



# United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, DC 20240

SEP 30 2014

The Honorable Jeff Merkley  
Chairman  
Subcommittee on Green Jobs and the New Economy  
Committee on Environment & Public Works  
U.S. Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are responses prepared by the U.S. Fish and Wildlife Service to questions submitted following the Subcommittee's June 3, 2014, oversight hearing on "*Farming, Fishing, Forestry, and Hunting in an Era of Climate Change.*"

Thank you for the opportunity to provide this material to the Subcommittee.

Sincerely,

Christopher P. Salotti  
Legislative Counsel  
Office of Congressional and Legislative Affairs

Enclosure

cc: The Roger F. Wicker  
Ranking Member

**Environment and Public Works Committee Hearing on  
"Farming, Fishing, Forestry, and Hunting in an Era of Changing Climate"  
June 3, 2014  
Follow-Up Questions for Written Submission**

**Questions from Senator David Vitter**

**Question 1:** In response to my letter about consultation regarding the EPA's Greenhouse Gases New Source Performance Standards, you noted that the EPA has not asked the FWS to engage in Section 7 consultation. Does the FWS ever engage in consultation when it is clear that a rule will have an impact on endangered species without being first asked by the Agency who is proposing the rules? If so, please provide me with a list of examples when that has taken place. If not, how can you be certain that endangered species are being protected?

**Response:** The U.S. Fish and Wildlife Service (Service) does not engage in consultation without first being asked by a federal agency proposing an action. Section 7 consultation is inherently a cooperative process that the Service engages in at the request of a federal action agency. Section 7(a)(2) of the Endangered Species Act (ESA) specifies that all federal agencies shall, in consultation with, and with the assistance of, the Secretary of the Interior or Commerce (as appropriate), ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. The regulations implementing section 7 of the ESA at 50 CFR part 402 require federal agencies to consult with the Service when any action they authorize, fund, or carry out may affect endangered or threatened species or designated critical habitat.

**Question 2:** As I noted in my March 6, letter to you and Administrator McCarthy, President Obama signed a Presidential Memorandum on March 3, 2009 that outlined a process "broad interagency consultation to ensure the application of scientific and technical expertise to decisions that may affect threatened or endangered species." Will you discuss EPA's New Source Performance Standards with the appropriate EPA officials to ensure that the proposal complies with March 3, 2009 Presidential Memorandum?

**Response:** The Presidential Memorandum issued on March 3, 2009, did not establish a new process of broad interagency consultation but requested that, until such time that a review of the consultation regulations issued on December 16, 2008 (73 Fed. Reg. 76272) is completed, the heads of all agencies exercise their discretion, under the new regulation, to follow the prior longstanding consultation and concurrence practices involving the Service and the National Marine Fisheries Service. The review of the December 16, 2008, regulatory revisions has been completed, and those regulatory revisions have been withdrawn. See 74 Fed. Reg. 20421 (May 4, 2009). We also note that each federal agency would have been responsible for its own compliance with the request in the Presidential Memorandum.

**Question 3:** Similarly, has EPA contacted FWS with regards to their greenhouse gas proposal for existing sources?

**Response:** The EPA has not contacted FWS with regard to that proposal. The FWS cooperates and coordinates with the EPA and many other Federal agencies in operating programs to help communities and ecosystems prepare for and adapt to the impacts of climate change.

**Question 4:** If EPA has not contacted the Service with regard to the existing source proposal, will you discuss the matter with officials from EPA to ensure that the proposal complies with the March 3, 2009 Presidential Memorandum that outlined the need for broad consultation?

**Response:** Please see the response to Question 2.

### Questions from Senator Jeff Sessions

**Question 1:** The President unveiled, last summer, a Climate Action Plan designed to reduce greenhouse gas emissions. This plan seeks a 17% reduction in 2005 levels of U.S. greenhouse gas emissions by 2020.

If the Climate Action Plan is implemented successfully, and US emissions decrease by 17% from 2005 levels by 2020,

- a) Will hurricanes that make landfall in the US be less severe and/or less frequent;
- b) Will tornadoes in the US be less severe and/or less frequent;
- c) Will wildfires in the US be less severe and/or less frequent;
- d) Will droughts in the US be less severe and/or less frequent; and
- e) Will floods in the US be less severe and/or less frequent?

For each answer to questions a) through e), please provide scientific data or peer-reviewed evidence corroborating your assertions.

**Response:** While the Service does not collect the information requested in the question, the President's Climate Action Plan identifies actions to mitigate the effects of future climate changes and adapt to the impacts that will result from the changes that will occur. A discussion of this issue, with information responsive to the question, can be found in the National Climate Assessment and its supporting documents, found at "<http://nca2014.globalchange.gov/>". As noted in that document, adaptation and mitigation are closely linked, and adaptation efforts will be more difficult, more costly, and less likely to succeed if significant mitigation actions are not taken.

**Question 2:** On June 2, 2014, the EPA proposed regulations for existing power plants requiring a 30% reduction from 2005 levels of greenhouse gas emissions.

If these regulations are implemented successfully, and US power plant emissions decrease by 30% from 2005 levels by 2030,

- a) Will hurricanes that make landfall in the US be less severe and/or less frequent;
- b) Will tornadoes in the US be less severe and/or less frequent;
- c) Will wildfires in the US be less severe and/or less frequent;
- d) Will droughts in the US be less severe and/or less frequent; and
- e) Will floods in the US be less severe and/or less frequent?

For each answer to questions a) through e), please provide scientific data or peer-reviewed evidence corroborating your assertions.

**Response:** See the response to the previous question.

**Question 3:** Could you please inform me what percentage reduction from 2005 greenhouse gas emissions from the United States will result in each of the following?

- a) Less frequent and/or less severe hurricanes making landfall in the United States;
- b) Less frequent and/or less severe US tornadoes;
- c) Less frequent and/or less severe US wildfires;
- d) Less frequent and/or less severe US droughts;
- e) Less frequent and/or less severe US floods

For each response to parts a) through e), please provide scientific data or peer-reviewed evidence corroborating your assertions.

Response: See the response to question 1.

## Questions from Senator James M. Inhofe

**Question 1:** Since the Service proposed listing the Northern long-eared bat last October based entirely on reported impacts from white nose syndrome (WNS), significant new information about the spread and impact of WNS has been submitted to FWS. Numerous states in which WNS has been present for years have reported to FWS that the disease has not affected the species in their borders. At the same time, an important new study [Ingersoll et al. (2013)], shows that the drastic estimates of the impacts of WNS on the species are significantly overblown-- by 30% or more.

- a) Why did FWS not obtain this crucial information before proposing one of the largest listings in the history of the Endangered Species Act?
- b) Will the Service incorporate this into the record as the best available science?
- c) Now that the Service has this study, how can it continue to justify an endangered listing when the record shows there are millions of Northern long-eared bats continuing to thrive across 38 states and the District of Columbia?

**Response:** The Service recently published a 6-month extension of the final determination of whether to list the northern long-eared bat (*Myotis septentrionalis*) as endangered to solicit additional information and resolve substantial disagreement regarding the sufficiency or accuracy of the available data. The Service will base our final determination on the best scientific data available.



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

SEP 25 2014

The Honorable John Fleming  
Chairman  
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs  
Committee on Natural Resources  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed are responses prepared by the U.S. Fish and Wildlife Service to questions submitted following the Subcommittee's May 20, 2014, oversight hearing on "*Oil and Gas Activities within the National Wildlife Refuge System and the Fish and Wildlife Service's Interest in Further Regulating Them.*"

Thank you for the opportunity to provide this material to the Subcommittee.

Sincerely,

Christopher P. Salotti  
Legislative Counsel  
Office of Congressional and Legislative Affairs

Enclosure

cc: The Honorable Gregorio Kilili Camacho Sablan  
Ranking Member

**Committee on Natural Resources**  
**Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs**  
**1324 Longworth House Office Building**  
**May 20, 2014**  
**2:00 p.m.**

Oversight Hearing on:

*“Oil and Gas Activities within the National Wildlife Refuge System and the Fish and Wildlife Service’s Interest in Further Regulating Them”*

**Questions for the Record**

**(1). What is your current regulatory authority over oil and gas operations within the refuge system? Please cite specific language in P. L. 105-57.**

**Response:** Section 5(b)(5) – “Issue regulations to carry out this Act”

Section 5(a)(4)(A) & (B) – “In administering the System, the Secretary shall—

(A) provide for the conservation of fish, wildlife, and plants, and their habitats within the System;

(B) ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;”

**(2). Of the 1,700 active wells within the national wildlife refuge system, how many are oil wells?**

**Response:** Based on our best available information the U.S. Fish and Wildlife Service (Service) estimates there are approximately 257 active wells that produce primarily oil and approximately 8 active wells that produce a combination of both oil and gas.

**(3). Do you have a database on the nature and extent of oil and gas activities within the national wildlife refuge system?**

**Response:** Yes. The Service has a database that was developed from information maintained by the Environmental Protection Agency (EPA) that was collected from each state. The Service extracted data on refuges from the EPA dataset in 2011 to compile our database.

**(4). Of the 1,700 active wells, how many are reserved mineral rights vs outstanding mineral rights?**

**Response:** The Service does not have access to this information.

(5). Other than those oil and gas operations that existed prior to acquisition, how many new oil and gas activities have begun operations within the refuge system within the last 20 years? Please provide a list.

Response: Since 1994 at least 667 wells were drilled within the Refuge System:

FWS Region / State / NWR	GAS	OIL	OIL & GAS	OTHER	Grand Total
<b>Region 2</b>	<b>87</b>	<b>20</b>	<b>2</b>	<b>2</b>	<b>111</b>
NM	2				2
BITTER LAKE NWR	2				2
OK	1				1
OPTIMA NWR	1				1
TX	84	20	2	2	108
ANAHUAC NWR	2	1			3
ARANSAS NWR	11				11
ATTWATER PRAIRIE CHICKEN	12				12
BRAZORIA NWR	3				3
CADDO LAKE NWR	2	1		1	4
HAGERMAN NWR	2	15		1	18
LAGUNA ATASCOSA NWR	1				1
LOWER RIO GRANDE VALLEY NWR	44		2		46
MCFADDIN NWR	1	2			3
SAN BERNARD NWR	4	1			5
TRINITY RIVER NWR	2				2
<b>Region 3</b>		<b>1</b>		<b>1</b>	<b>2</b>
IN		1		1	2
PATOKA RIVER NWR		1		1	2
<b>Region 4</b>	<b>122</b>	<b>73</b>	<b>3</b>	<b>332</b>	<b>530</b>
LA	122	73	3	332	530
ATCHAFALAYA NWR	1	5		7	13
BAYOU COCODRIE NWR				8	8
BAYOU SAUVAGE NWR				1	1
BAYOU TECHE NWR	1			5	6
BLACK BAYOU LAKE NWR	3			6	9
BRETON NWR				1	1
CAMERON PRAIRIE NWR				4	4
CAT ISLAND NWR	1				1
CATAHOULA NWR	1	2		10	13
D'ARBONNE NWR	11			83	94
DELTA NWR	28	26	1	25	80
GRAND COTE NWR				1	1
LACASSINE NWR	8	3	1	11	23

LAKE OPHELIA NWR				10	10
MANDALAY NWR	2	1		9	12
RED RIVER NWR	2	12		13	27
SABINE NWR	13	20	1	21	55
ST. CATHERINE CREEK NWR				1	1
TENSAS RIVER NWR		2		13	15
UPPER OUACHITA NWR	51	2		103	156
<b>Region 5</b>		<b>1</b>			<b>1</b>
<b>WV</b>		<b>1</b>			<b>1</b>
OHIO RIVER ISLANDS NWR		1			1
<b>Region 6</b>	<b>22</b>		<b>1</b>		<b>23</b>
<b>MT</b>	<b>22</b>				<b>22</b>
BOWDOIN NWR	1				1
BOWDOIN NWR	12				12
HEWITT LAKE NWR	9				9
<b>ND</b>			<b>1</b>		<b>1</b>
LAKE ILO NWR			1		1
<b>Grand Total</b>	<b>231</b>	<b>95</b>	<b>6</b>	<b>335</b>	<b>667</b>

**(6). In 2007, the Government Accountability Office recommended that the Service hire 32 refuge oil and gas specialists, 7 Regional Coordinators and a 6-member Mineral Regional Team. How many of those positions are currently filled?**

**Response:** The Service has hired a total of 13 oil and gas-related positions including: four national level staff which includes a program coordinator, a National Environmental Policy Act (NEPA) specialist, environmental contaminants specialist, and a petroleum engineer; four oil and gas specialists in the Service's Southwest Region; one oil and gas specialist, one law enforcement officer, and one regional energy coordinator in the Service's Southeast Region; one regional energy coordinator in the Service's Mountain-Prairie Region; and one oil and gas specialist in the Service's Alaska Region.

**(7). GAO also recommended in 2003 that the Service establish an inventory of oil and gas wells and infrastructure on refuge lands. What is the status of that comprehensive inventory?**

**Response:** The Service has assembled a database of over 5,000 oil and gas wells that occur on refuge system fee title lands. To keep this dataset current, the Service will continually update the dataset with data collected from states.

**(8). Does the Service have a national tracking system for oil and gas activities within the refuge system?**

**Response:** The Service has regional oil and gas coordinators/representatives that collate and share oil and gas data within the Service. This national team continues to develop new tools

such as a national spills database, oil and gas well and pipeline database, inspection and monitoring database, and other electronic inspection and monitoring forms, guidance and other support tools.

**(9). Does the Service charge rent or access fees to energy companies who desire to utilize their reserved or outstanding mineral rights? What restrictions does the Service place on those companies?**

**Response:** Typically, we do not charge rent or access fees to companies to utilize their mineral rights. However, if a company needs a right-of-way, the Service charges fees for that right-of-way. A mineral owner has a legal right to access their minerals; but if the owner needs to cross lands that the owner does not own, a right-of-way may be required. For example, if a new access route is developed such as a road.

In regard to restrictions, the Service could apply conditions as part of the Special Use Permit process or terms and conditions as part of the right-of-way process. The most commonly applied condition is a timing restriction. This restricts certain activities for a specific period of time, such as during nesting season for migratory birds. Other conditions are used to reduce environmental impacts, to ensure compliance with various federal laws and regulations. For example, the Service may restrict the location of the placement of a well if a cultural survey indicates that there is a site eligible for the register of Historic Places.

**(10). Can the Fish and Wildlife Service deny access to these subsurface minerals that it does not own? If you were to deny access, wouldn't that be a "takings" and a violation of the companies 5<sup>th</sup> Amendment constitutional rights?**

**Response:** The Service ordinarily will not deny access to subsurface minerals that it does not own. A total denial of access would likely constitute a compensable taking under the Fifth Amendment. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539–40 (2005); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018–19 (1992). Whether restricted access to subsurface minerals amounts to a compensable taking would depend on the specific facts involved. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 325–28 (2002); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). If denial of access is found to constitute a taking, the Fifth Amendment would not forbid the taking, but the owner would be entitled to just compensation.

**(11). Does the Service have oil and gas production figures for operations within the refuge system? How did you determine that energy companies owed the Service \$2.8 million in royalty payments in FY'13?**

**Response:** The Refuge System does not track production figures on non-federal minerals. These figures are proprietary information. The \$2.8 million in royalty payments received in Fiscal Year 2013 was from federal mineral leases, not from oil production related to privately held subsurface mineral rights. Federal mineral leases are managed by the Bureau of Land Management (BLM) and the revenue is collected by the Department of the Interior's Office of Natural Resources Revenue (ONRR).

**(12). Have there been any major oil spills (over 1,000 barrels of oil) from an exploration or production well within the refuge system? What does the Service define as a major oil spill in terms of barrels lost?**

**Response:** The Service is not aware of a spill over 1,000 barrels of oil (bbl) due to an exploration or production well within the Refuge System in the past 5 years. There have been numerous smaller spills on Refuge System lands that cumulatively surpass 1,000 bbl.

The Service does not have a specific definition of a "major spill." Any spill that is not contained could result in significant resource damage, depending on the habitat impacted and the species present.

**(13). During the past ten years, how many total barrels of oil have been spilled from oil wells within the refuge system? Please specify if the spills came from active wells or abandoned wells. Also, who paid for the cost of cleaning up these spills?**

**Response:** Most spills do not occur at the wellhead -- the majority of spills are production-related, from flowlines, headers, facilities, or storage vessels.

Most oil and gas activity within the Refuge System occurs within the Service's Southeast Region, and the Service focuses its efforts in this region. Therefore our best information to answer this question is from this region. Approximately 800 bbl have been spilled on refuges in the Southeast Region over the last 10 years, based on file records and refuge staff interviews, for actively producing wells. At this point in time we lack comprehensive information on spills in refuges across the Nation and spills from abandoned wells.

Where wells are actively producing oil or gas, the responsible party pays for the cost of clean-up. However, the largest reported spill from a single well, a plugged and abandoned well, on Refuge System lands happened at St. Catherine Creek National Wildlife Refuge. For this spill, there was no responsible party identified, so EPA directed the cleanup using funds from the Oil Spill Liability Trust Fund.

**(14). How many barrels have been spilled because of pipelines within the refuge system? Who paid for the cost of cleaning up these spills?**

**Response:** Many spills go unreported because the spill reporting requirements vary from state to state. The Service can provide specific examples of spills, but we are unable to provide a comprehensive list due to the varying nature of state reporting requirements. A revised national level regulation would standardize this reporting requirement.

Here are two recent examples:

In the Service's Southwest Region, a pipeline ruptured on Deep Fork National Wildlife Refuge on April 7, 2011. This was discovered by another pipeline company employee and was reported to the Refuge. According to the EPA's National Response Center report, an estimated 50 bbl

was released. The leak had been ongoing for several months, so actual total amount of oil released was unable to be determined. EPA was notified and responded to the cleanup in coordination with Service. The Service was reimbursed for our expenses through the Oil Spill Liability Trust Fund.

On Delta National Wildlife Refuge in Service's Southeast Region, Chevron had a 400 bbl spill on the Refuge. Chevron paid for all cleanup and restoration efforts.

**(15). The Service has indicated that abandoned oil and gas infrastructure represents a major environmental hazard within the refuge system. What is your current authority in dealing with abandoned rigs or equipment?**

**Response:** Two existing, but limited, regulatory provisions are applicable to such abandoned property:

50 CFR § 29.32 provides that "structures and equipment must be removed from the area when the need for them has ended."

50 CFR § 28.41 provides that "any property abandoned or left unattended without authority on any national wildlife refuge for a period in excess of 72 hours is subject to removal. The expense of the removal shall be borne by the person owning or claiming ownership of the property. Such property is subject to sale or other disposal after 3 months, in accordance with section 203m of the Federal Property and Administrative Services Act of 1959, as amended (40 U.S.C. 484m), and regulations issued thereunder. Former owners may apply within 3 years for reimbursement for such property, subject to disposal and storage costs and similar expenses, upon sufficient proof of ownership."

However, there are no penalties applicable for failing to comply with these regulatory requirements, nor does either provision provide a requirement to post bonds to cover the costs of removal and property restoration. Thus, if the mineral interest owner fails to remove the property, the Service must seek injunctive relief in court or to remove the property itself at taxpayer expense.

**(16). Who pays for the clean-up of oil spills from abandoned wells? Have you obtained any money from the Oil Pollution Liability Trust Fund?**

**Response:** The cost of cleanup of oil spills from abandoned wells, where no identifiable, viable party can be identified, can be paid by the State or the Service. In addition, the Oil Spill Liability Trust Fund, which is administered by the United States Coast Guard, is a potential source of funding for clean-up of oil spills when there is a discharge, or substantial threat of discharge, to waters of the United States or adjoining shorelines. The Service has received monies for cleanup from this fund.

**(17). Do you aggressively seek reimbursement from the owners of the abandoned, plugged or shut-in wells when they cause environmental damage?**

**Response:** When the Service is made aware of a problematic abandoned well we actively seek reimbursement from the owners of the abandoned wells where those owners have violated Federal statutes. However, often there is no solvent owner to pursue for damages. In those cases, the cost of addressing the problems caused by the well is paid by taxpayers.

**(18). On April 6, 2010, there was a 400 barrel oil spill from a pipeline at the Delta National Wildlife Refuge. What was the reaction and efforts by the pipeline owner to clean-up this spill?**

**Response:** The reaction to the spill at Delta National Wildlife Refuge by Chevron was immediate. An oil spill response organization was on site and cooperated from the initial notification of the spill to "close out," when the Delta National Wildlife Refuge staff was satisfied with the clean-up efforts.

**(18).The initial public comment period on your Advanced Notice of Proposed Rulemaking closed on April 25, 2014. How many comments did you receive during that 60-day period? How many of those comments reflected the opinion that the Service should not proceed with new federal regulations?**

**Response:** We received 47,454 comments on the Advanced Notice of Proposed Rulemaking (ANPR) during the comment period. The Service received 10 comments stating that the Service should not proceed with new regulations.

**(19). How long will it take to review those comments and do you intend to complete an Environmental Impact Statement?**

**Response:** The Service reopened the comment period for an additional 30 days beginning June 9, 2014 and closing on July 9, 2014. We anticipate finalizing a report on those comments by the end of the summer of 2014. Along with the publication of the ANPR the Service announced a notice of intent to prepare an Environmental Impact Statement (EIS). It is too early to project when we will complete an EIS.

**(20). Can you assure this Committee that the Service will not apply for a Categorical Exclusion for these proposed regulations?**

**Response:** Yes. If the Service deems the responses to the ANPR/NOI justify a rulemaking, then the Service intends to proceed with a programmatic EIS, which would incorporate public feedback on the draft rule and subsequent NEPA analysis.

**(21). When will the final rule be published and what is your target date for these regulations to be effective? Will you stipulate that any new regulations will be prospective in their authority?**

**Response:** We are in the very early stages of considering a rulemaking. It is too early to estimate the publication date of a potential final rule. Also, at this early stage, we cannot

stipulate on whether any potential regulations would be prospective although we would give full consideration to that approach if we begin to develop proposed regulations.

**(22). Did the Service receive directions, instructions or suggestions from the Department of the Interior, the Public Employees for Environmental Responsibility (PEER) or other nongovernmental organizations that it was time to more vigorously regulate these activities under refuge lands?**

**Response:** The Service received an inquiry from PEER in 2011 suggesting the Service update its oil and gas regulations. We have not received a request from the Department of the Interior or any nongovernmental organization outside of PEER prior to the opening of the comment period on the ANPR.

**(23). Since the Service cannot deny access to these oil companies who own the minerals, aren't there limits on how much you can charge them in terms of an annual permit or what you call "reasonable" access fees?**

**Response:** The Service would not charge more than reasonable and customary permit or access fees as determined by those charged to operators by other oil and gas regulatory agencies and landowners.

**(24). Do you intend to require annual inspections of both active and inactive wells? What is the cost of such an inspection?**

**Response:** We cannot state definitively whether any potential regulations would require annual inspections or what they would specifically entail. Monitoring of activity is integral to any regulatory program, and the frequency is dependent on the type of operations, environmental conditions, and other factors. It is reasonable to assume that monitoring could be expected on at least an annual basis. It is also reasonable to assume that inspections would be conducted by Service personnel, and therefore that operators would bear no out-of-pocket expense for the inspections themselves.

**(25). Let's talk about the scope of these new regulations. Here is my hypothetical question: My family has been in the energy business for nearly 100 years. We have a number of oil wells that are drilled on our private property and because of horizontal drilling we are able to extract oil resources from subsurface lands we own under a national wildlife refuge. How will any new federal regulations affect my oil and gas activities?**

**Response:** The Service is not contemplating regulation of activities beyond Refuge System boundaries, including the surface operations of wells that are directionally drilled from points outside a unit of the Refuge System boundary to points underneath it.

**(26). Since the Service has a legitimate concern about abandoned wells and orphaned infrastructure equipment, why not confine your new regulations to these pressing problems?**

**Response:** By definition, orphaned wells have no responsible party, so there is no entity to regulate. Orphaned wells would be addressed outside of the currently contemplated regulation.

A comprehensive suite of revised regulations could prevent current operations from falling into disrepair and ultimately into an abandoned or orphan status.

**(27). How many qualified oil and gas inspectors work for the Fish and Wildlife Service?**

**Response:** When the Service addresses the term “inspector”, it is within the context of our current authorities. Our inspectors are biologists, refuge managers, refuge staff, and law enforcement officers. The Service has many staff on refuges that deal with a variety of damage issues not related to oil and gas as the destruction of refuge property, illegal dumping, etc. These staff also examine oil and gas infrastructure under our current regulatory authorities. They are looking for leaks, spills, physical problems, and poorly maintained equipment, among other issues. If we see problems outside our authority, we report those to the proper regulatory authority, such as the State permitting office.

**(28). In the testimony of Mr. Steve Guertin, he indicated that the Service acquires refuge property, “with the least amount of property right necessary to carry out our primary mission.” However, by trying to regulate adjacent private landowners attempting to access private mineral rights under a refuge, without ever touching the actual surface property owned by the Service, it appears that you are trying to apply an amount of authority that would be more reflective of having acquired the maximum amount of property rights. If the Service wants to regulate at this level, shouldn’t the agency have acquired the entire property rights in the first place?**

**Response:** The Service is not contemplating regulation of activities outside the boundaries of Refuge System units. We are not contemplating regulations that would apply to adjacent private landowners attempting to access private mineral rights under a refuge without accessing refuge lands administered by the Service.



# United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, DC 20240

SEP 23 2014

The Honorable Doc Hastings  
Chairman  
Committee on Natural Resources  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed are responses prepared by the U.S. Fish and Wildlife Service to questions submitted following the Committee's March 26, 2014, oversight hearing on "*Collision Course: Oversight of the Obama Administration's Enforcement Approach for America's Wildlife Laws and Its Impact on Domestic Energy.*"

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Christopher P. Salotti  
Legislative Counsel  
Office of Congressional and Legislative Affairs

Enclosure

cc: The Honorable Peter DeFazio  
Ranking Member

Committee on Natural Resources  
Full Committee Oversight Hearing  
1324 Longworth House Office Building  
March 26, 2014

Oversight Hearing entitled *"Collision Course: Oversight of the Obama Administration's Enforcement Approach for America's Wildlife Laws and Its Impact on Domestic Energy"*

Questions from Chairman Hastings  
for Director of the U.S. Fish & Wildlife Service Dan Ashe

1. The final 30-year Eagle Tenure Rule issued in December 2013 and the earlier 2009 5-year Eagle Tenure Rule make clear that older wind farms, existing transmission infrastructure, and other industrial facilities are potentially liable—and in fact have been liable during the course of their operational lifetimes—for the unauthorized take of protected eagles. However it is also clear that the Service does not on a regular basis take enforcement actions against these older facilities, even though some of them are notorious for the number of eagles and other protected birds that they take. Do older wind facilities that went into operation prior to 2009 face the same potential legal liability as a facility that has gone into operation in 2009 or later? Please explain.

Response: Wind facilities that went into operation prior to 2009 face the same potential legal liability as do facilities that began operation in 2009 or later. The U.S. Fish and Wildlife Service (Service) Office of Law Enforcement (OLE) responds to and investigates reports of violations of laws that protect eagles without regard for the date that a facility has gone into operation.

2. Have any wind facilities that went into operation prior to 2009 applied for an eagle take permit? If yes, what is the status of any such applications?

Response: The Service has received eagle take permit applications for two wind facilities that were operational prior to 2009. One of the applications is under initial application review. For the other, the Service prepared a draft environmental assessment (DEA) of the effects of, and alternatives to, issuing the permit as required under the National Environmental Policy Act (NEPA). The public comment period for the DEA closed in November 2013, and the Service is reviewing public comment and preparing a Final Environmental Assessment.

3. How many wind farms that went into operation in 2009 or later have applied for an eagle take permit? What is the status of any such applications?

Response: The Service has received eagle take permit applications for six wind facilities that

went into operation in or after 2009. One of the sites is part of a joint application with a second facility already addressed in response to Question 2 and is under NEPA review. Four of the remaining five applications are in NEPA review (developing the Environmental Assessment) and one application is in the final stages of the NEPA process (final review of Environmental Assessment).

- 4. Would you agree that voluntary agreements by wind operators for mitigating their environmental impacts do not constitute take permits and as such do not immunize the companies from liability for unauthorized take?**

**Response:** Voluntary agreements by wind operators for mitigating their environmental impacts do not constitute take permits and do not immunize the companies from liability for unauthorized take. However, the Service has long employed a policy of encouraging industry to utilize best practices aimed at minimizing and avoiding the unpermitted take of protected birds. We have examples of successful partnerships like the Avian Power Line Interaction Committee, which is a partnership with the electric transmission line industry. With regard to the wind industry, in 2007 the Secretary of Interior chartered and the Service convened the Wind Turbine Guidelines Advisory Committee in accordance with the Federal Advisory Committee Act to develop guidelines for siting and operating wind turbines. The Service's Eagle Conservation Plan Guidance and Land-based Wind Energy Guidelines are intended to guide the process for development of conservation and implementation plans which significantly benefits eagles and other species.

When the Service has identified and communicated best management practices that are effective we anticipate they will be used. The Service focuses a considerable amount of its limited resources on developing partnerships with industries and government agencies where the greatest benefit for migratory bird conservation can be accomplished.

- 5. For older, pre-2009 facilities seeking a permit, please describe the range of mitigation measures that could be implemented and explain whether they would be different from the ones for newer facilities?**

**Response:** In 2009, the Service published sustainable take levels for both bald and golden eagles based on current population status and predicted ability of each species to withstand additional mortality. For bald eagles, we determined that most populations could withstand some additional mortality, and we established regional take thresholds (quotas) for permitting purposes. We determined that golden eagle populations were stable with existing survival rates, but might not be resilient to increased mortality levels. Accordingly, for golden eagles we determined that any added mortality over that already occurring would have to be offset by compensatory mitigation that reduced another existing source of mortality by a commensurate degree. Thus, post-2009 activities seeking an eagle take permit for golden eagles are required to offset their take directly through compensatory mitigation aimed at reducing an ongoing form of mortality, whereas activities that were operational prior to 2009 are not required to offset their take because that mortality was accounted for in the determination that the

populations were stable. The range of offsetting mitigation measures that can be implemented by a permittee for a post-2009 activity include any actions that have been demonstrated to reduce another existing source of golden eagle mortality, such as power pole retrofits to reduce ongoing electrocutions and highway road kill removal to reduce ongoing mortality due to vehicle collisions.

Operating and planned facilities may differ in their ability to implement avoidance and minimization measures. Alternative siting considerations are generally not feasible for operating facilities. The Eagle Conservation Plan Guidance places great emphasis on appropriate siting as being one of the most effective ways to reduce risks to eagles, but for a facility that is already built, moving turbines is generally not feasible. We have no proven methods to reduce eagle take at operating facilities, but the range of experimental measures we have considered can be applied at both operating wind projects and those being planned for which siting does not remove all risk of eagle take. For example, curtailing operations of turbines that are identified as risky during periods of high eagle use is an experimental measure applicable to both pre-2009 operating and future planned wind facilities.

- 6. Please explain the circumstances under which such unpermitted, pre-2009 wind facilities would be ordered to discontinue operation in connection with their take of protected eagles, migratory birds, or endangered species?**

**Response:** The Service does not issue permits for the operation of wind energy facilities; that authority lies with other permitting agencies. For this reason, the Service does not have the authority to order a facility to discontinue operation in connection with take of species protected under the Bald and Golden Eagle Protection Act (BGEPA), the Migratory Bird Treaty Act (MBTA), or the Endangered Species Act (ESA). Instead, if the conditions of an eagle take permit or endangered species incidental take permit are not met, the permit may be suspended or revoked, and penalties for violations of the BGEPA, MBTA, and ESA may potentially include monetary fines and imprisonment.

- 7. What kind of economic considerations if any would be taken into account in developing a take permit and mitigation measures to ensure that the continued operation of the wind facility remains economically viable and not so onerous and burdensome that the only economically viable option would be to shut down?**

**Response:** The Service considers the same factors with regard to economic viability when evaluating take permits for wind facilities as it does for other types of industries. With regard to eagle permits, the regulations at 50 CFR 22.26 require avoidance of take to the maximum extent practicable. The term "practicable" is defined as: "capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles, the following three things: the cost of remedy compared to proponent resources; existing technology; and logistics in light of overall project purposes".

As noted in the response to the previous question, the Service believes the best course of

action is to work with industry to develop conservation measures for wind projects and other activities as part of adaptive management associated with the permit process. The triggers that would initiate operational response will be described in each permit after being negotiated with project developers prior to permit issuance. Unless the Service determines that there is a reasonable scientific basis to implement conservation measures, potentially costly measures would be deferred until such time as a predefined trigger, such as a threshold of eagle use of a defined area or an eagle fatality, in the permit is reached. At that point, consistent with the adaptive management process, the permittee would be required to implement the additional conservation measures. The permit would also be amended at that time to allow the permittee to discontinue any ineffective conservation measures under the conditions of the programmatic eagle take permit. In this way, a project developer or operator will not be required to expend funds to implement measures shown to be ineffective.

8. **The most recent version of the eagle conservation plan guidance released in April 2013 recommended that abandonment or modification measures be implemented for those wind sites that have a high probability of eagle take and are unable to maintain a preservation standard. Would this remedy be applicable to all sites, or only older sites without take permits?**

**Response:** The Eagle Conservation Plan Guidance presents a tiered approach to applying for an eagle take permit. The Service considers many factors, including the status of projects when evaluating potential eagle take permits, and would consider whether a project is in the planning stage or operating. Based on the Eagle Conservation Plan Guidance, when evaluating potential eagle take permits for projects that are in the planning phase, the Service could recommend that a project be abandoned at a particular site or modified if the Service predicts that the likelihood of eagle take at that project is so high that it could not meet the BGEPA preservation standard. This is similar to what we recommend in the Service's Land-based Wind Energy Guidelines.

When the Service works with potential applicants of currently operating projects, we have to consider the likelihood of eagle take at the project and ways to minimize that take to a level that is compatible with the BGEPA preservation standard. When we can agree to measures to meet that standard, we are likely to issue an eagle take permit. For operating projects for which the Service has issued an eagle take permit, the Eagle Conservation Plan Guidance speaks to the possibility that when take of eagles is at a higher rate than predicted, and the permittee cannot implement measures to reduce that eagle take, they risk having their eagle take permit rescinded. Rescinding a permit would be necessary if the take associated with a permitted activity would violate the preservation standard in the BGEPA, as interpreted by the Service in the 2009 Eagle Permit rule. This applies to both any pre-2009 facility that has a permit, as well as any post 2009 facility with a permit. The Service has adopted conservative measures in the models we use to predict eagle take to minimize the possibility that eagle take rates are underestimated, therefore we do not expect this to be a common occurrence. Any take of eagles that is not authorized under an eagle take permit is potentially in violation of the BGEPA, regardless of when a facility was constructed.

9. Please explain what potential legal liability a company would face if it has an eagle take permit but takes other migratory birds for which it is not permitted to take?

**Response:** A company holding an eagle take permit that takes other migratory birds is violating the MBTA (16 USC 703 et seq.) The unauthorized take of migratory birds is a Class B misdemeanor with fines of not more than \$15,000 or imprisonment of not more than six months, or both.

10. On October 17, 2012, a two-page directive was issued by Chief William Woody of the Fish & Wildlife Service's Office of Law Enforcement. This directive states "unpermitted takings of permitted birds outside of the hunting context ... to be potential violations of the statute. Despite the MBTA's 'strict liability' standard, the Service has long employed an unwritten policy of encouraging industry and agriculture to employ "best practices" aimed at minimizing and avoiding the unpermitted take of protected birds." The memo goes on to state: "OLE will look for opportunities to foster relationships with, and provide guidance to, individuals, companies, and industries during the development and maintenance of their operational plans." What is meant by "fostering relationships"?

**Response:** The OLE has a long history of attempting to work with industry to promote compliance with the federal laws that protect wildlife, including those that protect eagles and other migratory birds. Most often this is done through personal face-to-face meetings to educate and inform individuals, companies, and industries about the laws and how best to comply. The Service strives to build partnerships with industry to conserve our nation's fish and wildlife. However, if and when those attempts fail, we then seek to enforce the provisions of the law as efficiently and equitably as possible.

11. The enforcement policy suggests that the Service will take enforcement actions only against companies that do not try to cooperate with the Service. Is there a number threshold for the number of birds killed that would trigger enforcement?

**Response:** The MBTA prohibits unauthorized take of migratory birds. The take of a single migratory bird may trigger enforcement. However, the Service views the term "enforcement" to be expansive and to encompass outreach, education, and attempts to secure compliance.

12. If a company has engaged in communications and sought to cooperate with the FWS consistent with FWS guidance and this directive, then under what circumstances would it be subject to enforcement?

**Response:** A company may be subject to enforcement in the form of referral for prosecution when the company fails to comply with the law. Compliance is achieved by avoiding continued unauthorized take of eagles or by obtaining take authorization via permit for take

that is unavoidable.

- 13. If a company does not have a take permit but has a demonstrated record of communicating with the FWS and has engaged in mitigation, would it be immune from enforcement for the unpermitted take of protected eagles?**

**Response:** No. The plain language of 16 USC 668 et seq., commonly referred to as the Bald and Golden Eagle Protection Act (BGEPA), prohibits the take of eagles without a permit.

- 14. After the development of the 2009 eagle rule and its envisioned permitting system, the Service went about developing the eagle guidelines. Indeed, the guidelines seem to exempt two types of wind developers from obtaining eagle permits: those developing new wind farms that are deemed low-risk to eagles; and those with existing facilities regardless of the threat posed to eagles. What constitutes an existing facility is undefined, but it appears that a facility that went into operation before the 2009 rule was finalized would be considered one. If a company was in compliance with the guidelines but did not have a take permit, would it be immune from liability?**

**Response:** As noted in response to a previous question, any activity that takes eagles, whether in operation prior to 2009 or since, needs to have an eagle take permit to cover that take or else it is a violation of the BGEPA. While the response to question 5 indicates that pre-2009 facilities are exempt from the requirement that they implement offsetting compensatory mitigation for any take of golden eagles, it does not imply they do not need a permit. In fact, the Eagle Conservation Plan Guidance provides information for operating facilities on how to develop an application for an eagle take permit. The only activities the Eagle Conservation Plan Guidance suggests may not need a permit are those for which conservative models predict that no eagle take will occur over the life of the project when adequate eagle exposure information is available. The Eagle Conservation Plan Guidance does not exempt or imply that any activity that might take eagles should not seek an eagle take permit.

- 15. The Service did not conduct a NEPA analysis on the environmental impacts of 30-year Eagle Tenure Rule pursuant to a categorical exclusion for rules involving technical or administrative amendments. The Service explained in its response to comments that NEPA analysis would instead need to be conducted for individual projects. However, the Service has provided a February 5, 2013 email from FWS employee Mike Johnson to FWS employees Sarah Mott and Brian Millsap that indicates Service staff were in fact considering conducting a full environmental impact statement in connection with an eagle program rulemaking but that the final EIS would not be completed until 2015 and policymakers in the Department were looking to complete the rulemaking in 2014. Please explain what rulemaking this email discussion refers to and what role time pressures played in the Service's decision to take advantage of a categorical exclusion for the 30-year**

**Eagle Tenure Rule rather than to conduct an EIS.**

**Response:** While the referenced e-mail was not provided for review, it appears that the email exchange relates to developing an EIS for the revision of the 2009 Eagle Rule as contemplated in the Advanced Notice of Proposed Rulemaking published April 13, 2012 (77 FR 22278). The Service always planned to utilize a categorical exclusion rather than an EIS for the 30-year tenure rule, and time constraints did not play a role in this decision.

16. **When the original Eagle Take rule was released in 2009, the Service wrote in its response to comments that "there was not enough time to fully engage any tribes in formal government-to-government consultation during the rule-making period." Then, with the release of the 2013 rule, the Service again held no formal consultations with tribes, stating in the response to comments that the 2013 rule was "a technical amendment to [Service] regulations ... [and] merely extend[ed] the approved duration of a permit from 5 to 30 years." The Service also wrote that while some tribes "may perceive further negative effects from these proposed changes," the Service determined "eagles would be sufficiently protected under this rule." Is it appropriate under Executive Order 13175 and Service policy to "perceive" what tribes think on significant matters, rather than actually ask their opinion in formal consultations? Please explain.**

**Response:** In the case of the 2013 Permit Duration Rule amendment, the Service did not believe that the amendment to the rule was significant and the amendment provided the same level of assurance for protection of eagles that consecutive 5-year permits would provide. Thereby, the effect of the amendment on eagles remained the same as the effects of consecutive 5 year permits. The Service is now reviewing the entire rule for possible revision, and as part of that process we are conducting consultations with tribes on possible future changes to the regulation including revisiting the provision of the 2013 Permit Duration Rule.

17. **Why was the Service unwilling to engage in formal consultations with the tribes, when it was available to meet with wind industry representatives and select environmental groups throughout the process for developing the Eagle Tenure Rule?**

**Response:** As stated in the previous response, the Service did not believe the amendment to the 2009 Eagle Take rule was significant and did not therefore request formal consultation with tribes. Several wind industry representatives and environmental groups requested formal listening sessions with the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) under Executive Order 12866 during and after the comment period and prior to the regulations being finalized. The Service attended but did not participate in these listening sessions. Additionally, the Service attended similar sessions requested by these groups with the office of the Deputy Secretary.

**18. On August 22, 2012, a letter was sent to Secretary Salazar from representatives of the wind industry and environmental organizations – the so-called “Group of 16” seeking a meeting to discuss the development of the bald and golden eagle permit process and the revisions to the 2009 Tenure Rule. What role did the Department have in selecting groups and participants to attend these meetings?**

**Response:** The Department of the Interior (Department) worked through the American Wind Energy Association (AWEA) contact and representatives of the environmental organizations that signed the letter to arrange the meetings.

**19. Were any invites extended to groups and interests beyond those that signed the August 22 letter?**

**Response:** No. The Department invited representatives of the environmental groups that had signed the August 22, 2012 letter to attend. The American Wind Energy Association coordinated participants representing wind industry.

**20. Were all interested groups invited or allowed to participate? In other words, were there any groups that requested to participate that were not allowed to do so? If yes, please explain why.**

**Response:** The meetings the Department held on February 11, 2013 and March 27, 2013 were not open, public meetings. They were meetings held at the request of signatories to the August 22, 2012 letter. The American Bird Conservancy (ABC) requested to attend the meeting. As ABC was not a signatory to the August 22, 2012 letter, the Department did not invite them to the meetings.

**21. The Service has provided the Committee with a November 15, 2012 email from FWS employee Jerome Ford with the subject line “hotel (Holiday Inn)” that discusses a request from the American Bird Conservancy to participate in these meetings, as well as tribal consultation requirements. The email states that if additional groups are allowed to participate then all interested groups will need to be invited. Please explain the concern with not allowing other interested groups, including tribes, to participate in these meetings.**

**Response:** While the referenced e-mail was not provided for review, it appears that the email chain expresses the concern that any meeting with outside parties needed to have a specific purpose. At the time, there was uncertainty about whether the purpose of the proposed meeting was to discuss the letter that had been sent by the 16 groups or to discuss revisions to the 2009 Eagle Rule. The concern was based upon the need to have all stakeholders present if the purpose was to discuss revisions to the 2009 Eagle Rule.

**22. Please explain why these meetings were not publicly noticed and open to the public to attend.**

**Response:** Representatives of the Department often meet with constituents and stakeholders. Some of those meetings are public, some are not. The meetings on February 11, 2013 and March 27, 2013, were with senior Departmental officials and representatives of organizations that signed a letter to the Secretary requesting such a meeting with Departmental officials. They were not public meetings. Accordingly, there was no need to publicly announce them.

23. **The Department has provided the Committee with a February 20, 2013 email string from FWS employee Albert Manville with the subject line "Letter to Hayes" concerning a letter from the American Bird Conservancy to Deputy Secretary David Hayes concerning these meetings. The email states in part: "Dan argued that the NGOs didn't have the economic resources to sue us so not to worry" and that "ex parte communication" with the Gang of 16 was "ostensibly violations of [the Federal Advisory Committee Act], [the Administrative Procedure Act] and DOI ethics rules." Please explain what is meant by the statement: "the NGOs didn't have the economic resources to sue us so not to worry."**

**Response:** While the referenced e-mail was not provided for review, it appears that the e-mail relays second-hand information related to a discussion of possible legal concerns associated with ex parte communications.

24. **Please explain whether these meetings were held in accordance with the Federal Advisory Committee Act, the Administrative Procedure Act, and DOI ethics rules.**

**Response:** The meetings the Department held on February 11, 2013 and March 27, 2013, were with environmental organizations and the American Wind Energy Association who had gotten together to suggest ways the Department and the Service might alter the substance and process by which the Department and Service were implementing the BGEPA. The Department did not ask them to form a group or solicit recommendations from them. That group was committed to working constructively together to address those topics. It would not have been appropriate for the Department to tell them who or what organizations should have been part of their discussions.

25. **Were these meetings planned in a way to prevent their triggering the public meeting process under the Federal Advisory Committee Act?**

**Response:** As noted in response to the previous question, the Department did not establish the group, ask the organizations to form a group, or solicit recommendations from the group. Therefore Federal Advisory Committee Act requirements were not applicable to the meetings.

26. **There was a recent study by the Administrative Conference of the United States**

that suggested certain high-profile, costly, or controversial rules were delayed because of a concern within the White House about the effect such rules would have on the President's reelection. A draft of the Eagle Conservation Plan Guidance was sent to the White House Office of Management and Budget for review in January 2013 and the final version was released in April 2013. What role, if any, did the 2012 presidential election have in the timing of the publication of the Eagle Conservation Plan Guidance, which was released in April 2013? In other words, was the timing of the guidance's release purposefully delayed until after the election?

**Response:** The Eagle Conservation Plan Guidance is not a regulation, and its issuance was not subject to any statutory or legal deadlines. Instead, the focus was on getting it right. As the country continued to increase its production of domestic energy through both conventional and renewable means, the Service, along with wind energy developers and other wildlife agencies, recognized a need for specific guidance to help make wind energy facilities compatible with eagle conservation and the laws and regulations that protect eagles.

As a matter of agency discretion and good management, the bureau's technical experts were given the time necessary to work through and address complex issues raised during the public comment period and that are reflected in Version 2. Furthermore, there was a high degree of federal interagency interest. Accordingly, we consulted and coordinated with other interested agencies. The Service also views this as an iterative process and plans to ensure that Module is updated as new information, such as population data, conservation strategies, and advanced conservation practices, becomes available.

27. Among the documents that have been provided to the Committee were a couple of internal emails concerning OMB's review. For example, in a November 12, 2012 email, FWS employee David Cottingham wrote: "Now that election is over, what should we expect for ECPG and West Butte permit?" In a second email dated November 13, Mr. Cottingham wrote: "Last I knew both of those documents [the West Butte permit and eagle guidance] had cleared us and ASFWP and were awaiting 6<sup>th</sup> floor approval to send to OMB. When I inquired of Jerome last week if they were moving post-election, he had heard nothing." Please explain whether the Eagle Conservation Plan Guidance intentionally was not sent to OMB until after the 2012 election.

**Response:** The Service transmitted the Eagle Conservation Plan Guidance to OMB when it was ready for submission. The Service worked with federal agencies and other stakeholders to inform the Guidelines. Given that the Eagle Conservation Plan Guidance is a non-binding guidance document, we were attentive to stakeholder concerns in the development of these Guidelines as their buy-in is critical to conserving bald and golden eagles in the course of siting, constructing, and operating wind energy facilities. The Service allowed the time for appropriate deliberation, coordination, collaboration, and scientific debate to ensure the development of reasoned and balanced Guidelines.

**28. Was the Service or the Department instructed not to transmit the draft eagle guidance to OMB until after the election? If yes, who give this instruction?**

**Response:** OMB established a process sometime before March 2012, that requires agencies to provide a pre-briefing to the EOP prior to transmitting a document for E.O. 12866 review. OMB then informs the agency when it is ready to accept the document for review.

**29. The guidance was not identified as economically significant and as such would not ordinarily undergo interagency review under Executive Order 12866 as amended. Please explain why the Guidance was designated for interagency review.**

**Response:** OMB frequently reviews actions for reasons other than significant economic impacts. In fact, of the 13 E.O. reviews of Service documents during FY 2013, the only economically significant rule promulgated by the Service was the Migratory Game Bird Hunting regulations, which generate over \$100 million annually.

Under Executive Order 12866, OIRA is responsible for determining which agency actions are "significant" and, in turn, subject to interagency review. Significant actions are defined in the Executive Order as those that:

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

The E.O. requires that such significant actions be reviewed by OIRA before they are published in the Federal Register or otherwise issued to the public.

**30. The draft of the 30-year Eagle Tenure Rule was sent to the White House Office of Management and Budget for review in April 2013 and the final rule was released in December 2013. What role, if any, did the 2012 presidential election have in timing of when the draft Eagle Tenure Rule was sent to OMB? In other words, was the timing of the Guidance's transmission to OMB purposefully delayed until after the election?**

**Response:** The Eagle Tenure Rule and the Eagle Conservation Plan Guidance are different

documents and were reviewed at different times. The Service transmitted the Eagle Tenure Rule to OMB when it was ready. The rulemaking process typically takes about one year from proposal to issuance of a final rule as agencies consider and address public comments. The public comment period for the April 13, 2012 proposed rule closed on July 12, 2012. The Service submitted the draft Final Rule to OIRA for E.O. 12866 review on April 18, 2013, roughly one year from publication of the proposed rule.

**31. Was the Service or the Department instructed not to transmit the draft rule to OMB until after the election? If yes, who gave this instruction?**

**Response:** As noted in response to a previous question, OMB established a process sometime before March 2012, that requires agencies to provide a pre-briefing to the EOP prior to transmitting a document for E.O. 12866 review. OMB then informs the agency when it is ready to accept the document for review.

**32. Can you explain why the eagle guidelines were sent to the White House for review in the first place?**

**Response:** As explained in the response to Question 29, OIRA has broad discretion to make a determination about what agency actions are significant and thus reviewed under E.O. 12866. For those matters determined by OIRA to be significant within the scope of section 3(f)(1), the Service must then comply with section 6(a)(3)(B) and section 6 (a)(3)(C).

**33. Were these guidelines economically significant? If not, what interest did the White House have in the guidelines?**

**Response:** As described more fully in previous responses, OMB frequently reviews actions that it has determined are significant for reasons other than economics. The Eagle Conservation Plan Guidance is non-binding. Any costs would be assumed voluntarily and might result in long-term savings as legal risk is minimized. OMB/White House interest can be understood via the stated objectives of E.O. 12866 and E.O. 13563 (<http://www.reginfo.gov/public/jsp/Utilities/faq.jsp>).

**34. Similarly, the 30-year Eagle Tenure Rule was not designated as economically significant under Executive Order 12866 as amended and the Service has described the rule as technical amendments not warranting environmental review under NEPA. Please explain why the rule sent to the White House for review if it was not economically significant and was only a technical amendment that did not raise novel legal or policy issues.**

**Response:** As described in previous responses, OMB frequently reviews actions that it has determined are significant for reasons other than economics. OIRA has broad discretion to make a determination about what agency actions are reviewed under E.O. 12866. OMB/White House interest can be understood via the stated objectives of E.O. 12866 and

**35. What role did the Secretary's Counselor Steve Black have in developing the 30-year Eagle Tenure Rule and the Eagle Conservation Plan Guidance?**

**Response:** Mr. Black participated in meetings about the 30-year eagle tenure rule and the Eagle Conservation Plan Guidance. He reviewed both documents as they went through routine internal Departmental review and approval. The Service considered his review and comments.

**36. Among the documents that that have been provided by the Service to the Committee were a couple of internal email exchanges among FWS senior staff and between the Secretary's Office:**

- a. A November 15, 2012 from FWS Chief of Staff Betsy Hildebrandt to Associate Deputy Secretary Liz Klein states: "Steve [Black] has been very aggressive in wanting specific info on fws ops plan. I really feel like that is way outside his lane and told him so. He then went on to ask Pam for the same info. I will back off if told but this seems problematic and Dan agrees." Please explain what this email is referring to, specifically what Mr. Black was "very aggressive in wanting specific info on, "why these issues were "way outside his lane," and how these concerns were resolved.

**Response:** While the referenced e-mail was not provided for review, it appears that it refers to inquiries from Mr. Black about the Service's FY 2013 Operating Plan. Ms. Hildebrandt's comment in the email was suggesting that she believed that inquiring about the specifics of the agency's Operating Plan that was under development was outside of the scope of Mr. Black's responsibilities as counselor to the Secretary. The concerns were resolved on their own when the Operating Plan became public.

- b. A November 26, 2012 from David Cottingham to Betsy Hildebrandt states: "Last week we talked about pressure Steve is exerting on [Region 8] for [the Draft Renewable Energy Conservation Plan].... The attached edits from Steve show the concerns he is raising." Please explain the "pressure" Mr. Black was exerting on FWS, whether these concerns were raised to Mr. Black or anyone else at the Department, and how were they resolved.

**Response:** Throughout the fall of 2012, the Service and Bureau of Land Management staffs in California were working diligently with their counterparts in the California state government to develop a Desert Renewable Energy Conservation Plan (DRECP). The DRECP is a 22 million acre habitat conservation plan (HCP) under the ESA (Section 10) as well as a Natural Communities Conservation Plan (NCCP) under the California Endangered Species Act. Service regulations implementing the BGEPA allow the Service to authorize incidental take permits for eagles, even though they are not listed as threatened or endangered under the federal ESA, through a HCP. Mr. Black was the co-

chair of the inter-agency Renewable Energy Policy Group. The Renewable Energy Policy Group had a goal to publicly release a DRECP plan in December 2012. Mr. Black was interested in the Service developing a process to authorize limited incidental take of eagles via the DRECP for that release.

Questions from Rep. Broun  
for Director of the U.S. Fish & Wildlife Service Dan Ashe

1. During the preparation of the biological opinion for the Cape Wind project, FWS recommended reasonable and prudent measures that would require the developer to shut down the turbines at certain times of high bird activity in order to reduce bird deaths. Cape Wind objected and submitted a letter which said that such a requirement would make it difficult to get financing. The U.S. Dept. of the Interior supported Cape Wind and pressured FWS to remove the requirement. FWS did not conduct its own economic review and instead, within days, accepted the Cape Wind/Interior position and withdrew the shutdown requirement.

A federal court has now ruled that FWS broke the law by failing to conduct an independent analysis and is now under a court order to conduct the independent review that should have already been performed.

- a. How will FWS conduct this economic analysis to ensure its independence and sufficiency given the complexity of offshore renewable energy economics?

**Response:** The Service completed its remand, concluding with correspondence to the Bureau of Ocean Energy Management, on June 27, 2014. The U.S. Department of Justice filed a Notice of Completed Remands with the U.S. District Court for the District of Columbia on July 2, 2014. The Service has an economist on staff who reviewed the Cape Wind Associate's and the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM's) submission regarding the economic feasibility of the originally-proposed reasonable and prudent measure (RPM). The Service considered the economist's perspective as it conducted its independent analysis of the reasonableness and prudence of the RPMs associated with the 2008 Cape Wind Biological Opinion.

- b. Does FWS have an in-house economic expert with the credentials to review energy project economics?

**Response:** The Service has in-house economics expertise and experience in addressing energy issues, including oil and gas, renewable energy and non-renewable and extractive energy issues. Staff includes two employees with Ph.D.s in economics with over 50 years of experience in resource economics issues and analysis. The Service economics staff also has access to energy economics expertise through interagency agreements with other federal agencies and contracts with private economic consulting firms.

- c. Does FWS plan to seek assistance from an outside expert? What will be done to ensure transparency through public review?

**Response:** Given that the Service has economic and biological expertise on staff, we did not seek assistance from an outside expert. While neither Section 7 of the ESA nor its implementing regulations require the Service to solicit public input on its decision-making during consultation, in order to complete the remand the Service filed its independent determination with the Court and those documents are public record.

- 2. Please provide examples of any other instances where FWS has withdrawn reasonable and prudent measures at the request of a project applicant or the action agency.**

**Response:** The Service does not maintain records pertaining to the withdrawal of reasonable and prudent measures. During consultation, our staff coordinates closely with project proponents and the action agency to develop reasonable and prudent measures that are compatible with the expected project outcomes and the conservation needs of the species. As a result of this coordination, the reasonable and prudent measures in a final biological opinion may differ from what was originally proposed in a draft shared with an action agency and applicant.

- 3. At any time during its review of the Cape Wind project, did FWS have communications from the Interior Secretary's Office, other agencies, or the White House on the need to take action favorable to this project?**

**Response:** During formal consultation with BOEM, there were regular communications regarding the applicable regulatory timeframes and the need to complete the final biological opinion on a timely basis. We are not aware of any communications or directives from the Department, other agencies, or the White House about the substance or outcome of the Service's decision-making regarding Cape Wind.

- 4. Has FWS received any communication from any federal official about the March 14, 2014, U.S. District Court's ruling? How about from Cape Wind officials?**

**Response:** The Service has discussed the District Court's ruling internally, with the Department of Justice, and with the Department of the Interior's Solicitor's office. A Cape Wind official has contacted the Service by phone three times to inquire about how the Service plans to respond to the Court's ruling and the Service's expected timeline. The conversations were brief and the Service indicated to the Cape Wind official that we could not identify a timeframe to complete the remand nor reveal the approach or possible outcomes.

- 5. The environmental impact statement for Cape Wind estimated that thousands of migratory birds would be killed by this project, including endangered species. What steps will FWS take to enforce the take prohibition of the Migratory Bird Treaty Act (MBTA), and the Endangered Species Act (ESA), against this offshore wind project,**

**especially considering the more aggressive stance that has been applied to oil and gas and power line facilities?**

**Response:** The OLE strives to respond to all alleged instances of take in a similar manner regardless of industry. As noted in responses to previous questions, the Service has long employed a policy of encouraging industry to utilize best practices aimed at minimizing and avoiding the unpermitted take of protected birds. When these efforts at partnerships with industry fail, we then seek to enforce the provisions of the law as efficiently and equitably as possible. The OLE investigates suspected instances of take with available resources. If supportive evidence is discovered, the OLE refers the matter to either prosecutors with the Department of Justice (for violations of the MBTA), or to Solicitors of the Department of Interior (for some [i.e. non-criminal] violations of the ESA).

**6. Why did FWS wait until years after the Cape Wind lease had been issued and the project operating plan had been approved, to specify an avian and bat monitoring plan?**

**a. What is the value in developing those requirements after the project has already been approved?**

**Response:** The requirement for an Avian and Bat Monitoring Plan (ABMP) is stipulated in the Service's Biological Opinion, the BOEM Final Environmental Impact Statement, its Record of Decision of its lease, and the Environmental Assessment for the Cape Wind Construction and Operations Plan. According to BOEM's decision-making documents, the ABMP must be completed prior to construction of the project. The project has not yet been constructed and BOEM approved Cape Wind's ABMP on November 20, 2012. Though the greatest potential for avian impacts occurs from operations, completion of the ABMP prior to construction was necessary to ensure that any additional baseline data is collected in a timely manner.

**b. What steps will FWS take to enforce the prohibition on taking migratory birds against this project?**

**Response:** As noted in response to a previous question, the OLE strives to respond to all alleged instances of take in a similar manner regardless of industry. The OLE investigates suspected instances of take pursuant to the MBTA with available resources. If supportive evidence is discovered, the OLE refers the matter to prosecutors in the Department of Justice.

**c. Will it require shut down when a prescribed level of mortality has occurred?**

**Response:** BOEM's April 2011 Environmental Assessment (EA) for its approval of the Cape Wind Construction and Operations Plan details the strategy to address impacts to birds. In particular, the EA identifies an adaptive management strategy that

contemplates new minimization or mitigation measures, such as operational changes. The ABMP is a monitoring plan and does not prescribe courses of action based on the data collected. Nevertheless, the ABMP is structured as an adaptive management tool. The parameters of the ABMP can be adjusted based on analyzed data to retarget monitoring, or make it more effective in the future.

7. **FWS repeatedly asked for three years of radar studies to evaluate bird impacts, but Cape Wind continually refused and ultimately, then-Interior Secretary Salazar approved the project despite this refusal and signed a lease years before an avian monitoring and mitigation plan had been developed.**
- a. **Has the Secretary ever approved another project where the applicant refused to gather the information requested by FWS during the permitting phase?**

**Response:** The Service commonly recommends to the Department and non-DOI agencies ways to monitor for wildlife and practices to avoid and minimize impacts to migratory birds and other wildlife as part of those agencies' environmental review of projects subject to their permitting requirements. Those agencies often, but not always, follow the Service's recommendations.

- b. **Can you refer to any non-renewable energy company that will kill tens of thousands of protected species over the term of its existence that has been given similar treatment?**

**Response:** A very clear example of this would be the transmission of electricity by the electric utility industry that is generated by both renewable and non-renewable electrical energy sources. The Service has worked with this industry since the early 1970s, formalized in 1989 as the Avian Power Line Interaction Committee in efforts to avoid and minimize the take of migratory birds. Cooperatively, we have developed best management practices that include guidelines for reducing electrocutions at distribution and transmission powerlines and infrastructure (most recently updated in 2006), guidelines for reducing powerline collisions (updated in 2012), and recommendations for siting of transmission corridors (updated in 2012).

Even with these efforts to avoid or minimize take, it is estimated that the unpermitted take associated with this industry may still exceed 50 million birds each year in the U.S. due to collisions and electrocutions combined. We work closely with this industry, and when individual utility companies do not cooperate with Service staff, we may pursue and have pursued enforcement actions against them.

8. **The 2010 DOI IG's report on Cape Wind contains statements that FWS felt political pressure to rush its review of Cape Wind.**
- a. **What steps are you taking to ensure that, on remand after the court's ruling against the project; FWS will not once again be subject to political pressure as it conducts its independent review?**

**Response:** As noted in response to a previous answer, the Service completed its remand, concluding with correspondence to the Bureau of Ocean Energy Management, on June 27, 2014. The U.S. Department of Justice filed a Notice of Completed Remands with the U.S. District Court for the District of Columbia on July 2, 2014. The Service conducted this review independently and in full compliance with the District Court's ruling.

**Questions from Rep. Cynthia Lummis**  
**for Director of the U.S. Fish & Wildlife Service Dan Ashe**

- 1. In December 2013, the state-federal Interagency Grizzly Bear Committee recommended delisting the Grizzly Bear as it has exceeded recovery goals. When is the U.S. Fish and Wildlife Service (FWS) going to propose a grizzly bear delisting? If there is a timeline, even an aspiration of a timeline, please provide it. If not, please provide specific reasons why the Service is delaying a proposal to delist the grizzly bear.**

**Response:** The Service is evaluating the biological status of the Greater Yellowstone Area (GYA) population in light of recent scientific analyses and legal considerations to determine whether this population is a distinct population segment that meets the definition of threatened or endangered. The ultimate legal status of this population under the ESA would be assessed in a proposed rule, which may include consideration of a proposal to remove the GYA population of grizzly bears from the List of Endangered and Threatened Wildlife. We currently anticipate such a rulemaking to be published in the Federal Register later this year.

- 2. The gray wolf first met federal recovery goals in 2002. Eleven years and numerous lawsuits later, FWS proposed national delisting in June 2013. By law, the FWS is supposed to finalize the proposal within a year. Is the FWS going to meet this deadline, and if not, please explain why?**

**Response:** To clarify, the 2002 recovery goals to which this question refers were specific to the population of gray wolves in the Northern Rocky Mountains (NRM). Our June 13, 2013, proposal has no effect on any of these conservation successes. On June 13, 2013, the Service proposed to list the Mexican wolf as an endangered subspecies and delist gray wolves elsewhere. Anticipating significant public interest in this issue, the Service focused on ensuring that all interested parties had the opportunity to provide comments on the proposed rule. The Service has received over 1.5 million comments to date during the nearly 8 month public comment period. The statutory deadline for the proposal was June 13, 2014, but due to the unprecedented number of comments received and administrative delays associated with the October 2013 lapse in appropriations, the Service will likely issue a final determination on the proposal by the end of the 2014 calendar year.

- 3. Does the FWS intend to or otherwise anticipate that the FWS will miss any listing decision deadlines established in the 2011 settlements with the Center for Biological Diversity and Wild Earth Guardians?**

**Response:** No, the Service does not intend to miss any listing decision deadlines agreed upon under the multi-district litigation settlement agreements and corresponding work plans. The Service has in the past and may in the future seek to modify deadlines established in the original agreements.

4. **The FWS's FY15 budget request includes a \$4 Million increase to Ecological Services for the Greater Sage Grouse (GSG). The FWS is describing this request as part of its "Sage Grouse Initiative" (SGI). It is intended to fund 38.75 full time employees. Please detail the specific activities denoted by "ecological services." Please detail the specific activities that the 38.75 full time employees will perform, including whether or not any of their work will implement Wyoming's FWS-approved "core area" conservation plan for the GSG. In your response, please indicate clearly whether this work will be performed at a desk or out in the field on GSG conservation.**

**Response:** The FY 2015 budget request supports additional capacity across three regions of the Service and 11 states. The majority of these positions will be on-the-ground support to implement conservation on private lands and to provide technical assistance for state and federal conservation planning and implementation. Currently, the Service has dedicated approximately 30 FTE to collaborating with the BLM, USDA Forest Service, NRCS, state and private land conservation efforts. We anticipate adding an additional 35 FTE over the next six months to double these efforts. Staff will be working in the field with partners and landowners to develop conservation agreements, implement actions identified in those agreements, and restore sage steppe habitat. Staff in Wyoming will continue to work closely with federal, state, and local partners, as we have over the last seven years, to support the State of Wyoming's core area strategy for greater sage-grouse. The Wyoming staff will continue their efforts to implement Candidate Conservation Agreements (CCAs, CCAAs) that facilitate on-the-ground proactive, strategic conservation effort as well as provide the staff support to meet the administrative requirements associated with these efforts.

5. **The FWS has a history of allowing the ecologically responsible acquisition of Golden Eagles for falconry, an activity explicitly recognized and allowed by the Bald and Golden Eagle Protection Act (Eagle Act). However, I have fielded concerns from my constituents engaged in the practice that the FWS has been refusing to grant permits for this activity. I would note that these permits are being sought in federally established depredation areas, where eagles have been injurious to wildlife, agriculture, personal property, or human health or safety. Moreover, the FWS's own 2008 Environmental Assessment (EA) found that removing a small number of eagles per year for falconry purposes was ecologically acceptable. Yet my constituents have reported that the FWS's recent amendments to 50 C.F.R. 22.23/22.24 have resulted in a de facto moratorium on the issuing of permits for Golden Eagle falconry. In light of these developments, please address the following items:**
- **How do you reconcile 50 C.F.R. 22.23/22.24 and the de facto moratorium on falconry permits with the findings of the 2008 EA that Golden Eagle acquisitions for falconry purposes are ecology responsible?**

**Response:** There has not been a moratorium on take of golden eagles by falconers. The BGEPA provides that "only golden eagles which would be taken because of depredation on livestock or wildlife may be taken for the purposes of falconry" (16 U.S.C. 668a). Pursuant to the BGEPA, the Service has established regulations to determine when it is

“necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality” and to determine that such take “is compatible with the preservation of the . . . golden eagle” (16 U.S.C. 668a). Under 50 C.F.R. 22.23, the Regional Office in Denver has permitted actions to address eagle depredation short of removing eagles from the wild, and in recent years has received no reports that these implemented actions have failed to resolve eagle depredation problems in Wyoming.

We recognize that the Environmental Assessment finalized in 2009 found that permitting take of depredating golden eagles by falconers, at the limited rate these permits were used from 2002-2007, would not result in national population-level effects. However, consistent with the BGEPA and its implementing regulations, the Service strives to resolve depredation issues while limiting the need to remove golden eagles from the wild. Consequently, no take of golden eagles from the wild has been permitted in recent years, because information reported to the Service has not indicated that such actions have been necessary to address eagle depredation.

The Migratory Bird Office in Denver has been working with USDA – Wildlife Services in Wyoming to better ensure that livestock producers are aware of what activities have been permitted, that reports of actions to address depredation as well as reports of any continued depredation problems are submitted, and that a process can be streamlined so that permits authorizing take of depredating eagles from the wild, if necessary, may be issued efficiently.

- **Are you willing to commit to a meeting with the falconry community, including the Wyoming Falconer's Association, in order to address their concerns about the revised 50 C.F.R. 22.23/22.24?**

**Response:** The Assistant Regional Director for Migratory Birds in Denver has committed to meet with members of the Wyoming Falconers' Association at their request.

- **More broadly, can you commit to working towards a resolution of these concerns about a de facto moratorium so as to ensure falconers are able to secure the small amount of permits they are seeking to perpetuate their historic and legally-recognized practice?**

**Response:** We commit to working to ensure that processes to address depredation are effective, understood, and consistent with the BGEPA. We cannot ensure that golden eagles will be available to falconers in any given year or in any given number. As described above, the BGEPA provides that falconers may take golden eagles for falconry, but that “only golden eagles which would be taken because of depredations on livestock or wildlife may be taken for purposes of falconry” (16 U.S.C. 668a). Falconers are not entitled to take golden eagles from the wild just because their falconry certification authorizes them to possess golden eagles. However, we continue to review opportunities

to streamline responses to eagle depredation. In doing so, we intend that effective implementation will address both Congressional goals of addressing eagle depredation and – where depredation permits may be authorized – allowing eagles to be available to falconers so that they can practice their sport.

**Questions from Rep. Tsongas**  
**for Director of the U.S. Fish & Wildlife Service Dan Ashe**

I believe that we need a comprehensive strategy for American energy independence that decreases our reliance on fossil fuels and helps move us to a new energy future built on American manufacturing of clean, renewable energy. This, of course, includes wind energy.

Thanks to the wind industry, my home state of Massachusetts has seen an influx of over \$200 million in capital investment and is home to 9 wind-related manufacturing facilities. In the past two years, clean energy jobs in Massachusetts have grown by 24%, and are projected to grow another 11% in 2014. Last summer, Massachusetts and Rhode Island were proud to be part of the Bureau of Ocean Energy Management's first ever competitive lease sale for offshore wind development.

We all know that no form of energy production has zero environmental impact, including wind energy production. However, the claim being made today by the Majority that Fish and Wildlife Service unfairly relaxes certain wildlife protection standards to promote wind energy development is unfounded. Documents submitted to the Committee by the Fish and Wildlife Service and the Department of Justice show that there is no biased enforcement policy of wildlife laws for the wind energy industry.

Director Ashe, we all acknowledge that the Fish and Wildlife Service should monitor the impact of wind turbines on bird mortality and take action when appropriate.

- a. What steps are you taking, in coordination with the wind industry, to reduce bird mortality?

The FWS Land-Based Wind Energy Guidelines provide 82 pages of detailed recommendations for safely developing a wind energy project, including recommendations on communicating with the Service early on the project development process, duration of pre- and post-construction studies and monitoring, methods for conducting such studies, and ways to avoid, minimize and mitigate impacts.

**Response:** The Service works with the wind industry in a number of different ways in an effort to reduce bird impacts. The Service developed the voluntary Wind Energy Guidelines in 2012, which outlines an approach developers can use to reduce the impacts of construction, operation, maintenance, and decommissioning of wind facilities. Currently, the Service is providing technical assistance and training to wind energy proponents – specifically with recommendations for proper project siting and the implementation of conservation measures to reduce project-related impacts. Service biologists are involved with the National Wind Coordinating Cooperative and also work with some industry proponents on research aspects of wind turbines/wildlife interactions

(especially collisions) primarily for Bald and Golden Eagles. The Service is developing tools that will allow better management of bird injury and mortality data from wind facilities and working with these facilities to implement sound monitoring programs to fully understand the impacts to birds and bats.

**b. Has the Service issued similarly comprehensive guidance on avoiding wildlife impacts for oil and gas facilities?**

**Response:** The Service has worked with the oil and gas industry to develop and implement best practices for avoiding bird mortalities. One example is the Service-developed best practices for avoiding bird "oiling" at oil and wastewater pits through the use of pit netting. We have also developed guidance for the Management of Oil and Gas Activities on National Wildlife Refuge System Lands (2012).

The Service has also provided technical assistance on a project-by-project basis for the development of several pipeline projects including the recommendation of conservation measures that reduce the impacts of pipeline construction, operation, and maintenance to migratory birds and their habitats.

**The Wind Energy Guidelines and the Eagle Conservation Plan Guidance for Wind Energy both essentially require multiple years of pre- and post-construction wildlife monitoring to predict potential impacts, monitor the actual impacts, and impose mitigation to offset impacts if necessary.**

**c. How many years of pre-construction wildlife studies does the Service require or recommend for oil and gas facilities to study potential direct and indirect mortality impacts before they are constructed?**

**Response:** There is no prescribed duration or frequency for pre-construction surveys for oil and gas projects. The need for pre-construction surveys should be determined in pre-siting planning and based on available data and identified risk of the project. In areas where risk of project-related impacts is high or uncertain, more rigorous surveys would be recommended. In areas where there is current resource data or where risks are determined to be low, few surveys could be recommended. Recognizing that each project site, project hazards, and species potentially affected varies, recommended project-specific monitoring needs (e.g., < 1 year, 4 full seasons, 2 years, or > 2 years) will also vary. Like the Wind Energy Guidelines, these recommendations would be voluntary.

**d. What are the penalties for companies that you find are not in compliance with wildlife laws, such as the Migratory Bird Treaty Act?**

**Response:** By statute, the MBTA establishes the unauthorized take of migratory birds as a Class B misdemeanor with fines of not more than \$15,000 or imprisonment of not more than six months, or both.

- e. **How does the number of cases brought against of wind energy companies compare to the number of cases brought against oil and natural gas companies?**

**Response:** There have been fewer cases brought against wind energy companies compared to the number of cases brought against oil and natural gas companies. The emergence and growth of the wind energy industry is relatively recent compared to the oil and natural gas sectors. Accordingly, the opportunities to investigate have been fewer. Additionally, investigations that have been initiated and are ongoing have had less time to conclude.

- f. **How do the environmental impacts of wind energy production compare to those of oil and natural gas production?**

**Response:** Regardless of the energy generation technology, energy production facilities will result in environmental impacts, including possible habitat loss, degradation, and fragmentation, and may also cause certain species to avoid areas or alter their behavior in ways detrimental to their survival. Wind energy facilities can also result in bird and bat fatalities via direct strikes with the turbines and associated infrastructure. Oil and gas facilities often use open pits filled with waste fluids that can attract and poison wildlife, including migratory birds. Waste fluids can leak from pipes, holding tanks and injection wells, contaminating local surface waters and aquifers. The use of fossil fuels results in air and water pollution and contributes to climate change, which all have large-scale, long term impacts on wildlife and their habitats. It should be noted that the number of oil and gas wells far outnumbers the number of wind turbines in the United States and therefore have a generally larger impact on the landscape.



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

SEP 23 2014

The Honorable Benjamin L. Cardin  
Chairman  
Subcommittee on Water and Wildlife  
Committee on Environment and Public Works  
U.S. Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are responses prepared by the U.S. Fish and Wildlife Service to questions submitted following the Subcommittee's May 5, 2014, oversight hearing on "*Finding Cooperative Solutions to Environmental Concerns with the Conowingo Dam to Improve the Health of the Chesapeake Bay.*"

Thank you for the opportunity to provide this material to the Subcommittee.

Sincerely,

Christopher P. Salotti  
Legislative Counsel  
Office of Congressional and Legislative Affairs

Enclosure

cc: The Honorable John Boozman  
Ranking Member

**Hearing on "Finding Cooperative Solutions to Environmental Concerns with the  
Conowingo Dam to Improve the Health of the Chesapeake Bay"**

**May 5, 2014**

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**1. What impact does the dam's operational flow regime, that simulates twice daily floods and droughts, have on habitat for migratory fish and other critical species?**

The daily rising and falling of water levels and velocities caused by power generation create unnatural conditions that degrade aquatic habitat downstream of the Conowingo Dam. The water level can change vertically as much as 7 to 9 feet downstream of Conowingo. At the same time, the velocity of the flow can increase above the sustained swim speed of the life stages of fish in the river. When this happens, affected fish are flushed downstream. High velocity flows also flush important elements of the habitat downstream such as sediment, gravel, boulders, and woody debris. This reduces habitat suitability for spawning, rearing, feeding, growth to maturity, staging, resting, and migration. Low flow events during warm weather can increase water and substrate temperatures that degrade habitat suitability. As a consequence of dam operations, these conditions occur more frequently than under natural conditions. For all species of fish, reptiles, amphibians, mollusks, and plants, the dam's operational flow regime negatively alters the suitability of the habitat and reduces the ecosystem services that would otherwise be provided.

Conowingo Dam operations cause extreme water level fluctuations to the point that fish migration can be interrupted; the time required for a fish to swim upstream can be lengthened; fish can be stranded, preyed upon, or die for other reasons; and the suitability of habitat in a given location can be diminished, with no suitable habitat nearby. These migration interruptions may adversely affect egg-bearing-adult American shad, alewife, and blueback herring migrating upstream to spawn. The same is true for juvenile American eel migrating upstream where they will grow to maturity before migrating back to the sea to spawn. In regard to fish migrating downstream that may be affected by generation flows, juvenile American shad, alewife, blueback herring, and adult "silver" American eels are of most concern. To correct this, a "zone of passage" is needed where the hydraulic conditions can be established to allow for safe, timely, and effective migration of fish.

**a. How about on the safety of boater and other downstream recreational users.**

Recreational boaters need to use considerable caution when boating in the lower Susquehanna River. Conowingo's influence on the river can be observed more than 10 miles downstream at the mouth of the Susquehanna River. Specialized jet outboard boat motors are needed to negotiate the rocks during the low flow periods.

**2. Seeing as how this is the largest dam on the largest river of the largest estuary in the United States, what would be a better balance of the production of energy with protecting this critical habitat?**

The Susquehanna is the largest watershed on the East Coast. It provides more than 50 percent of the freshwater input to the Chesapeake Bay. It once supported vibrant and economically important fisheries and has the potential to do so again. For there to be a better balance between hydropower generation and a full suite of healthy ecosystem services, operations at Conowingo would have to change.

Millions of sea-run fish, rather than thousands, would have to swim upstream of the dam to spawn and grow, and similar numbers would have to swim safely to the sea to mature and return. These fish would have to pass the dam, up- and downstream, without injury or delay. Comprehensive and enforceable measures necessary to accomplish this would have to be included in any new license issued under the Federal Power Act (FPA) by the Federal Energy Regulatory Commission (FERC), and any water quality certificate issued by the State of Maryland under the Clean Water Act.

Upstream fish passage is currently limited at Conowingo by the incomplete fish lift built in 1972 and a fish lift constructed in 1991. Completing the 1972 fish lift was included in settlement agreements dating back to 1984. A settlement agreement signed more recently identified necessary improvements to the 1991 fish lift. These improvements have yet to be implemented by the dam owner.

The U.S. Fish and Wildlife Service (USFWS) believes that enabling more fish to pass through the dam without injury or delay by improving and upgrading the fish passage structures and ensuring that flow conditions are optimal for fish passage are essential to restoring a better balance.

**a. How are you going about ensuring that USFWS concerns and recommendations will be taken into consideration during the FERC relicensing of the dam?**

The USFWS will continue to file its comments, fish and wildlife recommendations, and Prescriptions for Fishways under appropriate statutes with each opportunity. For example, the USFWS has filed a proposed preliminary prescription containing a series of alternatives for possible adoption as its Prescription for Fishways under Section 18 of the FPA. This is how the USFWS exercises its mandatory conditioning authority for fish passage. Adoption of a Prescription for Fishways, with or without agreement from Exelon, is the regulatory means available to the USFWS to resolve fish passage concerns. The USFWS has also submitted to FERC its recommendations to protect, mitigate damages to, and enhance fish and wildlife resources (including habitat) under Section

10(j) of the FPA and the Fish and Wildlife Coordination Act. These recommendations must be included in the license unless FERC finds them inconsistent with the purposes of the FPA. The USFWS is actively pursuing settlement with Exelon that would resolve the USFWS's concerns and incorporate appropriate terms into the prescription and license. If a settlement is reached, that agreement will be filed with FERC for its consideration in preparing a new license.

**b. What opportunities are there for public input into USFWS's recommendation to FERC?**

The FERC has a process for formally providing comments to the administrative record. Anyone can provide comments at any time, but comments have more weight if the commenting entity has intervenor status. FERC provides a process for becoming an intervenor and the Department of the Interior, which includes the USFWS, has been granted intervenor status by FERC for the Conowingo Dam relicensing proceeding. Comments may be filed in response to the comments and recommendations of others, including those of the USFWS.

With respect to the USFWS's Prescription for Fishways, when and if the USFWS adopts a preliminary Prescription for Fishways and files it with FERC, the public will have an opportunity to comment on the proposal and the USFWS can review the comments and modify the prescription as needed..

**3. While the infrastructure that has changed the ecosystem is old, as are the lakes it has created, is the ecosystem that the dam has created maintaining a steady state of health and quality (good or bad)?**

In the context of the USFWS's interests in the Conowingo and Muddy Run relicensing proceedings, the ecosystem that the dam created is at a steady state of diminished health. The ecosystem is not providing enduring ecological benefits. The USFWS has been actively pursuing settlement with Exelon that would resolve the USFWS's concerns and incorporate appropriate terms into the prescriptions and licenses for these projects.

Conowingo Reservoir, which is about 13 miles long, was created when Conowingo Dam was constructed around 1928. The free-flowing river was flooded and the habitat was transformed from a river system to a lake system. Consequently, American shad and herring must swim further upstream to reach quality spawning habitat. Migrating through the reservoir is costly in terms of energy and time and there is risk of mortality from entrainment and predation by other fish and birds.

The impoundment supports a system of large electric power generation facilities in which Exelon has an ownership interest: Conowingo Hydroelectric Project, Peach Bottom Atomic Power Station, and Muddy Run Pumped Storage Project. These projects are hydraulically linked. A primary use of the reservoir water is to generate over 3,660 megawatts of

electricity. However, the energy facilities have continuing negative effects on the ecosystem created by the dam. The sources of the negative effects are, in part: a) the operation of Conowingo's turbines, b) the operation of Peach Bottom's water-based cooling system, and c) Muddy Run's daily pumping and discharging of large volumes of lake water. The adverse effects are exacerbated when temperatures are warm, river flows are low, and sea-run fish are migrating upstream or downstream.

In addition, the discharge of water at Muddy Run may exceed the sustained swim speed of American shad, alewife, and blueback herring. Fish may expend excessive energy to continue, they may be swept downstream, or they may be delayed as they wait for flows to decline. Consequently, these species may not make it to the spawning habitat in time to reproduce.

When flow is low in the reservoir and Muddy Run is pumping from the reservoir, juvenile and post-spawned adult migratory fish may be entrained and pumped out of the river. They may not be able to detect the direction downstream and be delayed in migration, which increases their exposure to predatory fish and birds. Also, there is some mortality of these fish due to physical strikes, change in atmospheric pressure, and predation as they exit the lake through the turbines at Conowingo Dam. The USFWS has been actively assessing the relative importance of these adverse effects and seeking practical solutions with Exelon.

**4. As USFWS contemplates how suitable habitat ought to be managed and conserved, what consideration is given to the fact that this alteration to the ecosystem occurred almost 90 years ago?**

The USFWS is not attempting to recreate habitat conditions of the past. Instead, the USFWS is working with others to redesign the way the Susquehanna River will be operated, with Conowingo Dam in place, so the river will provide enduring benefits for fish, wildlife, and people into the future.

Section 10(a)(1) of the FPA requires the FERC to adopt a project that is best adapted to a comprehensive plan for the river. In this case, *The Migratory Fish Management and Restoration Plan for the Susquehanna River Basin* (Plan), is the comprehensive plan; it was prepared by the Susquehanna River Anadromous Fish Restoration Committee (SRAFRC). The SRAFRC is composed of the Maryland Department of Natural Resources, Pennsylvania Fish and Boat Commission, New York State Department of Environmental Conservation, USFWS, National Marine Fisheries Service, and the Susquehanna River Basin Commission. The Plan, which aims to protect and increase the Susquehanna River fishery, was publically noticed and comments were carefully considered by the SRAFRC. The Plan establishes goals and objectives for the fishery that are being applied uniformly to each hydropower project on the lower Susquehanna River as new Federal licenses are prepared. Those licenses will be in effect for 30 to 50 years. Relicensing is a rare opportunity to improve environmental conditions on the lower Susquehanna River.

**5. What is the scientific basis supporting the fish population goals set in the USFWS interveners' document?**

The USFWS and the states of Maryland and Pennsylvania support the population goals and underlying scientific principles described in the Plan (please see our response to question 4, above). Based on the best available information, the goals recommend that two million American shad and five million river herring need to pass upstream of the York Haven Dam.

Exelon, with input from the resource agencies, developed a population model that suggests that Conowingo Dam needs to pass 85 percent of the American shad that reach the vicinity of the dam in order to achieve restoration within 30 years. The passage goal in the Plan is also 85 percent. The Exelon model assumes that other hydropower dams on the river will also reach their fish passage goals.

The USFWS and the Maryland Department of Natural Resources recommend the same fish passage efficiency at Conowingo Dam identified for other dams on the Susquehanna. The USFWS believes 85 percent efficiency can be achieved at Conowingo based on the successful passage results at Safe Harbor Hydropower Dam just upstream on the Susquehanna River.

**6. How is the dam affecting the quality of habitat immediately downstream from the dam and restricting and passing the various types of sediments and nutrients?**

The dam has held back sediment, including larger grained substrate that is not available to create in-river habitats downstream of the dam. This material is critically important for creating high quality bay habitat for rockfish and other river fish. Due to the operational regime of the hydropower dam, the habitat immediately downstream is scoured during high flows. The sediment held in the impoundment behind the dam rarely moves downstream except during storm events. Because of the sediment issues and operational conflicts, diminished water quality and habitat quality have resulted in lower fish production and poor spawning success for areas immediately downstream of the dam.

**7. What species use the fish elevator?**

Anadromous (migrating from salt water to spawn in fresh water) fish using the fish elevator include American shad, hickory shad, alewife, and blueback herring.

Riverine (river) fish using the fish elevator include gizzard shad, smallmouth bass, walleye, white perch, and other freshwater fish.

The fish elevator is not used by American eel. This species requires a fishway specifically designed for it to access habitat.

Striped bass, shortnose sturgeon and Atlantic sturgeon historically used the lower part of the river. However, these species have not been "target species" with regard to using the fish elevator.

**a. Is it working well to ensure the passage of key fish species?**

No, the fish lifts at Conowingo Dam are inefficient and lack adequate capacity. Currently, there is an incomplete fish lift built in 1972 on the west side of the river and another fish lift on the east side that was built in 1991. Although the east fish lift was designed to release 900 cubic feet per second (cfs) as a near field attraction for fish, it has never been able to release more than 300 cfs. This has adversely affected the ability of migrating fish to find the entrance to the east fish lift.

**b. Compared to other fish passage methods on the river, how does Conowingo's compare and is it time for the elevator to be updated?**

Of the three other lower Susquehanna River dams, only Safe Harbor is meeting its fish passage goal. However, improvements are being made or are expected at all three of the dams upstream of Conowingo. As outlined in the recent settlement agreement with York Haven, a new fish passage structure and related measures are expected to be included in its new license that will advance restoration. Holtwood Dam has undertaken construction of new fishways and will be relicensed in 2030. Holtwood is already evaluating potential additional improvements. The three hydro dams above Conowingo are being held, or will be held, to the same fish passage efficiency standards as Conowingo.

In comparison with the three dams upstream, Conowingo ranks at the bottom for condition and efficiency. New, modern fish lifts are needed to pass the high numbers of gizzard shad along with lower numbers of American shad and river herring. The size of the Susquehanna River may ultimately require fully operational fish lifts on both sides of the river in order to pass the targeted number of fish in the river migrating upstream to spawn. Conowingo needs to timely pass fish at the peak of the run. With increased capacity, improved efficiency, and new fish passage technology, we believe this is possible. The goal is to pass two million American shad and five million river herring upstream of the fourth dam on the river (York Haven) in a season. To achieve this goal, it is critically important for the Conowingo to provide safe, timely, and efficient fish passage.

**c. What additional measures is the USFWS recommending be taken to improve year round fish passage?**

We are requiring fish passage facilities to operate only during the upstream migration season (March to June). The states are exploring a wider fish passage season for riverine fish passage. Downstream passage has been through the turbines and will remain so unless that becomes an issue in achieving restoration.

**d. What would this cost?**

Exelon has estimated the cost of two new fish lifts at \$60 million.

**8. How is the Exelon working with the USFWS to address concerns about fish and wildlife impacts of the dam?**

The USFWS has been closely engaged in settlement negotiations with Exelon. An intensive schedule has been planned through the summer of 2014. A settlement is still a possible outcome.

**a. How can this relationship, and levels of cooperation, be improved?**

The USFWS remains committed to working with all interested parties to achieve a mutually agreeable outcome. At the start of the relicensing process, Exelon developed a proprietary economic model known as the Oasis Model to determine how changes in the flow through the turbines would affect power generation and revenues. This model could be helpful in determining what the monetary effect of changes to fish passage, habitat, or flow has on the project. By knowing how the model responds to flow modifications at the project, the USFWS would be able to develop solutions that meet the needs of the USFWS and Exelon.

**Senator David Vitter**

**In your written testimony, you state that "[w]ith an increasing human population comes economic growth and an increase in demand for energy sources, like hydropower. Generating energy does not have to come at the price of fish for future generations."**

**I agree. However, I am concerned the current Administration is targeting traditional and reliable energy sources with unwarranted environmental regulations, while at the same time turning a blind eye to environmental impacts associated with wind, solar, and other so-called "renewable" energy projects.**

**As a field office supervisor with the USFWS, how do you ensure that Federal environmental laws are applied even-handedly to all energy producers? Are you aware of any renewable energy projects which have received preferential treatment by your office or other USFWS offices during USFWS review of potential environmental impacts?**

The USFWS's Chesapeake Bay Field Office is working with hydropower, wind energy, solar, and natural gas pipeline companies to evaluate effects to endangered species, bald and golden eagles, inter-jurisdictional fisheries, and migratory birds.

Since becoming Project Leader of the Chesapeake Bay Field Office, I am not aware of any renewable energy projects that have received preferential treatment by my office or other USFWS offices related to review of potential environmental impacts.

The USFWS developed Land-Based Wind Energy Guidelines in 2012 to provide transparency to industry on what measures they should take to evaluate and address potential impacts of wind power to species of concern.

In Maryland, we worked with Exelon Generation to develop a Habitat Conservation Plan and ultimately issued an incidental take permit for the endangered Indiana bat. We also developed an Avian Protection Plan for migratory birds and bald eagles for the Criterion Wind Project in Garrett County, Maryland and issued an Incidental Take Permit in accordance with Section 10 of the Endangered Species Act for Indiana bat. Exelon owns two other wind projects in Maryland, and has worked with the USFWS to ensure that they are avoiding impacts to Indiana bat. To minimize impacts to migratory birds, bald eagles, and unlisted bat species Exelon has also developed a Bird and Bat Conservation Strategy.

Our office is currently working with two other wind companies on the eastern shore of Maryland to evaluate potential take of bald eagles and determine whether we can issue a programmatic bald eagle take permit. A Bird and Bat Conservation Strategy will also be developed for these two projects.

This office has evaluated several proposed solar facilities but does not anticipate them having any effects on Federal trust species.



# United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, DC 20240

SEP 23 2014

The Honorable Jon Tester  
Chairman  
Committee on Indian Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are responses prepared by the Bureau of Indian Affairs to questions submitted following the Committee's March 13, 2014, oversight hearing on "Tribal Transportation: Pathways to Infrastructure and Economic Development in Indian Country."

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Christopher P. Salotti  
Legislative Counsel  
Office of Congressional and Legislative Affairs

Enclosure

cc: The Honorable John Barrasso

**Questions for the Record for Mr. Michael Black  
Submitted by Senator Lisa Murkowski  
U.S. Senate Committee on Indian Affairs  
Oversight Hearing on "Tribal Transportation: Pathways to Infrastructure and Economic  
Development"**

**March, 13, 2014**

- 1. Supporting self-determination in all Indian programs is critical. Do you believe that MAP-21's removal of a tribally negotiated formula with a statutory funding formula supports or minimizes Tribal self-determination? Do you plan to use a negotiated rulemaking process during MAP-21 reauthorization whereby tribes are engaged and consulted?**

The Bureau of Indian Affairs (BIA) supports and promotes self-determination and self-governance for tribes. The negotiated rulemaking formula was a regulatory formula, but Congress replaced it with the MAP-21 funding formula. It is difficult to predict the outcome of the MAP-21 formula until it is fully implemented: there is a four year transition process to this formula, two of which have transpired, and the remaining years of the implementation are dependent upon future legislation. Negotiated rulemaking is a helpful process when warranted. However, at this time it is not known what provisions will accompany the reauthorization of the highway act that this would be a consideration. The BIA and the Federal Highway Administration have been actively consulting with tribes on transportation matters, such as the funding formula, the use of the data from the inventory, and a proposed update of the regulations.

- 2. The majority of tribes in the United States are considered small. Does the MAP-21 formula disproportionately impact small tribes with small populations; especially, in economically depressed census areas?**

Established by MAP-21, the Tribal Transportation Program (TTP) funding formula found at 23 U.S.C. 202 (b) (3) encompasses three factors: road mileage, tribal population, and historic funding levels, and also incorporates a transitional element through a set aside referred to as Tribal Supplemental Funding. This supplemental funding is implemented to provide a TTP allocation very similar to the negotiated rule formula of 2004. The TTP funding formula relies on data established in the national tribal transportation facility inventory, the historical allocations of tribal share amounts under SAFETEA-LU, and the population data from the American Indian and Alaska Native population within each Indian tribe's American Indian/Alaska Native Reservation or Statistical Area, as computed under the Native American Housing Assistance and Self-Determination Act of 1996. Under the MAP-21 formula, tribal population is a large contributor to the tribal allocation amount as well as the mileage in the national inventory prior to October 1, 2004 for non-BIA roads and non-tribal roads and fiscal year 2012 for BIA and tribal roads. In addition, if the historic funding levels of a tribe is small, it would be reflected in the allocations under the TTP funding formula.

3. **Director Black, can you describe for the record, the Administrative rules you have placed on Alaska Native villages in including road and the need for the construction of roads in our rural communities in the distribution formula?**

The Administration has followed the statutory requirements for inclusion of inventory data such as road miles, construction need and population into the funding formula, which is the distribution formula or tribal shares. The statute clearly defines the data that is to be included in the distribution formula. 23 USC 202 (b)(1) describes all TTP-eligible facilities in the National Tribal Transportation Facility Inventory (NTTFI), while 23 USC 202(b)(3) identifies the basis for the funding formula and how the distribution amounts are to be computed. The MAP-21 funding formula considers past participation in the negotiated rule formula of 2004, which incorporated construction need miles, usage, and population; the MAP-21 funding formula also considers road miles, the population of each federally recognized Tribe or Alaska Native village and the funding distribution allocations received under the negotiated rule.

4. **Currently, traffic safety statistics among tribal communities outpace national averages. It is concerning to me that we are not giving proper weight to need in terms of safety that we should. Currently, the Tribal Bridge Program and the Tribal Transportation Safety Program are funded with a 2% set aside from the TTP fund. Additionally, the Tribal High Priority Project Program does not provide funding for Alaska and this hurts 229 tribes. Given these concerns, I must ask: Do you support putting Tribal High Priority Project funding back in the Highway Trust Fund so that Alaska tribes might also access funding for high need projects? Do you plan to examine and adjust the TTP formula to increase funding for safety, bridges with an eye toward reevaluating the importance of need in annual funding levels?**

In April 2014, the Administration announced its reauthorization proposal, the GROW AMERICA Act. The Administration's proposal would re-establish the Tribal High Priority Project (THPP) program back into the TTP as a Highway Trust-funded set aside from the TTP. The proposed THPP program would provide an opportunity for all tribes to receive funding for their highest priority projects along very similar procedures as the former Indian Reservation Roads High Priority Projects program, which was in 25 CFR Part 170 and was eliminated with the passage of MAP-21. In addition, the GROW AMERICA Act proposes increases in available funding for Tribal Transportation Facility Bridges and Tribal Transportation Planning, as well as increased funding for program activities.



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

SEP 22 2014

The Honorable Jon Tester  
Chairman  
Senate Committee on Indian Affairs  
Washington, DC 20510

Dear Chairman Tester:

Enclosed are responses prepared by the Assistant Secretary for Indian Affairs in response to questions received following the November 14, 2013, hearing before your Committee regarding "Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country."

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Christopher P. Salotti  
Legislative Counsel  
Office of Congressional  
and Legislative Affairs

Enclosure

cc: The Honorable John Barrasso  
Vice Chairman

**From Senator Cantwell:**

**1. As we all know, the Supreme Court ruled last year in *Salazar v. Ramah* that the federal government must pay each tribe's contact support costs in full. The Department of the Interior has not yet resolved these claims.**

**Q: It has been seventeen months since the Supreme Court's decision. What is your plan for expeditiously settling these claims?**

**Response:** After the Supreme Court decision, the case was remanded to the U.S. District Court for the District of New Mexico for further proceedings. The district court has stayed proceedings to allow the parties to pursue settlement. The Plaintiff class and the United States have been engaged in settlement negotiations since July 2012.

**Q: When does the Department expect all claims to be finally resolved?**

**Response:** Our hope is that the settlement process can be concluded within a year and will resolve all claims.

**Q: What is the estimated amount that the Department of the Interior owes to tribes?**

**Response:** The Department is not able to provide a total estimated amount at this time. As part of the settlement, however, the parties are engaged in a statistical sampling process to arrive at a settlement amount that accurately reflects what is owed to tribes. To move ahead with settlement discussions in the *Ramah* litigation in a fair and efficient manner, and to avoid burdensome and costly court-supervised discovery that would result if litigation resumes, the parties agreed to avoid the complex and costly task of attempting to determine with exactitude the specific amount owed to each tribal contractor for breach of approximately 10,000 contracts and annual funding agreements spanning over the last 20 years. The Department of Justice has proposed, and plaintiffs have agreed, instead to determine a settlement amount based on statistical sampling and extrapolation of the contracts of perhaps 100 to 150 tribes.

**Q: How is the Department of the Interior estimating this amount? Is it utilizing the Department's annual contract support costs shortfall reports that it submits to Congress?**

**Response:** As noted in the response to the previous question, the parties to the litigation are engaged in a statistical sampling process to arrive at a settlement amount that accurately reflects what is owed. The annual contract support costs shortfall reports could not be used and would not be as accurate because the reports are estimates based on self-reporting and were not collected for all years of the case. Moreover, the annual contract support cost reports are not

intended to reflect the amount of contract support costs owed under any particular contract. Instead, they are compiled in order to estimate the aggregate contract support cost need of all contractors for the next fiscal year. The reports contain information on the amounts of contract support costs that have been paid to contractors at a particular point in time, and the information is obsolete shortly after the reports are compiled.

**2. The Indian Self-Determination Act has been hailed as one of the most successful pieces of legislation in the history of federal Indian policy. Providing contract support costs is essential to the proper administration of these contracts, but we have heard from several tribes that the Bureau of Indian Affairs is beginning to more narrowly define how those costs are calculated, sometimes contrary to its own guidance.**

**Q: After providing contract support costs to tribes for over 20 years, can you explain why there is still so much ambiguity regarding these costs?**

**Response:** Calculation of these costs is a complex matter, in part, because each tribe can negotiate its own costs, but this effort is important; the Administration is strongly committed to supporting and advancing self-determination and self-governance for Federally-recognized tribes. In support of this goal, the Administration's fiscal year 2015 budget request provided full funding for tribal administration of programs. In addition, the budget includes an additional \$1.2 million to increase services from the Department's Office of Indirect Cost Negotiations, which is responsible for negotiating the indirect cost rates with non-Federal entities that contract with the Department of the Interior, including tribal governments. The Bureau of Indian Affairs and the Indian Health Service are currently consulting with tribes as part of a Congressionally-directed action to formulate long-term accounting, budget, and legislative strategies to address contract support costs, to include the provision of consistent and clear cost categories.

**3. The House Interior Appropriations bill does not contain the contract support cost cap language proposed by the Administration. Tribes have generally stated that the House approach towards contract support costs is the better one, and that the Senate should drop the Administration's proposal.**

**Q: What does the Administration's proposal actually accomplish, other than extinguishing the government's liability to pay tribes what they're contractually owed?**

**4. The Administration's budget proposal recommends that Congress cap the contract support costs owed to each specific tribe. If Congress were to accept this request, Tribes would no longer be able to recover unpaid contract support costs through the courts.**

**Q: Is it good federal Indian policy to prevent tribes from going to Court when the federal government shortchanges tribes from receiving what they're contractually owed?**

**Response to 3-4:** The Administration's 2014 budget had proposed an interim measure to address the contract support costs issue. However, after consideration, the Administration determined that the best federal Indian policy is to reimburse tribes for 100 percent of their contract support costs, and the Department is now fully funding contract support costs.

Questions for Kevin Washburn  
Senate Committee on Indian Affairs  
November 14, 2013

**From Senator Tom Udall:**

**5. As you know, the Buy-Indian regulations prohibit a Buy-Indian contractor from subcontracting more than 50% of the work to a non-Indian firm. In a letter to you earlier this year, I inquired whether a non-Indian company was doing 100% of the work on an air ambulance contract awarded to an Indian firm under the Buy-Indian Act. Your response only addressed whether the Indian firm was Indian owned.**

**Q: What is the percentage of work being performed by the prime contractor and the amount being performed by non-Indian subcontractors on the Air ambulance contract awarded by the Phoenix Area office?**

**Q: How does IHS monitor contracts to insure compliance with Buy-Indian regulations?**

**Response:** The Department defers to the Indian Health Service for responses to these questions.

**From Vice Chairman John Barrasso:**

**6. Testimony received by the Committee from several witnesses at the hearing on November 13, 2013, on “Contract Support Costs and Sequestration: Fiscal Crisis in Indian Country,” indicates there are approximately 9,000 Contract Support Costs (CSC) claims pending with the Bureau of Indian Affairs (BIA). These witnesses recommend that a Special Master be appointed to handle these claims.**

**Q: What are your views on this recommendation?**

**Response:** The claims of members of the class action in *Ramah Navajo Chapter v. Jewell*, No. 90-0957 (D.N.M.) are before the U.S. District Court for the District of New Mexico. The district court has stayed proceedings to allow the parties to reach a settlement. While the district court has the authority to appoint a Special Master should the court consider that a Special Master would be helpful, it is our view that the settlement process does not now require the appointment of a Special Master.

**Q: In your opinion, would a Special Master be better equipped than the BIA to settle these claims expeditiously?**

**Response:** The claims are being addressed through the settlement process in the U.S. District Court for the District of New Mexico, and it is our view that the parties should be given the opportunity to settle the claims through that process.

**Q: Are there any possible barriers or impediments (legal or otherwise) to using a Special Master for settlement of claims that are still in the administrative process and not yet in Federal court? Please be specific.**

**Response:** As noted in the previous responses, the U.S. District Court for the District of New Mexico has jurisdiction over the claims. Therefore, the claims are not being settled at this time through an administrative process. If the parties bring the settlement process successfully to a close, there will be no need for a Special Master to settle claims.

**Q: How many CSC claims are pending in Federal court?**

**Response:** All of the class members' claims are before the U.S. District Court for the District of New Mexico in *Ramah Navajo Chapter v. Jewell*, No. 90-0957 (D.N.M.).

**Q: How many CSC claims are pending in the administrative process?**

**Response:** Since September 2011, approximately 42 claims have been filed with the Department for Fiscal Years 2005 and beyond. These claims are also part of the class action in *Ramah Navajo Chapter v. Jewell*, No. 90-0957 (D.N.M.).



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

SEP 22 2014

The Honorable Maria Cantwell  
United States Senate  
Washington, DC 20510

Dear Senator Cantwell:

In accordance with your request to the Bureau of Reclamation, the Bureau of Reclamation has prepared the enclosed draft bill to amend Public Law 103-434 to authorize Phase III of the Yakima River Basin Water Enhancement Project for the purposes of improving water management in the Yakima River basin, and for other purposes.

This draft has been prepared as a service to you. It has not been reviewed within the Department of the Interior or cleared by the Office of Management and Budget. We can, therefore, make no commitment at this time concerning the position of the Department on this matter.

Sincerely,

Christopher P. Salotti  
Legislative Counsel  
Office of Congressional and Legislative  
Affairs

Enclosure

**A Bill**

To amend Public Law 103-434 (108 Stat. 4562) to authorize Phase III of the Yakima River Basin Water Enhancement Project for the purposes of improving water management in the Yakima River basin, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. MODIFICATION OF PURPOSES AND DEFINITIONS**

(a) Section 1201 of Public Law 103-434 (108 Stat. 4562) is amended--

(1) in paragraph 1 by inserting after "management": "and the construction of fish passage at storage and diversion dams";

(2) in paragraph 2 by inserting after "irrigation": ", and municipal and industrial purposes, especially during drought years";

(3) in paragraph 6 striking "." and inserting ";

(4) by adding after and below paragraph 6 the following:

"(7) to improve the sustainability of ecosystems and the regional economy in response to drought, climate variability and climate change for the benefit of both the people and the fish and wildlife of the region; and

(8) to authorize and implement Phase III of the Yakima River Basin Integrated Water Resources Management Plan in a balanced approach to maximize benefits from fish passage and irrigation supply projects."

(b) Section 1202 of Public Law 103-434 (108 Stat. 4562) is amended—

(1) in paragraph 13 and throughout Public Law 103-434 (108 Stat. 4562) by striking "Indian" in each place it appears; and

(2) in paragraph 14 and throughout Public Law 103-434 (108 Stat. 4562) by striking "Superintendent" and inserting "Manager" in each place it appears;

(3) by adding after paragraph 14 the following:

“(15) The term “Designated Federal Official” means the Commissioner of the Bureau of Reclamation, or the Commissioner of the Bureau of Reclamation’s designee, pursuant to the Conservation Advisory Group charter.”

## SEC. 2. AMENDMENTS TO THE YAKIMA RIVER BASIN WATER CONSERVATION PROGRAM

Section 1203 of Public Law 103-434 (108 Stat. 4562) is amended—

(1) in subsection (a)(1) by striking “The Secretary may make grants” and all that follows through “5 years of the date of enactment of this Act.”;

(2) in subsection (a)(2) by striking “irrigation” and inserting “the number of irrigated acres”;

(3) in subsection (c)(2)(E) by adding “and” after “Extension Service,”;

(4) in subsection (c)(2)(F) by striking “,and” after “State of Washington” and inserting “.”;

(5) by striking subsection (c)(2)(G);

(6) in subsection (c)(3)(E) by striking “.” and inserting “, and”

(7) by adding after subsection (c)(3)(E) the following:

“(F) provide recommendations to advance the purposes and programs of the Yakima River Basin Water Enhancement Project.”

(8) by striking subsection (c)(3)(4) and inserting:

“(4) The Designated Federal Official—

(A) shall arrange and provide logistical support for meetings of the Conservation Advisory Group;

(B) is authorized to utilize a facilitator to serve as a moderator for meetings of the Conservation Advisory Group or provide additional logistical support; and

(C) shall grant any request for a facilitator by any member of the Conservation Advisory Group.”

(9) by adding after subsection (d)(3) the following:

“(4) The State or Federal Government may fund the local portion of up to 17.5% in exchange for the long term use of conserved water.”

(10) by striking the first sentence in subsection (e) and inserting: "To participate beyond Phase I in the four phases of the Basin Conservation Program as described in subsection b, an entity must submit a proposed water conservation plan to the Secretary".

(11) in subsection (i)(3) by striking "made immediately upon availability" and all that follows through "Committee" and inserting "continued as needed to provide water to be used by the Yakima Project Manager under the advisement of the System Operations Advisory Committee and the Conservation Advisory Group";

(12) in subsection (j)(1) by striking "\$1,000,000" and inserting "\$2,000,000";

(13) in subsection (j)(4) by striking "initial acquisition" and all that follows through "flushing flows" and inserting "acquisition of water from willing sellers or lessors specifically to provide improved instream flows such as pulse flows for interim periods to facilitate the outward migration of anadromous fish".

### **SEC. 3. AMENDMENTS TO YAKIMA BASIN PROJECTS, OPERATIONS AND AUTHORIZATIONS**

(a) Yakima Nation Projects.-- Section 1204 of Public Law 103-434 (108 Stat. 4562) is amended—

(A) in subsection (a)(2) by striking "not more than \$23,000,000" and inserting "at September 2000 prices, plus or minus such amounts as may be justified by reason of ordinary fluctuations of applicable cost indexes, not more than \$49,000,000"

(B) in subsection (c) inserting after "Secretary" where it first appears and inserting the following: "at September 1990 prices, plus or minus such amounts as may be justified by reason of ordinary fluctuations of applicable cost indexes,".

(b) Operation of Yakima Basin Projects.-- Section 1205 of Public Law 103-434 (108 Stat. 4562) is amended—

(1) by striking subsection (a)(4)(A)(ii) and redesignating subsection (a)(4)(A)(iii) as subsection (a)(4)(A)(ii);

(2) in subsection (a)(4)(B)(i) inserting "in proportion to the funding received" after "Program";

(3) by inserting after subsection (a)(4)(B)(ii):

"(iii) The Yakima Project Manager will calculate the total amount of water conserved and acquired and will determine the amount of water available each year for the purpose of delivering or storing Project water for instream flows at variable rates (shaping), considering Yakima Project operational constraints. The Yakima Project Manager, in consultation with the System Operations Advisory

Committee, will determine how and when the available water will be delivered or stored.

(iv) The Yakima Project Manager, in consultation with the Systems Operations Advisory Committee, irrigation districts, and the Conservation Advisory Group, may manage and use all or a portion of the irrigation district's 1/3rd portion of the saved water resulting from conservation measures taken under this title, to increase target flows or otherwise deliver Project water for instream flows, if the right to use that water is acquired by purchase, donation or lease. During drought years, when the Yakima Project proration level is set at 70% or less of full entitlement, the 1/3rd portion of the saved water may be used to supplement the irrigation districts' water supply under the total water supply available."

(4) by striking subsection (a)(4)(D);

(5) in subsection (b) by striking "is exclusively dedicated to instream flows for use by the Yakima Project Superintendent as flushing" and inserting "may be available for use as part of the total water supply available by the Yakima Project Manager with primary consideration given to outmigration pulse";

(6) in subsection (e) by striking "Yakima Project shall be for fish, and wildlife, and recreation" and inserting:

"Yakima Project shall be for—

(A) fish, wildlife, and recreation, and

(B) municipal and industrial use."

(c) Lake Cle Elum Authorization of Appropriations.--Section 1206 of Public Law 103-434 (108 Stat. 4562) is amended in subsection (a)(1) by—

(1) striking "1990" and inserting "2014";

(2) striking "\$2,934,000 and inserting "\$18,000,000";

(3) striking "and" and inserting "plus" at the end of subparagraph (B); and

(4) striking subparagraph (C).

(d) Yakima Basin Tributaries.-- Section 1207 of Public Law 103-434 (108 Stat. 4562) is amended—

(1) in subsection (a)(2) by inserting "negatively" after "construed to";

(2) in subsection (d) by inserting “Yakima River basin” after “other”;

(3) in subsection (e)—

(i) by inserting “and implementation” after “investigation”; and

(ii) by striking the second sentence of subsection (e)(2).

(e) Chandler Pumping Plant and Powerplant-Operations at Prosser Diversion Dam.-- Section 1208 of Public Law 103-434 (108 Stat. 4562) is amended in subsection (d) by inserting “negatively” after “shall not be”.

(f) Interim Comprehensive Basin Operating Plan.-- Section 1210 of Public Law 103-434 (108 Stat. 4562) is amended—

(1) in subsection (b) by inserting “and” after “needed”;

(2) in subsection (c) by striking “\$100,000” and inserting “\$200,000, at September 2014 prices,”.

(g) Interim Comprehensive Basin Operating Plan.-- Section 1211 of Public Law 103-434 (108 Stat. 4562) is amended by inserting “, at September 2014 prices,” after “\$2,000,000”.

#### **SEC. 4. AUTHORIZATION OF PHASE III OF YRBWEP**

Public Law 103-434 (108 Stat. 4562) is amended by adding after Section 1212 the following:

##### **“SEC. 1213. GRANTS AND COOPERATIVE AGREEMENTS.**

(a) In General.--The Secretary may make grants or enter into cooperative agreements with the Yakama Nation, Yakima River basin irrigation districts, water districts, conservation districts, other local governmental agencies, non-profit conservation organizations and local landowners for the following purposes:

(1) to carry out this title under such terms and conditions as the Secretary may require, including the requirement that all water districts, irrigation districts, individuals, or other entities eligible to participate in any of the four phases of the Basin Conservation Program must equip all surface water delivery systems within their boundaries with volumetric water meters or equally effective water measuring methods within 5 years of the date of first participation in the program;

(2) to purchase or lease land or water from willing sellers, so long as the purchasing entity shall hold title and be responsible for any and all required operations, maintenance and management of the lands and water;

(3) to continue operation and maintenance or management of lands acquired by the Secretary under this title; and

(4) to combine or relocate diversion points, remove fish barriers, or for other activities that increase flows or improve habitat in the Yakima River and its tributaries for furtherance of this title.

(b) Exception.--The provisions of this section shall not apply to the Yakama Nation except as to any funds specifically applied for from the Basin Conservation Program.

**SEC. 1214. AUTHORIZATION OF PHASE III OF THE YAKIMA RIVER BASIN WATER ENHANCEMENT PROJECT**

(a) In General.—The Secretary, acting through the Commissioner of the Bureau of Reclamation, is authorized to study, plan and design, and if feasible, to construct, operate and maintain—

(1) the Keechelus to Kachess conveyance for the purposes of conveying water from Keechelus Reservoir to Kachess Reservoir to improve operational flexibility for the benefit of both fish and irrigation;

(2) Wymer Dam and Reservoir, the Bumping Reservoir enlargement which would include construction of a new dam, and facilities needed to access and deliver inactive storage in the existing Kachess Reservoir. Funds for construction of Wymer Dam and Reservoir and Bumping Dam and Reservoir may not be appropriated until after the Secretary submits a feasibility study to the appropriate congressional committees; and

(3) fish passage facilities in addition to any fish passage facilities authorized pursuant to Section 109 of the Hoover Power Plant Act of 1984.

(b) Federal Cost Share.-- The Federal cost share shall be determined in accordance with Bureau of Reclamation law and policy. The Secretary may accept as part of the non-Federal cost share, and expend as if appropriated, any contribution by the State of Washington or others, including in-kind services, which the Secretary determines will contribute toward the conduct and completion of the work.

(c) Electrical Power Associated with Wymer and Bumping Dam and the Kachess Drought Relief Pumping Plant.-- The Administrator of Bonneville Power Administration, consistent with the provisions of the Columbia River Basin fish and wildlife program established pursuant to the Pacific Northwest Electric Power Planning and Conservation Act, shall provide project power at no more than the Tier 1 rate for pumping plant facilities and appurtenant works, and for purposes of mitigating anadromous fishery resources. The cost of the power shall be credited to fishery restoration goals of the Columbia River fish and wildlife program.

**SEC. 1215. OPERATIONAL CONTROL OF WATER SUPPLIES.**

In regard to project water supplies affected by this Title, the Yakima Project Manager retains the authority and discretion over the management of project supplies to obtain maximum operational use and flexibility to meet all appropriated and adjudicated water rights. This authority and discretion includes the United States' ability to store, deliver, conserve and reuse water supplies deriving from projects authorized under this Title.

**SEC. 1218. FEDERAL PROPERTY.**

The Secretary, acting through the Commissioner of the Bureau of Reclamation, shall have unrestricted access to Federal lands necessary--

(a) to study or implement projects authorized under this Title; and

(b) to continue operation, maintenance, expansion or replacement of facilities pursuant to this Title and in furtherance of the authorized purposes of the Yakima Project.”



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

SEP - 4 2014

The Honorable Mike Thompson  
House of Representatives  
Washington, DC 20515

Dear Mr. Thompson:

In accordance with your request of July 25, 2014, the Department of the Interior has prepared the enclosed draft of legislative language to transfer recreational management authority for Lake Berryessa in the State of California from the Bureau of Reclamation to the Bureau of Land Management.

This draft has been prepared as a service to you. It has not been reviewed within the Department of the Interior or cleared by the Office of Management and Budget. We can, therefore, make no commitment at this time concerning the position of the Department on this matter.

Sincerely,

Christopher P. Salotti  
Legislative Counsel  
Office of Congressional and Legislative Affairs

Enclosure

113th CONGRESS  
2d Session  
**H. R. 4166**

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**A BILL**

To transfer recreational management authority for Lake Berryessa in the State of California from the Bureau of Reclamation to the Bureau of Land Management, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

- (a) ~~(a)~~ Short Title- This Act may be cited as the 'Lake Berryessa Recreation Enhancement Act of 2014'.
- (b) Table of Contents- The table of contents for this Act is as follows:
- Sec. 1. Short title; table of contents.
  - Sec. 2. Findings; purposes.
  - Sec. 3. Definitions.
  - Sec. 4. ~~Transfer of administrative jurisdiction~~ Establishment of Lake Berryessa Recreation Area.
  - Sec. 5. Management of Recreation Area.
  - Sec. 6. Concessions Permits and Agreements.
  - Sec. 7. Continued authorities of Commissioner of Reclamation.
  - Sec. ~~7~~8. Existing authorizations.
  - Sec. ~~8~~. ~~Recreation and concession fees.~~

**SEC. 2. FINDINGS; PURPOSES.**

- (a) Findings- Congress finds that--
- (1) the Monticello Dam--
    - (A) was authorized by the Reclamation Project Act of 1939 (53 Stat. 1187);
    - (B) resulted in the formation of Lake Berryessa; and

- (C) is operated by the Bureau of Reclamation;
- (2) Lake Berryessa--
  - (A) covers approximately 28,915 acres of surface water and land;
  - (B) has 165 miles of shoreline;
  - (C) has a 2,000 acre wildlife area on the east side;
  - (D) is located less than 100 miles from both Sacramento, California and San Francisco, California; and
  - (E) has become an important regional recreation destination; and
- (3) the recreational use at Lake Berryessa generates tourism that is important to local economies.

- (b) Purposes- The purposes of this Act are--
- (1) to provide diverse, high quality recreational facilities and services on ~~the water~~Lake Berryessa and ~~land~~the surrounding Lake Berryessa lands;
  - (2) to conserve the natural, scenic, scientific, historic, and other resource values contributing to the public use and enjoyment of that land and water;
  - (3) to promote cooperation between the Federal Government and private entities to manage that exceptional resource;
  - (4) to ~~authorize~~establish the ~~Secretary to manage certain resources under the Bureau of Land Management;~~Lake Berryessa Recreation Area and
  - (5) ~~to transfer to the Secretary, without consideration,~~ administrative jurisdiction over certain Federal land for management as ~~a unit~~public lands by the Bureau of Land Management as part of the Bureau of Land Management~~that area.~~area.

### SEC. 3. DEFINITIONS.

In this Act:

- (1) DAM- The term `Dam' means--
  - (A) the Monticello Dam; and
  - (B) any facility relating to the Monticello Dam.
- (2) RECREATION AREA- The term `Recreation Area' means the Lake Berryessa Recreation Area designated by section 4(a).
- (3) SECRETARY- The term `Secretary' means the Secretary of the Interior.
- (4) STATE- The term `State' means the State of California.

**SEC. 4. TRANSFER OF ADMINISTRATIVE JURISDICTION-ESTABLISHMENT OF LAKE BERRYESSA RECREATION AREA.**

(a) ~~In General~~Establishment - Subject to valid existing rights, there is established the Lake Berryessa Recreation Area, the boundaries of which are described in subsection (c).

(b) Transfer of Administrative Jurisdiction- Administrative jurisdiction over the Federal land, including any improvements thereon, as described in subsection ~~(b)~~(c), is transferred from the Bureau of Reclamation to the Bureau of Land Management for administration as the Lake Berryessa Recreation Area.

~~(b)~~

(c) Description of Land- The land referred to in this section subsection ~~(a)~~ is the approximately **XXX** acres of ~~water and land~~ administered by the Bureau of Reclamation that is ~~within~~underlying or adjacent to Lake Berryessa and is identified as '**XXX**' on the map dated **XXX**.

(d) Transfer of Ownership of Personal Property — The Bureau of Reclamation may transfer to the Bureau of Land Management, without compensation, items of personal property owned by the Bureau of Reclamation and used in the administration of the Recreation Area.

**SEC. 5. MANAGEMENT OF RECREATION AREA.**

(a) ~~In General~~- Subject to the authority of the Secretary under section ~~6~~, the Secretary shall manage the Recreation Area in accordance with sections 601 through 604 of Public Law 93-483.

~~(b) Applicable Law~~ Subject to valid existing rights, the Secretary shall manage and administer the Recreation Area in accordance with this Act, sections 601 through 604 of Public Law 93-493, and the laws (including regulations) applicable to ~~units of the public lands~~ under the administration of the Bureau of Land Management.

(b) ~~(c)~~ Waters Comprehensive Management Plan-

(1) GENERAL - The Secretary shall develop a management plan for the administration and management of the Recreation Area.

(2) DEVELOPMENT OF MANAGEMENT PLAN- For purposes of this Act, the Secretary -

(A) may use or adopt, in whole or part, the recreational use plan adopted by the Bureau of Reclamation on June 2, 2006 or may develop a new management plan, and (B) may use or adopt, in whole or part, any concessions planning or environmental documents prepared by or for the Bureau of Reclamation for the Recreation Area.

(3) The decision to use or adopt, in whole or part, any document referenced in paragraph (2) shall not constitute a major federal action for the purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). This decision is not subject to judicial review.

(4) APPLICABILITY- Nothing in this Act— requires an immediate revision or amendment to any plan for the Recreation Area.

(c) For the purposes of managing and administering the Recreation Area during a transition period not to exceed five years after the date of enactment of this Act, the Secretary may transfer funds from the Bureau of Reclamation to the "Bureau of Land Management- Management of Lands and Resources" account, to remain available until expended, for the administration the Recreation Area.

(d) Nothing in this Act prohibits existing authorized recreational uses, including motorized use on Lake Berryessa, from continuing.

## **SEC. 6. CONCESSIONS PERMITS AND AGREEMENTS.**

(a) In General. The Secretary is authorized to issue recreation concession permits, including at the Recreation Area, to allow a third party to provide facilities and services to visitors on lands and waters managed by the Bureau of Land Management in support of outdoor recreational opportunities in accordance with an applicable land use plan. Any such permit shall not constitute a contract for the procurement of goods and services for the benefit of the government or otherwise.

(1) COMPENSATION TO THE GOVERNMENT. -Each permit shall provide for monetary compensation, including franchise fees, to the Federal government for the rights and privileges provided.

(2) REGULATIONS. - The Secretary shall promulgate regulations to facilitate the implementation of this authority.

(b) Revenues collected under this section shall be deposited in an account in the U.S. Treasury, and shall remain available until expended for managing and enhancing the public lands at the specific area where the revenues are collected.

(c) Existing Agreements at Lake Berryessa Recreation Area-

(1) CONTINUATION OF AGREEMENTS - Facilities and services provided in the Recreation Area under existing recreation concessions and recreation lease agreements with the Bureau of Reclamation, including agreements for campgrounds and marinas, may continue pursuant to the terms and conditions of each agreement.

(2) EXTENSION OF AGREEMENTS: The Secretary may extend an existing recreation concessions and recreation lease agreement at the Recreation Area after expiration for a period not to exceed three years to allow continuation of services during the transition.

(3) REDUCTION IN FEDERAL COSTS- To reduce Federal costs in administering this subsection, the issuance of new agreements or concession permits for activities within the Recreation Area that have been considered and permitted by the Bureau of Reclamation under previous analysis, that are similar to existing uses, or that are not inconsistent with approved uses and will not substantially increase the use of an area, shall not constitute a major federal action for the purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

## SEC. 7. CONTINUED AUTHORITIES OF COMMISSIONER OF RECLAMATION.

(a) The Commissioner of Reclamation shall continue to administer and operate--

- (1) the Dam; and
- (2) any power facility relating to the Dam.
- (1) affects

(b) Nothing in this Act or any subsequent management plan shall -

- (1) impair the ability of the Bureau of Reclamation and its managing partners to operate, maintain, or manage Monticello

Dam, Lake Berryessa, and other Solano Project facilities in accordance with authorized purposes;

~~(2) affect~~ the use or allocation, in existence on the date of the enactment of this Act, of any water, water right, or interest in water;

~~(2) affects~~3) affect any vested absolute or decreed conditional water right in existence on the date of the enactment of this Act, including any water right held by the United States;

~~(3) affects~~4) affect any interstate water compact in existence on the date of the enactment of this Act;

~~(4) authorizes~~(5) authorize or ~~imposes~~impose any new reserved Federal water rights;

~~(5) relinquishes~~(6) relinquish or ~~reduces~~reduce any water rights reserved or appropriated by the United States in the State on or before the date of the enactment of this Act; or

~~(6) impairs the ability of the Bureau of Reclamation and its managing partners to operate, maintain, or manage Monticello Dam and other Solano Project facilities in accordance with the purposes of such project; or~~

~~(7) modifies, changes, or supersedes~~(7) modify, change, or supersede any water contract or agreements approved or administered by the Bureau of Reclamation or Solano County Water Agency or Solano Irrigation District.

~~(d) Existing Agreements—To benefit the interests of the public, the Secretary shall act in accordance with any agreement in existence on the date of the enactment of this Act with any organization for the management of—~~

~~(1) campgrounds located in the Recreation Area; and~~

~~(2) marinas located in the Recreation Area.~~

~~(e) Comprehensive Management Plan—~~

~~(1) DEVELOPMENT OF PLAN—The Secretary may develop a management plan under paragraph (1)—~~

~~(A) as a new document; or~~

~~(B) by adopting the recreational use plan adopted by the Bureau of Reclamation on June 2, 2006.~~

~~(2) APPLICABILITY—Nothing in this Act requires an immediate revision or amendment to any plan for any public land of the Bureau of Land Management.~~

~~(3) USE OF PLANNING DOCUMENTS—Until the date on which the Secretary develops a management plan, the Secretary may use planning documents prepared by the Bureau of Reclamation without further administrative action.~~

~~SEC. 6. CONTINUED AUTHORITIES OF COMMISSIONER OF RECLAMATION.~~

~~Nothing in this Act or any subsequent management plan shall impair the ability of the Bureau of Reclamation and its managing partners to operate, maintain, or manage Monticello Dam, Lake Berryessa, and other Solano Project facilities in accordance with that project's authorized purposes. The Commissioner of Reclamation shall continue to administer and operate—~~

- ~~(1) the Dam; and~~
- ~~(2) any power facility relating to the Dam.~~

~~SEC. 7. EXISTING AUTHORIZATIONS.~~

(a) In General- Except as otherwise provided in this Act, including subsections (b) and (c), nothing in this Act affects any authorization in effect as of the date of the enactment of this Act made by any department or agency of the Federal Government for the use of land or water located within the Recreation Area (referred to in this section as an 'existing authorization').

(b) Assumption of Existing Authorization- Not later than 1 year after the date of the enactment of this Act, the Secretary shall assume the administration of any existing authorization, with such revisions as necessary to align the authorization with existing law and policies of the Bureau of Land Management.

(c) Renewal of Existing Authorization- The renewal of any existing authorization shall be made in accordance with such terms and conditions as the Secretary may prescribe.

~~SEC. 8. RECREATION AND CONCESSION FEES.~~

~~(a) Fees Authorized— The Secretary may establish, modify, charge, and collect recreation or concession fees at the Recreation Area in accordance with section 803 of the Federal Lands Recreation~~

Drafting Service for  
Congressman Mike Thompson  
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~~Enhancement Act (16 U.S.C. 6802). The amount of the fee shall be commensurate with the benefits and services provided to the visitor or with the recovery of the anticipated costs associated with management of the Recreation Area, including costs of maintaining or operating facilities and visitor services.~~

~~(b) Use of Fees—The Secretary may retain fees collected under subsection (a) for the purposes of managing the Recreation Area.~~

*END*