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Mr. Peter Goldmark, Commissioner of Public Lands  
Department of Natural Resources  
P.O. Box 47000  
1111 Washington Street SE  
Olympia, WA 98504-7000

Submitted via email to: [cpl@dnr.wa.gov](mailto:cpl@dnr.wa.gov)

Re: Waterway Number 1 in the Laurelhurst Community

Commissioner Goldmark,

I am writing on behalf of Friends of Waterway 1 to once again communicate the deep concern regarding the Department of Natural Resources' (DNR) actions regarding Waterway 1. This letter addresses DNR's decision regarding the use authorization for the property located at 3335 43<sup>rd</sup> Avenue NE as well as DNR's presently ongoing deliberation for the other encroaching landowner located at 3509 43<sup>rd</sup> Avenue NE in Seattle, Washington.

To clarify the scope of the encroachments on the public waterway, a conservative estimate calculates that the private landowners now occupy, at a minimum, 30 percent of the waterway and upland portion. The public has lost at least one-third of this waterway. DNR appears to consider the amount of the waterway lost to the public as not significant. However, the loss of one-third of a waterway that cannot be leased or sold due to its significance to the citizens of Washington cannot be considered insignificant under any determination.

**Notice of Final Determination for SEPA File 09-072701**

As you are likely aware, DNR recently completed a State Environmental Policy Act (SEPA) process to determine the environmental impact of authorizing permits to allow a private boat dock and lift in the waterway and private landscaping on an upland portion. The use authorizations are for the landowners located at 3335 43<sup>rd</sup> Avenue NE.

During the comment period DNR received 51 comment letters. Most of the letters came from residents who live in the neighborhood while a few were submitted by environmental groups. The comments show a nearly universal opposition to the granting of the use authorizations. Yet despite the wishes of the public, DNR decided to grant authorizations that limit public access to this publicly owned waterway.

Many of the comments did not specifically pertain to SEPA, so DNR did not directly respond to these comments. However, the non-SEPA comments disregarded by DNR evince the neighborhood's dissatisfaction with the encroachments and the strong opposition to allowing the uses to remain. What these non-SEPA comments reveal is what the "public" considers a "public benefit."

The Department of Natural Resources claims in the Notice of Final Determination that "DNR will move forward in a manner" to meet the directives of RCW 79-105-030. The "directives" are; (1) encouraging direct public use and access; (2) fostering water-dependant uses; (3) ensuring environmental protection; and (4) utilizing renewable resources. Lastly, the statute holds that generating revenue in a manner consistent with these directives is a public benefit. This code section also imposes a duty on DNR to manage state-owned aquatic lands to "provide a balance of public benefits for all citizens of the state."

DNR's decision to authorize uses in the public waterway fails to meet these directives and any revenue generated via the permits is not consistent with them. Authorizing the use and placement of a dock and boatlift in the waterway does not "encourage[] direct public use and access." The boatlift and dock will limit direct public use and access. While the amount of space occupied by the boatlift and dock is significant to Friends and insignificant to DNR, clearly allowing any use that limits the amount of direct public use and access to the waterway does not "encourage" it.

For the same reasons, the decision does not "foster water-dependant uses." The Final Determination notes the permits contain conditions requiring the permit-

holder to provide maintenance on the occupied site. This hardly “ensures environmental protection”, particularly since the authorization allows for 650 square feet of impervious surfaces upland, which increases stormwater runoff. The Final Determination dismisses any runoff from this authorized use as having “minimal impacts.” However, any use that allows increased stormwater runoff does not “ensure environmental protection.”

DNR’s decision to authorize the uses appears to hinge on the fact that doing so will generate revenue, which it notes is a goal of RCW 79-105-030. However, any relatively small revenue generated by the rent paid for the private use of this public land does not offset the cost to the public over the loss of this waterway. DNR is framing the issue of public use versus private accommodation improperly. DNR is taking the approach that the private uses must necessarily exist and that any “remaining” public land is “sufficient” for the public. DNR’s duty is to protect and manage public lands for the benefit of the public. Any process to remove public land from the public’s use must first analyze the necessity of allowing any private use on public land. If this use, or uses, is contrary to the “public benefit” there is no need for DNR to allow them.

DNR has assumed that the private boat lift and dock and upland landscaping are inevitable and the public should simply be happy that there is some remainder of the public waterway. This assumption leads to the type of SEPA process performed for the use authorizations at 3335 43<sup>rd</sup> Avenue NE. It is a process that treats the encroached land as part of the “natural” waterway and seeks to formalize it via SEPA procedures.

The steadily increasing extent of unauthorized trespass by two private owners at Waterway 1 has emerged over the last 15-20 years because DNR failed to respond to repeated protests by concerned neighbors and by the Laurelhurst Community Club. This steadily increasing encroachment, which DNR failed to mitigate, has already wiped out many of the valuable community roles that Waterway 1 played before encroachers were allowed to take over at least 30 percent of the park land and block much of the shoreline. Long-term residents recall that their pre-school and grade-school children enjoyed beach discovery and nature study activities at the shoreline before DNR failed to halt the expanding encroachments. Teenagers sailed El Toros, took part in canoe classes, and learned to flip their kayaks upright in the inlet at the waterway. The waterway gave families adequate room for basketball practice, games in the playfield, and picnics at the shore. Today, due to the encroachments most of those activities are greatly hindered or not possible.

The fence and hedge on the southeast side, which transfer more than 20-feet of the waterway into a private parking area adjoining 43rd Ave, were installed in 2002. Again, there were repeated protests by the community and a strong letter of protest by the Laurelhurst Community Club, but DNR made no effort to mitigate the unauthorized trespass. Today, DNR treats these cases of unauthorized trespass as normal uses and measures further damages from a baseline in which many of the most substantial damages have already been imposed on the public by DNR's failure to limit unauthorized trespass. DNR needs to correct the substantial damage from past unauthorized trespass and prevent future damage.

Friends of Waterway 1, and many of the neighbors, remain very much against DNR's approval of the use authorizations for 3335 43<sup>rd</sup> Avenue NE. Yet, it now appears DNR is contemplating an even more egregious violation of the public trust.

### **DNR's Assistance and Promotion of a Potential Land Swap**

To clarify, the issue in dispute is between Friends of Waterway 1 and DNR. This is not a neighbor versus neighbor dispute. The encroaching landowners have no authority to unilaterally alienate public land from the public domain. While private landowners can certainly build into public waterways, they do so without authorization and are liable for damages for trespass onto to public land. But it is only with DNR's blessing that these encroachments can remain in the public waterway. In 1994, the property owner on the northwest side built a large residence with a substantial deck extending onto the public land, in spite of the fact that a 1993 survey clearly showed the location of the boundary of the waterway. Between the 1993 survey and 2009, the amount of unauthorized encroachment on the northwest side continued to increase.

Therefore, I implore DNR to take charge of this process by creating a forum whereby the public has as much input as the encroaching landowners in how DNR is ultimately going to make its decision. If DNR continues to cater solely to the encroaching landowners, it creates the appearance of favoritism and fosters distrust between the public and DNR.

Because DNR has not taken a proper leadership role by including the public in this process, the public is forced to gain information via public disclosure

requests and repeated calls and emails to DNR staff. This puts the Friends of Waterway 1 and the public in general, at a disadvantage because information revealed by public disclosure requests is often “old news” and only show what has already occurred. By not being part of the process, Friends of Waterway 1 cannot provide its opinion as to various management decisions by DNR. The land in question is still public land, yet the public has no voice in the process of how the waterway is to be managed.

Through a public disclosure request, it came to the attention of Friends of Waterway 1 that DNR is considering and even assisting the encroaching landowner with pursuing a land swap for the land presently encroached in the waterway. This is incredibly alarming and disturbing information. Is DNR seeking to vacate and permanently alienate a significant portion of the waterway? While a vacation of the property and land exchange may be difficult to accomplish, the fact that DNR is investigating this possibility is amazing. DNR has a duty to keep this public waterway open for public use, yet DNR is not seeking any alternative that would do so, and is considering permanently removing this land from the public domain.

Waterways are special pieces of property, owned by the citizens of the state and managed by DNR. Unlike other properties in DNR’s portfolio, waterways cannot be sold or even leased to private individuals. “As is well known, the state holds title to property in two distinct capacities, the one a proprietary capacity, as individuals generally hold property, and the other a governmental capacity, that is, in trust for the public use.” Laurelhurst Club, Inc. v. Backus, 161 Wash. 185, 192, 296 P. 819 (1931), citing State v. Superior Court, 91 Wash. 454 (1916).

Waterways fall within the class of properties held by DNR in trust for the public use. This is clearly announced in RCW 79.120.010, which states; “All waterways shall be reserved from sale or lease and remain as public highways for watercraft until vacated as provided for in this chapter.”

The special classification given to waterways is intended to promote important legislative determinations including direct access and use of waterways and the preservation and enhancement of water-dependant uses such as launching facilities. Northlake Marine Works, Inc., v. The Department of Natural Resources, et. al., 134 Wn. App. 272, 287, 138 P.3d 626 (2006). Therefore, any attempt by DNR to permanently remove a significant portion of the waterway from the public domain runs counter to legislative directives as to how DNR is to manage waterways. Friends of Waterway 1 urge DNR to halt any further consideration of a land swap involving any portion of Waterway 1. This

alternative must be removed from consideration of how DNR intends to move forward with this process.

Friends of Waterway 1 are asking to be involved in this process. As a non-profit organization dedicated to the protection and preservation of this unique waterway, it is imperative that DNR include the Friends group in the discussion. Friends of Waterway 1 are sympathetic to the encroaching landowners' desire for privacy and have ideas of how DNR can forge a compromise that would return most the waterway to the public and still allow the landowners to create the privacy they are seeking. However, until DNR opens this process and creates transparency the public has no voice and risks the permanent removal of Waterway 1 from public access and use. This is unacceptable.

## **Conclusion**

In closing, Friends of Waterway 1 renew its objections to DNR's decision to grant use authorization permits for 3335 43<sup>rd</sup> Avenue NE. While these uses are established on a time-limited basis, they are counter to DNR's purpose to manage waterways to allow for direct public use and access, encourage environmental protection, and foster water-dependant uses. DNR's decision to reject the numerous objections to its decision to authorize the uses has angered many residents of the neighborhood. DNR needs to listen to the public when determining what the "public benefit" will be in authorizing uses in a waterway.

Of even more pressing importance however, is DNR's apparent contemplation of vacating the waterway and conducting a land swap with the landowners at 3509 43<sup>rd</sup> Avenue NE. This is unacceptable and the fact that the public learned of this process only through a public disclosure requests casts DNR's motives in a dubious light. DNR is fully aware of the public outcry regarding the use authorization of the adjacent property owner. Yet despite the outpouring of opposition, DNR is now apparently investigating a permanent alienation of the public from a significant portion of the Waterway. Friends of Waterway 1 and many of the residents of the neighborhood will not stand for this. Friends of Waterway 1 seek a statement from you that DNR will not seek to vacate all or a portion of Waterway 1.

Commissioner Goldmark, this is a public land issue and the public must be involved in some meaningful way. The courts are always a poor venue to determine legislative directives and disposition of public land and waterways. The ultimate authority over how DNR uses lands that cannot be sold or leased

lies with the people of the state. DNR is delegated authority to manage these lands for the best use for all citizens of the state. As such, DNR must reach out and include the public in these determinations. As stated above, Friends of Waterway 1 have many ideas as to how the public and private needs can be met for the management of Waterway 1. However, until DNR takes a proper leadership role and includes a seat at the table for the public, Friends of Waterway 1 have no venue or chance to make these proposals known.

Finally, it is important to note that while the amount of public waterway in question is relatively small in comparison to the amount of waterways managed by DNR, every removal of public access from public waterways has an impact. As Bridget Moran, the Deputy Supervisor for Aquatics and Agency Resources, stated in discussing DNR's decision to stop construction of a dock for a mine on Maury Island, it is important for DNR to stop the "death by a thousand cuts" of public resources.<sup>1</sup> Friends of Waterway 1 urge you and DNR to open the process of determining use of Waterway 1 to the public and to consider alternatives in order to gain the largest public benefit from this decision.

Friends of Waterway 1 are available to meet with you and your staff to discuss the issues outlined in this letter. Please contact me if you have any questions or comments. I look forward to hearing from you.

Sincerely,

/s/

M. Patrick Williams

cc: Friends of Waterway 1  
Senator Maria Cantwell  
Center for Environmental Law and Policy  
Sierra Club Cascades Chapter

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<sup>1</sup> From the article, "Why Maury Island Matters." The Stranger, Bryan T. Bissell <http://www.thestranger.com/seattle/why-maury-island-matters/Content?oid=2069874> (last visited Dec. 7, 2009).