



Via First Class Mail--Return Receipt Requested

Robert S. Mahler
Adrienne McKelvey
Michael G. Martin
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101-3299

RE: Pierce County, Brian D. Stacy, and Kraig W. Shaner
Case No. NW1104390A
Appeal of Written Warning

Dear Counsel:

This appeal concerns a written warning issued against Pierce County (a political subdivision within the State of Washington) and its two employees, Brian D. Stacy and Kraig W. Shaner (Respondents) for violations of the Endangered Species Act (ESA), 16 U.S.C. § 1538(g), and regulations at 50 C.F.R. Part 223 (2010). Each Respondent received a written warning for: 1) jointly and knowingly soliciting or causing employees of the United States Department of the Army to close the headgate of a dam, resulting in a take of Puget Sound Distinct Population Segment (DPS) winter steelhead (*Oncorhynchus mykiss*), an ESA-listed threatened fish species; and 2) taking a threatened species.¹ For the reasons stated below, I affirm the written warning.

I. Background

In 2011, Pierce County Public Works and Utilities (Pierce County) oversaw a bridge replacement project over Muck Creek, a water body located in Roy, Washington.² Muck Creek supplies habitat for Puget Sound DPS winter steelhead, adult anadromous fish that use the waters to migrate to spawning areas.³ Puget Sound DPS winter steelhead is listed as a threatened species under the ESA, and was so listed at the time of the bridge replacement project in 2011.⁴

¹ The written warning mistakenly cites to 50 C.F.R. § 223.102(e) as regulatory authority for the ESA listing of Puget Sound DPS winter steelhead. Section 223.102(e) was published after the violation occurred, and, thus, is inapplicable. *See* 79 Fed. Reg. 20,086 (Apr. 14, 2014). The regulation in effect at the time of the violation is 50 C.F.R. § 223.102(c)(23) and is contained in the 2010 volume of the Code of Federal Regulations. Although the written warning contains an incorrect citation, the mistake is harmless error and does not provide grounds to vacate the written warning.

² NOAA Case Package NW1104390 (Nov. 12, 2013).

³ Critical Areas Report (Mar. 2011) (Attach. 16), at 7; Washington State Joint Aquatic Resource Permit Application Form (Attach. 16), at ¶ 9k; Biological Assessment (Feb. 16, 2012) (Attach. 20), at ES-1; JBLM Endangered Species Management Plan Draft (Attach. 28), at 18.

⁴ 50 C.F.R. § 223.102(c)(23) (2010).



Chambers Lake Dam, located on Joint Base Lewis-McChord (JBLM), a U.S. military base, has a headgate that controls the downstream flow of water into Muck Creek.⁵

To avoid impacts to aquatic species, and steelhead in particular, the plans and related State and Federal approvals for the bridge replacement project required Muck Creek to be dry before any work commenced.⁶ Historically, the creek dries on its own between mid-July and mid-October.⁷ In anticipation that no fish would be present after the creek dried, Pierce County did not engage in Section 7 consultation under the ESA. Instead, Pierce County prepared a “No Effect” Biological Evaluation,⁸ and planned for construction to begin on or before September 16, 2011, when the creek was expected to be dry.⁹ The Biological Evaluation expressly provided, “No work will be performed when water or ESA-listed species are in the creek.”¹⁰

By early September 2011, Pierce County staff became concerned that they could not proceed with the planned construction because creek waters had not receded.¹¹ On September 8 or 9, 2011, County Engineer Brian D. Stacy, the project supervisor, contacted JBLM to determine whether staff could adjust the downstream flow into Muck Creek.¹² Mr. Stacy also scheduled a meeting between Bridge Engineering Supervisor Kraig W. Shaner and JBLM.¹³ On September 12, 2011, Mr. Shaner met with JBLM staff and requested that they reduce the downstream flow into Muck Creek.¹⁴ During this meeting, JBLM informed Mr. Shaner that a fish stranding could occur if the water flow was reduced too fast.¹⁵ Yet, JBLM agreed to make minor incremental adjustments, and reduced the outflow at the headgate of the dam.¹⁶ JBLM staff also agreed to revisit the headgate on September 14, 2011 to ramp down the gate further, if necessary.¹⁷

On September 14, 2011, Mr. Shaner called JBLM to inform staff there that water was still flowing at the bridge and to ask whether staff had returned to the headgate, as promised.¹⁸ Later that day in response to Mr. Shaner’s telephone call, JBLM staff adjusted the headgate a second

⁵ Decl. of Brian Stacy, ¶ 7 (Dec. 7, 2016); Decl. of Kraig Shaner, ¶ 6 (Dec. 7, 2016).

⁶ NOAA Case Package NW1104390 (Nov. 12, 2013), at 125, 159, 249-250, 1458-1459.

⁷ *Id.* at 85-86, 125, 166-67, 1052.

⁸ *Id.* at 40, 123-167, 315-364.

⁹ *Id.* at 57, 61, 377.

¹⁰ No Effect Biological Evaluation, June 24, 2009 (Attach. 3 and 16), at 3-4 (emphasis added).

¹¹ *Id.* at 57, 61, 91-93, 111-112, 220-221, 377; Written Warning Appeal (Dec. 7, 2016), at 2.

¹² Written Warning Appeal (Dec. 7, 2016), at 2, 7.

¹³ NOAA Case Package NW1104390 (Nov. 12, 2013), at 64, 110; Written Warning Appeal (Dec. 7, 2016), at 2.

¹⁴ Decl. of Kraig Shaner, ¶ 13; NOAA Case Package NW1104390 (Nov. 12, 2013), at 41, 44, 51, 70, 108, 174-176, 180-183, 185-188, 207, 210-213, 215.

¹⁵ Decl. of Kraig Shaner, ¶ 13; Todd Zuchowski Written Statement (Attach. 12), at 2; NOAA Case Package NW1104390 (Nov. 12, 2013), at 212, 215.

¹⁶ NOAA Case Package NW1104390 (Nov. 12, 2013), at 41-42, 54, 58, 108, 174, 181-182, 207, 215.

¹⁷ *Id.*

¹⁸ *Id.* at 175, 187.

time to further reduce the water flow into Muck Creek.¹⁹ This second adjustment caused a rapid draw down and drying of Muck Creek, and the related stranding of approximately 10,000 fish.²⁰ The National Marine Fisheries Service tested water samples from Muck Creek and examined fish collected from the fish kill and identified two dead fish as ESA-listed Puget Sound DPS winter steelhead.²¹

On August 23, 2016, NOAA Office of the General Counsel, Northwest Section, issued a written warning against each Respondent, alleging that “Pierce County (a political subdivision of the State of Washington), acting by and through its agents, employees, and representatives, and Pierce County employees Brian D. Stacy and Kraig W. Shaner, did jointly and knowingly violate the [ESA] by soliciting another to . . . take . . . fish . . . listed as threatened [under the ESA].” Respondents were also charged with “unlawfully taking . . . threatened species.” In late October, I granted Respondents an extension of time in which to appeal. They filed the appeal on December 7, 2016, and the Northwest Section sent the case investigative record to this office for review.

II. Procedural Framework

Pursuant to 15 C.F.R. § 904.403(b), a respondent who receives a written warning from Agency counsel may appeal to the NOAA Deputy General Counsel. On appeal, the NOAA Deputy General Counsel may affirm, vacate, or modify a written warning.²² The decision constitutes final agency action for judicial review purposes.²³

III. Discussion

Upon review of the record, the written warning is affirmed.

A. Record Evidence Supports a Finding of Solicitation to Close the Headgate

On appeal, Respondents do not dispute that a prohibited take occurred in violation of the ESA. However, Respondents do challenge the factual allegations in the written warning, arguing they never solicited anyone to close the headgate. Respondents’ argument is not persuasive. The ESA and its regulations, prohibit the “take,” including the killing, of Puget Sound DPS winter steelhead.²⁴ It is also unlawful for any person to “solicit another to commit” a “take.”²⁵ The ESA and its underlying regulations do not define “solicit.” However, pursuant to settled rules of construction, the plain, common, and ordinary meaning of the term controls when the relevant statute and regulations are silent.²⁶ In its ordinary meaning, “solicitation” refers to an

¹⁹ Todd Zuchowski Voicemail (Attach. 9) left between Sept. 30 and Oct. 3, 2011; NOAA Case Package NW1104390 (Nov. 12, 2013), at 47, 54, 207.

²⁰ NOAA Case Package NW1104390 (Nov. 12, 2013), at 26, 70, 114-117.

²¹ *Id.* at 70, 454.

²² 15 C.F.R. § 904.403(c).

²³ *Id.*

²⁴ 16 U.S.C. §§ 1532(19), 1538(a)(1)(B); 50 C.F.R. §§ 223.102(c)(23), 223.203(a).

²⁵ 16 U.S.C. § 1538(g). *Accord U.S. Fish and Wildlife Service v. Steele*, 999 Interior Dec. 999, 2004 WL 2757961 (D.O.I. Nov. 10, 2004).

²⁶ *See e.g., BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006); *S. D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 375-387 (2006).

“act or an instance of requesting or seeking to obtain something: a request or petition.”²⁷ In addition, the common meaning of “close,” as used in the written warning, means “to . . . bar passage,” “reduce to nil,” or “reduce a gap.”²⁸

Applying these definitions, the record is replete with evidence that Respondents solicited JBLM staff to reduce the water flow on three occasions so the bridge project could proceed. It is also clear from the record that Respondents understood and communicated to JBLM staff that in order for the bridge project to proceed there could be no water flowing in Muck Creek. The first solicitation occurred on September 8 or 9, 2011, when Mr. Stacy contacted JBLM to ask whether staff “could adjust the [water] flow in Muck Creek and . . . reduce the creek to a level that would allow construction . . . to commence.”²⁹ The second solicitation occurred on September 12, 2011 when Mr. Shaner met with JBLM staff and informed them of “the need for the flow to either be nonexistent or just standing water at the bridge.”³⁰ In response to this request, JBLM made the first incremental adjustment to the headgate of the dam and reduced the outflow of water to Muck Creek.³¹ The third solicitation occurred on September 14, 2011, when Mr. Shaner called to inform JBLM that water was still flowing at the bridge³² and ask if JBLM staff had returned to the headgate.³³ The second adjustment to the headgate made by JBLM in direct response to Mr. Shaner’s telephone call on September 14 caused a rapid draw down and drying of Muck Creek, and resulted in the prohibited take of at least two listed Puget Sound DPS winter steelhead in violation of the ESA.³⁴

B. The Fish Kill was Reasonably Foreseeable and Caused by Respondents’ Actions

Respondents next contend that they are not liable for the ESA violation because it was not “reasonably foreseeable” that a fish kill would result and they did not proximately cause the take.³⁵ Instead, Respondents claim they relied on the expertise of JBLM staff, who acted independently to adjust the headgate a second time on September 14, 2011.³⁶

Respondents’ arguments are without merit. Federal courts define proximate cause as “a substantial contributing factor in bringing about the harm in question.”³⁷ This definition takes into account that there may be more than one proximate cause, and hinges on principles of

²⁷ Black’s Law Dictionary (10th ed. 2014); *see also* Ballentine’s Law Dictionary (LexisNexis [#174] 2010) (defining “solicit”); Merriam-Webster’s Collegiate Dictionary, 1115 (10th ed.1993) (defining “solicit”).

²⁸ Merriam-Webster’s Collegiate Dictionary, 215 (10th ed.1993).

²⁹ Written Warning Appeal (Dec. 7, 2016), at 2, 7; NOAA Case Package NW1104390 (Nov. 12, 2013), at 211-212.

³⁰ NOAA Case Package NW1104390 (Nov. 12, 2013), at 207.

³¹ NOAA Case Package NW1104390 (Nov. 12, 2013), at 41-42, 54, 58, 108, 174, 181-182, 207, 215.

³² *Id.* at 175.

³³ *Id.* at 187.

³⁴ *Id.* at 26, 70, 114-117, 454.

³⁵ Written Warning Appeal (Dec. 7, 2016), at 8.

³⁶ *Id.* at 8-9.

³⁷ *Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 492 (3d Cir. 1985); *Seattle Audubon v. Sutherland*, 2007 WL 1300964, at *11-12 (D. Wash May 1, 2007); Restatement (Second) of Torts § § 430, 431 (1965).

responsibility.³⁸ In addition, foreseeability is an element of proximate cause.³⁹ Foreseeability is “an anticipated outcome that a person of ordinary prudence would take into account in reaching a decision.”⁴⁰

On September 8, 2011, Mr. Stacy wrote in an email, “One of the permitting conditions is we can’t allow the contractor to start work until the creek stops running. . . [JBLM] controls a downstream weir we believe could affect these flows (i.e., dry them up) if they would simply adjust the weir/water elevation at the outlet.”⁴¹ He further noted, “[T]here are some fairly significant impacts if we lose this construction season. We need to give the contractor a ‘go/no go’ decision by 9-16.”⁴² The following day, Mr. Stacy instructed Mr. Shaner to contact JBLM for an onsite meeting. On September 12, 2011, Mr. Shaner and another Pierce County employee met with JBLM staff. At that meeting, Mr. Shaner was placed on notice that a fish stranding could occur if the water flow was reduced too fast.⁴³ Yet, Mr. Shaner chose to assume the risk in order to meet the project deadline.⁴⁴ But for Respondents’ request to JBLM to “slow the water flow in Muck Creek,”⁴⁵ JBLM would not have adjusted the headgate twice, slowing the creek flow to the point of dewatering and causing a fish kill to occur that included take of an ESA-listed species. The record also shows that JBLM did not act independently on September 14, 2011, when the headgate was lowered for the second time, the action that resulted in the rapid drawdown of water in Muck Creek that left more than 10,000 fish stranded. Rather, the actions of JBLM’s staff were taken in direct response to Mr. Shaner’s call seeking a further ramp down of the headgate, consistent with the parties’ prior arrangement reached on September 12, 2011.⁴⁶

Viewing the record in its entirety, I find that Respondents were fully aware that Muck Creek provided habitat for threatened Puget Sound DPS winter steelhead and knew that ESA-listed fish could be present in Muck Creek until the creek went dry, a condition that normally occurs between mid-July and mid-October. Based on their State and Federal approvals and associated environmental compliance documents, Respondents understood that they could not start the bridge project until Muck Creek was “dry or not flowing.”⁴⁷ I also find that when Muck Creek did not dry naturally during the anticipated window of time, Respondents asked JBLM staff to adjust the headgate to reduce the flow of water in Muck Creek so that the bridge

³⁸ *Buskirk*, 760 F.2d at 492; Restatement (Second) of Torts § 431 Cmt. a.

³⁹ *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 128 (1st. Cir. 1996); Black’s Law Dictionary (10th ed. 2014).

⁴⁰ *Id.*

⁴¹ Email from Brian Stacy, PCPWU County Engineer to Brian Ziegler, PCPWU Director, and Toby Rickman, PCPWU Deputy Director, *re: Muck Creek Bridge No. ROY 34182-C* (Sept. 8, 2011, 12:36PM PST) (Attach. 19) (emphasis added); NOAA Investigation Report (April 30, 2012), at 39.

⁴² *Id.*

⁴³ Decl. of Kraig Shaner, ¶ 13; Todd Zuchowski Written Statement (Attach. 12), at 2; NOAA Case Package NW1104390 (Nov. 12, 2013), at 212, 215.

⁴⁴ NOAA Case Package NW1104390 (Nov. 12, 2013), at 57, 61, 377.

⁴⁵ *Id.* at 70.

⁴⁶ NOAA Case Package NW1104390 (Nov. 12, 2013), at 70.

⁴⁷ Decl. of Kraig Shaner, ¶ 6; Decl. of Brian Stacy, ¶ 7; NOAA Case Package NW1104390 (Nov. 12, 2013), at 125, 159, 249-250, 1458-1459.

project could begin. The two headgate adjustments, made at Respondents' request, resulted in a fish kill that took Puget Sound DPS winter steelhead in violation of the ESA. Under these circumstances, I find it reasonably foreseeable that Respondents' actions would result in take of listed fish. I also find that Respondents were a proximate cause of the unlawful take because the headgate was adjusted at, and solely because of, their repeated requests. Thus, Respondents clearly were a substantial contributing factor in bringing about the harm in question.

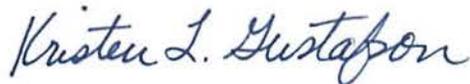
C. Mr. Stacy and Pierce County are not Excused from ESA Liability

Mr. Stacy and Pierce County are not excused from ESA liability simply because they had minimal direct contact with JBLM staff. Rather, the doctrine of *respondeat superior* applies to both. Past NOAA decisions have held "that an employer may be vicariously liable for its employee's acts committed in the scope of employment while furthering the employer's business."⁴⁸ The test is whether there is sufficient control over the actions of the wrongdoer.⁴⁹

Based on the facts and record evidence of this case, Mr. Shaner's actions are attributed to Mr. Stacy and Pierce County. Mr. Shaner acted within the scope of his employment during his interactions with JBLM staff, and both Mr. Stacy and Pierce County maintained sufficient control over Mr. Shaner for *respondeat superior* to apply. Mr. Stacy directly supervised Mr. Shaner⁵⁰ and instructed him to contact JBLM about adjusting the water flow into Muck Creek.⁵¹ Emails exchanged on September 8, 2011, between the Pierce County Director, Deputy, and Mr. Stacy reveal that Mr. Shaner's contact with JBLM was in furtherance of Pierce County's goal to reduce the water flow at Muck Creek to a level that would allow bridge construction to begin promptly.⁵² When Mr. Shaner and another Pierce County employee met with JBLM staff on September 12, 2011, JBLM understood that both were present on behalf of Pierce County.⁵³ Therefore, Mr. Stacy and Pierce County are jointly and vicariously liable for the actions of Mr. Shaner.

Based on the foregoing and in view of the full case record, I affirm the written warning.

Sincerely,



Kristen L. Gustafson
Deputy General Counsel

⁴⁸ *In the Matter of Bluefin Fisheries, Inc. and Rodney J. Baker*, 2011 NOAA LEXIS 6, at *22 (NOAA Jul. 28, 2011); see also *In the Matter of Matthew James Freitas*, 2013 NOAA LEXIS 4, at *140-141 (NOAA Aug. 23, 2013); *In the Matter of Kenneth Shulterbrandt and William Lewis*, 1993 NOAA LEXIS 26, at *6-7 (NOAA May 28, 1993).

⁴⁹ *In the Matter of Kenneth Shulterbrandt and William Lewis*, 1993 NOAA LEXIS 26, at *7.

⁵⁰ Decl. of Brian Stacy at ¶ 6.

⁵¹ Written Warning Appeal (Dec. 7, 2016), at 7; Decl. Brian Stacy at ¶¶ 9, 11 and 12.

⁵² NOAA Case Package NW1104390 (Nov. 12, 2013), at 64, 110, 377.

⁵³ *Id.* at 181, 212-213.

cc: Niel B. Moeller, Regional Enforcement Attorney
NOAA Office of the General Counsel, Northwest Section