

NO. 43808-9

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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LARRY & STACY BIRINDELLI,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE,

Respondent.

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BRIEF OF RESPONDENT STATE DEPT. OF FISH AND WILDLIFE

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## I. INTRODUCTION

The Birindellis sued their neighbor (Brogan & Anensen LLC or “B & A” and entities owned by Brogan and Anensen) on the theory that B & A excavated a stream bed on B & A property causing sediment to be deposited downstream on the Birindelli property. They named the State Department of Fish & Wildlife (“DFW”) as a defendant on the theory that DFW failed to prevent B & A from excavating the stream bed. Before trial, the trial court granted DFW’s motion for summary judgment. DFW argued, and the trial court agreed, that the Hydraulic Code is a regulatory statute and that if the Code creates any duty, it is a duty to the public but not an individual duty owed to the Birindellis.

The Birindellis argue two exceptions to the public duty doctrine apply: 1) the failure to enforce exception and 2) the special relationship exception.

The “failure to enforce” exception only applies when there is a *mandatory* duty to take a specific action to correct a known statutory violation. *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52 (2004), *review denied*, 154 Wn.2d 1005 (2005). The Hydraulic Code (RCW 77.55) does not include any mandatory duty to take a specific action. In addition, DFW enforced the Hydraulic Code by filing a violation report with the county prosecutor.

As to the “special relationship” exception our Supreme Court recently held:

A special relationship between a municipality's agents and a plaintiff will exist and thereby give rise to an actionable duty, if three elements are established: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public, (2) an express assurance given by the public official, and (3) justifiable reliance on the assurance by the plaintiff.

*Munich v. Skagit Emergency Comm'n Ctr.*, 175 Wn.2d 871, 879, 288 P.3d 328, 332 (2012).

“The plaintiff must seek an express assurance and the government must unequivocally give that assurance.” *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774,789, 30 P.3d 1261 (2001). The record proves that DFW did not make any “unequivocal” assurance to Mr. Birindelli upon which he relied to his detriment. Therefore, neither of these exceptions applies.

## **II. ASSIGNMENTS OF ERROR**

Respondents assert no error below. The trial court should be affirmed in all respects.

## **III. STATEMENT OF THE CASE**

Sergeant Matt Nixon is employed by the Washington State Department of Fish and Wildlife in the Enforcement Division. He has

worked for DFW since 1992 and has been in the Enforcement Division since 1996. CP at 19.

As a regular and frequent part of his duties he is called upon to enforce statutes and regulations within the authority of DFW granted by the legislature. This includes Chap. 77.55 RCW, the Hydraulic Code. CP at 19.

Mr. Birindelli says that he spoke to his neighbor Mr. Anensen in March 2008 and became concerned because Anensen, said “he was going to dig the creek without a permit.” CP at 103. Four months later Birindelli went to the local DFW office. His declaration says:

in early July 2008, I went to the local office of [DFW] and discussed the [Anensen] matter with Sgt. Matt Nixon. I told Sgt. Nixon that B & A had told me they were planning to move and strip Mohny Creek of all riparian vegetation. I asked Sgt. Nixon if WDFW would allow this activity. Sgt. Nixon told me that the Department would “strictly enforce” applicable laws to prevent any activity in the stream. I relied on Sgt. Nixon’s statement to me that DFW would prevent Brogan and Anensen’s plans. CP at 104.

Sergeant Nixon recalled that in 2008 a citizen (Birindelli) came to the Montesano DFW office and met with him about a parcel of open land outside McCleary. Nixon recalls the citizen telling him that he believed that a hydraulic code violation might occur in the future on the property. Nixon believes that this citizen identified the property owned by Brogan & Anensen, LLC. Nixon did not make notes at the time of the conversation

with this citizen. This was a brief discussion that took place in the lobby of the office in Montesano. CP at 19.

According to Mr. Birindelli's recollection of the conversation, he asked Nixon "if DFW would allow this activity." CP at 104. Nixon responded by saying that DFW would "strictly enforce" applicable laws. CP at 104.

It is important to note that Sgt. Nixon did not assure Mr. Birindelli that DFW "would prevent Brogan and Anensen's plans." According to both Nixon and Birindelli, Nixon told Birindelli that DFW would "strictly enforce" the hydraulic code. It is difficult to imagine how Nixon could prevent Brogan or Anensen from breaking a law before they had done so.

Nixon often talks to citizens about their concerns and DFW's enforcement authority. CP at 19. Since Nixon is the only sergeant in the office, when a citizen comes in with an enforcement concern, the receptionist at the front desk will usually call him. CP at 19. When Birindelli reported to Nixon that he believed a future hydraulic code violation might occur, Nixon told him what he tells any citizen who makes this kind of report. Nixon told him that if and when a violation was reported, DFW would investigate the alleged violation and take the appropriate enforcement action if called for. CP at 19.

Gloria Rogers is employed by the Washington State Department of Fish and Wildlife as a Habitat Biologist. She has worked for DFW since 1987. As part of Rogers' regular duties she reviews and works with applicants on hydraulic project approvals or HPAs. CP at 10-11.

On July 23, 2008, Rogers received a call from a neighbor who told her that he had observed equipment working in a stream near McCleary. She does not recall who it was that called her. She assumed that the person called her because the person knew that she worked for DFW. She drove to the site to investigate the complaint since the complainant told her it could be observed from the road. When she arrived at the site she could see equipment including a tractor and a dump truck near the stream. The property is open and there is no view obstruction from where she sat on the road. Rogers observed vegetation that appeared to have been removed from the stream banks and scoop marks in the stream itself. CP at 11.

Rogers called the DFW office in Montesano, reported her location, and reported what she was observing. She asked Montesano to send a DFW enforcement officer to the site. She remained at the site in her car parked on the side of the road until DFW officers arrived approximately 30 minutes later. CP at 11. Rogers wrote a report concerning the observations she made on the site on July 23, 2008. CP at 11, 13-17.

On July 23, 2008, Sgt. Nixon was on duty in his agency vehicle on the way to the office when he received a call from State Patrol dispatch stating that DFW officers were enroute to the B & A property to investigate an alleged hydraulic violation. Nixon diverted to the site. When he arrived, DFW Biologist Rogers was there and Officers Klump and Anderson arrived about the same time. DFW Officer Zimmerman and DFW Biologist Kloempken arrived minutes later. Mr. Brogan and an unidentified female were on the property.

Nixon spoke directly to Mr. Brogan who identified himself. Nixon told Mr. Brogan that he was there in response to a call about a hydraulic code violation in progress. Mr. Brogan was cooperative. CP at 19-20.

Nixon observed equipment in the area around the ditch locally known as "Mohney Creek." CP at 20. DFW investigated and determined that Brogan was engaged in work that required a hydraulic project approval. CP at 20. Since Brogan did not have an HPA, Nixon completed and filed an HPA violation investigation. CP at 20, 23-24. DFW turned the report over to the Grays Harbor County Prosecutor's Office for prosecution under RCW 77.15.300. DFW worked with Mr. Brogan on a mitigation plan to restore the ditch. The mitigation plan was approved by DFW but not implemented by the LLCs or Mr. Brogan. CP at 20.

When DFW sent the investigation report to the prosecutor's office, Nixon's intent was to work with Brogan to negotiate and implement a mitigation plan to prevent charges from being filed. CP at 20. There is a two year statute of limitations for such violations. CP at 20. In such cases, where a mitigation plan has been accepted, the prosecutor usually does not file a charge. Nixon was taken by surprise when the prosecutor quickly filed the charge against Mr. Brogan for the HPA violation. The prosecutor later dismissed the charge. CP at 20.

#### IV. ARGUMENT

##### A. **The Public Duty Doctrine Governs The Resolution Of This Appeal**

The threshold determination in this negligence case is whether DFW owed a duty to the Birindellis. This is always a question of law to be determined by the court. *Webstad v. Stortini*, 83 Wn. App. 857, 924 P.2d 940, *review denied*, 131 Wn.2d 1016 (1996). The action fails if no duty exists to the plaintiff on the part of the defendant. *E.g. Stenger v. State*, 104 Wn. App. 393, 399, 16 P.3d 655 (2001); *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984).

The public duty doctrine provides that regulatory statutes impose a duty on public officials which is owed to the public as a whole and that such a statute does not impose any actionable duty that is owed to a

particular individual. *Bailey v. Town of Forks*, 108 Wn.2d 262, 265-66, 737 P.2d 1257 (1987).

The essence of the public duty doctrine is that statutes relating to the regulatory and police functions of government create duties toward the welfare of the public generally, but do not create duties to protect individual citizens from harms which these governmental functions seek to ameliorate.

In negligence actions against a government entity, Washington courts follow the rule that, with respect to a regulatory mandate of a government agency:

. . . to be actionable, the duty must be one owed to the injured plaintiff, and not owed to the public in general. . . This basic principle of negligence law is expressed in the “public duty doctrine.” Under the public duty doctrine, no liability may be imposed for a public official’s negligent conduct unless it is shown that “the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one).” *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P. 2d 447 (1988); *Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006) (both quoting *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983).

“The traditional rule is that a regulatory statute imposes a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any duties owed to a particular individual which can be the basis for a tort claim.” *Baerlein v. State*, 92 Wn.2d 229, 231,

595 P.2d 930 (1979). “The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor v. Stevens County*, 111 Wn.2d 159, 170, 759 P.2d 447 (1988); *Donohoe v. State*, 135 Wn. App. 824, 834, 142 P.3d 654 (2006).

When a person wishes to undertake construction that will “use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state,” that person must secure the approval of the DFW before commencing the work. RCW 77.55.021(1). The approval given is a Hydraulic Project Approval (HPA). “The protection of fish life is the only ground on which approval of a permit may be denied or conditioned.” RCW 77.55.021(3)(a). RCW 77.55, “Construction Projects in State Waters,” (the Hydraulic Code) is a classic regulatory statute. The legislature adopted the code to protect “fish life.” Just like the building code that was at issue in *Taylor*, the hydraulic code imposes a duty on DFW officials that is “owed to the public as a whole” and not to a particular individual.

**B. The Failure To Enforce Exception Does Not Apply Because The Hydraulic Code Includes No Mandatory Duty To Take Specific Action**

The Birindellis argue that the “failure to enforce” exception applies to the present facts. App. Brief at 10-13. They argue that the Hydraulic

Code, RCW 77.55, “defines the duty WDFW owed to the plaintiffs.” App. Brief at 10. But the only section of the statute they cite requires that “in the event any person . . . desires to undertake a hydraulic project, the person . . . shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.”<sup>1</sup> App. Brief at 10-11.

The failure to enforce exception is established when: (1) there is a statutory duty to take corrective action; (2) governmental agents responsible for enforcing the statutory requirements possess actual knowledge of a statutory violation; (3) they fail to take corrective action; and (4) the plaintiff is within the class the statute intended to protect. This exception is narrowly construed. The plaintiffs have the burden to establish all four elements of the failure to enforce exception. For the failure to enforce exception to apply, government agents must have a mandatory duty to take specific action to correct a statutory violation. Such a duty does not exist if the government agent has broad discretion about whether and how to act. To show this exception applies, [the plaintiffs] must establish that the [statute] mandates the [agency] to take “specific corrective action.

*Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52, 58 (2004)(internal cites omitted); *see also Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987).

In *Bailey*, a police officer stopped an impaired person in public and released him. *Bailey*, 108 Wn.2d at 264. The court found that RCW

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<sup>1</sup> RCW 77.55.021(1).

70.96.120(2) created a mandatory duty to take a publicly incapacitated person into protective custody.<sup>2</sup> *Bailey*, 108 Wn.2d at 269. Unlike the peace officer duty at issue in *Bailey*, the Hydraulic Code (RCW 70.55) does not include a mandatory duty to enforce. The code contains no mandatory duties.

When Birindelli came to Nixon in early July 2008, there was no “actual knowledge of a statutory violation,” because there was no violation until July 23, 2008. DFW did not have actual knowledge of a statutory violation. When the violation was reported on July 23 DFW took swift action. DFW investigated the violation and filed a violation report with the prosecutor’s office.

For the reasons set out above, Birindelli can meet none of the four elements necessary to support the failure to enforce exception.

**C. The Special Relationship Exception Does Not Apply Because DFW Made No Express Assurance Upon Which The Appellant Could Justifiably Rely**

A special relationship between a municipality's agents and a plaintiff will exist and thereby give rise to an actionable duty, if three elements are established: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public, (2) an express assurance given by the public official, and (3) justifiable reliance on the assurance by the plaintiff.

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<sup>2</sup> “a person who appears to be incapacitated or gravely disabled by alcohol [. . .] shall be taken into protective custody by a peace officer [. . .].” RCW 70.96.120(2).

*Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 879, 288 P.3d 328, 332 (2012).

Sgt. Nixon's declaration states that he often meets with citizens who are concerned about potential hydraulic violations and that he may have met with Mr. Birindelli in early July 2008. CP at 19. Sgt. Nixon told Mr. Birindelli what he tells every citizen who tells him that someone else is "planning" a future act that could be a violation. CP at 19. Nixon told Birindelli that DFW would investigate the report of alleged violation and take appropriate enforcement action if called for. CP at 19. Birindelli's version of this conversation does not create a material issue of fact in dispute. Birindelli says that Nixon "told me that DFW would 'strictly enforce' applicable laws to prevent any activity in the stream." CP at 104.

Mr. Birindelli does not allege that Sgt. Nixon promised to "prevent any activity in the stream." He alleges that Sgt. Nixon said that "DFW would 'strictly enforce' applicable laws [that are intended] to prevent any activity in the stream."<sup>3</sup> This is consistent with Sgt. Nixon's recollection of the conversation. If Sgt. Nixon had said, "DFW will prevent any activity in the stream," the statement would have been unenforceable and impractical. DFW does not have authority to "prevent any activity in a

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<sup>3</sup> The law is not "intended to prevent any activity in the stream." The law is intended to protect fish life by allowing stream excavation by permit only. RCW 77.55.021.

stream.” It has authority to issue a notice of violation to a person who does hydraulic work without a permit.<sup>4</sup> But according to both Sgt. Nixon and Mr. Birindelli, Nixon did not make an unenforceable promise that DFW “would prevent any activity in the stream.” Sgt. Nixon only stated that DFW would ‘strictly enforce’ laws that are intended to prevent harm to fish life.

Mr. Birindelli did not make a direct inquiry on which he was entitled to rely to his detriment. The information that Nixon gave Birindelli was correct and accurate. DFW did strictly enforce the applicable law when the violation occurred. To the extent that Birindelli relied on any information, he did not do so to “his detriment.” Sgt. Nixon did not have the legal authority to prevent B & A from doing what they did several weeks later. When DFW and Nixon arrived at the site on the date of the violation they responded immediately and appropriately. Nixon filed a violation report with the Grays Harbor County Prosecutor’s office. CP at 23-24.

It is not apparent what more DFW should have done. When DFW employees arrived on the Brogan property on July 23, the ditch excavation

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<sup>4</sup> In fact, unless and until DFW has reason to believe that violation of the law has occurred the agency has no legal authority to enter upon and search a citizen’s property.

was largely complete. Under these circumstances it is difficult to imagine what Birindelli claims DFW should have done that it did not do.

## V. CONCLUSION

The Hydraulic Code is a regulatory statute intended to protect fish habitat. The code creates no mandatory duty. The failure to enforce exception does not apply.

Birindelli did not rely on any information given to him by Nixon to his detriment. Nixon told Birindelli that when a code violation occurred, DFW would enforce the law. That is exactly what DFW did.

Respondent respectfully requests that the trial court order granting summary judgment be affirmed.

RESPECTFULLY SUBMITTED this 22 day of May, 2013.

ROBERT W. FERGUSON

A handwritten signature in black ink, appearing to read 'MARK C. JOBSON', written over a horizontal line.

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**PROOF OF SERVICE**

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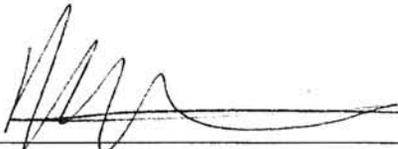
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# WASHINGTON STATE ATTORNEY GENERAL

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