

FAQ's About Wood Placements in Rivers

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The flurry of invitations we've recently received to speak at large wood workshops suggested it was time to follow up on Skellenger Bender's white paper entitled "Understanding the Legal Risks Associated with Design and Construction of Engineered Logjams." In that paper, which was initially published in 2007 and updated in 2010, we explored the risks associated with the use of large woody debris in stream restoration projects, including hazards to recreational river users and children. We introduced legal doctrines that govern liability for such structures and offered a list of recommended risk mitigation measures for design professionals.

Funding for riparian habitat restoration projects has grown, and large woody debris is being used with increasing frequency to protect natural resources and infrastructure alike. The rising interest in these dynamic in-river structures that mimic nature has spawned questions about liability that go beyond some of the issues addressed in our earlier white paper. Specifically, practitioners have inquired about potential grounds for liability to downstream property owners, whether the practice of designing these projects requires an engineering license, and recent legislative responses to this growing business. In response to these inquiries, we outlined a framework for analyzing hypothetical scenarios involving damage caused by large woody debris.

Frequently Asked Questions

1) **What are the underlying rights of riparian landowners?**

The long-established principle governing the fundamental rights of riparian proprietors is known as the natural watercourse rule, which says that each riparian owner has the right to have the stream flow over his land in the usual quantity, at its natural and accustomed place and height. Generally speaking, subject to prior appropriation rights, the owner above cannot divert or pollute the stream and the owner below cannot raise the level of the water by dams or other obstructions.

The natural watercourse rule prevents interference with the natural flow of a waterway. The fact that a river may have shifted course over time, either naturally or as a result of manmade changes, is largely immaterial to the determination of the river's natural flow or accustomed place. In *Peterson v. Arland*, 79 Wash. 679, 693-94, 141 Pac. 63 (1914), the Washington Supreme Court established that a landowner's rights are fixed with reference to the location of flow at the time the right is asserted:

The accustomed course of a stream which a riparian owner has the right to insist shall not be disturbed is not to be found in historical research, but is that which is its natural and apparently permanent course at the time when the right is called in question.

In *Peterson*, the plaintiffs sued for damages suffered when the defendants forced water back into an old channel. The Washington Supreme Court rejected the defendants' argument that the "old" channel was the natural watercourse, holding instead that the plaintiffs had the right to have the river continue to flow in the new channel.

2) What is the common enemy doctrine and does it apply to the placement of large woody debris in rivers?

The common enemy doctrine allows landowners to alter the flow of surface water to the detriment of their neighbors, so long as they do not block a watercourse or natural drainway. *Currens v. Sleek*, 138 Wn.2d 858, 862-63, 983 P.2d 626 (1999). However, the common enemy doctrine does not apply to the diversion of water that is part of a flood channel. As a result, placements of large woody debris constructed within streams or flood channels of streams are subject only to the natural watercourse rule discussed above.

The common enemy doctrine exists because surface water is regarded as an outlaw. *Cass v. Dicks*, 14 Wash. 75, 78, 44 Pac. 113 (1896). The term "surface water" has a specific meaning for purposes of the common enemy doctrine: surface water is identified by its inability to maintain its identity and existence as a body of water. *Halverson v. Skagit Cty.*, 139 Wn.2d 1, 983 P.2d 643 (1999). By definition, then, a distinct body of water, such as a stream or river, is not considered surface water. Instead, streams and rivers are considered natural watercourses. A natural watercourse is expansively defined to include not only the ordinary channel, but also the flood channel. *Fitzpatrick v. Okanogan Cty.*, 169 Wn.2d 598, 607, 238 P.3d 1129 (2010). In a case involving the diversion of water, if the water at issue is a natural watercourse, then "the applicable body of law is that relating to watercourses and riparian rights – not the law relative to surface waters." *Sund v. Keating*, 43 Wn.2d 36, 40, 259 P.2d 1113 (1953).

3) Is there a special standard of care that applies to the design and siting of large woody debris placements; does the design constitute the practice of engineering, requiring a license?

The general standard of care that applies to these projects means that the design professional, whether an engineer or scientist, must perform with the level of skill and diligence those engaged in the same profession would ordinarily exercise under the same or similar circumstances at the time the project was designed and constructed. As the use of large woody debris has become more mainstream, there has been a notable shift in terminology: the term "engineered log jam" appears to have fallen out of favor. To date, we are aware of no affirmative determination that projects involving the placement of large woody debris require engineering expertise. However, the statutory definition of "practice of engineering" is easily broad enough for the design of large woody debris placements to fall within its ambit. RCW 18.43.050(5)(a) states: "'Practice of engineering' means any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects."

With regard to the design and siting of large woody debris, skill and diligence should be exercised in conducting a rigorous and defensible analysis of the marginal increase in risk presented by such placement and configuration. In terms of technical guidance for in-channel wood placements, the U.S. Fish and Wildlife Service has cited Section 26 of the Forest Practices Board Manual, which is an advisory technical supplement to the forest practices rules published at Title 222 of the Washington Administrative Code, as a reference source for practitioners. To minimize the risk of liability, a design professional should ensure that any effects on the course of flow are modeled and that the predicted changes to flow and sediment effects are unlikely to result in a statistically significant increase in the risk of damage to other riparian owners.

4) Does the Recreational Use Statute afford any protection against liability for property damage?

Existing laws confer immunity upon landowners, but not practitioners, from claims of personal injury. Further, existing laws do not appear to cover property damage. Specifically, the Recreational Use Statute states that landowners who allow land to be used for fish or wildlife cooperative projects “shall not be liable for unintentional injuries to any volunteer group or to any other users.” RCW 4.24.210. By specifying that immunity extends to injuries “to any volunteer group or to any other users,” the statute makes it clear that the injury must be sustained by a person. Further, the titles of both RCW 4.24.200 and 4.24.210 contain references to “injuries to recreation users.” Our research has not disclosed any cases in which immunity was given for property damage, nor would such an interpretation find compelling support in the text of the statute.

5) What is the proper measure of damages if liability for property damage is established?

In the absence of a statutory grant of immunity for property damage, the potential for liability begs the question: What is the potential recovery available to an injured plaintiff who can establish that an emplacement of large woody debris caused damage to his or her property? There are different ways to measure damage to land, depending on whether the damage is permanent or temporary. Assuming that the placement of large woody debris remains in place and the damage is permanent, a liable party could be required to pay the injured party the reasonable market value of the land destroyed. In *Peterson v. Arland*, 79 Wash. 679, 695, 141 Pac. 63 (1914), the Washington Supreme Court went further and held that the plaintiff was entitled to recover not only the reasonable market value of the lands actually destroyed, but also damages reasonably certain to result by the endangering of the plaintiff’s remaining lands.

6) What happens if an engineered log jam recruits wood that later breaks free in a storm or other high flow event and causes damage to real property?

In the absence of a statutory grant of immunity from liability, it is possible that property owners, project designers and contractors, project sponsors, counties

and regulatory agencies could all face liability. This scenario highlights the tension between competing public interests: On the one hand, ordinary principles of negligence law apply; on the other hand, the legislature has shown a willingness to abrogate the application of negligence principles under very limited and specific circumstances, as in the enactment of the Forest Practices Act, RCW 76.09.330. That statute was adopted in 1987 in order to promote the functions and values of riparian ecosystems on forest lands and expressly states that snags and the recruitment of large woody debris within rivers and streams are beneficial to riparian habitat. In 1992, the legislature amended the statute to grant immunity from liability to landowners and the State in order to encourage application of the forest practices rules that require trees to be left. The statute provides:

The legislature hereby finds and declares that riparian ecosystems on forest lands in addition to containing valuable timber resources, provide benefits for wildlife, fish, and water quality. The legislature further finds and declares that leaving riparian areas unharvested and leaving snags and green trees for large woody debris recruitment for streams and rivers provides public benefits including but not limited to benefits for threatened and endangered salmonids, other fish, amphibians, wildlife, and water quality enhancement. The legislature further finds and declares that leaving upland areas unharvested for wildlife and leaving snags and green trees for future snag recruitment provides benefits for wildlife. Forest landowners may be required to leave trees standing in riparian and upland areas to benefit public resources. *It is recognized that these trees may blow down or fall into streams and that organic debris may be allowed to remain in streams. This is beneficial to riparian dependent and other wildlife species. Further, it is recognized that trees may blow down, fall onto, or otherwise cause damage or injury to public improvements, private property, and persons. Notwithstanding any statutory provision, rule, or common law doctrine to the contrary, the landowner, the department, and the state of Washington shall not be held liable for any injury or damages resulting from these actions, including but not limited to wildfire, erosion,*

flooding, personal injury, property damage, damage to public improvements, and other injury or damages of any kind or character resulting from the trees being left.

RCW 76.09.330 (emphasis added).

Under the Forest Practices Act, a landowner faces no liability from allowing large woody debris to remain in place within a riparian management zone, when trees are left unharvested, blown down, and allowed to remain in place to recruit snags. Granting similar immunity to persons who place large woody debris in fish-bearing streams is a logical extension of the public policies embodied in the Forest Practices Act and is presently being contemplated by the legislature.

Recent Legislative Responses

In January 2012, legislation was introduced to remove potential barriers to successful salmon recovery efforts. As part of the proposed law, a new section would be added to the Salmon Recovery Act, RCW 77.85, that would provide immunity to operators from liability for damages resulting from "leaving large woody debris within waters of the state to protect, retain, or recruit large woody debris for the purposes of enhancing fish habitat or water quality improvement, if such a project was funded by state or federal money for the purpose of building fish habitat or water quality improvement." House Bill 2597 would also provide immunity from liability to a landowner for personal injury, death or property damage from the use of the landowner's land by: (1) a person conducting a fish habitat improvement project using state or federal money for the purpose of building the project, or (2) a participant in a state or federally funded watershed or stream restoration enhancement program. The bill contains an exclusion that preserves liability for damages caused by gross negligence or willful or intentional conduct on the part of the operator, timber owner or landowner. The benefit of immunity is conferred only upon projects that are "properly designed and constructed to meet appropriate standards of care that adequately address and mitigate for potential hazards to public safety." The reference to "appropriate standards of care" is vague and ambiguous, insofar as it suggests that such standards presently exist in Washington. There have been a number of workshops at which practitioners from various disciplines have come together to discuss the

development of an appropriate standard of care for designing and constructing large woody debris. House Bill 2597 was pending before the Judiciary Committee at the time this newsletter was published.

In many respects, House Bill 2597 furthers many of the same public policies that led to the enactment of the Forest Practices Act. The immunity that House Bill 2597 would grant to practitioners would facilitate the broader use of large woody debris for stream enhancement projects. We will follow the legislative developments with interest and report on the outcome of the bill.



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