



State of Washington
DEPARTMENT OF FISH AND WILDLIFE

Mailing Address: 600 Capitol Way N • Olympia, WA 98501-1091 • (360) 902-2200, TDD (360) 902-2207
Main Office Location: Natural Resources Building • 1111 Washington Street SE • Olympia, WA

June 20, 2013

David Schumacher, Director
Office of Financial Management
Post Office Box 43113
Olympia, Washington 98504-3113

Dear David:

I had our Assistant Attorney General (AAG) look at some questions I discussed with Office of Financial Management (OFM) staff yesterday relative to Endangered Species Act (ESA) listed species of fish and wildlife that are under Department of Fish and Wildlife (Department) care and whether we have a federal mandate to continue that care during a government shutdown. The following is the advice I received:

Pygmy Rabbits: The AAG believes there is a reasonable argument that once a federally endangered animal is removed from the wild and placed in captivity, it brings with it some responsibility to avoid take (harming or killing), either through direct action or inaction that you know will lead to harm. Thus, the AAG thinks there is a decent argument with respect to the captive pygmy rabbits, that there is a federal mandate to keep caring for them.

Listed Hatchery Fish: The AAG believes that with respect to hatchery fish that are listed as endangered, the State could well violate the take prohibition in the ESA by letting those fish die by inaction. Thus, AAG thinks there is a good argument for identifying them to OFM as being subject to a federal mandate. For threatened hatchery fish to which ESA take prohibitions have been extended by federal regulation, the waters are murkier because 50 CFR Sec. 223.203(a) extended the take prohibition to threatened fish with an intact adipose fin, and the 2005 listing policy suggests that National Marine Fisheries Service left to hatchery managers the decision of whether or not to clip adipose fins. The most conservative approach would be to assume that until clipped, the take prohibition applies, such that allowing those fish to die through inaction would constitute prohibited take. A moderate risk approach would be to assume that the take prohibition extends only to those fish that are intended for release with an intact adipose fin. The most risky approach would be to assume that the take prohibition does not apply to any fish prior to release. Based on the Department's comfort level of risk, we do think there is a basis to include the maintenance of some federally listed hatchery fish in the "Federal Mandate" column for contingency planning purposes.

David Schumacher

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As a result of this legal advice, I believe that the Department of Fish and Wildlife's activities associated with protecting and caring of the ESA listed species of fish and wildlife qualifies as work mandated under federal law.

I propose that as part of our contingency plan for dealing with a government shutdown that we plan to retain the minimum number of staff needed to continue our care of the listed species under our control. I am making arrangements with U.S. Fish and Wildlife Service to care for the pygmy rabbits so I am not requesting any FTEs for this work. I will require up to 80 FTEs to continue hatchery operations in facilities where we have listed stocks of salmon and steelhead. I will refine this number over the course of the next few days to ensure it is the minimum number needed to fulfill our federal mandate.

I acknowledge that this legal advice came late and that documents have already been made public. I am aware that amending a plan at this late date may be difficult. At the same time ensuring that we comply with our federal mandates is also important. I am providing this letter in lieu of an amendment to our plan that was submitted yesterday. I appreciate your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Philip Anderson', with a long horizontal flourish extending to the right.

Philip Anderson
Director



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June 26, 2013

David Schumacher, Director
Office of Financial Management
Post Office Box 43113
Olympia, Washington 98504-3113

Dear David:

On June 20, I sent you a letter that identified several changes to the Washington Department of Fish and Wildlife's (Department) contingency plan for the potential of a government shutdown on July 1, 2013. In that letter I referenced a discussion I had with our Assistant Attorney General (AAG) relative to the Endangered Species Act (ESA) and listed species of fish and wildlife that are under the Department's care. As a result of the clear federal mandate for the Department to continue caring for the listed species I amended our contingency plan and included staff needed to care for listed species.

Since providing you with those changes, I have refined the number of staff needed to provide the care for those fish and wildlife species as identified in the categories below. In addition, I am proposing two other amendments to our plan relative to staff that are on Department of Transportation (DOT) funding and staff that are funded by non-appropriated accounts, also identified below.

Work Mandated under Federal Law

- **Caring for Fish and Wildlife Species Listed Under the ESA**
The Department will continue to care for and maintain the health of listed species of fish and wildlife that are held captive in a Department controlled facility. We are amending the number of FTEs required to provide this care for ESA hatchery fish from 80 FTEs to 59 FTEs. Relative to Pygmy Rabbits, we are amending the number of staff to provide this care from 0 FTEs to two FTEs.

Work Done by Staff Funded by DOT

- Three FTEs that are funded by DOT will continue to do work that provides fish passage across impassible barriers.

David Schumacher

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Work Done by Staff Funded by Non-Appropriated Accounts

- **Coastal Crab Account**
Two FTEs (enforcement officers) will be funded from this account to keep the coastal crab fishery open for up to two weeks of a government shutdown.
- **Columbia River Salmon and Steelhead Stamp Account**
Forty-three FTEs (31 fishery sampling, management, and hatchery staff, and 12 enforcement officers) will continue their work associated with keeping our recreational fisheries open in the Columbia River Basin including tributary fisheries for up to two weeks of a government shutdown.
- **Regional Fishery Enhancement Group Account**
One FTE will be retained to continue needed work to manage the 14 regional enhancement groups located across the state.

As you know, I continue to have great concern relative to the approximately 40 hatcheries that are holding fish but are not related to the coverage provided by the ESA consideration. It would take 49 staff to ensure these fish survive a government shutdown.

I appreciate your timely consideration of my request to update our contingency plan.

Sincerely,



Philip Anderson
Director