

COURT OF APPEALS
DIVISION I
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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.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

After taking the proper steps to promulgate regulations to address the problem of trespassing vessels on state-owned aquatic lands, the Washington State Department of Natural Resources (“DNR”) now invokes its “discretion” to ignore the regulations entirely. This refusal to comply with its own regulation is unlawful, and its failure to take any meaningful action to remedy the decades-old problem of trespassing vessels in Eagle Harbor is a complete abdication of DNR’s statutory responsibility to manage public lands for the benefit of all citizens of Washington. This arbitrary refusal to enforce its regulations, including DNR’s drastic shift in policy with regard to how it should deal with trespassing vessels, entitles Petitioner Bainbridge Citizens United (“BCU”) to relief.

II. ARGUMENT IN REPLY

A. **DNR’s Unlawful Failure to Comply with the Mandatory Terms of WAC 332-30-127 Entitles Petitioners to Relief.**

Notwithstanding the mandatory terms of WAC 332-30-127, and DNR’s conceded failure to take any action against trespassing vessels in Eagle Harbor as required by WAC 332-30-127, DNR contends that it has discretion to “refrain” from enforcing this regulation under its broad authority to manage state-owned aquatic lands, that there is no statutory directive mandating DNR to take enforcement action against the unauthorized use of state-owned aquatic lands, and that the mandatory

language in its regulations is in fact “directory.” None of these contentions insulate DNR from its decades-long failure to take any action against trespassing vessels in Eagle Harbor.

1. After Properly Exercising Its Discretion by Promulgating WAC 332-30-127, DNR May Not Arbitrarily Ignore the Rule.

DNR concedes that it has done nothing to enforce WAC 332-30-127, yet it attempts to excuse this inaction based on its broad authority to manage state-owned aquatic lands for the benefit of the public, including its “implied authority to address unauthorized use of these lands.” Response Br. at 12-16. The problem with this justification is that DNR has already exercised this cited authority by promulgating regulations—including WAC 332-30-127—which address how the agency will respond to the unauthorized use of aquatic lands. In other words, this case is not about DNR’s broad discretionary authority to manage state-owned aquatic lands, it is about DNR’s arbitrary refusal to apply regulations which it properly adopted pursuant to this authority. *E.g., Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986) (“The failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct.”); *Stark v. Geeslin*, 213 S.W.3d 406, 416 (Tex. App. 2006) (“We will reverse an administrative action as arbitrary and capricious only if the agency fails to follow the clear, unambiguous language of its own regulation.”); *see*

also *Carter v. Sullivan*, 909 F.2d 1201, 1202 (8th Cir. 1990) (finding that the Secretary of Health and Human Services abused his discretion in failing to follow the agency's own regulations in determining whether a claimant was disabled).

DNR claims to have discretion to pick and choose which of its promulgated regulations it will heed, and which it can choose to ignore. Allowing a state agency to invalidate its own regulations without following any prescribed process allows it to do away with the rulemaking requirement (including public notice and comment). This effectively allows an agency to engage in *de facto* rulemaking by deciding when—and whether—to give effect to any regulation at a given time. If DNR, in its discretion, determines that the process set out in WAC 332-30-127 is not the best way to address unauthorized use of aquatic lands, it must follow the proper procedure to repeal the rule.¹ It may not, however, make a unilateral, arbitrary decision that renders the regulation a dead letter.

¹ The fact that there is an established procedure for the repeal of regulations belies DNR's public policy arguments, in which it claims that an order in BCU's favor would direct DNR's limited resources away from activities that DNR has determined to be most effective to resolve the problems at hand. Response Br. at 12-13, 20. In reality, if DNR were ordered to follow its own regulation, and the burden of dealing with the handful of trespassing vessels in Eagle Harbor were too great, it would only need to follow the proper rulemaking procedure to amend or repeal the regulation. In any event, it is unlikely that enforcing its own regulations (including WAC 332-30-127) would impose any significant burden on DNR. BCU has not requested an order for DNR to search every acre under its management authority or even to stop all unauthorized use. Rather, BCU is only asking that DNR enforce its regulations against a handful of boats currently

An unreasoned, drastic change of course in an agency's actions or policies is "quintessentially arbitrary and capricious." *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 105 (D.D.C. 2003); *cf. Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 57, 103 S. Ct. 2856 (1983). Thus, courts have granted relief where, as here, an agency has taken a "180 degree reversal from a decision on the same issue." *See Id.* at 108.

DNR claims that "there has been no drastic shift in DNR policy on the issue of unauthorized use of state-owned aquatic lands," and that "the record does not establish any reversal in position by DNR." Response Br. at 26. However, DNR has clearly reversed its position on this very issue: First, DNR promulgated WAC 332-30-127, which set out definitively how to deal with trespassers on state lands. Now, DNR—in its own words—has "refrain[ed] from enforcement" of this rule, Response Br. at 16, and "has chosen to pursue an alternative course" to address the very same problem, Response Br. at 26. In other words, DNR promulgated regulations on how to deal with a very specific problem, and it has now chosen to ignore these regulations in favor of other means of addressing that same specific problem. It is difficult to imagine a more obvious case of a "180 degree reversal" than DNR's course of conduct with respect to

trespassing in Eagle Harbor, and for which WAC 332-30-127 was specifically written and properly adopted.

enforcement of WAC 332-30-127 against the trespassing vessels in Eagle Harbor.

DNR attempts to insulate from judicial review its change in position on how it will address unauthorized use of state-owned aquatic lands, and its arbitrary refusal to enforce regulations it adopted to address such unauthorized use, by invoking its broad discretion to manage state-owned aquatic lands. However, DNR has already exercised this broad discretion by promulgating WAC 332-30-127, and now it must comply with—or properly amend—the rule. Adopting DNR’s “carte blanche” view of its own discretion would not only short-circuit the protections inherent in the rulemaking process, it would open the door to any state agency to engage in the same type of *de facto* rulemaking merely by invoking its “discretion.”

2. DNR’s Failure to Comply with Its Statutory Mandate Subjects Its Actions to Judicial Review.

Judicial relief is also available where an agency fails to comply with its statutory mandate. *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, 975 P.2d 567 (1999). For example, in *Adams*, the court found that an agency’s consistent failure to obtain compliance with a statutory mandate constituted an actionable “dereliction

of duty.” *Adams*, 480 F.2d at 1163. Similarly, in this case, DNR’s decades-long failure to take any action against trespassing vessels in Eagle Harbor (and the harm caused by this failure)² is an actionable dereliction of its statutory duty to safeguard and manage public lands.

DNR attempts to distinguish *Adams* with its claim that “there is no similar statutory directive mandating DNR enforcement action against the unauthorized use of state-owned aquatic lands.” Response Br. at 25. However, this argument is without merit, for two reasons. First, DNR’s claim that no such statutory directive exists is simply false. DNR is, in fact, expressly required by statute to prosecute trespassers on *all* public lands. Pursuant to RCW 79.02.300, “[t]he department is authorized and directed to investigate all trespasses and wastes upon, and damages to, public lands of the state, and to cause prosecutions for, and/or actions for the recovery of the same to be commenced as provided by law.” RCW 79.02.300(3). “Damages recoverable under this section include . . . the market value of the use, occupancy, or things removed, had the use, occupancy, or removal been authorized.” RCW 79.02.300(1). Thus, not

² DNR’s knowledge of the harms that have arisen from the unregulated liveboard uses in Eagle Harbor is well documented. As early as 1994, DNR was aware of, and expressed concern about, the issue of liveboards in Eagle Harbor. CP 195-96. Internal correspondence and informational materials produced by DNR in 2000 specifically acknowledge the environmental impacts and navigational hazards caused by these vessels. CP 196, 239. Furthermore, DNR’s Final Environmental Impact Statement on the residential use rules proposal acknowledges the adverse environmental impacts caused by residential uses on aquatic lands. CP 332, 337.

only is DNR empowered to carry out such prosecutions and seek damages for trespasses on public lands, it has been specifically “directed” to do so by the legislature. *See* RCW 79.02.300(3).

The second problem with DNR’s attempt to distinguish *Adams* is that it suggests that the holding in *Adams* was based on the federal agency’s failure to comply with a specific “statutory directive.” But this is not so. On the contrary, the agency in *Adams* was in technical compliance with its statutory mandate, as “the Act d[id] not provide a specific limit to the time period within which voluntary compliance may be sought.” *Adams*, 480 F.2d at 1163. Thus, the *Adams* court’s finding of a “dereliction of duty” was not based on the agency’s violation of any specific statutory directive. Rather, it was based on the agency’s failure to take any meaningful steps to comply with its statutory mandate. In this case, much like in *Adams*, it is the agency’s failure to take any meaningful steps to comply with its statutory duty to “manage [public lands] for the benefit of the public,” and its decision to pursue only nominal and fruitless efforts towards that end, that amounts to a “dereliction of duty.”

DNR attempts to explain its inaction with respect to the trespassing vessels by making much of its efforts to work “collaboratively” with the City to address this problem. Response Br. at 16. However, the truth is—

and the record reflects—that DNR has taken *no* remedial action in the face of decades of illegal trespasses in Eagle Harbor, to wit:

- The 1999 Bainbridge Island Harbor Management Plan has not been implemented. CP 353. Thus, none of the boats occupying the center of Eagle Harbor have even complied with the terms of the Harbor Management Plan.
- The City Council has not adopted the Open Water Moorage Plan called for in the Harbor Management Plan. *Id.*
- None of the boat owners have signed an agreement with the City to lease space in the Open Water Moorage.
- None of the boat owners has agreed to, nor have they begun in good faith to follow the rules about monitored pump out of sewage nor have they complied with Coast Guard safety regulations. *See* CP 354, 397-425.
- Finally, the City of Bainbridge Island has not requested a lease from DNR. There is no commitment from DNR or the City to enforce the regulations against unauthorized use if the Shoreline Master Plan amendment for Open Water Moorage is not passed, or if it is passed and boaters fail to comply.

DNR attempts to defend its nominal and fruitless efforts by characterizing them as being directed toward “long-term resolution of

[the] Eagle Harbor moorage issues.” Response Br. at 20. However, much like the agency’s efforts in *Adams* to end segregation by “voluntary compliance,” DNR’s failure to take meaningful steps to remedy the illegal trespasses in Eagle Harbor is a dereliction of its statutory duty. As such, DNR’s arbitrary refusal to act is subject to judicial review.

Furthermore, *Heckler and Riveland*, cited by DNR in its claim to “enforcement discretion,” are inapposite to this case, for two reasons. First, both *Heckler and Riveland* dealt with specific statutory mandates committing enforcement discretion to an agency. *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985); *National Elec. Contractor’s Ass’n v. Riveland*, 138 Wn.2d 9, 31, 978 P.2d 481. In this case, no statute commits enforcement decisions to DNR’s absolute discretion; nor is there any other indication that the legislature intended to delegate any broad, unreviewable enforcement authority to DNR. Second, DNR has already exercised its discretion by taking the required steps to promulgate WAC 332-30-127. While *Heckler and Riveland* support an agency’s broad discretion in fulfilling its statutory duties, neither case supports arbitrarily refusing to implement a valid regulation adopted through a proper exercise of agency discretion.

3. WAC 332-30-127 Imposes a Mandatory Duty on DNR, and Is *Not* Discretionary, or “Directive” in Nature.

In its Response Brief, DNR attempts to read the content out of the word “will”—as it is used a number of times in WAC 332-30-127—by resorting to arguments about the statutory and regulatory “context” of the rule. Response Br. at 18. It does this immediately after acknowledging that “[r]ules of statutory construction apply to administrative rules and regulations,” and that “[w]hen a rule’s meaning is plain on its face, the court gives effect to that plain meaning.” Response Br. at 18 (quoting *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002)). DNR further acknowledges that a court will not construe a regulation in a way that creates “strained or leads to absurd results.” *Id.* (quoting *Allison*, 148 Wn.2d at 81).

The rule at issue states that “[u]pon discovery of an unauthorized use of aquatic land, the responsible party *will* be 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.” WAC 332-30-127(2) (emphasis provided). It goes on to state that “[t]he trespassing party . . . *will* be assessed” a monthly fee beginning with the date of the required notice. WAC 332-30-127(3). This language must be construed as mandatory, because the meaning of the rule is “plain on its face,” and the

court must “give[] effect to that plain meaning.” *See Allison*, 148 Wn.2d at 81. It is difficult to imagine a plainer and clearer statement of a mandatory duty than that set forth in this rule. For this reason, no resort to the regulatory or statutory context of the regulation is necessary to interpret the rule.

However, even if this Court chooses to resort to the rule’s context to interpret it, the context only reinforces the mandatory nature of the rule. Three parts of the rule itself highlight its mandatory nature: First, Section 1 of the rule states that certain “[a]quatic lands . . . may be leased if found to be in the public interest.” WAC 332-30-127(1). The fact that the drafters of the rule used the word “may” to allow discretionary leasing of public lands makes it highly unlikely that the word “will” was used in the very next sentence to create anything but a mandatory duty. Second, the final section of the rule requires the monthly fee assessed against trespassers to be higher than fair market rental, and notes that the charge is to “encourage either normal leasing or vacation of aquatic land.” WAC 332-30-127(4). Considering this stated purpose of the rules—to “encourage either normal leasing or vacation of aquatic land”—makes it unlikely that it imposes a discretionary duty on DNR. *Id.* (emphasis provided). This is because the stated goal of “leasing or vacation” of State aquatic lands could not be attained if the monthly fee were selectively

enforced, as DNR seeks to do in this case. Finally, the rule states that notice to vacate and the monthly fee *will* be charged “[u]pon discovery of an unauthorized use of aquatic land.” WAC 332-30-127(2) (emphasis provided). Thus, the plain language of the rule leaves no room for any exercise of judgment or discretion. Rather, the mere fact of “discovery” of an unauthorized use triggers DNR’s obligation to begin proceedings against the trespasser.

DNR’s arguments that the broader statutory and regulatory context of WAC 332-30-127 make it appropriate to construe “will” as “may” are largely irrelevant. DNR points out the “broad management authority” granted to it, and states that WAC 332-30-127 should be interpreted “in light of” this broad authority.³ Response Br. at 21. But nowhere in DNR’s Response Brief does it point to any statute or regulation stating—or even suggesting—that the steps required by WAC 332-30-127 are discretionary. And despite DNR’s claim that this rule is one of a number of “management options” for dealing with trespassing vessels, Response Br. at 10, DNR has not cited any statute or regulation supporting this view.

³ DNR cites *Port of Seattle v. Pollution Control Hearings Board* to suggest that its interpretation of its own enabling statute and WAC 332-30-127 should be accorded deference. Response Br. at 20; *see also Port of Seattle*, 151 Wn.2d 568, 90 P.3d (2004). However, there is no indication that DNR’s “special expertise” was a part of its decision to ignore this properly-promulgated regulation. Furthermore, the choice not to implement a regulation at all cannot be fairly characterized as an agency’s “interpretation” of a regulation. For these reasons, no such deference is due DNR’s decision not to implement WAC 332-30-127. *See id.* at 593.

This is because no such provision exists. In fact, under the plain language of WAC 332-30-127, the notice to vacate and monthly charge are triggered by mere “discovery of an unauthorized use of aquatic land.” WAC 332-30-127(2) (emphasis provided). Further, no other regulation in DNR’s “residential rule package” requires any threshold determination or any other procedure to set the steps of WAC 332-30-127 into motion.

The lack of any conflict between WAC 332-30-127 and the related statutes and regulations distinguishes this case from *ITT Rayonier* and *Anderson*, both cited by DNR in its Response Brief. Response Br. at 21-22. In *ITT Rayonier*, the court examined a number of related regulations and statutes and found it “apparent” that the rule stating that claims “must” be received within a certain timeframe “was not designed to limit the director’s discretion.” *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). The *Anderson* court applied a similar analysis and concluded that it was appropriate to construe the word “shall” as directory to avoid a direct conflict with the agency’s enabling statute. *Anderson v. Weyerhaeuser Co.*, 116 Wn. App. 149, 64 P.3d 669 (2003). In this case, unlike *Anderson* and *ITT Rayonier*, no statute or regulation contradicts the mandatory nature of the language of WAC 332-30-127, or evidences any intent to make it directory.

Another fundamental difference distinguishes this case from *Anderson* and *ITT Rayonier*. In both *Anderson* and *ITT Rayonier*, the courts interpreted language that is normally prescriptive to be directory in order to further the legislature’s goals and intent for the functions the agency was to carry out. In both cases, the restrictive phrasing of a regulation was argued to limit an agency’s authority to carry out its statutory mandate. The regulation in this case, however, does not purport to restrict DNR’s authority, but rather is an exercise of the same. It resulted from an exercise of DNR’s rulemaking authority, and it to set out how DNR will proceed against trespassers on aquatic lands. Unlike the case in *Anderson* or *ITT Rayonier*, enforcing the regulation will not interfere with DNR’s authority to carry out its statutory mandate. On the contrary, it will give effect to DNR’s discretionary promulgation of the rule.

Without any statute or regulation to support its argument that the “context” of WAC 332-30-127 converts “will” into “may,” DNR has only its “broad management authority” to defend its willful flouting of its own properly promulgated rule. The gist of DNR’s argument is that if it has the discretion to promulgate regulations, it also has the discretion to ignore them or unilaterally determine how they are to be interpreted—after the fact. Adopting this view would not only nullify the procedural protections

inherent in the rulemaking process, but would also render a number of agency enforcement regulations meaningless, as the agencies would be free to decide on an *ad hoc* basis whether to heed their requirements.

B. DNR’s Continued Failure to Enforce Its Own Regulations and Comply with Its Own Statutory Mandate Violates the Public Trust Doctrine and Entitles Petitioners to Relief.

The parties agree that the public trust doctrine is violated where the state “has given up its right of control over the *jus publicum*” in such a way that the public’s interest in it is not “promoted,” or is “substantially impaired.” *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987). DNR takes the position, however, that it is not bound by the public trust doctrine. In fact, it is. Furthermore, DNR’s continuing failure to enforce its own regulations substantially impairs the public’s right of access to waters in Eagle Harbor, thereby violating the public trust doctrine.

1. DNR Is Bound by the Public Trust Doctrine.

In support of its apparent claim that it is not bound by the public trust doctrine, DNR cites language from *Rettkowski*, stating that the public trust doctrine “devolves upon the State, not any particular agency thereof.”⁴ See Response Br. at 36 (quoting *Rettkowski v. Dept. of*

⁴ DNR also presents a number of “red herring” arguments, suggesting that they establish the legality of DNR’s actions in this case. First, DNR states that navigation may be regulated under local police powers, “so long as the regulation does not conflict with state or federal laws.” Response Br. at 37. Because local regulation must be consistent with state laws, including the public trust doctrine, it is unclear how the existence of local

Ecology, 122 Wn.2d 219, 232, 858 P.2d 232 (1993) (en banc)). However, in *Rettkowski* the agency being sued was not charged with protection of a public resource for the benefit of the public, as is DNR. As the Supreme Court noted, “[n]owhere in Ecology’s enabling statute is it given the statutory authority to assume the State’s public trust duties and regulate in order to protect the public trust.” *Rettkowski*, 122 Wn.2d at 232. DNR, in contrast, has been granted “broad management authority” over public lands for the benefit of the citizens of the State. For this reason, DNR is in fact bound by the public trust doctrine. See *Washington State Geoduck Harvest Ass’n v. Washington State Dept. of Natural Resources*, 124 Wn. App. 441, 895, 101 P.3d 891 (2004) (holding that “[u]nder the public trust doctrine, DNR must protect various public interests in state-owned tidelands, shore lands, and navigable water beds”).

regulation of navigation supports DNR’s argument that it—in *this case*—has not violated the public trust doctrine. Second, DNR notes that it “continues to exercise sovereignty over the navigable waters under a panoply of statutes,” Response Br. at 37, apparently suggesting that because it has not given up the control it exercises over *all navigable waters* pursuant to *all statutes*, that it has not violated the public trust doctrine *in this case*. Not only is this argument a *non sequitur*, it rests on the specious assumption that as long as the DNR complies with *some* statutory duty on *some* navigable waters, it cannot be held to violate the public trust doctrine. Third, DNR notes a past judicial determination that the requirements of the Shoreline Management Act (SMA) complied with the public trust doctrine, apparently suggesting that because the SMA complies with the public trust doctrine, no agency action consistent with the SMA could possibly violate the doctrine. This argument, like the first two, it is based on a logical fallacy and thus has no merit.

2. DNR’s Failure to Address the Problem of Trespassing Vessels Violates the Public Trust Doctrine and Entitles Petitioners to Relief.

As succinctly stated in *Caminiti*, “[t]he [public trust] doctrine prohibits the State from disposing of its interest in the waters of the state in such a way that the public’s right of access is substantially impaired, unless the action promotes the overall interests of the public.” *Caminiti*, 107 Wn.2d at 670. The Court also noted the broad range of interests protected as part of the *jus publicum*, including “the right of navigation, together with the incidental rights of fishing, boating, swimming, water skiing, and other related recreational uses generally regarded as corollary to the navigation and use of public waters.” *Id.* at 669. It is also well established Washington law that heightened scrutiny is applied in cases involving *jus publicum* interests. *Weden v. San Juan County*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998).

Citing *Caminiti*, DNR contends that no violation of the public trust doctrine has occurred because other laws still apply in Eagle Harbor, because “[a]t any time, DNR *could* assert its authority” and eject the trespassers, and because the legislature can revoke DNR’s enabling statute at any time, *see* Response Br. at 39 (emphasis provided). While some of these factors were mentioned in *Caminiti*, the analysis of the public trust doctrine in this case does not turn solely on the factors, for two reasons.

First, the laws and regulations that DNR claims apply to the vessels in Eagle Harbor only apply in theory. In reality, the trespassing vessels on Eagle Harbor are subject to *no regulation whatsoever*. The record clearly shows that DNR has relinquished control over a substantial portion of Eagle Harbor over a period of years, and that no public benefit has accrued from DNR's inaction in the face of decades of trespasses. The heart of the inquiry under *Caminiti* is not whether other regulations *could* apply to the activities in question, but rather whether the use in question is subject to *some* kind of regulatory control.

In this case, it is the regulatory control that DNR could exercise over the trespassing vessels—and the area they currently occupy—that has been given up entirely. The record shows that this relinquishment of control has substantially impaired public access rights, and other rights inherent in the *jus publicum*, through the resultant navigational hazards, environmental degradation, reduced availability of recreational use, and aesthetic impairment.¹ CP 397-418. This total relinquishment of control of a substantial portion of Eagle Harbor, and the harms that have resulted, constitute a violation of the public trust doctrine on DNR's part, and entitle Petitioners to relief.

C. BCU’s Request for Relief Is Justiciable and BCU Has Standing to Maintain It.

Both parties agree that the four-prong test enunciated in *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994) should be applied to determine the justiciability of BCU’s claims. Response Br. at 27. However, DNR claims that BCU does not satisfy the test’s third prong, which inquires whether a litigant has a “direct and substantial” interest—or standing—in a dispute; or its fourth prong, which inquires whether judicial determination of the dispute would be “final and conclusive.” Response Br. at 28 (conceding that “BCU demonstrates a present and existing dispute between parties with opposing interests”). To the contrary, BCU and its members have alleged facts sufficient to satisfy both of these prongs of this justiciability test. Thus, the present action is justiciable and Petitioners have standing to maintain it.

1. BCU’s “Direct and Substantial” Interest in This Dispute Provides It with the Standing Required to Maintain This Action.

The third—or “standing”—prong of the justiciability test requires that a dispute involve interests that are “direct and substantial, rather than potential, theoretical, abstract or academic.” *Walker*, 124 Wn.2d at 411. In the context of the Uniform Declaratory Judgment Act (UDJA), Washington courts will find standing if 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,” and that the challenged action has caused an “injury in fact,” economic or otherwise, to the party seeking to establish standing. *Save a Valuable Env’t v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978).

DNR does not directly address the “injury in fact” requirement, but rather focuses its argument on its claim that BCU’s claim does not satisfy the “zone of interest” test as applied by Washington courts. *See* Response Br. at 28-32. In its briefing of this point, DNR correctly states that “[c]ourts often refer to the general *purpose of the statute* in question when evaluating whether a party’s interests are within the zone of interests to be protected by the statute.” Response Br. at 29 (citing *Branson v. Port of Seattle*, 152 Wn.2d 862, 876 N.7, 101 P.3d 67 (2004)) (emphasis provided). Then, it analyzes the issue of whether the “*purpose of the rules* at issue in this case” satisfies the zone of interest requirement. Response Br. at 29. This confusion between an enabling statute and an implementing regulation only serves to confound the zone of interest analysis. Furthermore, DNR’s citation of *Branson*, in which the court analyzed a statute to determine whether a litigant’s claim fell within its zone of interest, is inapposite.

A proper analysis of the zone of interests analysis begins with DNR’s enabling statute, RCW 79.105.030, wherein the legislature delegated to DNR the authority “to manage [state-owned aquatic lands] for the benefit of the public.” DNR acknowledges a number of serious problems that exist due to its failure to address the trespasses in Eagle Harbor—including “rude and lawless behavior of the vessel owners, impaired water quality, declining local economy, declining property values, reduced access to their shoreline properties, difficulty navigating, and unsightly views”—but then suggests that these problems are not DNR’s problem because WAC 332-30-127 does not specifically address any of these harms. Response Br. at 30.

The “broad management authority” that DNR touts throughout its brief surely includes the authority to address these problems, all of which fall squarely within the very public interests that DNR is charged with protecting in its enabling statute, including: “(1) Encouraging direct public use and access; (2) Fostering water-dependent uses; (3) Ensuring environmental protection; [and] (4) Utilizing renewable resources.” RCW 79.105.030. As members of the public who have suffered injury as a result of DNR’s inaction, BCU and its members are clearly within the “zone of interest” that the agency’s enabling statute was intended to protect.

In a recent case, this Court found both individual and organizational standing based on a finding that the members of the organization that brought suit would be “individually and collectively . . . specifically and perceptibly affected by the moratorium as it affects their personal and business interests.” *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). As the record clearly shows, BCU members’ have suffered injury to their “personal and business interests,” as their recreational and commercial use of Eagle Harbor has been adversely affected by the presence of the trespassing vessels. CP 349-51. They have suffered adverse impacts to their waterfront businesses due to the hazardous conditions created in Eagle Harbor, loss of business, adverse health and safety impact, threats and other lawless behavior, interference with use of waterfront amenities, and a decrease in property values due to the aesthetic, health and safety impacts of the trespassing vessels. CP 397-425.

In addition, many BCU members also own residential property on the south side of Eagle Harbor just yards away from the trespassing boats. CP 350. Their access to their docks and to buoys leased from DNR has been severely restricted. *Id.* The home owners’ property values have been negatively affected as well as the safety of their property and their

children. CP 351, 397-425. All of these injuries are suffered by a discrete number of individuals, including BCU and its members, and are not suffered by the public at large.

These facts contradict DNR's claim that BCU invokes no interest that is "distinguishable from any other member of the public." Response Br. at 32 (citing *Crane Towing Inc. v. Gorton*, 89 Wn.2d 161, 172-73, 570 P.2d 428 (1977)). They also prove that BCU and its members have standing to maintain the present suit.

2. A Judgment in This Matter Will Be Final and Conclusive with Respect to the Parties to This Action, and the Trespassing Vessel Owners Are Not Indispensable Parties.

The fourth and final requirement for justiciability is that "a judicial determination of [the claim] will be final and conclusive." *Walker*, 124 Wn.2d at 411. The UDJA requires that "all persons . . . be made parties who have or claim any interest which would be affected by the declaration." *See* RCW 7.24.110. DNR, through an overbroad reading of the statute, claims that the UDJA prohibits any declaratory judgment in this case because the owner of every trespassing vessel is not a party to this action. Response Br. at 34.

This same overbroad reading of the UDJA was urged by a party in *Ruston*, but was flatly rejected by the court. *See Town of Ruston v. City of*

Tacoma, 90 Wn. App. 75, 951 P.2d 805 (1998). *Ruston* involved an action for declaratory judgment to determine the boundary between the Town of Ruston and the City of Tacoma. The City argued that the current lessee of the land, which happened to be DNR, as well as the land's former owner, should have been joined under RCW 7.24.110. *Id.* at 81. Although the court acknowledged that "the legal relationships between the [past owner and lessee] of the land might change as a result of th[e] action," it held that the joinder was not required because "such changes are speculative and secondary to the issue at hand." *Id.* at 82.

The issue at hand in this case is BCU's request for a determination that DNR has a mandatory duty to implement its regulations, and an injunction requiring DNR to do the same. BCU has not requested that any action be taken directly against the trespassers on Eagle Harbor, and thus the effects that a judicial determination in this case may have on the trespassing vessel owners is "speculative and secondary to the issue at hand," much like the case in *Ruston*. *See id.* Without doubt, the vessel owners would not be bound by any judgment in this case, though they may be indirectly affected by the ruling. This does not mean that the relief requested by BCU will lack finality or conclusiveness: a judicial determination on the contested issues in this case would resolve a great deal of uncertainty regarding DNR's duties.

DNR's argument that the controversy will continue because "the vessel owners . . . may institute their own litigation," and because they will be "affected" by the proceeding, Response Br. at 33-34, is likewise without merit. Such a broad reading of RCW 7.24.110 would make virtually any suit against any state agency impossible, as most agency actions "affect" individuals who could conceivably institute their own litigation. Because the effect on the individual vessel owners will be secondary, and is at best speculative, and because a judgment in this case would settle the uncertain legal relations of the parties to this case, BCU's claim meets the fourth prong—requiring a judgment be final and conclusive—of the applicable justiciability standard.

III. 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 19th day of July, 2007.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

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.)

I, Donna S. Spaulding, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on July 19, 2007, I served a true and correct copy of the following documents:

1. Reply Brief of Appellants; and

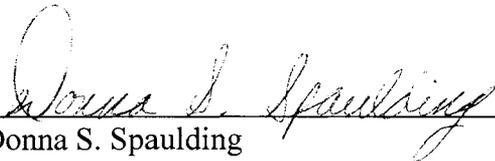
2. Declaration of Service

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 July 19, 2007, at Seattle, Washington.



Donna S. Spaulding