

NO. 35961-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BAINBRIDGE CITIZENS UNITED, a Washington nonprofit corporation;
and GARY TRIPP, Director of Bainbridge Citizens United,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES;
and DOUG SUTHERLAND, Commissioner of Public Lands,

Respondents

BRIEF OF APPELLANTS

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ORIGINAL

FILED 5-17-07

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
MAY 18 PM 1:35

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I. INTRODUCTION

The Washington State Department of Natural Resources (“DNR”) has turned a blind eye for decades to a fleet of approximately 70 vessels, approximately one-third of which are used for residential purposes, that have been and remain illegally moored in the open waters of Eagle Harbor. Appellants are owners and residents of residential waterfront and upland properties on Eagle Harbor and owners of waterfront businesses, restaurants and marinas on Eagle Harbor whose concerns about the harmful impacts from these illegally moored vessels in Eagle Harbor have gone unheeded by DNR. Consequently, the only option available to appellants to address this long-standing problem was to file a lawsuit to compel DNR to take action to enforce its statutory obligations to protect and manage state-owned aquatic lands against these trespassing vessels.

There is no dispute regarding certain key facts: (1) that DNR has long been aware of the illegal, long-term moorage of live-aboard and other vessels in the open waters of Eagle Harbor; (2) that such long-term moorage of such vessels is clearly prohibited by state law and DNR’s own regulations; (3) that DNR has no discretion to grant leases to such vessels under its own regulations; and (4) that such illegal use of state owned aquatic lands harms the public interest and use of such waters of the state.

Even assuming, as DNR claimed below, that it has discretion on *how* it enforces its regulations, there should be no doubt that this discretion does not extend to *whether* DNR must enforce such regulations, especially where, as here, the illegally moored vessels in Eagle Harbor are a long-term problem that DNR admits it has been aware of for decades. Further, even where state agencies have discretion to enforce their regulations, a failure to exercise that discretion will at some point become unlawful and actionable, a point DNR reached years ago. Finally, if as DNR claimed below, appellants do not have standing and do not present justiciable claims, if not appellants, then who can or will redress DNR's failure to protect the state owned waters of Eagle Harbor? And if not now, then when will such a controversy become justiciable?

Appellants are entitled to an order compelling DNR to take action against the illegally moored vehicles in Eagle Harbor. The trial court erred in refusing to grant such relief.

By granting DNR's motion for summary judgment, dismissing the action and denying appellants any relief, the trial court has in effect eliminated any hope or likelihood that a significant public harm will ever be addressed. This is reversible error.

II. ASSIGNMENTS OF ERROR

1. The Kitsap County Superior Court erred in granting Respondents' Motion for Summary Judgment and in denying Appellants' Cross-Motion for Summary Judgment.

2. The Kitsap County Superior Court erred in denying Appellants' Motion for Reconsideration.

Issues Pertaining to Assignments of Error

1. Does DNR have a mandatory duty under WAC 332-30-127 to take enforcement action against vessels illegally moored in Eagle Harbor in violation of WAC 332-30-171(8); and if so, has DNR failed to perform that duty?

2. Are Appellants entitled to declaratory and injunctive relief compelling DNR to initiate the requisite enforcement action against illegally moored vessels under WAC 332-30-127?

3. Do Appellants BCU have standing to challenge DNR's failure to enforce its regulations against illegally moored vessels in Eagle Harbor?

4. Has Appellants BCU alleged facts sufficient to establish a justiciable controversy under the Uniform Declaratory Judgment Act?

5. Are the owners and occupants of the illegally moored vessels in Eagle Harbor indispensable parties whose nonjoinder as parties requires dismissal of Appellants' claims?

III. STATEMENT OF THE CASE

Appellant Bainbridge Citizens United ("BCU") is a Washington non-profit corporation whose members include owners and residents of residential waterfront and upland properties on Eagle Harbor and owners of waterfront businesses, restaurants and marinas on Eagle Harbor, one of four natural harbors on Bainbridge Island. CP 349. Appellant Gary Tripp is its Director. *Id.*

A. The Chronic Problem of Illegally Moored Vessels in Eagle Harbor.

BCU and its members have become increasingly concerned about the unlawful trespass on state-owned aquatic lands in Eagle Harbor of live-aboard vessels and floating homes illegally moored in open water in Eagle Harbor. CP 350. The illegal long term moorage of these vessels on state-owned aquatic lands in Eagle Harbor has been an ongoing problem for more than 20 years. *Id.*

As far back as 1994, DNR was aware of and expressed concerns about unauthorized live-aboards in Eagle Harbor. CP 195-96. In 1999, DNR acknowledged that Eagle Harbor was one of only two known

locations of unauthorized anchorage areas of “anchor-out communities” using state owned aquatic lands. CP 198, 213. DNR also acknowledged the hazards to safe navigation, environmental issues, and other adverse impacts to the public’s use of and access to the state’s aquatic lands from such anchor out live-aboards in Eagle Harbor, impacts that resulted in requests from key state legislators and their waterfront constituents to solve the anchor-out problem in Eagle Harbor and remove the boats. CP 195-96, 198, 239.

As the number of illegal vessels has increased, the problem has become more acute. CP 350. As of 2005, there were 50 vessels, 7 rafts and 30 illegal buoys in Eagle Harbor, 22 of which were houseboats or other boats used as live-aboard residences. CP 351, 358. Today, there are still more than 50 vessels, in addition to the rafts and illegal buoys. CP 354.

With the chronic and increasing unauthorized use of state-owned aquatic lands in Eagle Harbor has come an increase in environmental impacts from such use, including the following:

- Property owners on the south side of Eagle Harbor have had their DNR leased buoys encroached upon by the illegally moored boats, thereby depriving them of use of their leased buoys. CP 6, 416-17.

- The illegally moored vessels have interfered with and prevented recreational use of Eagle Harbor and blocked and created hazards to navigation in the Harbor, resulting in diminished recreational use of the Harbor by BCU members and declining numbers of customers and loss of business to waterfront retail businesses, restaurants, and marinas in Eagle Harbor. CP 6, 399-400, 410-11, 413.
- The illegally moored vessels and vessel owners and live-aboards have dumped sewage and trash into the harbor. CP 350-51, 400, 404, 412-13.
- When waterfront property owners complained to the City of Bainbridge Island and to the DNR about the illegal trespass and dumping of sewage and trash into the harbor, the shore side residents have been verbally harassed and have had their property vandalized and their physical safety threatened. CP 350-51, 398, 404.
- The unsightly collection of derelicts, boats and boat houses in Eagle Harbor has adversely affected the view of Eagle Harbor and has had a negative impact on property values and marketability of properties surrounding Eagle Harbor. CP 351, 399-400, 403-04, 412-13.

B. DNR Enforcement Authority Over Illegally Moored Vessels.

In 1984, with enactment of the Aquatic Lands Management Act (“ALA”), the Washington legislature delegated to DNR the responsibility for managing state owned aquatic lands for the benefit of the public. RCW 79.105.010. This management responsibility includes the “power to lease state-owned aquatic lands.” RCW 79.105.210(4). It also includes the authority to make such rules as are necessary to carry out these responsibilities. RCW 79.105.360.

In 2002, DNR promulgated new regulations governing residential uses of state-owned aquatic lands to address and guide DNR’s exercise of its leasing authority with regard to residential uses, both floating houses and vessels used as a residence, on state-owned aquatic lands. CP 257. These regulations were promulgated as the result of concerns and disputes that had continued to arise since passage of the 1984 Aquatic Lands Management Act over floating residences’ impacts and effects on safety, navigation, water pollution, public access to the water, and the historical nature of the use. CP 258.

The 2002 regulations, codified in Chapter 332-30, WAC, prohibit open water moorage of vessels used for residential use on state aquatic lands, subject to certain exceptions. WAC 332-30-171(8). The exceptions

are for vessels moored at marinas, piers or similar fixed moorage facilities connected to the shoreline or for vessels moored at an “open water moorage and anchorage area” established by a local government in its shoreline master program within five years from the effective date of the rule and leased by the local government from DNR. *Id.*; WAC 332-30-139.¹ The regulations provide enforcement procedures for unauthorized use of state owned aquatic lands, which include a one-year grace period for trespassing vessels moored on state aquatic lands at the time of the effective date of the rules, and a requirement that the trespassing vessel otherwise vacate the site. WAC 332-30-171(8)(b).

DNR’s promulgation of the 2002 regulations reflect and implement three central purposes of the regulations: (1) to eliminate or restrict non-water dependent residential use of state-owned aquatic lands; (2) to facilitate use of state owned aquatic lands for water dependent uses; and (3) to address environmental impacts from residential use of state owned aquatic lands. CP 311-21.

C. DNR’s Refusal to Take Enforcement Action.

Notwithstanding the fact that the DNR has been aware of the trespassing vessels in Eagle Harbor for decades, the DNR has failed to

¹ For such vessels, the regulations also provide mandatory requirements for lessees that address waste disposal, including methods to handle the upland disposal of sewage, oil and toxic substances, solid waste, and gray water and best management practices for the increased waste associated with residential use. WAC 332-30-171(4)-(5).

take any enforcement action against any of these vessels. CP 354. This lack of any enforcement action against illegally moored vessels in Eagle Harbor has continued since DNR's promulgation of its new residential use regulations in 2002, up to and including the present. *Id.*

After awaiting action by DNR, nearly three years after promulgation of the DNR regulations, on February 13, 2005, Mr. Tripp, on behalf of BCU, notified DNR via electronic mail of the presence of the approximately 50 vessels, 3 rafts and 30 buoys trespassing on state-owned aquatic lands in Eagle Harbor, 22 of which were being used for residential purposes. CP 351. Mr. Tripp also requested a meeting with the State Commissioner of Public Lands, Doug Sutherland, to discuss DNR's enforcement obligations with respect to these trespassing vessels. *Id.*

On February 23, 2005, Mr. Tripp informed DNR via electronic mail that it had completed a detailed survey of the trespassing vessels, and had counted "87 boats, houseboats, rafts and buoys trespassing on DNR land," including 22 houseboats and other boats with live-aboard occupants. CP 351, 358-73. Mr. Tripp again requested a meeting with Mr. Sutherland to discuss DNR's enforcement obligations with respect to the trespassing vessels. CP 351.

On March 14, 2005, Mr. Tripp met with Mr. Sutherland and several other officials from DNR and the Office of the Attorney General

of Washington. CP 351-52. At this meeting, Mr. Tripp requested that DNR enforce its regulations against the unauthorized use of the waters of Eagle Harbor by the trespassing vessels. *Id.* Mr. Sutherland informed Mr. Tripp that he would provide a list of steps required for removing boats trespassing on state aquatic lands to Mr. Tripp. *Id.*

Instead of providing the requested list of steps for removing the trespassing boats, however, on March 28, 2005, Mr. Tripp received a letter from Ms. Christa L. Thompson of the Office of the Attorney General of Washington officially informing him that DNR would not enforce its own rules and regulations against the trespassing vessels. CP 352. In the letter, Ms. Thompson stated:

DNR's authority to enter into leases and otherwise authorize the use of state-owned aquatic lands is discretionary. In this particular case, DNR has decided to work with the City of Bainbridge Island to develop a Harbor Plan. The purpose of the Harbor Plan is to involve the local community and local government in addressing the problem of long-term moorage in Eagle Harbor. While Mr. Tripp may disagree with DNR's approach, it is still within the discretion of DNR to try to solve this problem by working with local authorities.

CP 374.

In a subsequent email, Mr. Tripp informed Ms. Thompson that BCU was not seeking to compel DNR to lease aquatic lands, but instead was requesting that DNR enforce its own regulations against “unauthorized used of aquatic lands.” CP 352. Mr. Tripp also requested the information promised him by Mr. Sutherland regarding the steps required for removing the boats trespassing on state aquatic lands. *Id.* In an April 6, 2005 response, Peggy Murphy of DNR sent Mr. Tripp an email on Mr. Sutherland’s behalf denying that DNR had stated at the meeting that it would identify steps to enforce trespass regulations in Eagle Harbor. *Id.* Mr. Tripp’s subsequent email that same day to Mr. Sutherland requesting the information promised him at the March 14, 2005 meeting was never answered. *Id.*

D. Failure to Establish an Eagle Harbor Open Moorage Area.

The City of Bainbridge Island has also long been aware of the problem of long term open water moorage of liveaboard vessels in Eagle Harbor. For instance, its Shoreline Master Program prohibits “live-aboard” vessel use in waters of the state subject to regulation under the Shoreline Management Act. BIMC §16.12.260(18).

In 1998, the City adopted regulations that would allow those live-aboard vessels which were present in City waters on September 7, 1998,

or were registered with the City on or before September 7, 1998, to remain in Eagle Harbor, but only at the anchorage location or locations designated by the City Council upon recommendation of the Harbor Commission. BIMC §12.40.080(C), (D). Under these City regulations, any such vessels must register with the City and pay a registration renewal fee. BIMC §12.40.080(E). Those vessels which are not permitted to remain in Eagle Harbor may apply to the City Clerk for live-aboard vessel registration on a first-come, first-serve basis, provided that no additional live-aboard vessels would be permitted to register with the City or to moor or anchor in Eagle Harbor unless and until the future number and permitted location of live-aboard vessels in Eagle Harbor have been determined by the City Council. BIMC §12.40.080(H).

In 1999, the City Council directed the Bainbridge Island Harbor Commission to designate an open water anchoring and mooring area in Eagle Harbor for recreational vessels and citizens who wish to live aboard vessels in accordance with BIMC §12.40.080. CP 113. The City has never established such an open water anchoring and mooring area in Eagle Harbor under its regulations, however. CP 353.

Three years after DNR adopted regulations prohibiting long-term open water moorage for residential purposes on state owned aquatic lands unless within an authorized open water moorage and anchorage area

established by a city in its shoreline master program and leased from DNR, in March 2005, the City of Bainbridge Island Harbor Commission prepared the Eagle Harbor Anchoring and Mooring Plan. CP 111. The 2005 Eagle Harbor Plan proposes establishment of an open water anchoring and mooring area within Eagle Harbor for transient, short-term and long-term use of vessels, including long-term residential use. CP 114. Inexplicably, the 2005 Plan has not been adopted by the City Council or implemented by the City. CP 353. Further, no amendments to the City's Shoreline Master Program to establish the open water anchorage and mooring area in Eagle Harbor have been proposed or adopted. *Id.* Any authority to establish an open water anchorage and mooring area in Eagle Harbor expires on November 17, 2007. WAC 332-30-139(5).

E. BCU Sues to Compel DNR to Evict Trespassing Vessels.

After DNR's refusal to take any enforcement action against the trespassing Eagle Harbor vessels, and with no City solution on the table, in September 2005, BCU filed an action for declaratory and injunctive relief. CP 1-17. In its action, BCU asked for an order declaring that the trespassing vessels are illegally moored in Eagle Harbor in violation of WAC 173-30-139, that DNR has unlawfully failed to enforce this regulation against the trespassing vessels, and that DNR has a mandatory duty to do so under WAC 332-30-127 by: (1) serving notice in writing to

the trespassing vessel owners requiring them to vacate the premises within thirty days; (2) collecting a “use and occupancy fee” from the trespassing vessel owners as of the date of notification; and (3) filing an unlawful detainer action against the party in trespass filed along with an action to collect past due rent. *Id.* BCU also requested an order enforcing the declaration. *Id.*

On September 8, 2006, DNR filed a motion for summary judgment for dismissal of BCU’s claims, alleging lack of a justiciable controversy, lack of standing, failure to name indispensable parties (the trespassing vessel owners), and claiming that DNR’s enforcement obligations are discretionary. CP 30-59. BCU cross moved for summary judgment on their claims for declaratory and injunctive relief. CP 161-91.

Following oral argument, the trial court issued a letter ruling on November 28, 2006, and a final order on January 18, 2007, granting DNR’s motion for summary judgment, and denying BCU’s motion for summary judgment. CP 549-52. Neither the letter ruling nor final order indicates a basis or rationale for the trial court’s order on summary judgment. *Id.*

On January 29, 2007, BCU filed a motion for reconsideration requesting clarification, which was denied. CP 553. This appeal followed.

IV. STANDARD OF REVIEW

On appeal from summary judgment, this Court engages in the same inquiry as the trial court. *Hodge v. Raab*, 151 Wn.2d 351, 88 P.3d 959 (2004) (citing RAP 9.12). After considering all evidence and reasonable inferences in the light most favorable to the nonmoving party, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing CR 56(c)).

In this case, by filing cross motions for summary judgment, the parties admit that there is no genuine issue as to any material fact. Further, the Court reviews the legal issues under a de novo standard of review. *Herron v. Tribune Publ'g Co., Inc.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987). While the issues raised by the parties were appropriately determined by summary judgment, the trial court erred in granting DNR's motion for summary judgment instead of BCU's.

V. ARGUMENT

A. **DNR Has a Mandatory, Nondiscretionary Duty to Take Action Against Trespassing Vessels in Eagle Harbor.**

By granting DNR's motion for summary judgment and denying BCU's, the trial court apparently held that DNR has no obligation or duty to enforce its own regulations against the trespassing vessels in Eagle

Harbor, or that even if it had such a duty, its exercise of that duty was discretionary and unenforceable. Either interpretation is reversible error.

1. DNR’s Regulations Create a Mandatory Duty to Take Action Against Trespassers on Public Aquatic Lands.

DNR has promulgated regulations to implement its management responsibility over state owned aquatic lands. *See* WAC 332-30.

Relevant to this dispute, the residential use of vessels on state-owned aquatic lands is governed by WAC 332-30-171 (aptly titled “Residential uses on state-owned aquatic lands”).

Under WAC 332-30-171(8)(a), “vessels used for residential use” and “floating houses” must be moored, anchored, or secured at one of two locations: (1) a marina, pier, or similar fixed moorage facility; or (2) at an “open water moorage and anchorage area” pursuant to WAC 332-30-139(5). With the exception of emergency situations, this requirement is a strict prohibition, as the regulations make clear:

Vessels used for residential use and floating houses ***shall not*** be moored, anchored or otherwise secured in open water above state-owned aquatic lands away from a fixed moorage facility that is connected to the shoreline, nor be moored, anchored, or otherwise secured to any natural feature in the water or on the shoreline, except within an open water moorage and anchorage area.

WAC 332-30-171(8)(a) (emphasis added).

A vessel that could not or failed to comply with the above requirements was granted a one-year grace period from the effective date of the rule, at which time the vessel was required to “vacate the site” if still in non-compliance. WAC 332-30-171(8)(b). The effective date of the rule was November 17, 2002. Thus, as of November 17, 2003, *any* current residential use of vessels on state-owned aquatic lands not in compliance with the explicit provisions of WAC 332-30-171(8)(a) is unauthorized and constitutes trespass.

DNR does not deny the applicability of the enforcement provisions of WAC 332-30-127 in the present case; instead, DNR argues that its obligations under the WAC are discretionary, that it has no mandatory duty to enforce the provisions of the WAC. This position, however, ignores the plain language of its own regulations, which impose a nondiscretionary duty upon DNR to act in accordance with its provisions.

Most notable is what these regulations do not provide. Nowhere do the enforcement regulations state, suggest, or in any way imply that the duty imposed on DNR in WAC 332-30-127 can be exercised at the discretion of the DNR. Nor do the regulations that the DNR seek to avoid having to enforce in WAC 332-30-171(8) contain any nonmandatory or discretionary language or otherwise suggest that the mandatory language in the regulations are intended to be other than mandatory. By its own

regulations, DNR is legally obligated to enforce its regulations against vessels trespassing on state owned aquatic lands in Eagle Harbor.

In fact, DNR's regulations direct how enforcement will occur. Upon discovery of an unauthorized use of state-owned aquatic lands, DNR's own regulations require it to "immediately notify" the "responsible party" of his or her status as an unauthorized user. *See* WAC 332-30-127. If the use will not be authorized by DNR, DNR has the following duties: (1) to serve notice in writing to the trespassing vessel owners requiring them to vacate the premises within thirty days; (2) to collect a "use and occupancy fee" from the trespassing vessel owners as of the date of notification; and (3) to file an unlawful detainer action against the trespassing vessel owners, along with an action to collect past-due rental. WAC 332-30-127.

Notwithstanding its mandate and the unequivocal dictates of its own regulations, DNR takes the position that the language in its regulations should be construed to be merely directory or permissive—i.e., that "shall" or "will" should be interpreted to mean "should" or "may." The problem with this argument is that neither the language of the regulations themselves nor case law support the agency's argument.

For example, in *Faunce v. Carter*, the Court stated:

With reference to powers and duties imposed by statute on public officers, it is often difficult to determine whether they are mandatory or merely directory. ***Generally speaking, however, where the provisions affect the public interest*** or are intended to protect a private citizen against loss or injury to his property, ***they are held to be mandatory rather than directory.*** Always, however, the prime consideration is the intent of the legislature as reflected in its general, as well as its specific, legislation upon the particular subject.

Faunce v. Carter, 26 Wn.2d 211, 215, 173 P.2d 526 (1946) (quoting *Spokane County ex. rel. Sullivan v. Glover*, 2 Wn.2d 162, 97 P.2d 628 (1940)) (emphasis added) (citations omitted). The Court in *Faunce v. Carter*, then went on to apply these legal principles by holding that the word “shall,” as repeatedly used in the tax statute at issue, was employed in its mandatory sense, imposing an imperative duty upon the county treasurer to enforce certain statutory obligations because not only does “the entire section lay a positive injunction upon the treasurer, but it also directly affects the public interest. . . .” *Id.*

The same is true here. Both the enforcement regulations, WAC 332-30-127, and the regulations DNR seeks to avoid having to enforce, WAC 332-30-171(8), repeatedly and consistently use mandatory

terms (“will”, “must”, and “shall”). Thus, as in *Faunce v. Carter*, they should be interpreted consistent with their use in the regulations.

Moreover, as in *Faunce v. Carter*, the regulations at issue here directly affect the public interest. The regulations prohibiting open water moorage of vessels for residential uses were promulgated to protect against unauthorized use of state owned aquatic lands by liveaboard vessels, and the impacts from such use to state owned aquatic lands. CP 311, 331-40. In fact, one of the very problems the regulations at issue were promulgated to address was the long-standing, illegal anchor out community in Eagle Harbor, one of only two in the state at the time the 2002 regulations were promulgated by DNR. CP 201, 213. They were thus intended to protect an important public interest, the management of the state-owned aquatic lands for the benefit of the public. RCW 79.105.010. The provisions of WAC 332-30-127 and WAC 332-30-171(8) create mandatory enforcement obligations upon DNR to take action against the trespassing vessels in Eagle Harbor.

2. DNR Has Failed to Act in Accordance With the Mandatory Requirements of Its Own Regulations.

DNR does not deny that there are trespassing vessels in Eagle Harbor, nor can it. At the present time, there are approximately 21 vessels in Eagle Harbor that are either “vessels used for residential use” or

“floating houses” within the meaning of WAC 332-30-106, in addition to dozens of other trespassing boats, rafts, and mooring buoys. CP 354. As DNR admits, these vessels are illegally moored in Eagle Harbor in violation of WAC 332-30-171. *See* CP 25. They are not moored within an authorized “open water moorage and anchorage facility,” nor are they moored in an authorized “marina, pier, or similar fixed moorage facility.” WAC 332-30-171. Consequently, the vessels are in violation of WAC 332-30-171(8)(b). Furthermore, the vessels did not vacate their sites within one year of the effective date of the 2002 regulations; therefore, they are trespassing on state-owned aquatic lands.

DNR also does not deny that it has failed to take action against these trespassing vessels, notwithstanding the fact that it has known about the illegal anchor out community of liveaboard vessels in Eagle Harbor for years; nor can it. DNR’s awareness of the illegal anchor out community in Eagle Harbor is well documented in DNR’s own records. *See* CP 195-96, 198, 201-48.

Thus, despite this longstanding and blatant violation of WAC 332-30-171(8)(b), DNR has utterly failed to take any action against the trespassing vessel owners in Eagle Harbor as required by WAC 332-30-127(2), thereby choosing to abrogate its clear duties under its own regulations. Not only has DNR failed to collect a use and occupancy fee

and file an action in unlawful detainer against the owners of the vessels, it has even failed to perform its most basic duty to serve the owners of the vessels with a notice in writing that they are trespassing. WAC 332-30-127(2).

B. BCU Is Entitled to Judicial Relief for DNR’s Failure to Enforce Its Regulations Against the Trespassing Vessels in Eagle Harbor.

Under RCW 7.24.020 and RCW 7.24.050, BCU is entitled to a judgment declaring DNR’s duties and obligations regarding enforcement of the requirements of WAC 332-30-127. In relevant part, the Uniform Declaratory Judgment Act (“UDJA”) provides as follows:

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020.

BCU and its members are interested persons within the meaning of the UDJA on their status as legal user of the public waters within Eagle Harbor. DNR’s failure and continuing refusal to enforce WAC 332-30-127 has harmed BCU and its members, and has created controversy and

uncertainty regarding the legal status of the trespassing vessels in Eagle Harbor. A declaratory judgment will terminate the controversy and remove this uncertainty. Thus, under the UDJA, BCU is entitled to an order declaring that DNR has failed to perform its legal obligation under its own regulations to take enforcement action against trespassing vessels in Eagle Harbor and compelling to take such action.

BCU is also entitled to injunctive relief under RCW 7.24.080, which authorizes a court to grant further relief based on a declaratory judgment “whenever necessary or proper.”

Washington courts have held that “the combining of declaratory and coercive relief is proper and even common,” and “merely carries out the principle that every court has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective.”

Ronken v. Board of County Comm’rs of Snohomish County, 89 Wn.2d 304, 311-12, 572 P.2d 1 (1977). In *Ronken*, the Court reviewed a trial court decision which declared that certain competitive bidding practices in Snohomish County were illegal and which imposed injunctive relief to assure that the practices ceased because of “continuing abusive practices by Snohomish County, violative of the statutory mandate.” *Id.* In upholding the trial court’s grant of injunctive relief in a declaratory judgment action, the Supreme Court held that a basis for injunctive relief

to enforce a declaratory ruling exists where there is sufficient proof of irreparable and continuing injury were the governmental practices at issue in the case allowed to continue, and the legal remedy is inadequate. *Id.*

The same is true here. DNR has failed to initiate even one code enforcement proceeding against any of the trespassing liveaboard vessels in Eagle Harbor, notwithstanding their unauthorized presence in the Harbor for decades. Nor have they even sent notices to any of the vessel owners informing them of their unauthorized use of state owned aquatic lands, as required by WAC 332-30-127. As in *Ronken*, BCU has no adequate legal remedy against the trespassing vessels: only DNR has authority to enforce its residential use regulations, including assessment of use and occupancy fees and institution of court proceedings to compel removal of the vessels from state aquatic lands. Also as in *Ronken*, BCU and its members have been and continue to be irreparably harmed by the DNR's failure to enforce its residential use regulations.

Consequently, not only should the trial court have held that DNR failed to perform its mandatory duty under WAC 332-30-127 to (1) serve notice in writing to the trespassing vessel owners requiring them to vacate the premises within 30 days; (2) collect a "use and occupancy fee" from the trespassing vessel owners as of the date of notification; and (3) file an unlawful detainer action against the party in trespass filed along with an

action to collect past due rent, the court should also have entered an order compelling DNR to initiate immediately enforcement action against the trespassing vessels in Eagle Harbor, and to exercise continuing jurisdiction to ensure that such proceedings are initiated forthwith. Its failure to do so was reversible error.

Notwithstanding DNR's clear duty under its own regulations to take enforcement action against the illegally moored vessels in Eagle Harbor, and its utter failure to do so, DNR has sought to justify its failure by attempting to hide behind its discretionary leasing authority under RCW 79.105.210(4), and state and federal case law that limit judicial review of an agency's exercise of its enforcement powers. Neither justifies DNR's inaction in this case.

- 1. DNR Lacks Discretion to Lease State Owned Aquatic Lands to the Trespassing Vessels in Eagle Harbor.**

DNR cannot avoid its mandatory duty under its own regulations to take enforcement action against trespassing vessels in Eagle Harbor by alleging discretion to enter into leases with such vessels; for none exists. Regarding vessels used for residential uses, the enforcement obligations of WAC 332-30-127 are mandatory because DNR has no discretion to enter into leases for such uses under WAC 332.30.171(8)(a) ("Vessels used for residential use and floating houses *shall not* be moored, anchored or

otherwise secured in open water above state-owned aquatic lands away from a fixed moorage facility that is connected to the shoreline, nor be moored, anchored, or otherwise secured to any natural feature in the water or on the shoreline, except within an open water moorage and anchorage area.”) (emphasis added).

And for the other illegally moored vessels in Eagle Harbor used for non-residential purposes, even if DNR has discretion to enter into leases with such vessels, it has not done so and apparently has no intention of doing so. CP 354. At the very least, as to these vessels, DNR should be compelled to exercise its discretion, assuming it has any to lease the open waters of Eagle Harbor for long term anchorage of vessels that are not used for residential purposes.

2. DNR’s Failure to Take Any Enforcement Action Is Subject to Judicial Review.

While courts have held that state agencies have discretion to enforce their regulations, *e.g.*, *National Elec. Contractor’s Ass’n v. Riveland*, 138 Wn.2d 9, 978 P.2d 481 (1999), judicial relief is generally available where, as here, an agency has consistently failed to enforce a statute or has otherwise acted arbitrarily and capriciously in failing to follow its own regulations. *E.g.*, *Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973); *Children’s Hosp. & Med. Center v. Washington*

State Dept. of Health, 95 Wn. App. 858, 871, 975 P.2d 567 (1999). If not reviewable, there is no legal remedy to protect the public interest.

In *Adams v. Richardson*, African-American students claimed that the responsible federal agency had failed to “take[] appropriate action to end segregation” under a federal statute that gave the agency two ways in which it could enforce the law, including by seeking “voluntary compliance,” for which no time limit was set. 480 F.2d at 1163. The court found that the agency was not relieved of its statutory duty merely by requesting voluntary compliance if it was not followed by responsive action within a reasonable time. *Id.*

Similarly, in this case, the state legislature has unequivocally delegated “the responsibility to manage [state-owned aquatic lands] for the benefit of the public.” See RCW 79.05.010. In the face of decades of illegal trespasses on the state-owned aquatic lands in Eagle Harbor, DNR has taken no remedial action. In failing to act, it has abdicated its statutory duty to “manage” these public lands. Such inaction is arbitrary and capricious.

Further, DNR’s drastic, unexplained shift in the agency’s policy since the regulations were promulgated is, in itself, arbitrary and capricious. In reviewing agency action, federal courts have found a such

policy shift to be arbitrary and capricious unless the agency provides a reasoned analysis for the change.

For example, in *Fund for Animals v. Norton*, the U.S. District Court of the District of Columbia heard a challenge to a change of policy by the National Park Service (NPS) regarding the use of snowmobiles in national parks. 294 F. Supp. 2d 92 (D.D.C. 2003). The challenge was to the NPS's reversal of its 2001 rule, which, "explicitly citing the negative environmental impacts of snowmobiling . . . mandated that snowmobiling be phased out in favor of snowcoaches." *Id.* at 105. Three years later, just when the phase-out was almost complete, the NPS promulgated a rule that allowed 950 snowmobiles to enter the Parks each day. *Id.* The court found that the "180 degree reversal from a decision on the same issue made by a previous administration . . . represent[ed] precisely the 'reversal of the agency's views' that triggers [its] responsibility to supply a reasoned explanation for the same." *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 57, 103 S. Ct. 2856 (1983) (holding the National Highway Traffic Safety Administration acted arbitrarily and capriciously in revoking motor vehicle passive restraints requirements without supplying a "reasoned analysis" of its decision)). The *Fund for Animals* Court then found that the NPS had not met its obligation to

explain its 180 degree reversal in policy, and that the unreasoned change was thus “quintessentially arbitrary and capricious.” *Id.* at 108.

In this case, DNR promulgated regulations that definitively decided how to deal with trespassers on certain state lands. Now DNR refuses to follow these regulations. As the U.S. Supreme Court noted in *State Farm*, “[a]n agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.” 463 U.S. at 57.

Here, much like the NPS’s action in the *Fund for Animals* case, DNR has not even attempted to justify its change of course between promulgation of the regulations at issue, and its subsequent flouting of the same. Much like the NPS’s change of course in the *Fund for Animals* case, this 180 degree policy reversal—if it is not justified in some way—is arbitrary and capricious.

To justify its inaction, DNR relies upon *Riveland*, 138 Wn.2d 9, 978 P.2d 481 (1999). In that case, the Washington State Supreme Court cited the leading United States Supreme Court case of *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985), for the proposition that, in the context of agency decisions not to undertake enforcement action, the presumption is that judicial review is not available.

However, *Heckler* and *Riveland* are inapposite because in both of these cases, the agencies involved had broad enforcement authority that was granted by statute. The *Riveland* court noted the breadth of this statutory grant of power before finding that “[a]s a practical matter, decisions associated with exercising these enforcement powers are discretionary.” *Riveland*, 138 Wn.2d at 31. And in *Heckler*, the U.S. Supreme Court also based its finding of unreviewability on a legislative intent to commit certain decisions to an agency’s discretion. 470 U.S. at 832 (finding that “an agency’s decision not to take enforcement action should be presumed immune from judicial review” in part because “such a decision has traditionally been ‘committed to agency discretion.’”) (citing 5 U.S.C. § 701, which precludes judicial review of agency action “committed to agency discretion by law”).

In this case, no statute grants DNR broad enforcement authority to take enforcement action against trespassing vessels. Nor is there any other indication that the legislature intended to vest DNR with any broad, unreviewable discretion to implement its statutory mandate to manage state owned aquatic lands. Thus neither *Heckler* nor *Riveland* support DNR’s position that it has discretion to ignore its own regulations.²

² *Heckler* can also be distinguished on another basis. The Court, in *Heckler*, was careful to note that this presumption against reviewability was rebuttable “where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement

Riveland is also inapplicable because, unlike DNR in this case, the agency in *Riveland* actually exercised the discretion its enforcement regulations gave it. In the case at bar, DNR has ignored them, refusing to take even the first step required under the enforcement regulations: to send a written notice of unauthorized use to any of the offending vessel owners. In *Riveland*, the Court's decision not to compel enforcement was based on the fact that the specific discretionary decision made by the State Department of Licensing ("DLI") not to enforce the electrical licensing statute against the Department of Corrections ("DOC") for its use of inmate labor was appropriate and not arbitrary and capricious. As the Court found:

Here, there is no question that DLI has exercised its discretionary authority in deciding not to enforce the electrical licensing, WISHA, and prevailing wage laws against DOC. The record indicates that DLI's historical approval of inmates' electrical work on prison facilities, and the agency's decision not to enforce the statutes, were decisions based on the agency's determination that those statutes were inapplicable to DOC's statutory authority to utilize inmate labor. To the extent that DLI believed it could enforce electrical licensing

powers." 470 U.S. at 832-33. Here such guidelines are provided for DNR to follow in exercising its enforcement powers: The steps DNR must take to enforce its regulations against trespassing vessels on state owned aquatic lands are very specifically and carefully laid out and proscribed in WAC 332-30-127 and WAC 332-30-171(8). So also is the discretion that DNR is allowed to exercise under these provisions. Any presumption of discretion is rebutted by the enforcement regulations themselves.

standards over DOC, the record indicates that in addition to conducting inspections of electrical work at prison facilities, DLI has also required DOC to obtain electrical installation permits.

Riveland, 138 Wn.2d at 32. In other words, there was a defensible basis for DLI's decision not to enforce its electrical licensing regulations against prison inmates under the particular facts and circumstances of that case. Here, there is no such defensible basis for DNR's failure to enforce its regulations against the trespassing vessels in Eagle Harbor.

Instead, DNR has consistently and arbitrarily and capriciously failed to enforce its own regulations against trespassing vessels in Eagle Harbor. Such inaction is judicially reviewable.

C. DNR's Failure to Enforce Its Own Regulations Violates the Public Trust Doctrine.

DNR's long-standing and intentional failure to enforce its adopted regulations against trespassing vessels in Eagle Harbor violates the public trust doctrine. The public trust doctrine protects "public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation, and environmental quality." *Weden v. San Juan County*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998) (quoting Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521,

524 (1992)). Because of the “universally recognized need to protect public access to and use of . . . [aquatic resources],” courts undertake review under the doctrine “with a heightened degree of judicial scrutiny.” *Id.* at 698 (internal quotations and citations omitted). Indeed, the level of scrutiny is so high that it is “as if they were measuring the legislation against constitutional protections.” *Id.*

The test of whether the public duty doctrine has been violated is

(1) whether the state, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by doing so the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it.

Caminiti v. Boyle, 107 Wn.2d 662, 670, 732 P.2d 989 (1987).

In this case, DNR, by allowing the trespassing vessels to remain in Eagle Harbor for over 20 years, has completely given up its right of control of those waters. DNR has allowed the moorage and anchorage of the trespassing vessels to continue without *any* regulation. In all but title, the trespassing vessels exercise full dominion over the public aquatic lands in question. Thus, by its inaction, DNR has completely relinquished control over a substantial portion of the Middle Harbor area of Eagle Harbor to vessels and vessel-owners that occupy and control this portion of Eagle Harbor for their private and exclusive use and enjoyment. There

could be no more complete relinquishment of control than if DNR sold the area to the squatters. While the private interests of a handful of individuals have been furthered by being allowed to remain, rent-free, on lands that belong to all, absolutely no benefit accrues to the public at large.

In addition, the illegally moored vessels have substantially impaired the interests of the public. The navigational hazards, environmental degradation (including the dumping of sewage), reduced availability of recreational use, and aesthetic impairment are all well documented in the record. CP 397-418.

DNR's failure to enforce its regulations against the trespassing vessels in Eagle Harbor violates the public trust doctrine and also justifies the declaratory and injunctive relief sought by BCU.

D. BCU's Request for Declaratory and Injunctive Relief Is Justiciable and BCU Has Standing to Maintain It.

DNR sought dismissal of BCU's request for declaratory and injunctive relief based in part on its claim that BCU had not alleged facts sufficient to establish a justiciable controversy. CP 52. To the extent the trial court granted DNR's motion for summary judgment on this ground, the court erred.

For declaratory judgment purposes, a justiciable controversy is:

(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Walker v. Munro, 124 Wn.2d 402, 411, 879 P.2d 920 (1994).

In this case, BCU alleged facts sufficient to establish a justiciable controversy. There is an actual and present dispute over DNR's duty to enforce its regulations against trespassing vessels in Eagle Harbor, DNR and BCU have genuine and opposing interests, which involve interests that are direct and substantial because of the harm to BCU and its members, and a judicial determination of which will be final and conclusive: it will establish the duty of the DNR to enforce its regulations against trespassing vessels in Eagle Harbor and compel DNR to take action for their removal.

A justiciable controversy is an "actual and not hypothetical dispute;" it exists if the parties have "direct and substantial opposing interests in the dispute requiring a final and conclusive judicial determination." *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858,

103 P.3d 244 (2004), *review granted*, 156 Wn.2d 1005, 132 P.3d 146 (2006). Here, as in *Biggers*, a case also involving agency action affecting protection of shorelines, the record indicates that many BCU members, individually and collectively, have been and will be specifically and perceptibly affected by DNR's failure to enforce its regulations against trespassing vessels in Eagle Harbor "as it affects their personal and business interests." *Biggers*, 124 Wn. App. at 864. In particular, members of BCU are owners of boats and owners of waterfront residences and businesses whose recreational and commercial use of Eagle Harbor is adversely affected by the presence and actions of trespassing vessels and vessel-owners in Eagle Harbor. CP 349-51. Specific and perceptible harm to BCU members from DNR's failure to enforce its own regulations against these vessels and vessel owners include adverse impacts to their recreational use and to their waterfront businesses because of the hazards to navigation caused by the trespassing vessels; loss of business; adverse impacts to health and safety, including sewage and trash dumped in the waters of Eagle Harbor by liveaboards, threats to waterfront residents by liveaboards, and interference with use of waterfront amenities, including Waterfront Park; and adverse impacts to views and property values because of the unsightly collection of vessels in the Harbor. CP 397-425.

For the same reasons, BCU has standing to maintain its action for declaratory and injunctive relief.

Washington courts have established a two-part test to determine standing under the UDJA. The first part of the test asks whether the interest sought to be protected is “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Save a Valuable Env’t v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)). The second part of the test considers whether the challenged action has caused “injury in fact,” economic or otherwise, to the party seeking standing. *Id.* at 866, 576 P.2d 401. Both tests must be met by the party seeking standing. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004).

An association has standing to bring suit on behalf of its members when the following criteria are satisfied: (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor relief requested requires the participation of the organization’s individual members. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343,

97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), cited with approval in *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978).

Under any of these tests, BCU has standing to maintain its action for declaratory and injunctive relief.

The first prong for associational standing is easily satisfied. As indicated above, specific and perceptible harm to BCU members from DNR's failure to enforce its own regulations against these vessels and vessel owners are well established in the record. *See* CP 397-425.

The second prong for standing, that the interest sought to be protected is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," is also satisfied. In this case, the interest of BCU members in the management, protection, and regulation of the waters of the waters of Eagle Harbor through enforcement by DNR against unauthorized and illegal use of such waters is within the interest sought to be protected and regulated by the regulations at issue, which were expressly promulgated to protect state owned aquatic lands from unauthorized residential use and the impacts of such use, including interference with navigation and other adverse environmental impacts, including uncontrolled waste disposal into the waters of Eagle Harbor by trespassing liveaboards. *See* CP 311-45.

Thus, because individual members of BCU can establish standing in their own right, the first prong for associational standing is satisfied as well. *Save v. Bothell, supra*.

The second prong for associational standing is also satisfied because the interests that BCU seeks to protect—protection of Eagle Harbor from unauthorized use of the Harbor and the hazards to navigation and adverse environmental impacts that such use causes—are germane to the purposes of BCU, one of which is the promotion and protection to the fullest extent possible of the environment of Bainbridge Island, including Eagle Harbor. The majority of the members of BCU own waterfront property and businesses on Eagle Harbor and use the Harbor for recreational and other purposes. CP 349. Their interests are thus directly affected by DNR’s failure to enforce its regulations against the trespassing vessels in Eagle Harbor and are within the zone of interests these regulations are intended to protect.

The third prong for associational standing is satisfied because the claims asserted by BCU and the relief it requests do not require participation of the organization’s individual members. BCU thus has standing to assert its members’ rights and to act as their representative. *See SAVE, 89 Wn.2d at 866-67.*

BCU has raised a justiciable controversy and has standing to maintain it.

E. Trespassing Vessel Owners Are Not Indispensable Parties.

DNR sought dismissal of BCU's request for declaratory and injunctive relief for failure to join the owners and occupants of the trespassing vessels in Eagle Harbor as indispensable parties under CR 19 and interested parties under RCW 7.24.110. How owners of vessels trespassing on state-owned aquatic lands without permission or authorization have cognizable interests that make them indispensable parties under CR 19 or even interested parties under RCW 7.24.110 was never adequately explained by DNR. Nor was DNR able to cite to a case which suggests such a preposterous proposition, for none exists.

BCU did not request an order from the trial court for removal of any trespassing vessels from Eagle Harbor. Nor did BCU request an order imposing penalties or other civil enforcement remedies against such vessel owners. Instead, BCU merely requested a declaration establishing the mandatory duty of DNR to enforce its regulations against trespassing vessels in Eagle Harbor and an injunction requiring DNR to commence enforcement proceedings. Judgment on such requested declaratory and injunctive relief will bind only DNR. Thus, the general rule in *Seattle v.*

Fontanilla, 128 Wn.2d 492, 502, 909 P.2d 1294 (1996), that “one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he is not made a party by service of process” has no application to the relief sought by BCU.

Further, vessel owners in Eagle Harbor have no more interest in the declaratory or injunctive relief sought by BCU than would any other vessel owner or boater in the State of Washington that violates DNR’s regulations. Should BCU be required to name them as well?

Owners of vessels that are on state owned lands without permission or authorization are not indispensable parties in an action to compel the owner of the lands, the State, to enforce its regulations involving such lands. The trial court had before it all necessary parties to render a decision in favor of BCU.

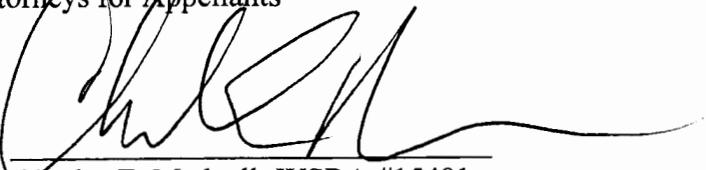
VI. CONCLUSION

For the reasons set forth herein, BCU respectfully requests that the Court reverse the order granting DNR’s motion for summary judgment and remand the case to the trial court for entry of an order granting BCU’s motion for summary judgment.

RESPECTFULLY SUBMITTED this 3rd day of May, 2007.

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By

A handwritten signature in black ink, appearing to read 'Chuck Maduell', written over a horizontal line.

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APPENDIX

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Wash. Admin. Code 332-30-127

**WASHINGTON ADMINISTRATIVE CODE
TITLE 332. NATURAL RESOURCES, BOARD AND DEPARTMENT OF
CHAPTER 332-30. AQUATIC LAND MANAGEMENT**

Current with amendments adopted through March 7, 2007.

332-30-127. Unauthorized use and occupancy of aquatic lands (see RCW 79.105.200 and 79.125.200).

(1) Aquatic lands determined to be state owned, but occupied for private use through accident or without prior approval, may be leased if found to be in the public interest.

(2) Upon discovery of an unauthorized use of aquatic land, the responsible party will be immediately notified of his status. If the use will not be authorized, he will be served notice in writing requiring him to vacate the premises within thirty days. If the law and department policy will permit the use, the occupant is to be encouraged to lease the premises.

(3) The trespassing party occupying aquatic lands without authority will be assessed a monthly use and occupancy fee for such use beginning at the time notification of state ownership is first provided to them and continuing until they have vacated the premises or arranged for a right to occupy through execution of a lease as provided by law.

(4) The use and occupancy fee is sixty percent higher than full fair market rental and is intended to encourage either normal leasing or vacation of aquatic land.

(5) In those limited circumstances when a use cannot be authorized by a lease even though it may be in the public interest to permit the structure or activity, the fair market rental will be charged and billed on an annual basis.

(6) The use and occupancy billing is to be made after the use has occurred and conveys no rights in advance. Payment is due by the tenth of the month following the original notification, and if not received, a notice is to be sent. If payment is not received within thirty days of this notice and monthly thereafter by the tenth of each month during the period of the use and occupancy lease or if the improvement has not been removed from the aquatic land, an unlawful detainer action against the party in trespass will be filed along with an action to collect past due rental.

Statutory Authority: RCW 79.105.360. 06-06-005 (Order 724), S 332-30-127, filed 2/16/06, effective 3/19/06.

Statutory Authority: RCW 43.30.150. 80-09-005 (Order 343), S 332-30-127, filed 7/3/80.

<General Materials (GM) - References, Annotations, or Tables>

WAC 332-30-127, WA ADC 332-30-127

WA ADC 332-30-127
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**WASHINGTON ADMINISTRATIVE CODE
TITLE 332. NATURAL RESOURCES, BOARD AND DEPARTMENT OF
CHAPTER 332-30. AQUATIC LAND MANAGEMENT**

Current with amendments adopted through March 7, 2007.

332-30-139. Marinas and moorages.

(1) Moorage facilities developed on aquatic lands should meet the following design criteria:

(a) Moorage shall be designed so as to be compatible with the local environment and to minimize adverse esthetic impacts.

(b) Open moorage is preferred in relatively undeveloped areas and locations where view preservation is desirable, and/or where leisure activities are prevalent.

(c) Covered moorage may be considered in highly developed areas and locations having a commercial environment.

(d) Enclosed moorage should be confined to areas of an industrial character where there is a minimum of esthetic concern.

(e) In general, covered moorage is preferred to enclosed moorage and open moorage is preferred to covered moorage.

(f) View encumbrance due to enclosed moorage shall be avoided in those areas where views are an important element in the local environment.

(g) In order to minimize the impact of moorage demand on natural shorelines, large marina developments in urban areas should be fostered in preference to numerous small marinas widely distributed.

(h) The use of floating breakwaters shall be considered as protective structures before using solid fills.

(i) Dry moorage facilities (stacked dry boat storage) shall be considered as an alternative to wet storage in those locations where such storage will:

(i) Significantly reduce environmental or land use impacts within the water area of the immediate shoreline.

(ii) Reduce the need for expansion of existing wet storage when such expansion would significantly impact the environment or adjacent land use.

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- (2) Anchorages suitable for use by transient, recreational boaters will be identified and established by the department in appropriate locations so as to provide additional moorage space.
- (3) Upland sewage disposal approved by local government and appropriate state agencies is required for all vessels used as a residence.
- (4) The department shall work with federal, state, local government agencies and other groups to determine acceptable locations for marina development, properly distributed to meet projected public need for the period 1980 to 2010.
- (5) The department may lease open water moorage and anchorage areas only to local governments that have authorized the establishment of open water moorage and anchorage areas in their local Shoreline Master Programs within five years of the effective date of this rule. With the department's approval, the local government lessee may install mooring buoys or other floating moorage devices, designate anchorage locations, sublease moorage and anchorage in the area, collect rent and fees for such moorage and anchorage, and otherwise manage the area as a moorage facility. All open water moorage and anchorage areas must meet the following requirements:
- (a) Open water moorage and anchorage areas must meet all relevant requirements normally applicable to a marina lease, which may include the placement, design, limitation on the number of vessels or floating houses, and operation of the area and any improvements within the area, payment of rent to the department, consideration of navigational and environmental impacts, and all other applicable permits and other requirements of law.
 - (b) Open water moorage and anchorage areas may not be in a harbor area nor in any location or configuration that would interfere with water-borne commerce and navigation.
 - (c) The leasing of state-owned aquatic lands for open water moorage and anchorage areas is subject to all preferences accorded upland, tideland, or shoreland owners in RCW 79.125.400, 79.125.460, 79.125.410, 79.130.010, and WAC 332-30-122.
 - (d) Any vessel used for residential use or floating house in an open water moorage and anchorage area must comply with WAC 332-30-171.
 - (e) Except for nongrandfathered floating house moorage as defined in WAC 332-30-171 (7)(a)(ii), nonwater-dependent uses and commercial uses are prohibited in open water moorage and anchorage areas. Uses prohibited by this subsection (e) are allowed when necessary because of an emergency that immediately threatens human life or property, for the duration of the emergency only.

The department will not lease an open water moorage and anchorage area to an entity other than a local government agency. This restriction shall not affect use authorizations to public or private entities for mooring buoys, aquaculture net pens, or other floating structures otherwise allowed by law.

Statutory Authority: RCW 79.105.360. 06-06-005 (Order 724), S 332-30-139, filed 2/16/06, effective 3/19/06.
Statutory Authority: RCW 79.90.455, 79.90.460. 02-21-076 (Order 710), S 332-30-139, filed 10/17/02, effective 11/17/02. Statutory Authority: RCW 43.30.150. 80-09-005 (Order 343), S 332- 30-139, filed 7/3/80.

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WASHINGTON ADMINISTRATIVE CODE
TITLE 332. NATURAL RESOURCES, BOARD AND DEPARTMENT OF
CHAPTER 332-30. AQUATIC LAND MANAGEMENT

Current with amendments adopted through March 7, 2007.

332-30-171. Residential uses on state-owned aquatic lands.

(1) **Application.** This section applies to residential uses, as defined in WAC 332-30-106(62), and floating houses, moorage facilities, and vessels, as defined in WAC 332-30-106 (23), (38) and (74), as they relate to residential uses, on state-owned aquatic lands. 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). This section does not apply to: Activities or structures on aquatic lands not owned by the state; vessels used solely for recreational or transient purposes; floating houses or vessels used as hotels, motels or boatels; or vessels owned and operated by the United States military.

(2) **Limits on the number of residential uses.** Residential uses on state-owned aquatic lands shall only occur in accordance with all federal, state, and local laws. The following apply only to leases entered into following the effective date of this rule unless otherwise provided in subsection (3) of this section.

(a) The total number of slips which may be allocated for residential uses in any marina, pier, open water moorage and anchorage area, or other moorage facility shall be limited to ten percent of the total number of slips within a marina, unless otherwise established as provided in (b) or (c) of this subsection. For the purposes of determining the exact number of residential slips, the department shall round to nearest whole number.

(b) Upon the effective date of this rule, the ten percent limit can be changed by local government, through amendments to the local shoreline master program and/or issuance of a shoreline substantial development conditional use permit, if all of the following conditions are met:

(i) Methods to handle the upland disposal and best management practices for the increased waste associated with residential use are expressly addressed and required; and

(ii) Specific locations for residential use slips do not adversely impact habitat or interfere with water-dependent uses.

(c) If a local shoreline master program or local ordinance has established a different percentage limit prior to the date this rule takes effect, the limit established in that shoreline master program or local ordinance shall be the recognized percentage limit. After the effective date of this rule, changes to the percentage limit shall only be recognized by DNR as the percentage limit if the changes are made through amendments to the Shoreline Master Program or adoption of a shoreline substantial development conditional use permit.

(d) Application of the percentage limit to moorage facilities that occupy both state-owned aquatic and privately owned aquatic lands.

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(i) If the city or county jurisdiction has not established a percentage limit, then the total number of vessels used as a residence and floating houses in any moorage facility shall be limited to ten percent of the total number of slips or spaces usable for moorage or anchorage in that facility. In this case, when a moorage facility occupies both state-owned and nonstate-owned aquatic lands, the percent limit will be calculated using only the total number of slips that are located on state-owned aquatic lands and will be applied only to the portion of the facility located on state-owned aquatic lands.

(ii) If a county or city has established a percent limit, and a moorage facility occupies both state-owned and nonstate-owned aquatic lands, the department may authorize any or all of the floating houses or vessels with residential uses within the entire facility to be located in the portion of the facility on state-owned aquatic lands.

(e) If a moorage facility has so few moorage slips or spaces that the percent limit allows for less than one residential use slip, then one residential use slip may be authorized, if not otherwise prohibited by the city or county jurisdiction.

(3) Excess residential use slips.

(a) This subsection shall apply to all lessees occupying state-owned aquatic lands under written leases with the department as of the effective date of this rule. Within one hundred eighty days of the effective date of this rule, each existing moorage facility lessee shall document the existing percentage of residential use slips within their facility and report this information to the department. This reported percentage shall be referred to as the 'reported existing percentage' for the moorage facility lessee.

(i) If the reported existing percentage of residential use slips is greater than the ten percent limit established in this rule, or other locally established limit as described in subsection (2)(b) or (c) of this section, then the reported existing percentage will establish the allowable residential use percentage at the beginning of a new lease for the same moorage facility, regardless of whether ownership of the facility changes subject to attrition described in subsection (3)(b) of this section. At the time the new lease is entered into, those residential uses in excess of the reported existing percentage will be required to vacate the moorage facility.

(ii) If the reported existing percentage of residential use slips is less than or equal to the ten percent limit established in this rule, or other locally established limit as described in subsection (2)(b) or (c) of this section, then the percentage limit established in this rule, or other locally established limit as described in subsection (2)(b) or (c) of this section, will establish the allowable residential use percentage at the beginning of a new lease for the same moorage facility, regardless of whether ownership of the facility changes. At the time the new lease is entered into, those residential uses in excess of the ten percent limit established in this rule, or other locally established limit as described in subsection (2)(b) or (c) of this section, will be required to vacate the moorage facility.

(iii) If a moorage facility lessee fails to report the existing percentage of residential slips within their facility within one hundred eighty days of the effective date of this rule, then the percentage limit established in this rule, or other locally established limit as described in subsection (2)(b) or (c) of this section, will establish the allowable residential use percentage at the beginning of a new lease for the same moorage facility, regardless of whether ownership of the facility changes. At the time the new lease is entered into, those residential uses in excess of the ten percent limit established in this rule, or other locally established limit as described in subsection (2)(b) or (c) of this section, will be required to vacate

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the moorage facility.

(b) The purpose of this subsection is to describe the process of attrition used to reach compliance with the percentage limit or locally established percentage limit. For all leases entered into following the effective date of this rule, if there are more residential use slips in a moorage facility than allowed by the percent limit, then no new or additional residential use slips, including replacements for grandfathered floating houses under subsection (7)(a) of this section, shall be authorized in that facility. In such cases, any residential uses that leave the facility for a period of time greater than thirty days may not return to the facility until the total number of residential use slips is below the percent limit. For purposes of counting the thirty days described in this subsection (3)(b), the department shall not include time needed for repairs to the vessels or floating houses, nor any time when a vessel is away from the moorage facility but the owner or operator of the vessel continuously maintains a written moorage agreement for that facility.

(c) Marina owners, operators, and/or managers may decrease the ten percent limit on a site-specific basis.

(4) **Waste disposal.** The following apply to all leases entered into following the effective date of this rule:

(a) Sewage. All treated and untreated sewage shall be disposed of upland, in accordance with federal, state, and local laws. This section does not require specific disposal methods so long as the measures established by the lessee and the department ensure upland disposal.

(b) Oil and toxic substances. All oil, grease, corrosive liquids, and other toxic substances shall be disposed of upland, in accordance with federal, state, and local laws. This section does not require specific disposal methods so long as the measures established by the lessee and the department ensure upland disposal.

(c) Solid waste. All solid waste shall be disposed of upland, in accordance with federal, state, and local laws. This section does not require specific disposal methods so long as the measures established by the lessee and the department ensure upland disposal.

(d) Gray water. All gray water shall be disposed of in accordance with federal, state, and local laws. Moorage facilities shall develop and implement best management practices to avoid, to the maximum extent possible, all discharges into waters above state-owned aquatic land, of wastewater from showers, baths, sinks, laundry, decks, and other miscellaneous sources, otherwise known as 'gray water.' For those unavoidable discharges, the best management practices shall minimize discharges, to the maximum extent possible, of gray water from showers, baths, sinks, laundry, decks, and other miscellaneous sources.

(5) **Responsibilities of lessees with residential uses.** The following apply to leases entered into following the effective date of this rule:

(a) Each department lessee must establish and implement measures satisfactory to the department for ensuring upland waste disposal, and the avoidance or minimization of any discharge of waste, as described in (c) of this subsection, onto or in the waters above state-owned aquatic lands from vessels used for residential use and floating houses. This shall include a contingency plan in case of failure or unavailability of the waste disposal methods identified by the lessee and approved by the department.

(b) Each department lessee must annually, or as otherwise provided in the lease, provide the department with evidence that all vessels used for residential use and floating houses in their facility comply with this rule and

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the terms of the department lease.

(c) Each department lessee shall fully describe the waste disposal measures. These measures may include, but are not limited to:

- (i) Connection to an upland sewage system;
- (ii) Periodic sewage pump-out service, either at a pump-out station or with transportable pump-out equipment, including prepayment for such services and proof of participation by residential occupants;
- (iii) Installation of appropriate waste receptacles;
- (iv) Back-up and clean-up facilities and procedures as needed in case of failure or temporary unavailability of waste disposal systems;
- (v) Educational efforts, such as posting of notices, distribution of information, and training for residents on waste disposal methods and requirements;
- (vi) Monitoring of activities within the facility to prevent or identify and remedy improper waste disposal;
- (vii) Contractual requirements in moorage subleases requiring proper waste disposal by residents; and/or
- (viii) Other best management practices and/or best available technologies that are established by any local, state, or federal agency, including the department, or by any appropriate nongovernmental organization, that are satisfactory to the department to ensure upland disposal of waste and avoid or minimize any discharge of waste onto or in the waters above state-owned aquatic lands.

(d) Consistent with all federal, state, and local laws and regulations, all leases issued by the department after the effective date of this rule for moorage facilities with residential uses within them shall require and specify:

- (i) Methods to handle the upland disposal and best management practices for the increased waste associated with residential use;
- (ii) Specific locations for residential use slips that do not adversely impact habitat or interfere with water-dependent uses.

(6) **Vessels.** Moorage of a vessel, as defined in WAC 332-30-106(74), is a water-dependent use.

(7) **Floating houses.** Moorage of a floating house, as defined in WAC 332-30-106(23), is a water-oriented use.

(a) **Classifying floating house moorage under RCW 79.105.060(25).** In classifying floating house moorage under RCW 79.105.060(25), the department will apply the following rules:

- (i) If a floating house moorage site had a floating house moored there under a department lease on October 1, 1984, or if a floating house was moored there for at least three years before October 1, 1984, then the department will classify that site as a water-dependent use for the purposes of determining rent. Such sites may be referred to as 'grandfathered' sites.

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(ii) If a floating house moorage site did not have a floating house moored there under a department lease on October 1, 1984, nor for at least three years before October 1, 1984, then the department shall classify that site as a nonwater-dependent use. Such sites may be referred to as 'nongrandfathered' sites.

(iii) The classification of a grandfathered or nongrandfathered floating house moorage site applies to the specific aquatic land being utilized for moorage of the floating house, not to the floating house itself.

(iv) The department shall classify each individual floating house moorage slip within a moorage facility as a separate site. This may result in a marina containing both grandfathered and nongrandfathered floating house moorage sites.

(v) If a floating house vacates a grandfathered moorage site and either returns within thirty days or is replaced with another floating house within thirty days, then the moorage site will remain grandfathered.

(vi) If a floating house vacates a grandfathered moorage site and does not return within thirty days, future moorage of that floating house in the same or a different site shall be nongrandfathered, unless the floating house qualifies as a replacement floating house under (a)(v) of this subsection.

(vii) After October 1, 1984, if a grandfathered site ceased or ceases being used for floating house moorage for more than thirty consecutive days, then the site shall no longer be grandfathered.

(viii) When counting the thirty days described in (a)(v) through (vii) of this subsection, the department will exclude any reasonable time needed for repair of the floating house.

(ix) If a lessee redesignates a grandfathered floating house moorage slip within the lease area, consistent with the lease requirements, and notifies the department in advance of where the slip is to be relocated, then the slip will remain grandfathered. However, if a nongrandfathered site has a floating house relocated to it after the effective date of this rule, the site shall not be designated as grandfathered as provided in this subsection, (7)(a)(ix).

(x) If a floating house was moored at a grandfathered site on October 1, 1984, but was relocated to a site authorized by the department so that on the effective date of this rule the floating house is moored at a nongrandfathered site, then the department may classify this new location as a grandfathered site if the floating house meets all of the following criteria:

(A) The floating house was on state-owned aquatic land leased on October 1, 1984, or was on state-owned aquatic lands for three years prior to October 1, 1984;

(B) The floating house was continuously on state-owned aquatic lands from October 1, 1984, until the effective date of this rule, except for any reasonable time needed for repair of the house; and

(C) The department receives, within one year after the effective date of this rule, a request to have the current moorage site classified as a grandfathered site.

(b) **Managing grandfathered floating house moorage.** Floating houses moored in grandfathered sites that meet all applicable laws and rules, and are consistent with all lease requirements, may remain. The department shall charge the water-dependent rental rate for such moorage.

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(c) Managing nongrandfathered floating house moorage.

(i) The department may authorize floating house moorage at a nongrandfathered site only if the department determines that the following conditions are met:

(A) All conditions as set forth in this section;

(B) The specific sites and circumstances for floating house moorage have been identified in an adopted local shoreline management plan that provides for the present and future needs of all uses, considers cumulative impacts to habitat and resources of statewide value, identifies specific areas or situations in which floating house moorage will be allowed, and justifies the exceptional nature of those areas or situations; and

(C) The floating house moorage is compatible with water-dependent uses existing in or planned for the area.

(ii) If a floating house is moored at a nongrandfathered site that does not meet the conditions in (c)(i) of this subsection, but the site is authorized by a department lease and the floating house and moorage meet all conditions as set forth in this section and is consistent with all lease requirements, then the floating house may remain until the termination of the lease or one year after the effective date of this rule, whichever is later. Thereafter, unless at that time the floating house meets the conditions in (c)(i) of this subsection, the floating house must vacate the nongrandfathered site.

(iii) If a floating house is moored at a nongrandfathered site that does not meet the conditions in (c)(i) of this subsection and is not authorized by a department lease, then the floating house must vacate the site within one year from the effective date of this rule, unless at that time it meets the conditions in (c)(i) of this subsection and the department chooses to grant a lease.

(iv) For nongrandfathered floating house moorage sites, the department shall charge the nonwater-dependent rental rate. If a leased area contains both nongrandfathered floating house moorage along with grandfathered floating house moorage or other water-dependent uses, then the nonwater-dependent rental rate shall be applied to a proportionate share of any common areas used in conjunction with the nongrandfathered floating house moorage, including, but not limited to, docks, breakwaters, and open water areas for ingress and egress to the facility.

(8) Open water moorage. For the purposes of this section, open water moorage and anchorage areas are defined in WAC 332-30-106(45).

(a) Vessels used for residential use and floating houses shall be moored, anchored, or otherwise secured only at a marina, pier, or similar fixed moorage facility that is connected to the shoreline, or in open water moorage and anchorage areas described under WAC 332-30-139(5) and subject to the restrictions therein. Vessels used for residential use and floating houses shall not be moored, anchored or otherwise secured in open waters above state-owned aquatic lands away from a fixed moorage facility that is connected to the shoreline, nor be moored, anchored, or otherwise secured to any natural feature in the water or on the shoreline, except within an open water moorage and anchorage area. A vessel used for residential use or floating house may moor in areas prohibited by this subsection (8)(a) when necessary because of an emergency that immediately threatens human life or property, for the duration of the emergency only.

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(b) Any vessel used for residential use or floating house that is moored on state-owned aquatic lands on the effective date of this rule, and complies with all other applicable laws and all lease requirements, but does not comply with (a) of this subsection, may remain until one year after the effective date of this rule or until the termination date of the existing department lease, whichever is later. Thereafter, unless at that time it meets the conditions in (a) of this subsection, the vessel used for residential use or floating house must vacate the site. The department shall not authorize or reauthorize any moorage for vessels used for residential use or floating houses that do not comply with (a) of this subsection.

Statutory Authority: RCW 79.105.360. 06-06-005 (Order 724), S 332-30-171, filed 2/16/06, effective 3/19/06.
Statutory Authority: RCW 79.90.455, 79.90.460. 02-21-076 (Order 710), S 332-30-171, filed 10/17/02, effective 11/17/02.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BAINBRIDGE CITIZENS)
UNITED, a Washington non-profit)
corporation and GARY TRIPP,) No. 35961-8-II
Director of Bainbridge Citizens)
United,) DECLARATION OF SERVICE
Appellant,)
v.)
WASHINGTON STATE)
DEPARTMENT OF NATURAL)
RESOURCES; AND DOUG)
SUTHERLAND, Commissioner of)
Public Lands,)
Respondent.)

COURT OF APPEALS
DIVISION II
07 MAY 18 PM 1:35
STATE OF WASHINGTON
BY _____
DEPUTY

I, Donna S. Spaulding, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on May 17, 2007, I served a true and correct copy of the following documents:

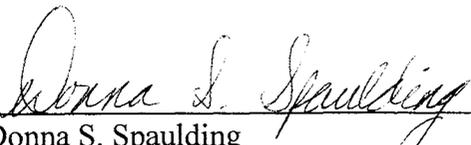
1. Brief of Appellants;
2. Supplemental Designation of Clerk's Papers; and
3. Declaration of Service

upon counsel of record in the manner indicated below:

Via U.S. First Class Mail to:

Christa L. Thompson
Assistant Attorney General
1125 Washington Street Southeast
P.O. Box 40100
Olympia, Washington 98504-0100

EXECUTED May 17, 2007, at Seattle, Washington.



Donna S. Spaulding