

Puget Sound: Sunk by Law, Salvaged by Law

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As these forces of Climate Change and Shared Strategy and Puget Sound Partnership and Puget Sound Action Team come together at this critical juncture in 2007, you are told that—

- **our VISION is poor**
- **our KNOWLEDGE is weak**
- **our SCIENCE is bad**
- **our FUNDS are short**
- **our REGRETS are deep**
- **our LAWS are inadequate**

**I'm here to tell you: The only thing we're short on is
POLITICAL GUMPTION
and LEADERSHIP**

For Puget Sound, the Governor has urged waters that are "FISHABLE, SWIMMABLE and DIGGABLE" by the year 2020.

Her advisors forgot to read Subsection 101(a)(2) of the Clean Water Act (33 U.S.C.A. § 1251(a)(2) (enacted in 1972) that specified as a "NATIONAL GOAL" and an "INTERIM GOAL" the achievement of FISHABLE, SWIMMABLE waters by the date of July 1, 1983

Which generation has scaled back the VISION?

**For Puget Sound in 2006-07,
the Governor urges that we
"Accelerate Control and
Cleanup of Toxic Pollution"¹**

1. Puget Sound Partnership Recommendations, Sound Health, Sound Future 26 (Dec. 2006) [hereinafter 2006 Puget Sound Partnership Recommendations].

**For the entire U.S. in 1972, it
was announced as a "National
Policy" that the "Discharge of
Toxic Pollutants in Toxic
Amounts be Prohibited"²**

2. 33 U.S.C.A. § 1251(a)(3).

**For Puget Sound in 2006-07,
the Governor recommends
that we "Substantially
Increase Compliance With
Our Existing Laws that
Protect Habitat, Water
Quality, and Stream Flows"¹**

¹. 2006 Puget Sound Partnership Recommendations at 25.

Nonenforcement. A new problem?

**Act of Congress establishing a
Temporary Government for the
Territory of Oregon, § 12, 9 Stat.
323, 328 (Aug. 14. 1848):**

**And be it further enacted, that
the river and streams of water
in said Territory of Oregon in
which salmon are found, or to
which they resort, shall not be
obstructed by dams or
otherwise, unless such dams or
obstructions are so constructed
to allow salmon to pass freely
up and down such rivers and
streams.**

Territory of Washington Code of 1881:

SEC. 1173. Any person or persons who may build any dam of any kind, or place any obstruction of any kind for any purpose whatever, in any of the rivers in Washington Territory, frequented by salmon for the purpose of spawning, shall construct a suitable fish way by which said fish may reach the water above said dam, or obstruction; and it shall be unlawful for any person or persons to close any river of this territory by placing across the same any stakes, seines, drag or gill nets, which may prove an absolute bar to the passage of fish frequenting the same for the purpose of spawning. Any person violating the provisions of this section may be fined in any sum not exceeding five hundred dollars, to which may be added imprisonment in the county jail not exceeding one year.

Reenacted by Wash. Sess. Laws 1889-90, p. 107, § 8 (“said dam or obstruction may, in the discretion of the court, be abated as a nuisance”), repealed by the Fisheries Code of 1915 (Laws of 1915, ch. 31).

Hydraulics Laws—1949

"any person . . . [who desires] to construct any . . . project that will use, divert, obstruct, or change the natural flow or bed of any river or stream . . . shall submit . . . complete plans and specifications for the proper protection of fish life . . . [and secure the] written approval [of the authorities] before commencing construction and work thereon."

Washington Hydraulics Law

**Washington Department of Fisheries,
Streamside Catalogue, 2 Vols. (1974)**

(a great study) of

- fish populations in each stream**
- environmental conditions**
- assessments, trends and evaluations**

**The conclusion – NONENFORCEMENT
and MORE NONENFORCEMENT:**

"A recurring problem is the attitude of the local courts when the Department attempts to prosecute a hydraulic violation. Convictions are rarely obtained and when favorable judgments do occur the penalties are usually so low that they provide little if any deterrent to future violations."

Enforcement?

Daniel Jack Chasan, "The Rusted Shield: government's failure to enforce – or obey – our system of environmental law threatens the recovery of Puget Sound's wild Salmon" (March 2000) (Commissioned by the Bullitt Foundation)

Id. at 14

(the Hydraulics Act "is rarely enforced. Much of the public does not even know it exists. And government itself has violated the law thousands of times, often by not providing fish passage when it builds roads")

Mitigation

See 2000 Chasan at 23:

"A 1998 King County study of 38 mitigation projects found that 97 percent did not work. At 9 sites the required mitigation did not meet the County's performance standards. Five of the six projects that met the standards did not actually replace the functions of the wetlands that had been destroyed. If replacing the function of lost wetlands was the criterion, **ONLY ONE** of the **THIRTY-EIGHT MITIGATION PROJECTS SUCCEEDED.**"

The Philosophy of Non-Enforcement called "Regulatory Reform,"

H.B. 1010, ch. 403 (Wash. Laws, 1995):

§ 1 The legislature finds –

(f) In order to achieve greater compliance with administrative rules at less cost, that a cooperative partnership exist between agencies and regulated parties that emphasizes **EDUCATION** and **ASSISTANCE** before the **IMPOSITION** of **PENALTIES**

This is the law that invents the **SMALL BUSINESS IMPACT STATEMENT** (an idea borrowed from environmental law)

How could a universal and tempting strategy of NONENFORCEMENT be defeated legislatively as a practical matter?

- **The prohibited conduct (e.g., work in a streambed in violation of a hydraulics permit) could be defined as a "public nuisance" and enforcement powers vested in a broader class (Attorney General, county prosecutors, city attorneys)**
- **Unlikely-to-forgive enforcers (citizen suits, Indian tribes) could be sought for enforcement purposes**
- **The Department of Ecology could be required to account systematically for its numerous "forgiveness" strategies**

Collaboration—Sometimes

In 2006, the Puget Sound Partnership reminds us that "the History of Collaboration in Natural Resources in Washington is Nationally known"¹

1. 2006 Puget Sound Partnership Recommendations at 18.

Does this **COLLABORATION** swing into play when somebody is willing to take action to combat a serious and long-lasting detriment to Puget Sound? Consider the case of **FISH-BLOCKING CULVERTS.**

Culverts

In 1998, the Washington State Legislature found

- that there are over 2,000 barriers to fish passage at road crossings throughout the state**
- these barriers block fish access to as much as 3,000 miles of freshwater spawning and rearing habitat**

Fish-Blocking Culverts

The Washington State Legislature has weighed in on this question (Laws of 1998, ch. 249, § 1):

Findings—Purpose—1998 c 249: "The legislature finds that fish habitat enhancement projects play a key role in the state's salmon and steelhead recovery efforts. The legislature finds that there are over two thousand barriers to fish passage at road crossings throughout the state, blocking fish access to as much as three thousand miles of freshwater spawning and rearing habitat. The legislature further finds that removal of these barriers and completion of other fish habitat enhancement projects should be done in a cost-effective manner, which includes providing technical assistance and training to people who will undertake projects such as removal of barriers to salmon passage and minimizing the expense and delays of various permitting processes. The purpose of this act is to take immediate action to facilitate the review and approval of fish habitat enhancement projects, to encourage efforts that will continue to improve the process in the future, to address known fish passage barriers immediately, and to develop over time a comprehensive system to inventory and prioritize barriers on a statewide basis."

But who has to lead the way? Who has to discover fortuitously useful fish-protection law in some 1855 treaties? The Indian tribes. And are they helped along the way by the **CONSENSUS-BUILDERS OF Washington State?**

There is a lawsuit brought by the Indian tribes to enforce the STRONGEST ENVIRONMENTAL LAW ever brought to bear to protect Puget Sound

- **The "Culvert Case" (*U.S. v. Washington*), filed Jan. 2001, alleged –**
 - **improperly maintained culverts blocked access to at least 249 linear stream miles of habitat**
 - **407,464 square meters of productive salmon spawning habitat**

"Culvert Case," continued

- 1,619,831 square meters of productive salmon rearing habitat
- loss of 200,000 adult salmon we otherwise would have

Tribes v. Road Builders

- let me add another story on tribal motivation to protect Puget Sound and its waters

**This case was argued before
Hon. Ricardo S. Martinez in
the U.S. District Court in
Seattle on February 1, 2007**

- **Was the Governor there to file a supporting brief on behalf of the tribes? NO.**
- **Or the Puget Sound Partnership? NO.**
- **Or interested legislators? NO.**
- **An Amicus Brief was filed by the Washington Association of Counties—and this group opposed what the tribes were trying to accomplish**

**Washington Association of
Counties, Memorandum in
Support of the State's Motion for
Summary Judgment, Sept. 29,
2006, p. 6.**

"The Tribes are seeking to force the State, and presumably later, the counties, to immediately repair all fish-blocking culverts. . . . [Absent specific language in the treaties], neither the State nor the counties can be found to have a duty to immediately return every culvert to a condition that allows for the same flow of fish as existed prior to the erection of the culvert. . . ."

Washington's Opposition to [Tribes'] Motion for Partial Summary Judgment [in the Culvert Case], Sept. 27, 2006, pp. 18, 19:

"The Tribes' claim, carried to its logical conclusion, would give them a right to demand restoration of 1855 conditions and to control all future land management decision in the *United States v. Washington* case area. . . . The potential scope of the right sought by the Tribes cannot be underestimated."

Treaty with the Dwamish, Suquamish, etc., 1855

**Title on Esplanade Drive (near NW
85th Street and 32nd Avenue NW):**

“Under the Treaty with the Dwamish this land is encumbered and restricted by the tribal rights of taking fish, and all associated uses, including access, prohibition on disturbances of sensitive areas, such as wetlands, limitations on all development inconsistent with sustainable use of the property for fish habitat.”

What could be done?

What could be done in law to correct the thinking of this latest Attorney General of Washington who prefers to resist this modest "treaty" proposal to help the salmon?

He could be instructed by the legislature to settle the case forthwith and to take advantage of this wonderful opportunity to apply treaty-based habitat protection.

Hydraulics 2005

How would you destroy this law if you were an accommodating and indifferent resident in the enclave of timidity called the Washington State Legislature?

- **Fill it with exemptions, such as those for**
 - **"streambank stabilization projects"**
 - **small-scale prospecting and mining**
 - **construction of facilities for sexually-violent predators (RCW 77.55.071)**

Hydraulics 2005

- Sweep it aside for any "emergency" declared by a "county legislative authority" (Laws of 2005, ch. 146, § 201(8) (upon a county declaration of emergency, the department "shall issue immediately, upon request, oral approval for a stream crossing, or work to remove any obstructions, repair existing structures, restore streambanks, protect fish life, or protect property threatened by the stream or a change in the stream flow"))

Hydraulics 2005

- Invent an override for "imminent danger" (Id., § 201(10)) ("In cases of imminent danger, the department shall issue an expedited written permit, upon request, for work to remove any obstructions, repair existing structures, restore banks, protect fish resources, or protect property")

Hydraulics 2005

- Pay sensitive heed to "significant hardship" (Id., § 201(11)) ("The department may issue an expedited written permit in those instances where normal permit processing would result in significant hardship for the applicant or unacceptable damage to the environment")

Hydraulics 2005

- **Put the burden on fish-protectors (Id., § 201(6)) ("The burden is on the department to show that changed conditions warrant the modification in order to protect fish life"). Contrast id., § 201(7) (burden is otherwise where permittee seeks modification)**
- **Make the whole arrangement completely mysterious, complex, bureaucratic, unworkable and unenforceable.**

The value of CONSENSUS?

NOAA's technical review of the Recovery Plan

"ASSUMED" that the various plans would be implemented and did not explore the "LIKELIHOOD" that they would not.¹

1. 2006 Shared Strategy at 342.

How realistic is that assumption?

The "Wherewithal"

Washington Constitutional Amendment, § 18, enacted in 1944, establishes the Washington Highway Trust Fund, identifies the gas tax as a source of funding, and limits expenditures to the "CONSTRUCTION, RECONSTRUCTION, MAINTENANCE, REPAIR and BETTERMENT of PUBLIC HIGHWAYS."

Conclusion

Law Is Never the Barrier It Is Cut Out to Be Because It Can Be Changed

- **A 1944 Highway Trust Fund?** **Break it to fund Puget Sound needs.**
- **PCBs beyond regulation?** **Tax them.**
- **Historical damage from I-5 or Burlington Northern?** **Assess natural resource damages.**
- **Expired NPDES Permits?** **Enforce them.**
- **Contaminated Shellfish Beds?** **Treat them as Superfund sites.**
- **Fish Advisories That Go Nowhere?** **Require an enforceable clean-up plan to follow.**

Hydraulics 2005

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