

BUILD IT AND THEY WILL COME: ADDRESSING THE LIABILITIES OF LARGE WOOD IN RIVERS

Large Wood in Rivers Workshop
February 14, 2012

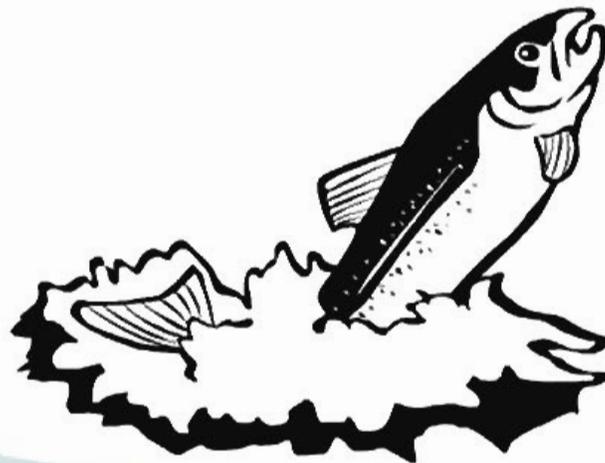
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ATTORNEYS

Introduction / Background

- ▶ Fish & Wildlife Protection & Enhancement
- ▶ Unintended Consequences
- ▶ Increased Awareness & Concerns



What are the Risks?

- ▶ Health and Safety During Construction
- ▶ Hazards to River Users
- ▶ Hazards to Children
- ▶ Flooding of Upstream Properties
- ▶ Erosion and Damage to Downstream Properties
- ▶ Personal Injury and Property Damage when all or Part of ELJ or LWP Breaks Free



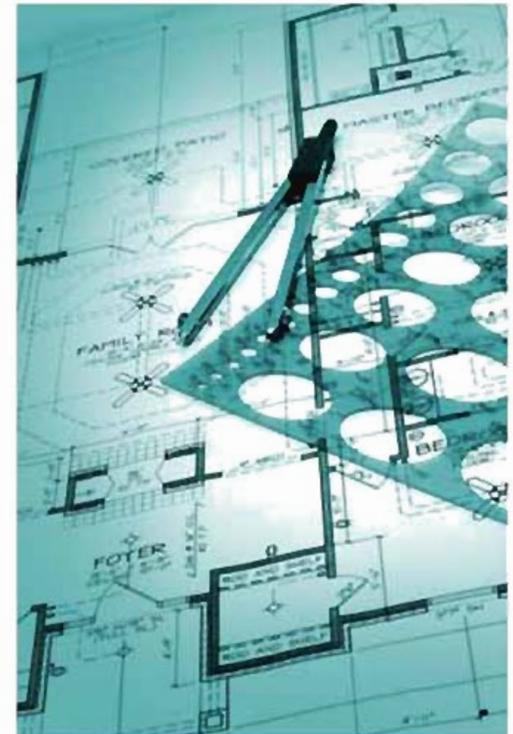
Who are the Potential Injured Parties?

- ▶ Construction Workers/Field Personnel
- ▶ River Users
- ▶ Children
- ▶ Upstream Private Property Owners
- ▶ Downstream Private Property Owners
- ▶ Public Landowners
- ▶ Natural Environment



Who are the Potential Liable Parties?

- ▶ Designers
- ▶ Contractors
- ▶ Landowners Where ELJ or LWP is Located
- ▶ Project Sponsors



Legal Principals

- ▶ Health & Safety Standards
- ▶ Negligence
- ▶ Recreational Use Immunity
- ▶ Attractive Nuisance
- ▶ Natural Watercourse Rule
- ▶ Environmental Laws



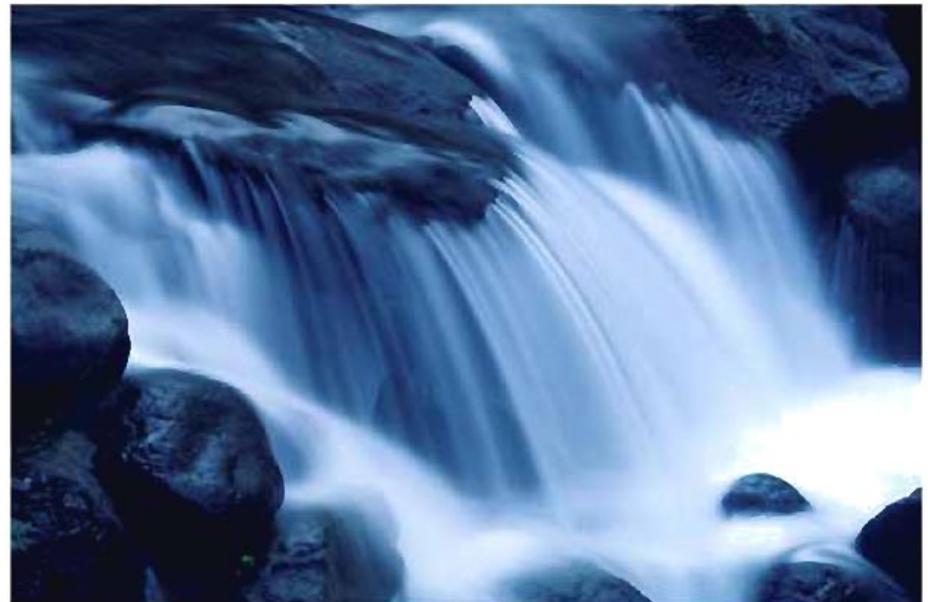
Health & Safety Standards

- ▶ All employers are required to maintain a safe workplace for their employees.
 - RCW 49.17.060(1)
- ▶ Assess Site Conditions
- ▶ Site Safety Plans



Negligence

- ▶ In the Design
- ▶ In the Construction
- ▶ Need for Licensed Engineer?
- ▶ How Extensive Should Modeling Be?
- ▶ Ultimately a Standard of Care Question



Recreational Use Immunity

- ▶ RCW 4.24.210:

(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, . . . *fishing*, camping, picnicking, *swimming*, hiking, . . . clam digging, . . . *boating*, nature study, winter or *water sports*, viewing or enjoying historical, archaeological, scenic, or *scientific sites*, without charging a fee of any kind therefore, shall not be liable for *unintentional* injuries to such users.

Recreational Use Immunity (cont.)

- ▶ RCW 4.24.210:

...

- ▶ (2) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowner or others in lawful possession and control of any lands whether rural or urban, or water areas or channels and lands adjacent to such areas or channels, who offer or allow such land to be used for purposes of a *fish or wildlife cooperative project*, or allow access to such land for cleanup of litter or other solid waste, shall not be liable for unintentional injuries to any volunteer group or to any other users. . . .

...

Recreational Use Immunity (cont.)

- ▶ RCW 4.24.210:

...

- ▶ (4) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a *known dangerous artificial latent condition* for which warning signs have not been conspicuously posted. . . . *Nothing in RCW 4.24.200 and this section limits or expands in any way the doctrine of attractive nuisance. . . .*

Known, Dangerous, Artificial, Latent Condition

- ▶ **Known**
 - Actual Knowledge by Landowner
- ▶ **Dangerous**
 - Unreasonable Risk of Harm
- ▶ **Artificial**
 - Man Made
- ▶ **Latent**
 - Not Readily Apparent
- ▶ **Fish & Wildlife Cooperative Projects**



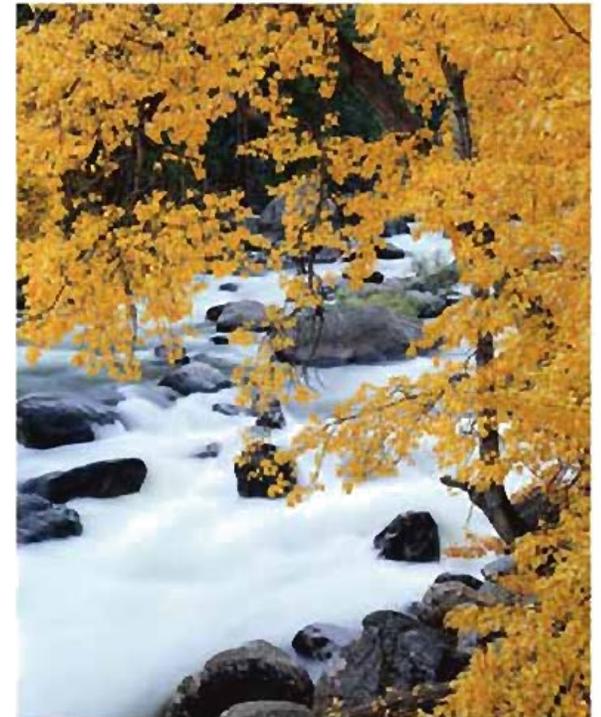
In Perspective

- ▶ Immunity Only for Landowner
- ▶ Need for Warning Signs



Attractive Nuisance

- ▶ Must be Dangerous
- ▶ Must be Attracting/Alluring
- ▶ Child Incapable of Comprehending Danger
- ▶ Condition Left Unguarded
- ▶ Reasonable to Prevent Access
 - *Without Obstructing Purpose*



Natural Watercourse Rule

- ▶ Early 1990's
- ▶ Entitled to Allow Stream to Flow in Natural Watercourse Next to Land
- ▶ “Natural” means time when right is exercised
- ▶ Subject to Appropriation Water Rights



Environmental Laws

- ▶ NEPA/SEPA
- ▶ Clean Water Act
- ▶ Critical Areas
- ▶ Flood Plain Restrictions
- ▶ State Forest Practices Act
- ▶ Local Laws



Specific Observations

- 1) “Stable” v. “Unstable” Installations
- 2) Permitting
- 3) Water Rights



Mitigating the Risk

- ▶ Quality Design/Construction Team
- ▶ Planning for Health & Safety Risks
- ▶ Warnings! Warnings! Warnings!
 - In Specifications
 - Signs on River
 - Affected Landowners



Mitigating the Risk

- ▶ Opportunities to Avoid ELJ or LWP
- ▶ Monitoring Maintenance & Repair
- ▶ Contractual Risk Allocation



Questions?

