

December 10, 2018

Scott Bird
Rules Coordinator
Department of Fish and Wildlife
600 Capital Way N
Olympia, WA 98501

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DEC 10 2018
FISH AND
WILDLIFE COMMISSION

Good morning Scott,

The Carney Lake property owners held our meeting on December 8, 2018, at the Pierce County Public Library in Key Center, WA. The conference room was packed and many attendees had to stand in the aisles. I can honestly state that a vast majority of the lake property owners were in attendance.

The vote was unanimous for re-instatement of the previous language contained in the relevant regulation (previous WAC 220-312-040(62), now WAC 220-312-040(34)). Although you mentioned in your voice mail to me last month that it was preferred to receive one petition, many in attendance wanted to submit their own petitions even though we were all in agreement. I have enclosed my petition as well as the others that were submitted at the meeting. I have also enclosed a signature sheet, that includes my wife's and my signature, as well as those in attendance who did not want to submit a separate petition, but supported our efforts. I placed my petition on top as it is arguably the most comprehensive and many of the other petitions restate the concerns raised in this first petition. A couple of the petitions contain copies of letters issued over the years between the Department and property owners addressing our two concerns. I cite to two of those letters in my petition.

I believe you have already received two petitions and those property owners have received a response from the Department announcing the teleconference meeting scheduled for Friday, December 21, 2018. I would like the Commission to have mine, as well as the other enclosed petitions, prior to that meeting. I will call the listed phone number – (360) 902-2267 – today to make arrangements to attend that meeting telephonically. Thank you for your attention to this very serious matter.

Sincerely,



James Conant
Carney Lake property owner

Enc: 17 petitions to amend Department regulations
1 signature sheet (2 pages)



PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE

Print Form

In accordance with RCW 34.05.330, the Office of Financial Management (OFM) created this form for individuals or groups who wish to petition a state agency or institution of higher education to adopt, amend, or repeal an administrative rule. You may use this form to submit your request. You also may contact agencies using other formats, such as a letter or email.

The agency or institution will give full consideration to your petition and will respond to you within 60 days of receiving your petition. For more information on the rule petition process, see Chapter 82-05 of the Washington Administrative Code (WAC) at <http://apps.leg.wa.gov/wac/default.aspx?cite=82-05>.

CONTACT INFORMATION *(please type or print)*

Petitioner's Name James and Paula Conant

Name of Organization _____

Mailing Address 16817 156th St. NW

City Gig Harbor State WA Zip Code 98329

Telephone (253) 884-9091 Email conantpaula@yahoo.com

COMPLETING AND SENDING PETITION FORM

- Check all of the boxes that apply.
- Provide relevant examples.
- Include suggested language for a rule, if possible.
- Attach additional pages, if needed.
- Send your petition to the agency with authority to adopt or administer the rule. Here is a list of agencies and their rules coordinators: <http://www.leg.wa.gov/CodeReviser/Documents/RClst.htm>.

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INFORMATION ON RULE PETITION

Agency responsible for adopting or administering the rule: Washington State Department of Fish and Wildlife

1. NEW RULE - I am requesting the agency to adopt a new rule.

The subject (or purpose) of this rule is: _____

The rule is needed because: _____

The new rule would affect the following people or groups: _____

2. AMEND RULE - I am requesting the agency to change an existing rule.

List rule number (WAC), if known: WAC 220-312-040(34)

I am requesting the following change: Re-instatement of July and August closure of public access and prohibition of internal combustion motors on Carney Lake

This change is needed because: See attached Addendum to Petition for Adoption, Amendment, or Repeal of State Administrative Rule

The effect of this rule change will be: See attached Addendum to Petition for Adoption, Amendment, or Repeal of State Administrative Rule

The rule is not clearly or simply stated: _____

3. REPEAL RULE - I am requesting the agency to eliminate an existing rule.

List rule number (WAC), if known: _____

(Check one or more boxes)

It does not do what it was intended to do.

It is no longer needed because: _____

It imposes unreasonable costs: _____

The agency has no authority to make this rule: _____

It is applied differently to public and private parties: _____

It conflicts with another federal, state, or local law or rule. List conflicting law or rule, if known: _____

It duplicates another federal, state or local law or rule. List duplicate law or rule, if known: _____

Other (please explain): _____

Addendum to Petition for Adoption, Amendment, or Repeal of a State Administrative Rule

Washington State Register (WSR) 18-06-045 amended Washington Administrative Code (WAC) 220-312-040(34) effective April 1, 2018, to change the “open” season for fishing on Carney Lake (Pierce County)¹ by changing the language contained in subdivision (a) from “the fourth Saturday in April through June 30 and September 1 through November 30” to “the fourth Saturday in April through October 31.” The WSR also deleted then existing subdivision (b) which prohibited fishing from a floating device equipped with an internal combustion motor.

We are petitioning the Washington State Department of Fish and Wildlife (Department) to reinstate the “open” season for fishing to the preexisting time period and the prohibition of internal combustion motors on the lake as that language existed under WSR 17-16-109, effective August 28, 2017, (then existing WAC 220-312-040(62)). Again, that pre-existing language provided:

“(a) Open the fourth Saturday in April through June 30 and September 1 through November 30.

(b) It is unlawful to fish from a floating device equipped with an internal combustion motor.”

We are petitioning the Department for these amendments for the following reasons:

Carney Lake is a small (less than 40 acres) pristine shallow lake with no natural outlet. The lake rises and falls seasonally dependent on rainfall, water runoff, and natural evaporation. By Statutory Warranty Deed filed February 16, 1954, the then Washington State Department of Game took ownership of a lot on the lake (the Allan and Arlie Ostling property). This was done to allow for seasonal public access for fishing when the decision was made to annually stock the lake for sport fishing. In a letter dated June 19, 1953, the Department of Game specifically stated that the lot was being purchased to provide “a boat launching site” and to “materially reduce the conflict caused by sportsmen trespassing to gain access to the lake.” This stated intent by the Department at the inception of the public access boat launch, coupled with the responsibilities of the Department set forth in both statute and regulation,² can lead to only one conclusion – the public access located on Carney Lake was, and is, for the sole purpose of providing fishing access to the lake.

Since at least 1969 there have been intermittent negotiations between the Department, Carney Lake property owners, and others as to when the public access was to open. Most likely due to the lakes pristine and relatively warm waters (again, it is a shallow lake), the lake would become a popular swimming, camping, and partying area during the warm summer months. This situation inevitably led to problems of garbage and debris scattered on the access site and adjoining properties; noise and profanity at all hours; and vandalism, pilferage, and harassment. The problems related to non-fishing use of the public access became so prevalent as to cause a substantial number of property owners surrounding the lake to retain legal representation to negotiate either shutting down the public access or, at least, closing the

¹ The lake is located in both Pierce and Kitsap counties so the title within subsection (34) “Carney Lake (Pierce County)” does not appear to be exactly correct unless it is the Department’s practice to use only one county designations regardless of the actual location of the body of water.

² See RCW 77.04.012 and WAC 220-101-010, respectively.

access during the warmest summer months to discourage non-fishing (swimming, camping, partying, etc.) use of the lake. On August 20, 1986, the State of Washington Department of Game issued a letter to the property owners' attorney stating that it was the Department's intention to keep the access gate closed during July and August, annually, a practice that had been in place for the preceding 4-5 years.³ This practice was codified in the previous regulation at WAC 220-312-040(62) until the most recent amendment found at current WAC 220-312-040(34). The public access lot is only large enough for predominantly hand boat launching and minimal parking – there is no room for a “swimming/camping beach.” Concurrent use of the lot for both fish boat hand launching and non-fishing recreation creates a safety risk to all persons on the lot, especially small children. Signs currently posted at the boat launch state that swimming and camping are prohibited, however these signs have been ineffective in the past in preventing non-fishing recreation use during the warmest summer months.

The problems associated with, and leading to, the negotiated decision to close the access during the two summer months have not gone away. In fact, due to the substantial increase in population in the area, as well as immediate potential population growth with the development of Carney Lake Estates and other residential land developments between Carney Lake and Port Orchard, the problems can only be expected to worsen. We recognize that the rule change came about due to the Department's attempt to reduce the number of “open/close” dates to six categories for water bodies and none of these new categories provide for interim closing as existed at Carney Lake prior to the most recent rule change.⁴ However, in an era of strained governmental budgets and increasing exposure to extraordinary tort claims against various state agencies, it makes little sense to increase the Department's liability risk by allowing and encouraging “mixed-use” recreational activities on a small parcel of land intended and designed only for light fishing boat launching. Closure of the access for the two warmest months of the year has been successful in reducing this risk exposure without appreciably restricting fishing on the lake as most of the public fishing is completed prior to July 1 of each season. Furthermore, our request only shortens the fishing season by one month as we ask that the final closure be reinstated to November 30 which, we note, is part of the third “season” category set forth in #8 of the *Concise Explanatory Statement*. It is for all these reasons, we are petitioning the Department of Fish and Wildlife to reinstate the previous “open” fishing season to eliminate the months of July and August, annually.

Of perhaps greater importance is the lifting of the prohibition of gas motors on the lake. Again, this is an extremely small lake with no natural outlet. Inevitable and unavoidable discharge of gas and oil products from the use of marine internal combustion engines will have the immediate impact of observable oil and gas sheen upon the shallow shore waters and a devastating effect on the lake's delicate ecosystem. The lake is a seasonal home for numerous transient water fowl and the full-time home for many other wild creatures such as Bald Eagles which fish the lake from tall fir and old growth trees on its shores. The lake's substantial circular shape and the natural tendency of noise to be carried over water will cause the sound of internal combustion engine use to be an extreme annoyance to not only the property owners and

³ Please see August 20, 1986 letter issued by the Department of Game attached to Margie Rhae Reid's petition to amend a state administrative rule related to “season opening.”

⁴ See 2018-2019 Sport Fishing Regulation Simplification Proposals Concise Explanatory Statement, p. 10, §8, ¶ “Seasons.”

fisherman using the lake, but will most definitely have a devastating affect on the wildlife which depend on the lake for sustenance and existence. Because of the lake's small area and shallow shores, any use of motorized vehicles at anything over trolling speeds, such as speedboats and jet skis, will cause an immediate and extremely dangerous situation for all others using the lake. Once it becomes general knowledge that motors are allowed on the lake, it is inevitable some one is going to try using their motored high-speed personal vehicle. A brief view of the small lake and its shallow shores will convince any person of the extreme dangers such use of motorized vehicles will create. There exists no concrete boat launch at the access – only the natural lake shoreline which is extremely shallow and with a gradual decline. For this reason, fish boat launching is almost exclusively by hand. Boat launching a watercraft burden with an outboard motor from a trailer will necessitate significant extension of the boat trailer into the lake with a high likelihood of both trailer and tow vehicle intrusion and entrapment into the lake waters. Allowing gas motor use on the lake can only lead to increased attempted use of boat trailers at the public access and, thus, increased exposure to plant seed transfers by boats, outboard motors, and boat trailers. Because of Carney Lake's small size, shallowness, and mud-bottom, the lake is extremely susceptible to infestation of milfoil, lily pads, and other invasive plants that would quickly choke off the lake and make it unusable for any purpose, fishing or otherwise.

Reading the cover sheet to WSR 18-06-045, we note the amendments were based on the "Agency's own initiative" rather than at the request of "a Nongovernmental Entity." We also note that the amendments were made "for conservation purposes and to provide greater fishing opportunity." Based on this information, we thought the Department may have deleted language prohibiting motor use on all lakes, relying on regulations or statutes found elsewhere to protect the small, sensitive lakes within the state. This appears not to be so, as some lakes retain this protection under the amended rules (*i.e.* Lone Lake, Munn Lake, Koeneman Lake) and the prohibition was even added to others (*i.e.* Gibbs Lake). For the reasons set forth in the preceding paragraph, we are at a loss to understand how allowing gas motors on Carney Lake will either support "conservation purposes" or "fishing opportunity." If the concern is the use of the lake for fishing by individuals with physical disabilities, electric trolling motors are often effectively used on the lake and allow the quiet non-polluting use of the lake by individuals who cannot row or paddle. In fact, the allowance of gas motors on the lake can be detrimental to a physically handicapped individual when excessive speed and wake action is involved. For all these reasons, we are am petitioning the Department of Fish and Wildlife to reinstate the previous language prohibiting the fishing from a floating device equipped with an internal combustion motor.

In addition to the preceding argument for reinstating the prohibition of internal combustion engines on Carney Lake, we believe the Department also has an ethical, as well as legal obligation, to do so. Upon purchasing our lot on Carney Lake in January 1990, the requisite title insurance policy referenced the "*Restrictions, Easements, Covenants and Conditions imposed by instrument recorded on April 14, 1941, under Recording No. 1277298.*"⁵

⁵ See *Policy Of Title Insurance* issued by Transamerica Title Insurance Company, Policy No. 009871-A, Schedule B, Special Exceptions, ¶ 3, for short plat recorded under No. 78-222 and subsequently corrected to Nos. 8611060108 and 8804080314.

Six provisions are listed in that referenced document (Warranty Deed) setting forth specific restrictions and conditions of ownership of property abutting⁶ Carney Lake.

The two provisions relevant to this issue are numbers "5" and "6" which provide:

5. *Grantee agrees neither (sic) use or permit the use of power driven boat or craft upon said Carney Lake.*

6. *Acceptance of this deed shall constitute and be deemed an acceptance of any and all conditions and stipulations herein contained and violation thereof shall forfeit all rights hereunder, and that each and all conditions shall be understood and agreed to run with the land perpetually.*

There is no evidence that restriction/covenant (5) has been waived or rendered void due to *acquiescence, abandonment, laches*, or lack of enforcement as evidenced by the historical absence of motor boat use on Carney Lake and the Department's previous long-running regulatory prohibition of such use, as well as long-term signing at the access area prohibiting use of gas motors on the lake. Furthermore, we would strongly argue the language in paragraph (6) renders the restriction/covenant effective *in perpetuity*.

Reasonable minds cannot differ in concluding that the term "power driven boat or craft" does not include vessels driven by "human power" or "wind power" via oars, paddles, pedals or sails. To conclude otherwise would lead to the inane result of prohibiting all watercraft on the lake except floating devices. Reasonable minds must also concur that the prohibition was intended to include vessels driven by an internal combustion engine, whatever the fuel source may be, and thus, prohibit use of such "power driven" vessels on Carney Lake.

Since the listed *Restrictions, Easements, Covenants and Conditions* would have little meaning and effect if not pertaining to all lakefront property owners, and because we are aware of at least one other lakefront owner's land title in Kitsap County (our lot is in Pierce County) that contains the exact same language prohibiting "power driven boat or craft upon said Carney Lake," we believe it is reasonable to expect all Carney Lake property owners are subject to the same provisions. And since the recording date of the document containing the provisions (April 14, 1941) predates the Department's purchase of the Ostling property in 1954 to create a public access, we can reasonably expect that the Department took that property subject to the same perpetual restrictions/conditions. This expectation is supported by Cliff Millenbach, then Chief of the Fishery Management Division, in a letter addressed to a Carney Lake property owner under the letterhead of the Department Of Game dated May 21, 1975, acknowledging the prohibition of use of motors on Carney Lake. Mr. Millenbach wrote: "*Upon receipt of your letter I checked our records and note that the title insurance for the property conveyed to the Department of Game does include a prohibition against the use of motors on Carney Lake.*"⁷

⁶ The term "abutting" is somewhat a misnomer as the property lines abut each other under the lake and, thus, the lake bed is part of the surrounding property owners' plots even though the State owns and controls the "lake" waters.

⁷ Please see May 21, 1975 letter issued by the Department of Game attached to Margie Rhae Reid's petition to amend a state administrative rule related to "use of internal combustion motors on Carney Lake."

One may argue that the existence of this property title restriction/condition prohibiting power driven vessels on Carney Lake renders the previous regulatory language prohibiting internal combustion motors unnecessary. We believe such a position is wrong for two reasons.

First, the Department has an obligation to inform its invitees (the public sport fisherperson) of the prohibition in the most effective way possible. The Department is informing the public of this prohibition now only through the signs posted at the public access stating gas motors are not permitted on the lake. A much more effective and formal method is by placing the prohibition in the relevant regulation as existed prior to April 1, 2018, and in the annual fishing pamphlet. Without the regulation prohibiting motors, a fisherperson, upon reviewing the regulation, or more likely the fishing pamphlet, could very well assume gas motors are now allowed on Carney Lake and make the trip out to the lake fully expecting to launch his/her fishing boat powered by an internal combustion engine. This is not fair to the fishing public in general.

Second, without the existence of the prohibition as set forth in previous regulations, the Department is creating a situation where an individual lake property owner will feel compelled, in order to enforce the restriction/condition contained in his/her land title, as well as to avoid possible forfeiture of his/her property by "permitting" use of motor driven watercraft as addressed in paragraph (6) of the covenants, to confront members of the public using motor boats on the lake. This can very well lead to confrontations between a member of the general public who honestly *believes* he/she now has a right to use a motor on the lake due to the deletion of the regulatory prohibition and a lakefront property owner who *knows* use of motors are prohibited based on the restrictions/conditions set forth in the land titles. This is unfair to both the general members of the public and the lakefront property owners. The citizens of the State of Washington should not be placed in such a potential adversarial, hostile, and dangerous confrontation when there exists a regulatory resolution.

The *Concise Explanatory Statement* authored by the Department in implementing the most current rule changes, in Section # 6, titled **Removing duplicative landowner rules**, provides:

Type of Rule Change Proposal

Simplification

Short Description

Remove fishing regulations in the WAC and pamphlet that are duplicative of local landowner rules and regulations (e.g. county ordinances stating "no use of a floating devise equipped with an internal combustion motor.")

Explanation

This will reduce the complexity of regulations in the pamphlet and rely on local landowners to post and enforce their regulations on site.

The "Restrictions, Easements, covenants and conditions" imposed by the instrument recorded on April 14, 1941, under Recording No. 1277298, as well as the Department's land title as conceded by Mr. Millenbach, are not "county ordinances." Which leads to the question, "Are there county codes or ordinances that render "duplicative" the previous Department regulatory language prohibiting motor driven watercraft on the lake?"

A review of the Pierce County Code (PCC) at Chapter 8.88 **Watercraft Regulations** defines all lakes which are 25 acres or greater but less than 100 acres as Class "C" lakes and

then lists the Class "C" lakes within Pierce County as: Lake Florence, Lake Rapjohn, Crescent Lake, Lake Louise, Lake Whitman, Twin Lakes, Jackson Lake, Palmer Lake, Lake Josephine, and Lake Holiday.⁸ The code then goes on to provide:

1. **Jackson Lake.** It shall be unlawful to operate a motor-powered vessel on the waters of Jackson Lake.
2. **Lake Holiday.** It shall be unlawful to operate a motor-powered vessel on the waters of Lake Holiday.
3. **Lake Josephine.** It shall be unlawful to operate a vessel powered by an internal combustion engine on the waters of Lake Josephine.⁹

It does not appear that the PCC addresses Carney Lake even though it falls within the definition of a Class "C" lake and the southern portion of the lake falls within Pierce County.

A review of the Kitsap County Code at Title 10 provides:

10.36.420 Restricted waterways.

A. Internal combustion (i.e., gasoline and/or diesel) powered motor boats used for recreational purposes are not permitted at any time on any lake of less than twenty acres in area, or on the following waters: Buck Lake, Wye Lake, Island Lake, Carpenter Creek estuary upstream of South Kingston Road and the Curley Creek estuary upstream of Southworth Drive.

Again, it does not appear that the Kitsap County Code specifically prohibits the use of internal combustion engines on Carney Lake as it is larger than 20 acres.

It appears neither Pierce County nor Kitsap County codes specifically address watercraft use on Carney Lake. This may be due to the somewhat unique situation of the lake's location in both counties. Perhaps because neither county has jurisdiction over the entire lake, each county believes it cannot effectively adopt and enforce watercraft use on the lake. Because of the multi-county aspect of Carney Lake, it is appropriate for the next level of government, the state's Department of Fish and Wildlife, to adopt (or reinstate) regulations critical to the overall health and safety of both the lake and those who enjoy it.

The reason of preventing duplication set forth in the *Concise Explanatory Statement* does not exist in this case as no county ordinance addresses the issue. Furthermore, the idea that local landowners should "post and enforce their regulations on site" raises the serious concerns set forth above related to confrontation between individual citizens in what could quickly become a heated debate over lack of a relevant Department regulation versus a lake property owner's attempt to enforce a *covenant, condition, or restriction*. The prior existence of a Department regulation specifically prohibiting the use of internal combustion engines on Carney Lake, and publication of that restriction in the Department's fishing pamphlet, has historically gone a long way in preventing such confrontations and has kept the need for Department enforcement action under RCW 77.15 and WAC 220-500-050 at a minimum, if non-existent.

In the final analysis, we, the Carney Lake property owners, sincerely believe that it is incumbent upon the Department, as a fellow Carney Lake property owner, to do what is within the Department's power to fully inform all of the Department's invitees (the fishing public) as to the prohibition of the use of internal combustion engines on the lake. Failure to do so can only

⁸ PCC 8.88.480.

⁹ PCC 8.88.480(B).

undermine and run counter to State Environmental Policy enacted under RCW 43.21C and implemented under WAC 197-11 and WAC 220-600.

We sincerely thank you for your careful and deliberative consideration of our petition to amend WAC 220-312-040(34).