjunction with the lease area is not assessed or has an assessed value inconsistent with the purposes of the lease, the nearest comparable upland parcel used for similar purposes shall be substituted and the lease payment determined in the same manner as provided in this section.

If in fact the NSI parcel has been devalued due to contamination, but that contamination does not affect NSI's ability to operate as a shipyard, this might constitute an inconsistent valuation. In that case, RCW 79.90.480 clearly directs me to select an appropriate alternate parcel. In accordance with subsection 4 of WAC 332.30.123 the appropriate alternate parcel value would result in an increase of NSI's annual rent from \$88,274.64 to \$104,872.03 (an

increase of about 20%). In lieu of alternate parcel selection, subsection (3)(c) of WAC 332.30.123 allows for substituting the full value for the parcel in question if the amount of the reduction is "part of the assessment records." Unfortunately in NSI's case, the amount of the reduction granted for contamination was not considered "quantifiable" by King County assessors and so was not recorded. We are forced to select the alternate parcel, in accordance with the law.

The above scenario assumes that the assessment is indeed "inconsistent with the purposes of the lease." In NSI's case, I don't think I can make that case. I have had several phone conversations with Alan Hashimoto, who handled the NSI review for the King County assessors. Mr. Hashimoto has been adamant that contamination is considered a "stigma" that does reduce the value of land. However, in NSI's case, Mr. Hashimoto insisted that the reduction was granted based on the "economic obsolescence" of shipyards. I did have some success in convincing Mr. Hashimoto that such a reduction might better be tagged to the improvements, and not to the bare land, so as not to encourage less than the most efficient use of land. This does not change the current issue, however. The reduction was based on an appraisal of the property submitted by John F. Boucher & Associates (copy in file 20-012992). The appraisal assumes the "highest and best use" of the property is as "shipbuilding or repair ventures, or as commercial moorage." The assessed value (having been based on this appraisal) cannot be considered "inconsistent with the purposes of the Lease." The Lease states that NSI is permitted to use the leased property "only for the specified purposes of the operation and maintenance of a ship repair facility and vessel moorage."

Recommendation:

Based on this analysis, I conclude that we are bound by law, a negotiated lease document, and circumstance to grant NSI's rent reduction. This is perhaps a case where the inflexibility of our legal direction, combined with creative, knowledgeable opposing council, limit the State's ability to exact proper compensation for allowing an exclusive use of SOAL. To NSI's credit, they did not create the contamination. It is also important to mention that NSI has entered into a Consent Decree that requires NSI to pay 15% of its profits over fifteen years toward cleanup of the property. That cleanup does include SOAL. Therefore, although property value reduction due to contamination is a general concern, this specific case is one where the Department might be willing to forego immediate compensation for benefits at a future date. With this in mind, I suggest we work to assist NSI in becoming a profitable shipyard (at a site where others have tried, failed, contaminated SOAL and left it orphaned). Unless directed otherwise, I intend to grant NSI's requested rent reduction, effective immediately.

cc: Danie Kitchel



June 19, 2003

Mr. E. Peter Kelly
Northlake Shipyard, Inc.
1441 North Northlake Way
Seattle, WA 98103-8920

CERTIFIED MAIL

**SUBJECT: Notification of Correction to Assessed Value of Upland Parcel
Aquatic Land Lease No. 20-012992**

Dear Mr. Kelly:

We have received your Notification of Correction to Real Property Valuation, forwarded with your letter of April 7, 2003 to Lance Davisson in our South Puget Sound Region office in Enumclaw.

After reviewing information in the tax appeal submittals and your lease file, we have decided to make the rental adjustment, according to the revised assessment value for 2002. This will apply to the four-year revaluation period commencing September 16, 2002.

A refund for rent overpayments made between September, 2002 and June 2003 will follow under separate cover. The refund will include interest compounded at 1% per month (12% annual). Because payments made during this time have been on a monthly basis, we are still calculating the total interest applicable to the overpayments. However, the principle involved is \$13,157.02 [\$11,659.92 rent + \$1497.10 leasehold tax].

Background

This was not an easy decision for us to make. Also, it is not a decision that can be applied uniformly to all other situations in which the assessed value of an upland tax parcel has been lowered due to hazardous waste contamination or other site-specific circumstances. Certainly some explanation is in order, in consideration of the time period over which you have been waiting for our response. The following is a discussion of the key factors that weighed upon our decision in this particular case:

The primary assumption of the water-dependent rent formula is that the upland tax parcel can be used as a surrogate for calculating the value of the abutting state-owned aquatic lands and the resulting rent. To dispense with the need for an appraisal, the rent statute generally uses the tax assessment value. However, RCW 79.90.480(4) recognizes that the upland tax parcel used in conjunction with the leased area may not have an assessed value that is consistent with the purposes of the lease. In that case an alternate parcel should be selected to compute rent.

RECEIVED

LUDD
IV-00630

The question of whether the upland tax value is consistent with the purpose of the lease is determined, in part, by the similarity of uses and circumstances surrounding the upland parcel and the adjacent aquatic land. The legislative history for this statute shows that the method of establishing values and rents for adjacent state aquatic lands is premised on the notion that there is some connection between the activities and circumstances on the uplands and the use being made of the adjacent state-owned aquatic land. Where this connection is diminished, or where the basis for valuing the uplands fails to reflect the value of the aquatic lands, the tax assessment may be inconsistent with the purpose of the lease. This concept is pursued further in WAC 332-30-123(3), which speaks about the method of rental establishment and which also provides some examples of inconsistent assessments.

The Board of Tax Appeals has adjusted the tax assessment for the upland property adjacent to the aquatic lands you lease from the state based upon the presence of contamination, restrictive covenants, a consent decree, the need for long-term monitoring of the upland property and a variety of other factors. Before we consider adjusting your rent to reflect the adjusted upland tax assessment we needed to understand the adjusted tax assessment in the context of RCW 79.90.480(4).

The tax appeal submittals and information in our lease file (including the August, 1994 Prospective Purchaser Consent Decree) provide evidence that the Northlake Shipyards has made tangible commitments and monetary contribution toward cleanup of the site, which includes portions of the state-owned aquatic lands within your lease. This supports the contention that issues affecting the upland tax assessment are also representative of the condition of the state-owned aquatic lands for which rent is being calculated. Accordingly, we will consider the upland tax parcel abutting the lease to have a consistent assessment for the purposes of determining rent at this time.

Another rather unique factor was the special contract language that is in your current lease contract under Subsection 3.1(e) Rent. This contract clause acknowledged the existence of a pending property tax appeal on the abutting upland parcel at the time at which this lease was negotiated. While it seems self-evident that this was intended only to address the tax appeal that was pending in 1994-1995, the language adds to the preponderance of evidence that a rental adjustment is appropriate at this time. This lease clause will likely not be included when a new lease contract is negotiated following expiration of the current contract in September of 2006.

If you have any questions, I can be contacted at (360) 902-1091.

Sincerely,



Richard Phipps, Section Administrator
Division of Aquatic Resources

Mr. E. Peter Kelly, Northlake Shipyards, Inc
June 19, 2003
Page 3 of 3

Encl. (2)

cc: Dave Kiehl
Lance Davisson
Loren Stern
Mike Grossmann
File 20-012992



WASHINGTON STATE DEPARTMENT OF
Natural Resources

JENNIFER M. BELCHER
Commissioner of Public Lands

October 11, 1999

Mr. Robert E. Hibbs
Short Cressman & Burgess
999 Third Ave, Ste 3000
Seattle, WA 98104

CERTIFIED MAIL

Subject: Unocal Corporation - Rent Review for Aquatic Lands Lease No. 22-002684

Dear Mr. Hibbs:

As Rental Dispute Officer (RDO) I have made my final decision on your request for review of rent for Aquatic Lease No. 22-002684, received by this department on June 11, 1999. As you recall, on August 9, 1999 I sent a letter extending the review period 60 days, as allowed under WAC 332-30-128(6)(d). This 60-day extension brings the due date for my final decision to October 11, 1999.

In this letter I will first provide a brief synopsis of my decision. I will then summarize the background and relevant information submitted as part of the request for review, respond to the issues raised, and explain my decision with respect to those issues.

Summary of RDO decision on request for review of rent:

An assessed value that is substantially based upon hazardous waste contamination is not a value that is "consistent with the purposes of the lease," as per WAC 332-30-123(3) and RCW 79.90.480(4). Staff attempted to correct this by substituting "full value" of the parcel from information received from the Snohomish County Assessor, in their letter dated March 5, 1999. Because this letter did not reflect an actual record of assessment conducted within the last four years, the rent should have been determined through selection of a comparable upland tax parcel as outlined in WAC 332-30-123(4). Our review of alternate parcels indicates that the appropriate comparable parcel would be CPN# 352703-3-011-0006, which is owned by Chevron. The resulting annual rent from using this comparable upland parcel would be \$27,134.50 plus leasehold tax.

Background information on this request for rental review is as follows:

- Lease No. 22-002684 is a portion of the harbor area in front of Tract 1, Edmonds Tide Lands, in front of Section 26, Township 27 North, Range 3 East, W.M., Snohomish County. The permitted use is for the purposes of a wharf approach, vessel maneuverability space and moorage. The term is from July 5, 1987, to August 1, 2007. The contract agreement between the tenant (Union Oil Company of California, dba Unocal) and the Department of Natural Resources (DNR) provides that the lease rental rate is redetermined every four years for the term of the contract.

The last notification was sent on May 13, 1999, and the base rate, determined by WAC 332-30-123(9), increased from \$37,816.35 to \$40,163.71. The next scheduled revaluation date is July 5, 2003.

Information provided to the DNR from legal counsel for Unocal:

- A letter dated June 10, 1999, received by DNR on June 11, 1999, requesting formal rent review of Aquatic Land Lease No. 22-002684, pursuant to WAC 332-30-128.
- Copy of Aquatic Land Lease No. 22-002684
- Copy of WAC 332-30-128 *Rent Review*.
- Payment of rent plus leasehold tax (@12.84%) via Citibank Delaware check No. 319942 in the amount of \$45,320.73.

The following is a synopsis of arguments made by legal counsel for Unocal in the request for rent review, followed by a brief analysis and RDO response on each:

- 1) *This letter is a request for review of the rent DNR proposes to be charged, as authorized under WAC 332-30-128. It is submitted within the thirty-day time period from DNR's May 13, 1999, notification of the rent due. WAC 332-30-128(3). For the reasons described below, we believe that the appropriate amount of rent due is actually \$6,695.09. In accordance with WAC 332-30-128, we enclose \$45,320.73.*

Analysis and Response: Under WAC 332-30-128(3)(enclosed), a request for review of the rent (an original and two copies) shall be submitted within 30 days of notification by the department of the rent due from the lessee/applicant. Under WAC 332-30-128 (4), the request for review shall be accompanied by one year's rent payment based on the preceding year's rate, or a portion thereof as determined by RCW 79.90.530; or based on the rate proposed by the department, or a portion thereof as determined by RCW 79.90.530; whichever is less.

The request for review of rent for this lease was received within the 30-day appeal period and was accompanied by payment of rent, satisfying the submitted requirements under WAC 332-30-128 (3) and (4).

- 2) *For determining rents, the existing regulations at WAC 332-30-123 apply to this situation. The regulations indicate that the rental rate is calculated by the formula $UV \times LA \times .30 \times r$, where UV = per unit assessed value of the upland tax parcel, LA is the units of the lease area and r is the real rate of return.*

Analysis and Response: Under Section 2.1 of the lease contract, the permitted use of the leasehold is "for the purposes of wharf approach, and ship and vessel maneuverability, and moorage . . ." These uses would fall within the definition of a "water-dependent use," as described under WAC 332-30-106(71) and therefore qualify for the valuation under the water-dependent rent formula under WAC 332-30-123. It should be noted that this formula reflects a preferential lease rate for the purposes of fostering water-dependent uses, as indicated by the .30 multiplication factor. We find that the formula was applied to the rent determination for this lease. The issue of appropriate upland parcel selection and/or adjustment for inconsistent assessment will be analyzed responded to in the following portion of this RDO response letter.

- 3) *The attached March 5, 1999, letter from the Snohomish County Assessor's Office indicates that the assessed value of the one of the two upland parcels, No. 262703-1-026-004, has diminished from a \$3/square foot to a \$.50/square foot due to contamination . . . Your May 13, 1999, letter to Unocal indicates that the most recent assessment of the contaminated upland parcel is irrelevant because of the applicability of WAC 332-30-123(3)(c). This provision exempts DNR from relying on assessed value in determining rent in a few limited circumstances, where the assessment:*

results from a special tax classification not reflecting fair market value. Examples include classifications under: State-regulated utilities . . . , Reforestation lands . . . , Timber and forest lands . . . , and Open Space.

In the above-described circumstances, DNR can substitute "fair market value" for assessed value "if such value is part of the assessment records." Id. This provision is clearly inapposite to our situation. The disputed upland parcel, No. 262703-1-026-004, is not subject to a special tax classification. In addition, there is no other "fair market value" within the assessment records, except for that of the \$.50/square foot described in the Snohomish County Assessor's Office letter to you dated March 5, 1999.

Analysis and Response: The decision of the Snohomish County Assessor's Office seeks to determine the true and fair market value of the upland tax parcel which was effected by contamination. The assessment concluded that contamination present at the Unocal facility significantly offset the value of the upland parcel as may be offered by a willing buyer, without any pre-existing liability for the contamination. In trying to determine a value consistent with the purpose of the lease, DNR staff attempted to substitute the "full value" of the upland parcel, based upon information provided by the Snohomish County Assessors Office as per WAC 332-30-123(3)(c). This information was drawn from the March 5, 1999, letter which expressed the professional opinion of the Commercial Supervisor of the Snohomish County Assessor's Office, but did not reflect a formal recorded assessment. To adjust back for the most recent assessment which did not reflect the significant

adjustment for upland contamination, DNR staff would have to rely on assessment records prior to May 12, 1995. This would place the assessment record at more than four years old, which would be inconsistent with WAC 332-30-123(3)(b).

According to WAC 332-30-123(3) Consistent Assessment, the upland tax parcel's assessed value must be consistent with the purposes of the lease and method of rental establishment. This follows from RCW 79.90.480(4) and RCW 79.90.540. Those statutes provide that if the assessed value of the uplands is "inconsistent with the purposes of the lease," an alternate parcel will be used. DNR is given the authority to determine when a parcel has been "inappropriately assessed."

Although the reassessment of the upland tax parcel in question may be true and fair market value, it is not considered "consistent with the purposes of the lease" and the method of rental adjustment. The quoted language was used by legislature on the presumption that the assessed value of the upland parcel would reflect a good surrogate value of the aquatic parcel upon which the state could calculate a fair rental rate. This presumption assumes that the assessed value reflects the relationship between the uplands and the aquatic lands and for the purpose for leasing the aquatic land (see Harbor Area Lease No. 22-002684, Section 2.1 Permitted Use). In this case, the assessed value is driven solely by the contamination and does not reflect the essential purpose of leasing the land. The assessed value is inconsistent with the purposes of the lease. Therefore, an alternate parcel will be used to determine rentals for Harbor Area Lease No. 22-002684.

At my direction, staff has selected an alternate tax parcel meeting the criteria of WAC 332-30-123(4) Selection of the nearest comparable upland tax parcel. The selected parcel (CPN # 352703-3-011-0006) is currently owned by Chevron, is located in close proximity to the Unocal facility, and is associated with a similar water-dependent use as described in Harbor Area lease No. 22-002684. Of the parcels located to the south of the Unocal facility, the Chevron site is the closest upland parcel associated with a water-dependent use. Parcels located immediately to the north are under control of the Port of Edmonds and therefore not assessed (pers. com. Snohomish County Assessor's Office). The current assessed upland value per acre at the Chevron Point Wells site is \$84,294.19, resulting in an annual rent of \$27,134.50 plus leasehold tax. A new rental worksheet and refund will be processed through our Northwest Region Office in Sedro Woolley.

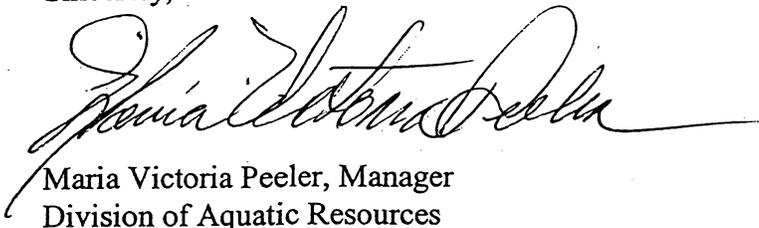
This is the final decision of the Rental Dispute Officer as required in WAC 332-30-128(6)(d). Should you wish to appeal this decision, you must follow the procedure outlined in WAC 332-30-128 (copy enclosed). This requires that your written appeal be postmarked within fifteen (15) calendar days of the date that you received this decision, as outlined in WAC 332-30-128(7). The Rental Dispute Appeals Officer (RDAO) is Charles Baum, Department Supervisor, Department of

Robert E. Hibbs
October 11, 1999
Page 5

Natural Resources, 1111 Washington Street SE, P.O. Box 47001, Olympia, WA 98504-7001.

On a separate issue, both the June 10, 1999, letter formally requesting rent review and a previous letter from Unocal (April 26, 1999) indicate that the Unocal wharf and the fueling facilities were decommissioned several years ago and are expected to remain dormant for the foreseeable future. Please submit to me, no later than December 15, 1999, Unocal's future plans for this portion of our property. This should include Unocal's intentions regarding disposition of the improvements and restoration of the site, assuming they do not intend to continue active use of the leasehold for the purposes defined in the lease. Additional interim options may be to reduce the lease area, contingent upon sediment sampling and agreement on any necessary cleanup actions.

Sincerely,



Maria Victoria Peeler, Manager
Division of Aquatic Resources

Enclosures

c: JoAnn Gustafson
Steve Jennison
Lisa Largent
Christa Thompson, AAG
File 22-002684

LEASE # 22-02064

Cnty Parcel # _____

NAME ASARCO

State Tax ID # _____

ADDRESS PO Box 1677

PHONE # _____

TACOMA Wa 98401

OFFICE mgr. Pat Crawford →

206-756-0225

DATE	INIT	COMMENTS
6-24-87	JD	Called Pat Crawford in Ref Federal Insurance Co. cancelling Bond, stated that new bond is only \$15,000 not contract \$24,200 ⁰⁰
12-14-88	DB	Approval of Sublease to Zidell Inc - Sent copy to ASARCO
	**	REVALUE IN 1992
8/31/92	Hm	Revalued rent for 1992, because the value was only \$100.00 assessed by county - we had to use an alternate parcel. We used Fross's lease # 20-009550 for base mortgage (T.L. we owned by ^{uplands +} Oline). Same use even though rent is less than previous years - it would have been double or triple if we'd used Sperry Ocean, Puget Sound Plywood.
		Revalue in 1996
10-23-95	OL	Index Organized, Updated RTA
12496	JB	Region copy made
5/1/05	LR	RENT APPEAL DECISIONS (LETTERS)

LUDD
IV-00655

1000004
22-002064 (AS)

- 1. Lease Number 20-A09507
- 2. Name Woeck/Lake Union Yacht Center
- 3. County King
- 4. Acres 0.396
- 5. Previous Rent
- 6. Current Revaluation Assessment Date 11/9/2005
- 7. Use Commercial moorage in support of boat repair
- 8. Adjacent/Alternate Parcel Adjacent
- 9. If Alternate Parcel, why?

Parcel No.	Acres	Square Feet	Value	Rate	Value	Rate	Value	Rate
4088804565	2,159,500.00	61700	\$ 1,179,450.00	5.46%	\$ 457,521.19	0.396	\$ 1,179,450.00	5.46%

Annual Rent + Tax **\$ 10,365.19**
 for DNR Harbor Area Lease based on
 area in 1985 Exhibit map
 \$ 0.53 rent per sq ft. (based on above rent calc)
 Rent \$ 9,585.25
 tax \$ 1,230.75
Annual Rent + Tax \$ 10,816.00
 Waterway 240 ft x 75 ft
 Estimate for DNR Waterway Permit

Date: 12-20-05
 Land Manager: Andrew Meryk

1 acre = 43,560 sq. ft.

1. Lease Number 20-010241 2. Name RWE Family LLC 7. Use Commercial Marina
 3. County King 4. Acres 0.344 8. Adjacent/Alternate Parcel Adjacent
 5. Previous Rent \$ 8,646.37 6. Current Revaluation Assessment Date 7/11/2005 9. If Alternate Parcel, why?

Square Feet 15004
 Conversion Ft to Acres 0.344

10 County	11 Upland Value	12a Square Feet	12b Acres	13 Upland Value/Acre	14 Aquatic Value @ 30%	15 Aquatic Lease Acres	16 Lease Area Value	17 Rent
Parcel No 408880-3735	\$ 1,385,500.00	30790	0.707	\$ 1,959,688.83	\$587,906.65	0.344	\$ 202,239.89	\$ 10,253.56
Rent + Tax								\$ 11,570.12

Remarks: Is the new water-dependent rate more than 50% increase from the previous rent? no
 If yes, do not increase the annual rents by more than 50% each year.

Are you collecting backrent Y/N? N
 Is the PPI or OPI applied? No PPI allowed under this old lease
 Amount of back rent due? 5 year reval 0

If use is log storage, the rent is \$374.62 per acre for July 1, 2005 to June 30, 2006. No parcel numbers are needed.

Date: 7-11-05
 Land Manager: *Melissa Matipone*

* updated 06/07/2005

EXACT COPY



May 23, 2005

CERTIFIED MAIL

Suzanne Dills
Lake Union Waterworks
639 North Riverpoint Blvd. #3W
Spokane, Washington 99202

SUBJECT: Notification of Revalued Rent Due for Aquatic Lands Lease No. 20-011805

Dear Ms. Dills:

Your rent has been revalued for the next four (4)- year period beginning July 1, 2005. This revaluation was conducted in accordance with Subsection 3.3 of your amended aquatic lands lease and the rent calculation methods used were established by the Legislature in RCW 79.90.

Your annual base rent of \$7,630.81 will decrease to \$5,782.24, plus leasehold tax of \$742.44 for a total payment due of \$6,524.68

A rental billing for your rent from July 1, 2005 through June 30, 2006 will follow under a separate cover. Bills are computer generated and mailed out approximately four (4) weeks before the bill is due. All amounts past due will be charged penalty pursuant to the terms of your lease.

If you wish to appeal the amount of rent identified above, you must follow the procedure outlined in WAC 332-30-128 (copy enclosed). This procedure requires that within thirty (30) calendar days of your receipt of this letter, the department must have received your written request for review of rent containing all the requirements identified in the regulation. Please address your request to: Manager, Department of Natural Resources, Aquatic Resources Division, 1111 Washington Street SE, Olympia, WA 98504-7027.

Pursuant to Subsection 6.9 of your amended lease, your financial security requirement will also decrease to \$13,000. You may choose a bond, letter of credit or a savings account assignment. This security must be in place within thirty (30) calendar days from the date of this letter.

If you have any questions, please contact me at (360) 825-1631, extension 2020.

Sincerely,

Melissa Montgomery

Melissa Montgomery, Land Manager

REGION COPY

Enclosure

c: Region File
Aquatic Resources file

gj/20011805Reval

LUDD
IV-00658

1. Lease Number 20-011805
 2. Name Lake Union Waterworks
 3. County King
 4. Previous Rent \$7,630.81
 9. Current Revaluation Assessment Date 5/23/2005

5. UBI
 6. DNR

Melissa Montgomery

7. Use	1	2	3
8. Acres			
Square Feet	15181.5		
Conversion Ft	0.349		

10. County Parcel No.	40888045101	11. Upland Value	\$ 762,500.00	12a. Square Feet	30500	12. Acres	0.7	13. Upland Value/Acre	\$ 1,089,285.71	14. Aquatic Value @ 30%	\$ 326,785.71	15. Aquatic Lease Acres	0.349	16. Lease Area Value	\$ 114,048.21	17. Rent	\$ 5,782.24
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Rent + Tax \$ 6,524.68

Stair-step rents if more than 50% increase

Current Reval Rent	\$ 5,782.24
Previous Rent	\$ 7,630.81
1st Year Rent	\$ 5,782.24
2nd Year Rent	
3rd Year Rent	
4th Year Rent	

Remarks: Is the new water-dependent rate more than 50% increase from the previous rent?
 If yes, do not increase the annual rents by more than 50% each year.

5782.24 * 1.07294 = 6204.50

Are you collecting backrent Y/N?
 Is the PPI or OPI applied?
 Amount of back rent due?

If use is log storage, the rent is \$374.62 per acre for July 1, 2005 to June 30, 2006. No parcel numbers are needed.

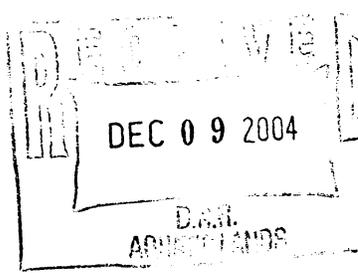
*updated 4/12/2005

WATER-DEPENDENT RENT CALCULATION WORKSHEET

1. Lease Number 20-012104 5. UBI 1111 7. Use! Marina 8. Acres 13.605 5815
 2. Name Portlake Marine Works 6. DNR 1111
 3. County King 7. UGA 47
 4. Previous Rent 7469.47 9. Current Revaluation Assessment Date 2005
 LUDD
 IV-00660

10. County King 11. Upland Value 12. Acres/
 Parcel No. Value Sq. Ft. 13. Upland Value/Acre 14. Aquatic Value @ 30% 15. Aquatic Lease Acres 16. Lease Area Value 17. Rent @ 5.73%
 1. 408820-4440 778,400 31,139 25.00 7.50 13,605 102,037.50 5846.75
 2. _____
 3. _____
 4. _____

Remarks: Is the new water-dependent rent more than a 50 percent increase from the previous rent? Yes No X
 If yes, do-not increase annual rents by more than 50 percent each year.



PPA Adjustments (Used only for Revaluations and PPA Adjustments Years)

90-91 + 4.958%	1.04958
91-92 + 3.654%	1.03654
92-93 + 0.170%	1.00170
93-94 + 0.601%	1.00601
94-95 + 1.450%	1.01450
95-96 + 1.262%	1.01262
96-97 + 3.571%	1.03571
97-98 + 2.326%	1.02326
98-99 - 0.235%	.99765
99-00 - 2.508%	.97492
00-01 + .884%	1.00884
01-02 + 5.657%	1.05657
02-03 + 1.13%	1.0113
03-04 - 2.31%	0.9769
04-05 + 5.34%	1.0534

TRUST DIST. % OF RENT	NAV. 15 %/100\$ 5846.75
FC Tide/Shore 20 % \$	
SC Tide/Shore 21 % \$	
Harbor Area 25 % \$	

Date 11-16-04 By John Price
 1) If use is log storage, the rent is \$344.27 per acre for July 1, 2003 to July 1, 2004. No parcel numbers are needed.

J:\Agency\DNR DOCS\AQR DDC\General Forms\ "WaterDependentRentCalcForm_FY 2004"

updated 4/17/2003

DUPLICATE

- 1. Lease Number 20-A12331
- 2. Name Youngquist Marina Inc.
- 3. County King
- 4. Acres 0.507
- 5. Previous Rent \$11,086.91
- 6. Current Revaluation Assessment Date 6/1/2005
- 7. Use Commercial Marina
- 8. Adjacent/Alternate Parcel Adjacent
- 9. If Alternate Parcel, why?

Parcel No.	4088804090	\$	938,300.00	26811	0.507	0.507
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Conversion of Acres to Sq Ft	Acres	Square Feet
Conversion of Sq Ft to Acres		22069

Remarks: Is the new water-dependent rate more than 50% increase from the previous rent? N
 If yes, do not increase the annual rents by more than 50% each year.

Are you collecting backrent Y/N? N
 Is the PPI or OPI applied?

Amount of back rent due? 0

Handwritten calculations:
 $13290.90 \times 1.0922 = 14494.0$
 $14494.0 - 11086.91 = 3407.09$

Date: 10-7-05
 Land Manager: Melissa Munday

1 acre = 43,560 sq. ft.

272, 6900 26

WATER-DEPENDENT RENT CALCULATION WORKSHEET

1. Lease Number 20-012241 5. UBI 1/1/1 TRANSPORTATION 7. Use¹ 8. Acres 546
 2. Name NOAA 6. DNR 1/1/1

3. County King 113.73 10. County King 11. Upland 113.73 12. Acres/ Sq. Ft. 307,704 13. Upland 15 14. Aquatic 4.50 15. Aquatic 546 16. Lease 2457 17. Rent @ 6.74%
 4. Previous Rent 113.73 Done on 3/4/03

1. 408880-2460 4,615,560 307,704 15 4.50 546 2457 165.60 For 3/1/01

3. 16560 x 1.05657 (PIE) = 174.97 For 3/1/02-3/1/03

Remarks: Is the new water-dependent rent more than a 50 percent increase from the previous rent? Yes No If yes, do not increase annual rents by more than 50 percent each year.

- 1) Back out RB 47428 and RB 51521 as incorrect rent calculations.
- 2) Create an IB for: 3/1/00 - 2/28/01 \$113.73 rent after PPI added (new) 3/1/01 - 2/28/02 \$165.60 rent next year 3/1/02 - 2/28/03 \$174.97 for year after PPI added
- 3) APPR COA to IB created
- 4) Create IB for 3/1/03 - 2/28/04 \$176.95 after PPI added

PPI Adjustments (Used only for Revaluation and PPI Adjustment Year)

85-86 + 2.375%	1.02375
86-87 - 0.483%	0.99517
87-88 - 2.014%	0.97086
88-89 + 2.365%	1.02635
89-90 + 3.990%	1.03990
90-91 + 4.958%	1.04958
91-92 + 3.654%	1.03654
92-93 + 0.170%	1.00170
93-94 + 0.601%	1.00601
94-95 + 1.450%	1.01450
95-96 + 1.262%	1.01262
96-97 + 3.571%	1.03571
97-98 + 2.326%	1.02326
98-99 - 0.235%	.99765
99-00 - 2.508%	.97492
00-01 + .884%	1.00884
01-02 + 5.657%	1.05657
02-03 + 1.13%	1.0113

TRUST DIST. % OF RENT	
NAV.	
15 %	\$
FC Tide/Shore	
20 %	\$
SC Tide/Shore	
21 %	\$
Harbor Area	
25 %	\$

This completes rent through the end of lease 3/4/03 Date 3/4/03 By Bill Kalle

1) If use is log storage, the rent is \$348.48 per acre for July 1, 2001 to July 1, 2002. No parcel numbers are needed. Form: J:\Agr/Data/Contracts/Master Merge/General Form/Aquatics Forms "WaterDependentRentCalcForm" updated 3/15/2002

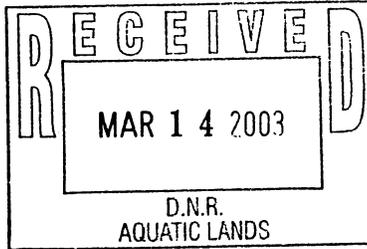
22-090025



WASHINGTON STATE DEPARTMENT OF
Natural Resources

DOUG SUTHERLAND
Commissioner of Public Lands

November 26, 2002



CERTIFIED MAIL

Mark Freeman
Gibson, Freeman, Messerly
1059 North Northlake Way
Seattle, WA 98103

SUBJECT: Notification of Revalued Rent Due for Aquatic Lands Lease No. 22-090025

Dear Mr. Freeman:

Your rent has been revalued for the next five (5) year period beginning January 1, 2003. This revaluation was conducted in accordance with Subsection 4 of your aquatic lands lease and the rent calculation methods used were established by the Legislature in RCW 79.90.

Because the assessed value of the upland parcel used to value your lease has decreased, your annual rent has decreased as well. Your annual base rent of \$28,511.16 will decrease to \$21,917.37, plus leasehold tax of \$2,814.19 for a total payment due of \$24,731.56.

A rental billing for your rent from January 1, 2003 to December 31, 2003 will follow under a separate cover. Bills are computer generated and mailed out approximately four (4) weeks before the bill is due. All amounts past due will be charged penalty pursuant to your lease agreement.

If you wish to appeal the amount of rent identified above, you must follow the procedure outlined in WAC 332-30-128 (copy enclosed). This procedure requires that within thirty (30) calendar days of your receipt of this letter, the department must have received your written request for review of rent containing all the requirements identified in the regulation. Please address your request to: Manager, Department of Natural Resources, Aquatic Resources Division, 1111 Washington Street SE, Olympia, WA 98504-7027.

If you have any questions, please contact me at (360) 825-1631.

Sincerely,

Lance Davisson (4)

Lance Davisson, Land Manager

OLYMPIA COPY

Enclosure

LUDD
IV-00663

c: Region File
Aquatic Resources file

gj/22090025Reval

2003 rent re-valuation
 comp. 11/5/02 JFD

1. Lease Number	22-090025	5. UBI	
2. Name	Gibson, Freema	6. DNR	
3. County	King	7. Use	1
4. Previous Rent	\$28,511.16	8. Acres	1.83
9. Current Reval. Assessment Date	2003	Square Feet	79,711.00
		Conversion Ft to A	1.830
			0

Parcel No	408880-2460	307743	064807	\$ 653,393.63	\$ 196,013.09	1.83	\$ 568,743.10	\$ 21,917.37
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Conversion of Acres to Square Feet	Acres	Square Feet	Rent + Tax
	1	43560	\$ 24,731.56

Remarks: Is the new water-dependent rate more than 50% increase from the previous rent?
 If yes, do not increase the annual rents by more than 50% each year.

Stair-step rents if more than 50% increase

Current Reval. Rent	\$21,917.37	Rent + LHT (w/o PPI)
Previous Rent	\$28,511.16	\$24,731.56
1st Year Rent	\$ 21,917.37	\$32,171.99
2nd Year Rent	\$ 21,917.37	\$24,731.56
3rd Year Rent	\$ 21,917.37	\$24,731.56
4th Year Rent	\$ 21,917.37	\$24,731.56

2003 re-valuation comparison for year 1983-1992

22-090025 term: Jan 1, 1983 - Dec 31, 1992	
re-val cycle (5yr) =	1983
	1988
	1993
	1998
	1978
	1983
	1988
	1993
	1998
	2003

2004 rent
 $\$ 21,917.37 \times (PPI) \cdot 97690 = \$ 21,411.08 + LHT$

→ 1997 holder's agent signed

1. Lease Number

- 2. Name
- 3. County
- 4. Previous Rent
- 9. Current Reval. Assessment Date

22-A09025	5. UBI
Gibson, Freeman, Messely	6. DNR
King	
n/a	2004

	1	2	3
7. Use	Vessel moorage		
8. Acres	1.83		
Square Feet	79,711.00		
Conversion Ft to A	1.830	0	0

10. County	11. Upland Value	12. Acres	13. Upland Value/Square Foot	14. Aquatic Value @ 50%	15. Aquatic Value @ 100%	16. Lease Value	17. Rent @ 8.25%
Parcel No. 408880-2460	\$ 7,693,500.00	307743	25.00	\$ 7.50	\$ 79,711.00	\$ 597,832.50	\$ 37,364.53
Conversion of Acres to Square Feet		Acres					
		1					43560

Rent + Tax \$ 42,162.14

* 2004 rent worksheet for base rent of new lease agreement

June 2005 "Snap Shot"
Lake Union Leases

NUMBER	LESSEE NAME	STATUS	USE 1	ANNUAL AMOUNT 1	USE 2	ANNUAL AMOUNT 2	BILLING INTERVAL	BILL START	WATER BODY	SIZE	UOM
20009684	MARY MARGARET FREEMAN	EXTEND	REPAIR	\$13,074.28		\$0.00	03	5/16/2005	LA UNION	30423	SQFT
20009689	MARY MARGARET FREEMAN	EXTEND	REPAIR	\$31,388.16		\$0.00	03	8/26/2004	LA UNION	1.52	ACRE
20010241	RWE FAMILY LLC	EXTEND	PRIVATE MARINA	\$6,646.37		\$0.00	12	9/1/2004	LA UNION	15000	SQFT
20010468	JOHN E NELSON	EXTEND	COMMERCIAL MARINA	\$6,287.34		\$0.00	12	5/1/2005	LA UNION	9109.5	SQFT
20010474	MARY MARGARET FREEMAN	EXTEND	COMMERCIAL MARINA	\$6,513.37		\$0.00	12	5/13/2005	LA UNION	9422	SQFT
20011007	LE CLERCO MARINE CONSTRUCTION	EXTEND	EXTEND	\$0.00		\$0.00	12	9/26/2001	LA UNION	3800	SQFT
20011046	ASSOC GENERAL CONTRACTORS	EXTEND	EXTEND	\$57,434.13		\$0.00	03	7/1/2004	LA UNION	2.44	ACRE
20011248	UNION BAY INVESTORS	SIGNED	COMMERCIAL MARINA	\$11,051.70		\$0.00	12	10/1/2004	LA UNION	18369	SQFT
20011445	CHINA SUN INCORPORATED	EXTEND	COMMERCIAL MARINA	\$16,774.00		\$0.00	12	3/15/2005	LA UNION	27860	SQFT
20011548	LAKE UNION BUILDING LLC	SIGNED	COMMERCIAL MARINA	\$39,831.82		\$0.00	12	7/15/2004	LA UNION	1.58	ACRE
20011716	ROANOK REEF BOAT MOORAGE ASSN	SIGNED	PUBLIC MARINA	\$10,483.14		\$0.00	12	7/15/2004	LA UNION	17424	SQFT
20011805	LAKE UNION WATERWORKS	EXTEND	PRIVATE MARINA	\$7,630.81		\$0.00	03	10/1/2004	LA UNION	15181	SQFT
20012104	NORTHLAKE MARINEWORKS INC	EXTEND	REPAIR	\$5,846.75		\$0.00	03	7/1/2004	LA UNION	13605	SQFT
20012228	COMMERCIAL MARINE	EXTEND	COMMERCIAL MARINA	\$16,462.35		\$0.00	03	1/20/2005	LA UNION	31350	SQFT
20012468	MON, LLC	EXTEND	COMMERCIAL MARINA	\$67,144.73		\$0.00	12	8/1/2004	LA UNION	101704	SQFT
20012577	DAVID HOLT CO., LLC	SIGNED	COMMERCIAL MARINA	\$2,933.75		\$0.00	01	4/1/2005	LA UNION	4657	SQFT
20012627	JOHN DUNATO & COMPANY	SIGNED	COMMERCIAL MARINA	\$11,604.84		\$0.00	12	10/1/2004	LA UNION	23502	SQFT
20012992	NORTHLAKE SHIPYARD INC	EXTEND	PRIVATE MARINA	\$31,395.94		\$0.00	12	1/1/2005	LA UNION	4.82	ACRE
20013246	OCEAN ALEXANDER MARINE CENTER,	SIGNED	REPAIR	\$6,396.29		\$0.00	01	9/16/2004	LA UNION	15000	SQFT
20013260	ASSOC GENERAL CONTRACTORS	EXTEND	COMMERCIAL MARINA	\$10,194.08		\$0.00	03	4/14/2005	LA UNION	9675	SQFT
20013482	MLU INC	EXTEND	RECC	\$7,643.73		\$0.00	12	1/1/2005	LA UNION	2149	SQFT
20013509	LAKE WASHINGTON ROWING CLUB	SIGNED	AO R/E	\$1,236.90		\$0.00	12	3/1/2005	LA UNION	1	ACRE
20013670	SEATTLE MARINA INC.	HOLD	COMMERCIAL MARINA	\$6,882.47		\$0.00	12	3/1/2005	LA UNION	17693.11	SQFT
20070698	WESTLAKE MARINA LLC	SIGNED	RECC	\$8,927.07		\$0.00	12	4/8/2005	LA UNION	73845	SQFT
20071103	JOEL & JULIE DIAMOND	SIGNED	COMMERCIAL MARINA	\$57,681.23		\$0.00	12	5/15/1999	LA UNION	8146.5	SQFT
20071223	WATERWORKS MARINE I LLC	SIGNED	COMMERCIAL MARINA	\$40,876.46		\$0.00	03	6/1/2004	LA UNION	0.93	ACRE
20072149	DIAMOND PARKING INCORPORATED	SIGNED	COMMERCIAL MARINA	\$6,354.72		\$0.00	12	4/1/2005	LA UNION	3120	SQFT
20A10144	BARNACLE POINT, LLC	SIGNED	TRANS	\$11,321.62		\$0.00	01	12/17/2004	LA UNION	21882	SQFT
20A10290	DIAMOND PARKING INCORPORATED	SIGNED	COMMERCIAL MARINA	\$32,227.44		\$0.00	12	3/1/2005	LA UNION	20822	SQFT
20A10916	PHOENIX MOORAGE	SIGNED	COMMERCIAL MARINA	\$21,312.41		\$0.00	01	4/1/2005	LA UNION	25995	SQFT
20A11096	CITY INVESTORS XIII, LLC	SIGNED	HB PRE 1984	\$1,576.61		\$0.00	12	6/1/2005	LA UNION	9670	SQFT
20A11488	YALE STREET MARINA, INC.	SIGNED	COMMERCIAL MARINA	\$20,657.01		\$0.00	01	3/1/2005	LA UNION	1.08	ACRE
20A12029	FAIRVIEW ASSOCIATES	SIGNED	PRIVATE MARINA	\$22,065.22		\$0.00	12	8/1/2004	LA UNION	4.67	ACRE
20A12140	TRC MARITIME PROPERTIES/MARINA	SIGNED	PUBLIC MARINA	\$9,594.75		\$0.00	01	3/18/2005	LA UNION	25800	SQFT
20A12178	NAUTICAL LANDING	SIGNED	COMMERCIAL MARINA	\$28,202.34		\$0.00	12	7/1/2005	LA UNION	1871	SQFT
20A12178	SEATTLE YACHT CLUB	SIGNED	NWD FILL	\$50,137.17		\$0.00	01	3/18/2005	LA UNION	26746	SQFT
20A12272	SEATTLE YACHT CLUB	SIGNED	PRIVATE MARINA	\$70,161.58		\$0.00	12	7/1/2005	LA UNION	10714	SQFT
20A12378	GEORGE POCOCK	SIGNED	PRIVATE MARINA	\$1,058.76		\$0.00	01	3/2/2005	LA UNION	17320	SQFT
20A12686	CITY INVESTORS XIV	SIGNED	COMMERCIAL MARINA	\$19,354.28		\$35,786.09	01	1/1/2005	LA UNION	18884	SQFT
20A13089	DIAMOND MARINA LLC	SIGNED	PUBLIC MARINA	\$6,446.08		\$0.00	12	7/2/2004	LA UNION	4697.5	SQFT
22090025	WESTLAKE LANDING PARTNERSHIP	SIGNED	COMMERCIAL MARINA	\$11,973.21		\$0.00	12	9/1/2005	LA UNION	1.88	ACRE
22090026	GIBSON FREEMAN & MESSERLY	EXTEND	PUBLIC MARINA	\$22,554.43		\$0.00	00	1/1/2005	LA UNION	11000	SQFT
22090027	CITY OF SEATTLE	SIGNED	COMMERCIAL MARINA	\$8,653.59		\$0.00	12	5/1/2005	LA UNION		
23077493	CITY OF SEATTLE	SIGNED	REPAIR	\$2,018.75		\$0.00	00	8/1/2004	LA UNION		
51RE0103	NORTHWEST YACHT BROKERS	SIGNED	TRANS	\$0.00		\$0.00	00		LA UNION		
	CITY OF SEATTLE	SIGNED		\$0.00		\$0.00	00		LK UNION		

Data Source: Access RTA Database
Data Date: Info as of June 2005

NO. 36374-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LAKE UNION DRYDOCK
COMPANY, INC.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

**CERTIFICATE OF
SERVICE**

I certify that on the 11th day of October, 2007, I caused a true and correct copy of DEPARTMENT OF NATURAL RESOURCES' RESPONSE BRIEF and this CERTIFICATE OF SERVICE to be served upon the parties herein, in the above-entitled action, as indicated below:

Eric R. McVittie
Markus B.G. Oberg
LE GROS BUCHANAN & PAUL
701 Fifth Avenue, Suite 2500
Seattle, WA 98104-7051

Attorneys for Appellant

- US Mail Postage Prepaid
- Certified Mail Postage Prepaid
- State Campus Mail
- ABC/Legal Messenger
- UPS Next Day Air
- Fax
- Hand Delivered

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

Dated this 11th day of October, 2007 at Olympia, Washington.


BARBARA TOMFORD
Legal Assistant
Natural Resources Division
(360) 586-3690