

**COLLISION COURSE: OVER-
SIGHT OF THE OBAMA ADMIN-
ISTRATION'S ENFORCEMENT
APPROACH FOR AMERICA'S
WILDLIFE LAWS AND ITS IM-
PACT ON DOMESTIC ENERGY**

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

Wednesday, March 26, 2014

Serial No. 113-64

Printed for the use of the Committee on Natural Resources



Available via the World Wide Web: <http://www.fdsys.gov>
or
Committee address: <http://naturalresources.house.gov>

U.S. GOVERNMENT PRINTING OFFICE

87-354 PDF

WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
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**OVERSIGHT HEARING ON COLLISION
COURSE: OVERSIGHT OF THE OBAMA AD-
MINISTRATION'S ENFORCEMENT APPROACH
FOR AMERICA'S WILDLIFE LAWS AND ITS
IMPACT ON DOMESTIC ENERGY**

**Wednesday, March 26, 2014
U.S. House of Representatives
Committee on Natural Resources
Washington, DC**

The committee met, pursuant to notice, at 10:01 a.m., in room 1324, Longworth House Office Building, Hon. Doc Hastings [Chairman of the committee] presiding.

Present: Representatives Hastings, Gohmert, Bishop, Lamborn, Fleming, McClintock, Tipton, Labrador, Southerland, Flores, Mullin, Cramer, LaMalfa, DeFazio, Tsongas, Hanabusa, Huffman, and Shea-Porter.

The CHAIRMAN. The committee will come to order, and the Chair notes the presence of a quorum, which under rule 3(e) is two Members, and we have exceeded that.

The Committee on Natural Resources is meeting today to hear testimony on an oversight hearing entitled, "Collision Course: Oversight of the Obama Administration's Enforcement Approach for America's Wildlife Laws and Its Impact on Domestic Energy."

Under committee rule 4(f), opening statements are limited to the Chairman and the Ranking Member. However, I ask unanimous consent that any Member who wishes to have an opening statement as part of the record submit it to the clerk by close of business today.

[No response.]

The CHAIRMAN. And without objection, so ordered. I will now recognize myself for 5 minutes for my opening statement.

STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

The CHAIRMAN. For nearly 2 years, the Committee on Natural Resources has investigated the Obama administration's approach for enforcing wildlife laws, including the Migratory Bird Treaty Act, and the Bald and Golden Eagle Protection Act, as it relates to U.S. energy producers. Both of these laws are strict liability statutes that prohibit the taking of migratory birds and bald and golden eagles within the United States. As strict liability statutes, any authorized take that occurs, be it intentional or unintentional, violates the acts.

However, despite the strict liability of these laws, the administration has developed specific guidance to assist the burgeoning wind industry, and has selectively prosecuted only a handful of violations. In November 2013, the Department of Justice announced

a plea agreement involving the Duke Energy renewables in connection with the protected migratory birds and golden eagles at two wind energy projects in Wyoming. This is the only such enforcement case that has been brought to date involving the wind industry.

Now, there are legitimate concerns that the administration is implementing these laws in an arbitrary fashion. The goal of this hearing and the committee's oversight efforts is to gain a better understanding of how and why the administration decides to enforce some violations and not others. We are also interested in learning more about what role cooperation between the administration and wind developer plays in making these enforcement decisions. Unfortunately, like so many issues, this administration has been less than transparent on this topic. The Department has engaged in a deliberate, 10-month slow roll in fulfilling the committee's request for documents and information.

For example, it took the administration more than four months before it provided fewer than 70 pages of emails and meeting materials about the development of a secret bird mortality data base. The administration dragged its feet for six months before providing a two-page policy memo that was written a year earlier. The administration gave us copies of redacted documents that had previously been provided to the public under the Freedom of Information Act. The administration may be able to legally withhold certain information from the public when responding to a 4-year request, but FOIA exemptions do not apply to Congress, and complete, unredacted copies should have been provided to us, instead.

Now, this was not compliance. This is a deliberate slow-rolling of documents and answers. And, frankly, I have had enough of that. Unfortunately, the lack of transparency by the Fish and Wildlife Service here is but one example, and is a part of a larger, broader pattern by the Department and the administration not to provide timely cooperation with congressional oversight requests.

Although the administration may say it has provided thousands of pages in response to this and other requests, what it does not say is that the majority of the committee's original requests remain unanswered and unaddressed, months after they were sent, and the Department never explains what it is withholding. This left me with no choice but to issue a subpoena this month. It was an unfortunate, last resort which we shouldn't have had to take in our attempt to get answers from this administration.

I also want to be very clear. This hearing is not an attack on the wind industry or wind energy. It is about how the administration is developing and implementing enforcement policies, and its lack of transparency with Congress and the American people on how those decisions are made. I strongly support an all-of-the-above approach to energy that includes renewables and alternate sources of energy, including wind, solar, hydropower, geothermal, and nuclear, along with oil, natural gas, and coal. In fact, in my Central Washington District, we have some of the highest number of wind-mills in the country.

No matter the industry, all of these job creators deserve to have certainty, clarity, and transparency from the administration about how laws and regulations are enforced. Fish and Wildlife Director

Dan Ashe is testifying before us today, and I hope we can get some answers about the administration's enforcement policies and the status of the committee's long-standing requests for information.

[The prepared statement of Mr. Hastings follows:]

PREPARED STATEMENT OF THE HONORABLE DOC HASTINGS, CHAIRMAN, COMMITTEE
ON NATURAL RESOURCES

For nearly 2 years the Committee on Natural Resources has investigated the Obama administration's approach for enforcing wildlife laws, including the Migratory Bird Treaty Act [MBTA] and the Bald and Golden Eagle Protection Act [BGEPA], as it relates to U.S. energy producers.

Both of these laws are strict liability statutes that prohibit the taking of migratory birds and bald and golden eagles within the United States. As strict liability statutes, any unauthorized take that occurs—be it intentional or unintentional—violates the acts.

However, despite the strict liability requirements of these laws, the administration has developed specific guidance to assist the burgeoning wind industry and has selectively prosecuted only a handful of violations. In November 2013, the Department of Justice announced a plea agreement involving Duke Energy Renewables in connection with the deaths of protected migratory birds and golden eagles at two wind energy projects in Wyoming. This is the only such enforcement case that has been brought to date involving the wind energy industry.

There are legitimate concerns that the Obama administration is implementing these laws in an arbitrary fashion. The goal of this hearing, and the committee's oversight efforts, is to gain a better understanding of how and why the Obama administration decides to enforce some violations and not others. We're also interested in learning more about what role "cooperation" between the administration and wind developers plays in making enforcement decisions.

Unfortunately, like with so many other issues, the Obama administration has been less than transparent on this topic. The Department has engaged in a deliberate, 10-month-long slow roll in fulfilling the committee's requests for documents and information.

For example, it took the administration more than 4 months before it provided fewer than 70 pages of emails and meeting materials about the development of a secret bird mortality data base.

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This is not compliance. This is the deliberate slow-rolling of documents and answers, and we've had enough. Unfortunately, the lack of transparency by the Fish and Wildlife Service here is but one example and is part of a broader pattern by the Department and administration to not provide timely cooperation with Congressional oversight requests.

Although the administration may say it has provided thousands of pages in response to this and other requests, what it does not say is that the majority of the committee's original requests remain unanswered and unaddressed months after they are sent and the Department never explains what it is withholding. This left me with no choice but to issue a subpoena this month. It was an unfortunate last-resort, which we shouldn't have had to take, in our attempt to get answers from this administration.

I also want to be very clear; this hearing is not an attack on the wind industry or wind energy. It's about how the Obama administration is developing and implementing enforcement policies, and its lack of transparency with Congress and the American people on how decisions are made.

I strongly support an all-of-the-above approach to energy that includes renewable and alternative sources of energy including wind, solar, hydropower, geothermal and nuclear, along with oil, natural gas and coal. In fact, my Central Washington District has some of the highest number of windmills in the country. No matter the industry, all of these job-creators deserve to have certainty, clarity, and transparency from the administration about how laws and regulations are enforced.

Fish and Wildlife Service Director Dan Ashe is testifying before us today and I hope we can finally get some answers about the administration's enforcement policies and the status of the committee's long-standing requests for information.

The CHAIRMAN. And, with that, I will yield back my time and recognize the Ranking Member.

STATEMENT OF THE HON. PETER A. DEFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. DEFAZIO. Mr. Chairman, this hearing is yet another hearing attempting to find intentional disregard by the administration in areas where no evidence has been uncovered.

In this case there is no report at the hearing, because there is nothing to report, except a few things I will talk about, which are outrageous. There isn't a single directive, a single secretarial policy, a single email that shows there was any improper behavior or supposed favoritism toward the wind industry, or prejudice toward the fossil fuel industry in enforcement actions by this administration. It is yet another conspiracy that doesn't exist. And, really, we are wasting a lot of valuable time and taxpayer resources with these investigations.

The subpoena, as I understand it, talking to the Director, resulted in him diverting a substantial number—and I am not exactly clear, I thought he told me 30, I am hearing today from staff 50—professional law enforcement agents and other staff to answer this mindless subpoena for the conspiracy that doesn't exist. They were diverted from catching people who were devastating elephant herds, rhinoceros, killing other endangered species around the world, engaged in organized crime and trafficking, and also real crimes that are being committed here, in the United States of America. They were diverted from those duties for 2 full weeks. Why? Because we wanted to send—or you wanted to send a subpoena to uncover a conspiracy that doesn't exist.

I mean enough is enough. We have been harassing the Secretary of the Interior, diverting staff from a whole host of things that need to be done, including what I need to do on a bill that passed out of this committee to deal with the O&C lands in Oregon, and developing a sustainable timber harvest on those lands. We are diverting professional employees from doing those things in these continuing quests to find some kind of conspiracy. We want to pretend we are the Issa Committee, I guess, on investigations and oversight, and act like Darrell Issa, which is, really, not something to be aspired to or replicated, so far as I am concerned, and this committee has conducted itself—

Mr. LABRADOR. Mr. Chairman, I—

Mr. DEFAZIO [continuing]. With more comedy than—

Mr. LABRADOR. Mr. Chairman, I object.

The CHAIRMAN. The gentleman will suspend. The gentleman, the Ranking Member, has a right to make this statement. Obviously, there are some things that I would disagree with in that, but the gentleman has every right to make his statement. He is recognized.

Mr. DEFAZIO. Thank you, Mr. Chairman. I am pretty angry. And I have foregone a number of times here and sat through these hearings. I sat through last year, when I wasn't Ranking Member,

and we dragged a woman in here, I think, three times for hours and hours and hours on end, to get at the meaning of one word, which didn't make any difference, in fact, on the Horizon spill report.

Really, I mean, we are wasting millions and millions of dollars of taxpayer resources with these investigations. You know, there are things to investigate. There are things that need to be legislated. But that certainly isn't what is going on here today.

And I don't have anything more to say about this. We will let the Director represent his views. You can grill him all you want, and you are not going to find anything here, except for people doing their job, and being diverted from doing real jobs that are much more important than shuffling paper and I don't even know where you keep all this stuff. You must have rented a giant storage locker somewhere.

Thank you, Mr. Chairman.

[The prepared statement of Mr. DeFazio follows:]

PREPARED STATEMENT OF THE HONORABLE PETER A. DEFazio, RANKING MEMBER,
COMMITTEE ON NATURAL RESOURCES

Thank you Mr. Chairman.

Today's hearing marks the culmination of a long and fruitless crusade by the majority aimed at uncovering an Obama administration conspiracy to promote wind energy at the expense of fossil fuels. The majority has not produced a report to accompany this hearing, because they have nothing to report: the investigation found nothing. No White House directive, no Secretarial policy, not even a single email suggesting improper behavior, showed up in the thousands of pages of correspondence produced by the Department of the Interior at the Chairman's request. We are, yet again, wasting valuable time, resources, and energy on another political conspiracy theory conjured up in Republican imaginations.

Earlier this month, DOI received another subpoena that demanded they produce even more documents. Attempting to comply with the demands of this subpoena has virtually crippled the Fish and Wildlife Service's Office of Law Enforcement, which has dedicated 73 employees—or one third of its workforce—to this project full time. So far this has cost an estimated \$67,000 and 1,300 man hours, and fulfilling the request is expected to take months at this level of effort. Maybe this is by design: Committee Republicans do not seem to like it when the Service enforces the law and holds criminals who engage in illegal timber harvesting, or wildlife trafficking responsible for their actions.

Transparency is one thing. Congress has a duty to hold Federal agencies accountable to the people. But this is something else. The nine subpoenas and nearly endless list of document request letters sent to Obama administration officials by this committee since 2011 have produced exactly zero results. They have uncovered no intentional wrongdoing or irresponsible actions whatsoever. In the last two Congresses, these frivolous requests and subpoenas—including three fixated on a years-old report that recommended a common sense “time out” on offshore drilling in the wake of *Deepwater Horizon*—have produced more than 50,000 pages of documents at a cost of \$1.5 million to taxpayers. Agency staff has spent 19,000 hours responding to these requests, instead of doing the jobs we are paying them to do, like permitting responsible energy development and combating illegal trade in timber and endangered wildlife.

As for today, the only things on a “collision course” are the Republican's far-fetched fantasies and reality. I find it laughable that the most radically anti-environment House majority in history is now trying to justify their contempt for this administration and for renewable energy by crying “fowl” over impacts to migratory birds. These same people are bottling up wilderness bills, undermining creation of national monuments and parks, and plotting to gut the Endangered Species Act.

Ironically, Monday was the 25th anniversary of the Exxon Valdez oil spill. This preventable accident dumped 10.8 million gallons of crude into Alaska's Prince William Sound, killing thousands of sea otters—populations of which have only this year recovered to pre-spill levels. Killer whales and harlequin ducks are still trying to bounce back, and Pacific herring and pigeon guillemots (GILL-a-mots) have not

yet recovered from the effects of the spill. A recent study showed that oil from the spill is still there, and is still leaching into the environment. The spill also killed 900 bald eagles—orders of magnitude more than wind farms ever have.

Over the weekend, an oil barge collided with a ship in Galveston Bay, spilling 170,000 gallons of oil and further threatening a marine ecosystem that is still reeling from the impacts of the 210 million gallon *Deepwater Horizon* spill just 4 years ago. Scientific evidence continues to show us that irresponsible fossil fuel development and transport pose enormous threats to fish and wildlife, and I am not aware of a “wind spill” ever blackening beaches or closing off traffic to shipping lanes. But instead of investigating progress on recovery in the Gulf of Mexico—and pushing much needed legislation to prevent future spills—the Chairman has decided that today’s hearing is the best use of the committee’s time. While I strongly disagree, I look forward to hearing from Director Ashe, and I yield back the balance of my time.

The CHAIRMAN. I thank, I think, the gentleman’s opening statement.

Director Ashe, thank you very much for being here. You have been in front of this committee before. And, as a matter of fact, you worked on predecessors to this committee, so you know exactly how the timing lights work, and you have 5 minutes.

Now, you submitted a statement to us last night; appreciate that. That will appear totally in the record. But I would like to keep, if you would, your oral remarks within the 5 minutes. With that, Director Ashe, you are recognized.

**STATEMENT OF THE HON. DANIEL M. ASHE, DIRECTOR,
U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE
INTERIOR**

Mr. ASHE. Thank you very much, Mr. Chairman, and good morning. It is always an opportunity, and I appreciate the opportunity, to testify before Congress, and particularly this committee.

As you remarked, Mr. Chairman, I served for 13 years on the staff of the former House Committee on Merchant Marine and Fisheries, a predecessor of this committee. I fully understand and respect the critical role of congressional oversight, and the challenges sometimes faced in obtaining responsive information. I have worked now in the executive branch for 19 years, nearly 3 years as Director of the United States Fish and Wildlife Service. So I also understand the many demands facing an organization which carries a mission and expectations that far exceed its budget and resources.

Mr. Chairman, as I always have been, I am here today in response to your request, to answer your questions to the best of my abilities. I have, without exception, always made myself and the employees and the officers of my organization available to this committee and to its members, without exception. I will accept on the face of your March 11 subpoena for documents that you are not satisfied with our responsiveness.

But I really believe that the subpoena was unnecessary, and it has been extraordinarily disruptive to agency mission, and expensive to the taxpayer, as Mr. DeFazio remarked. The staff work required to respond to the committee’s multiple requests is massive, and the cost of compliance with this subpoena is illustrative. Since receiving the committee’s subpoena about 2 weeks ago, we estimate that 125 Fish and Wildlife Service employees have worked 2,600 hours at a taxpayer cost of about \$150,000. Notably, of these 125

employees, 73 are Office of Law Enforcement employees, including 54 special agents, as Mr. DeFazio remarked. Fully one quarter, 25 percent of our total special agent force, are working full-time and over-time to respond to this subpoena. This is to the exclusion of all mission duties.

These are the world's most highly trained wildlife law enforcement professionals, and right now they are sidelined while internationally syndicated criminal rings are decimating elephants, rhinos, and other iconic species. And to fully comply with the committee's subpoena, we estimate that it will likely need to sustain that level of effort for 3 months.

In regard to implementation and enforcement of the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, I am here to better understand your concerns, address your questions, and hopefully find a productive course forward in responding to your needs for information.

Our challenge has always been to implement these laws faithful to the original intent of Congress, while meeting the evolving needs of these species in the context of changing and expanding demands of human society. We develop collaborative solutions, we seek, first and foremost, to educate project proponents and operators, regardless of the nature of their business activity, about their obligations under the law.

By supporting and encouraging voluntary adherence to best management practices, we focus our limited resources on those entities that choose to ignore the law, or who are having significant impacts on migratory birds. Criminal prosecution has always been and will always be our last resort.

We have worked with the oil and gas industry to prevent migratory bird deaths in oil field waste pits. We have worked with the electric utility industry to understand how to retrofit power lines and transmission towers to reduce collisions and electrocutions of raptors and other birds. We have worked similarly with the radio and cell tower industries, the architectural and building trades communities, and the commercial fishing industry. And today, we are working in a similar fashion with the wind and the renewable energy industry.

In taking enforcement actions, our agents go where the evidence takes them, period. When they determine it is necessary and appropriate to refer a case to the Justice Department, they do so. They neither need nor seek approval at political levels.

Thank you, Mr. Chairman and committee members, for giving me the opportunity to testify today. I would be happy to answer your questions and explore with you a better way forward.

[The prepared statement of Mr. Ashe follows:]

PREPARED STATEMENT OF THE HONORABLE DANIEL M. ASHE, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

INTRODUCTION

Good morning Chairman Hastings, Ranking Member DeFazio, and members of the committee. I am Dan Ashe, Director of the U.S. Fish and Wildlife Service (Service). Thank you for inviting me to testify today on the Committee's oversight involving the Migratory Bird Treaty Act [MBTA] and the Bald and Golden Eagle Protection Act (Eagle Act).

The Service's mission is working with others to conserve, protect, and enhance fish, wildlife, plants and their habitats for the continuing benefit of the American people. The Service's long track record of working with industries, agencies, and individuals to conserve migratory birds, including eagles, supports that mission. Today, impacts to migratory birds from anthropogenic activities are myriad and expanding. For decades, the Service has worked cooperatively with its partners to minimize these impacts and facilitate compliance with the MBTA and other Federal statutes, like the Eagle Act. Although many bird populations are currently in decline, there is much to be encouraged about. Bald eagle populations increased to the point that we removed them from the endangered and threatened species list. In some areas, like the Chesapeake Bay, bald eagle populations are increasing rapidly. Our management and conservation of migratory waterfowl with our State and international partners is one of history's great conservation success stories. Many decades ago the viability of waterfowl populations was in question, but sustained conservation and management actions with our partners, grounded in science, has produced robust populations that enable hunting activity along all four flyways in the United States.

The MBTA prohibits the taking of migratory birds, including eagles, and the Eagle Act prohibits the taking of bald and golden eagles. The Service works with industries, agencies, and other stakeholders to develop best management practices to facilitate compliance with these laws. These guidelines are based on the best available science and employ practical, common-sense actions that allow individuals and organizations to carry out otherwise lawful activities in ways that reduce impacts on migratory birds.

The Service focuses its resources on developing partnerships with industries and other stakeholders to identify actions that can be taken to minimize or eliminate take of migratory birds. After the Service identifies best management practices that are practicable and effective, our expectation is that people will use them. Examples of successful partnerships include the Avian Power Line Interaction Committee, which is a partnership with the electric transmission line industry; and guidelines for oil companies to cover open oil pits that attract birds. For the nascent wind industry, the Service convened the Wind Turbine Guidelines Advisory Committee to develop guidelines for siting and operating wind turbines. All of these are voluntary programs.

COMMITTEE OVERSIGHT AND DOCUMENT REQUESTS

The Service recognizes and respects the committee's oversight role of the Federal agencies within its jurisdiction. The committee requested documents from the Service pertaining to the enforcement of the MBTA and the Eagle Act against energy companies, including: (1) copies of documents related to Service investigations, as well as referrals to the Department of Justice, created between January 2009 and the present; (2) copies of communications between the Service and representatives from wind energy companies; (3) copies of policies, legal analysis, and emails related to enforcement discretion under the MBTA and Eagle Act; (4) communications between the Service and the American Wind Wildlife Institute; and (5) documents related to meetings concerning proposed revisions to the eagle take regulations.

The Department of the Interior (Department) and the Service continue to cooperate with the committee to provide information that is responsive to its concerns about these issues. Since receiving the Chairman's original letter on May 16, 2013, the Department has provided approximately 5,000 pages of documents to the committee on September 18, 2013, December 2, 2013, December 13, 2013, and February 28, 2014. To compile this information, Service staff spent thousands of hours reviewing years of records and files to comply with the committee's request.

On December 17, 2013, committee staff met with Mr. William Woody, Chief of the Service's Office of Law Enforcement, who answered questions related to enforcement of the MBTA and the Eagle Act. At that meeting, Chief Woody discussed the Chief's Directive on "Enforcement of the Migratory Bird Treaty Act as it Relates to Industry and Agriculture." The Chief's Directive is a responsible way to focus Service law enforcement efforts on entities that ignore best management practices that are well known to avoid and minimize takes of migratory birds, including bald eagles and golden eagles.

In response to the subpoena issued on March 11, 2014, we have once again reached out to staff across the country to compile requested documents. We hope to provide these to the committee in the near future.

BACKGROUND ON THE MIGRATORY BIRD TREATY ACT AND BALD AND GOLDEN EAGLE
PROTECTION ACT

When Congress passed the MBTA in 1918 it sought to put an end to the commercial trade in birds and their feathers that, by the early years of the 20th century, had wreaked havoc on the populations of many native bird species. The MBTA decrees that all migratory birds and their parts (including eggs, nests, and feathers) are protected under Federal law, and all migratory bird “take” is governed by the MBTA. Killing, possessing, transporting, and importing migratory birds is illegal except as authorized under a valid permit. Additionally, the MBTA authorizes and directs the Secretary of the Interior to determine if, and by what means, the take of migratory birds should be allowed and to adopt suitable regulations permitting and governing take, such as those embodied by hunting seasons and bag limits.

Since the enactment of the MBTA, great strides have been made in conserving wild bird populations. Yet, the threats that human activities pose to these bird populations continue to increase. The United States population in 1915 reached 100 million people. Today it exceeds 300 million people. It continues to increase. Development of housing, electricity and communications, transportation systems and other infrastructure directly and indirectly affect migratory bird populations. The Service has adopted an approach to implementing the MBTA that allows us to focus our enforcement activities on individuals and organizations that disregard the law and repeatedly ignore best management practices that minimize impacts to migratory birds.

When Congress passed the Bald Eagle Protection Act in 1940, it sought to protect bald eagles, our national symbol, from exploitation. In 1962, Congress added the same protections for golden eagles and changed the statute’s title to the Bald and Golden Eagle Protection Act (Eagle Act). The Eagle Act protects the bald eagle and the golden eagle by prohibiting the take, possession, sale, purchase, barter, offer to sell, purchase or barter, transport, export or import, of any bald eagle or golden eagle, alive or dead, including any part, nest, or egg, unless allowed by permit. Additionally, the Eagle Act allows for members of federally recognized Native American Tribes to take a very limited number of eagles for their religious ceremonies, and it permits the take of eagles where they are a threat to human health and safety.

PERMITTING EAGLE TAKE

The Eagle Act protects bald eagles and golden eagles, but it authorizes the Secretary of the Interior to issue regulations, consistent with the preservation of the species, permitting some take of eagles. The permitting process under the Eagle Act is a key mechanism to avoid and minimize the take of eagles from various industries and activities that can impact eagles. Permits may be issued for some limited take of eagles as a result of otherwise lawful activities. An applicant for such a permit must demonstrate he or she is doing everything possible to avoid and minimize risk to eagles, and if needed, to compensate in some way for any unavoidable deaths so that the eagle populations do not decline.

Any entity, including wind energy facilities, developers building strip malls, utility companies constructing and operating power lines, and highway departments building roads, may apply for one of these permits. In December 2013, the Service finalized revisions to the 2009 eagle incidental take regulations to extend the maximum duration of permits from 5 years to up to 30 years. Applicants can request permits of any length up to 30 years. Permits will be subject to annual reporting requirements and 5-year reviews, which allow for revisions to the permit requirements. Such permits provide a greater level of predictability to industry for ongoing projects, while providing much needed data on the effects of long-term projects on eagles and on the effectiveness of the mitigating measures and terms and conditions of the permits.

Based on reported data, population data, and other information, at the 5-year review, the Service will determine whether changes to the terms and conditions of the permit are necessary to avoid and minimize take, and can prescribe such changes going forward.

The Service is working closely with other Federal agencies, private landowners, and developers to minimize conflicts between the emerging wind energy industry and eagles. As with other industries, wind energy companies are not required to obtain an eagle take permit to operate; however, also as with other industries, they risk Federal penalties, including criminal prosecution, for any unauthorized take of eagles. Wind farms may adversely impact eagles, by disturbance of nesting areas, migratory and foraging habitat, and by taking individuals via collision with turbine blades. Therefore, we believe it is important that they apply the voluntary wind en-

ergy guidelines, apply for an Eagle Act permit where eagle take is anticipated, and implement the conservation measures required under these permits.

The permit process provides the Service the opportunity to work closely with wind developers and other project proponents onsite selection, surveys and monitoring, and operational measures that will minimize impacts to eagles and other birds, as well as bats. These long-term permits will incorporate an adaptive management framework under which the Service will review the project and make adjustments to ensure the permitted activity does not unduly impact eagles. The Service has been working with a variety of stakeholders to develop guidelines and best management practices on siting and operations to avoid and minimize the take of eagles, other migratory birds, and bats. We are working to educate and communicate these guidelines to the industry so they are broadly implemented, and so that companies are aware of the potential enforcement consequences of not following these guidelines.

EAGLE CONSERVATION PLAN GUIDANCE AND LAND-BASED WIND ENERGY GUIDELINES

In 2003, the Service issued *Interim Guidance on Avoiding and Minimizing Wildlife Impacts from Wind Turbines*. This Guidance addressed the responsible development of wind energy projects and suggested best management practices in the selection, siting, and operation of wind farms that would earn the agency's forbearance of enforcement of unavoidable takings. The Interim Guidance was in place until 2012, when it was replaced by voluntary *Land-based Wind Energy Guidelines*, developed during several years of consultation between the agency, industry and other stakeholders. In 2013, the Service issued *Eagle Conservation Plan Guidance* for wind energy developers that complemented the voluntary *Land-based Wind Energy Guidelines*. Together, these two recent documents guide the process for wind energy development and provide information on how to prepare conservation plans for eagles and other species of concern. The process focuses on assessing project risks to eagles and other species and identifying modifications that would reduce those risks. These guidance documents benefited from input provided by the public, other agencies, nongovernmental organizations, and wind energy operators.

The Service uses its voluntary *Eagle Conservation Plan Guidance* and *Land-based Wind Energy Guidelines* to assist project developers in minimizing impacts to avian and bat species and in developing permit applications for eagle take that cannot be avoided. The Service is also actively engaging numerous stakeholders (agency staff, States, wind energy companies, nongovernmental organizations, and other interested citizens) in wind energy training, which began with a major workshop held at the National Conservation Training Center in fall 2012, and continues with regularly scheduled national broadcasts that include a wide variety of wind energy issues, including the Wind Energy Guidelines, eagle conservation planning, facility siting and operations, and research and monitoring. In general, wind energy operators have been very receptive to these efforts and are collaborating with the Service to minimize the impacts of wind facilities on wildlife.

ENFORCEMENT OF THE MIGRATORY BIRD TREATY ACT AND BALD AND GOLDEN EAGLE PROTECTION ACT

As outlined in the Chief's Directive, the Service has long employed a policy of encouraging industry and agriculture to utilize best management practices aimed at minimizing and avoiding the unpermitted take of protected birds. To promote compliance with the law and protect migratory birds from "take," the Service's Office of Law Enforcement 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. We recognize that the take of migratory birds may occur even when individuals and companies consult with the Service, comply with best management practices, and follow the Service's recommendations. Our goal is to focus Office of Law Enforcement investigative efforts on bird take that is foreseeable, avoidable, and proximately caused by industry or agriculture.

The Office of Law Enforcement pursues potential violations of the MBTA and the Eagle Act regardless of the industry, individual, or agency at issue. There is no preferential application of the statutes to the wind energy industry compared to traditional energy development. However, industrial-scale wind facilities are relatively new on the landscape. As we learn more about how to avoid and minimize the effects of these facilities on migratory birds and other wildlife, the Service will continue working with the wind energy industry to develop guidelines and best management practices on siting and operations. This effort will include education and communication components to ensure these guidelines are broadly implemented across the wind energy industry so that companies are aware of the potential law

enforcement consequences of not following these guidelines and taking eagles and migratory birds.

Additionally, the first prosecution under a law sets a precedent for future cases and is a cautionary example for other potential violators of the law. To strike a balance between energy production, conservation of migratory birds, and the effective use of limited law enforcement resources, it is important to work with industry to develop and communicate guidelines broadly and promote best management practices that minimize the accidental take of migratory birds and also avoid the necessity for law enforcement action. The Service took a similar approach decades ago with the oil and gas industry. Best management practices were developed for open oil pits that attracted and killed waterfowl. The practices were communicated to industry, and enforcement actions were taken against those who did not follow them and took migratory birds. The Service continues to follow this approach. We anticipate a similar future for the wind industry, where most entities are following the guidelines and those who are not are priority investigative targets and are prosecuted when take occurs.

Currently, 17 wind energy cases are under investigation by the Service. Seven cases have been referred to the Department of Justice for future investigation and possible prosecution for violating either the Endangered Species Act, BGEBA or the MBTA. The Service investigated golden eagle and other migratory bird fatalities at Duke Energy's "Campbell Hill" and "Top of the World" wind facilities in Wyoming. Despite prior warnings from the Service, Duke Energy failed to make all reasonable efforts to build its wind facilities in a way that would avoid the risk of avian deaths by collision with turbine blades. After lengthy discussions between the Service, the Department of Justice, and Duke Energy, the company pleaded guilty to violating the MBTA in connection with the deaths of protected birds, including golden eagles, at the two Wyoming projects. The settlement requires Duke Energy to: (1) develop eagle conservation plans and apply for eagle take permits at its facilities; (2) institute extensive monitoring programs; and (3) curtail operation of certain high-risk turbines during eagle migration seasons; and (4) support a variety of eagle conservation measures in Wyoming. This case is significant because it establishes a precedent for the prosecution of other violations; because eagle take will be reduced through implementation of best management practices; and because Duke Energy cooperated in getting to a speedy and effective solution.

CONCLUSION

In closing, the Service works diligently and effectively with industries, agencies, and other stakeholders to ensure fish and wildlife conservation and compliance with the law. We appreciate the committee's oversight role, and we look forward to continuing to cooperate with the committee to provide information that is responsive to your concerns and inquiries about the MBTA and the Eagle Act.

Thank you for the opportunity to present testimony today. I will be pleased to answer any questions that you may have.

QUESTIONS SUBMITTED FOR THE RECORD TO THE HONORABLE DANIEL M. ASHE

QUESTIONS SUBMITTED FOR THE RECORD BY THE HONORABLE DOC HASTINGS

Question. 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.

Answer. 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.

Question. 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?

Answer. 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.

Question. 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?

Answer. 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).

Question. 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?

Answer. 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 the 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.

Question. 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?

Answer. 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.

Question. 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?

Answer. 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.

Question. 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?

Answer. 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.

Question. 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?

Answer. 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.

Question. 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?

Answer. A company holding an eagle take permit that takes other migratory birds is violating the MBTA (16 U.S.C. 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 6 months, or both.

Question. On October 17, 2012, a two-page directive was issued by Chief William Woody of the Fish and 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"?

Answer. 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.

Question. 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?

Answer. 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.

Question. 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?

Answer. 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.

Question. 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?

Answer. No. The plain language of 16 U.S.C. 668 et seq., commonly referred to as the Bald and Golden Eagle Protection Act [BGEPA], prohibits the take of eagles without a permit.

Question. 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?

Answer. 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.

Question. 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.

Answer. While the referenced email 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.

Question. 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 rulemaking 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.

Answer. 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.

Question. 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?

Answer. 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.

Question. 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?

Answer. 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.

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

Answer. 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.

Question. 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.

Answer. 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.

Question. 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.

Answer. While the referenced email 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.

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

Answer. 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.

Question. 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 NGO's 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 NGO's didn't have the economic resources to sue us so not to worry."

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

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

Answer. 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.

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

Answer. 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.

Question. 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?

Answer. 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.

Question. 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 6th 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.

Answer. 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.

Question. 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?

Answer. 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.

Question. 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.

Answer. OMB frequently reviews actions for reasons other than significant economic impacts. In fact, of the 13 E.O. reviews of Service documents during fiscal year 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.

Question. 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?

Answer. 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 1 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 1 year from publication of the proposed rule.

Question. 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?

Answer. 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.

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

Answer. 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).

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

Answer. 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>).

Question. 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 was 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.

Answer. 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 E.O. 13563.

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

Answer. 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.

Question. Among the documents 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.

Answer. While the referenced email was not provided for review, it appears that it refers to inquiries from Mr. Black about the Service's fiscal year 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 Sec-

retary. 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.

Answer. 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 SUBMITTED FOR THE RECORD BY PAUL C. BROUN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Question. 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. Department 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.

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

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 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.

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

Answer. 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 inter-agency agreements with other Federal agencies and contracts with private economic consulting firms.

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

Answer. 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 decisionmaking during consultation, in order to complete the remand the Service filed its independent determination with the Court and those documents are public record.

Question. 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.

Answer. 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.

Question. 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?

Answer. 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 decisionmaking regarding Cape Wind.

Question. 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?

Answer. 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.

Question. 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?

Answer. 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).

Question. 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?

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

Answer. 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 decisionmaking 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.

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

Answer. 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.

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

Answer. 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.

Question. FWS repeatedly asked for 3 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.

Has the Secretary ever approved another project where the applicant refused to gather the information requested by FWS during the permitting phase?

Answer. 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.

Question. 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?

Answer. 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 United States 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.

Question. The 2010 DOI IG's report on Cape Wind contains statements that FWS felt political pressure to rush its review of Cape Wind.

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?

Answer. 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 SUBMITTED FOR THE RECORD BY THE HONORABLE CYNTHIA M. LUMMIS,
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Question. 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.

Answer. 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.

Question. 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?

Answer. 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.

Question. 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?

Answer. 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.

Question. 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.

Answer. The fiscal year 2015 budget request supports additional capacity across 3 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 6 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 7 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.

Question. 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 CFR 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 CFR 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?

Answer. 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 protec-

tion 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 CFR 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.

Question. 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 CFR 22.23/22.24?

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

Question. More broadly, can you commit to working toward 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?

Answer. 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 SUBMITTED FOR THE RECORD BY THE HONORABLE NIKI TSONGAS, A
REPRESENTATIVE IN CONGRESS FROM MASSACHUSETTS

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 2 years, clean energy jobs in Massachusetts have grown by 24 percent, and are projected to grow another 11 percent 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.

Question. 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.

Answer. 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.

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

Answer. 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.

Question. 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?

Answer. 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.

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

Answer. 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 6 months, or both.

Question. 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?

Answer. 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.

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

Answer. 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 outnumber the number of wind turbines in the United States and therefore have a generally larger impact on the landscape.

The CHAIRMAN. Thank you, Director Ashe, for your testimony. Let me, for the record, just so everybody knows, we started this process last year on May 16, when we first asked for documents. That is nearly a year ago. And while you said it is destructive, the Ranking Member talked about the extraordinary cost to comply, I just want all the members of the committee to know that the vast majority of what we are asking, as far as documents, were documents that you submitted to us that were redacted.

I just want to emphasize that. It took a lot of effort to redact. We didn't ask for that. We didn't ask for them to be redacted within your agency, I don't know how much the cost was to redact all of the stuff that we are asking about. And so, the subpoena, largely, not exclusively, but the subpoena largely asked you to give us the unredacted information. That is what we are asking. Now, I don't know how that could be a huge, huge cost. The big cost was redacting.

So, I just want everybody to understand that this argument that is costing all of this, and you are taking people out of the field, to do what? I have a hard time understanding that. So I just want to, Director Ashe, make that point.

Let me ask one question here. Do you agree that the two laws, the two statutes that we are dealing with here, the migratory bird and the eagle statutes, are strict liability statutes?

Mr. ASHE. They are strict liability—

The CHAIRMAN. They are strict liability statutes. Now, you didn't mention this in your oral statement, but you alluded to it in your written statement, about how you had gone through with Duke Energy, and how because of Duke Energy, that hopefully would be a template for others that are in the industry. Did I read that correctly in your statement?

Mr. ASHE. The template for the energy industry really is in the voluntary wind energy guidelines that we have developed, in cooperation with the industry. I think the settlement with Duke Power was reflective of the cooperative relationship that we are developing with the wind industry. Duke Energy brought to us the information concerning those eagle mortalities. And Duke Energy was cooperative in the settlement that we reached with the Justice Department.

The CHAIRMAN. Well, see, that goes to the heart of the issue here. You acknowledge this is strict liability statutes that we are under, you admitted that there was an agreement, a settlement, if you will, with Duke Energy in Wyoming. All we are trying to find out, all we are trying to find out here, at this hearing, is the process that led to the guidelines that Duke Energy is following. That is all we are asking. It is nothing more complicated than that.

And why, even with the subpoena for example, when we sent you the subpoena, you have not fully complied with that. Would you agree with that?

Mr. ASHE. We have not complied with the subpoena.

The CHAIRMAN. Let me ask what should be the obvious follow-up question. When will you comply with all of that?

Mr. ASHE. Mr. Chairman, I think that we are, as I said in my testimony, we have put forth extraordinary effort to try to comply with the subpoena, but—

The CHAIRMAN. Well, let me be pretty specific. If we are asking for unredacted reports, how hard is that to respond to us?

Mr. ASHE. Well, first, Mr. Chairman, the redactions that you refer to, the principal redactions, were made in a FOIA document. And so, the—

The CHAIRMAN. Right.

Mr. ASHE. The document that we provided to the committee with extensive redaction was a document that was created in a FOIA request from an external, non-congressional party.

The CHAIRMAN. I understand that, I understand that. And you redacted it for the FOIA. FOIA does not apply to us.

Mr. ASHE. And we provided it to the committee as a courtesy, because it was related to your earlier document request. We are now working on the process of going through that document and determining which unredacted documents we can give to the committee, and we have given you, in response to the subpoena, unredacted documents.

The CHAIRMAN. Again, for the record, has executive privilege been asserted in any of this, not complying with us?

Mr. ASHE. I am not a lawyer, and I am not familiar, and I am not here to, I guess, present you with any legal opinion or determination about the basis of redactions. All I can say to you, Mr. Chairman, is I do not make those decisions, personally—

The CHAIRMAN. Who makes those decisions?

Mr. ASHE. Those decisions are made in the process of review within—

The CHAIRMAN. But who makes the decision, then?

Mr. ASHE. I do not know.

The CHAIRMAN. You don't know who? I don't know how to follow up with that. I mean we seem to have come to a—how do you have transparency in government, when I ask the head of a department who is responsible, and the response I get is, "I don't know"?

Mr. ASHE. Mr. Hastings—

The CHAIRMAN. Am I misunderstanding something here?

Mr. ASHE. Those decisions are made during a process of review within the Department of the Interior. There are many people who are involved in those decisions about reviewing documents and then determining, on the basis of—some of those documents contain personally identifiable information. Some of those documents contain confidential industry information. Some of those documents contained pre-decisional material. And so all of those decisions—

The CHAIRMAN. My time is out. I just want to say, in your response to us, in all of the responses that we have had, at no place that I can remember, and if I am wrong, I will be corrected, have you said, "This is why we have not provided this document, be-

cause of this.” You have not given us that explanation, whatsoever. Not at all. So, how do we know how to respond to that, other than to say, “We would like to have the documents?”

My time is way over here, and I apologize to my colleagues for that, and I recognize the Ranking Member.

Mr. DEFAZIO. Director Ashe, do you criminally prosecute each and every endangered species, let’s say eagle death, or migratory bird death in the case of golden eagles, which are not endangered? Do you prosecute each and every one of those, criminally?

Mr. ASHE. No, we do not.

Mr. DEFAZIO. OK. Do you prosecute each and every one of those against the oil and gas industry?

Mr. ASHE. No, we do not.

Mr. DEFAZIO. OK. So there are incidental takes, or whatever you call them, that are occurring on a regular basis across the energy sector, which are not prosecuted.

Mr. ASHE. That is correct. There are approximately 876,000 oil wells in the Continental United States. It is estimated in the peer-reviewed literature that those wells take approximately 1 to 2 million birds per year, we are currently investigating 21 cases involving the oil and gas industry.

Mr. DEFAZIO. OK. How about the wind industry?

Mr. ASHE. We are currently investigating 17 cases involving the wind industry. There are about 48,000 wind turbines in the Continental United States.

Mr. DEFAZIO. It seems that, in emphasizing that this is a strict liability statute, that the committee is urging that you should prosecute each and every one of those millions of takings against the oil and gas industry, and the tens of thousands, or whatever it is, against the wind industry.

Mr. ASHE. And there is, from a practical standpoint, there is no way that we can do that. And, from a common sense standpoint, there is no way that we should do that. Any strict liability law has to involve the exercise of enforcement discretion.

Much the same as you or I, if we are driving on the New Jersey Turnpike, and the speed limit is 55 miles an hour, that is a strict liability. We know the speed limit is 55 miles an hour. If we are driving 56 miles an hour, we are violating the law. But we don’t expect a State Trooper to write us a ticket for 56 in a 55. Each mile per hour that we go faster than that, we increase the likelihood that a State Trooper would use their enforcement discretion. But we hope that our State Police, and they, our State Police do, in large measure, reasonably exercise their enforcement discretion. Likewise, our agents reasonably use their enforcement discretion in——

Mr. DEFAZIO. OK. So, generally, you have, after you develop best practices, and we are still working on that with the wind industry and some of the early sitings were not well thought-out, in terms of bird strikes, which I believe was the case with Duke, and then there is big problems down in California, with those turbines in the Altamont Pass, et cetera.

But after you have developed best practices, or made, entered into agreements on how to avoid these, if the industry in question, whether it is oil and gas or wind, follows those best practices, and

makes every attempt, but inadvertently birds are killed, you don't prosecute them, right?

Mr. ASHE. That is correct.

Mr. DEFAZIO. But when you do prosecute them, it would be like someone who didn't cover a spill pit and migratory birds landed in it. That sort of a thing, which was intentional or negligent, you would prosecute.

Mr. ASHE. That is correct.

Mr. DEFAZIO. And in the case of the wind industry, if they didn't follow guidance or best practices that has been developed, you would prosecute them.

Mr. ASHE. That is correct.

Mr. DEFAZIO. And, in the case of Duke, did you extend special favoritism? It seems like the committee here is kind of on a rampage to have millions of prosecutions against every kind of energy development in the United States, because that is the only conclusion I can come to here. Did Duke get some kind of special deal, here?

Mr. ASHE. Not at all. With Duke Energy we had advised Duke, with their Campbell Hill and Top of the World facilities, we had advised them against construction on those sites, and we had advised them to take mitigation measures in construction of those sites because of our concern about bird take.

And so, then, when they actually did take birds, again, they came to us with that information, and they sought a reasonable solution. And they committed to applying for an eagle take permit, they committed to remedial measures. And, in fact, in the first year after they reported the bird takes to us, they achieved no take of golden eagles, and they did that by implementing some relatively simple best management practices, but they were in violation of the law, and they had ignored our previous recommendations to them about both of those sites.

Mr. DEFAZIO. And did they pay a fine?

Mr. ASHE. They did. They paid a \$1 million fine.

Mr. DEFAZIO. OK, thank you. My time has expired.

The CHAIRMAN. Will the gentleman yield real quickly?

Mr. DEFAZIO. Certainly.

The CHAIRMAN. I just want to make a point. The gentleman made an observation about best practices. You see, that is what we are trying to find out, is exactly how those best practices were developed by Fish and Wildlife. That is really what this whole hearing is about, is to find that out. And that is why we were looking for these documents. So I think the Ranking Member and I are, I don't want to put words in his mouth, but I think we are on the same page.

We want to find out how those best practices were developed, and give them to us. That is what we are asking about with our requests going way back to last May. So I thank the gentleman—

Mr. ASHE. Mr. Chairman, I am here to say I can tell you how those were developed, and I am happy to do that.

The CHAIRMAN. Well, that is what we have been asking. I just want to make that point. That is what we have been asking. Maybe you are not getting information from people, I have no idea.

My time has expired. I will recognize Mr. Fleming, Dr. Fleming is recognized.

Dr. FLEMING. Thank you, Mr. Chairman. I would ask the staff to bring up Exhibit No. 7 on the screen. And while we are waiting for that—ah, there it is.

[Slide]

Dr. FLEMING. Yes, Dr. Ashe, on February 14, 2013, President Obama said, “This is the most transparent administration in history. Every law we pass and every rule we implement, we put online for everyone to see.”

Now, what is up there is a document that was provided as a result of our subpoena from your office. Can you interpret what that says?

Mr. ASHE. What you are seeing is a redacted document covered by the subpoena. That was, again, I believe that was a document that was produced in response to a FOIA request, and not in response to the committee’s subpoena.

Dr. FLEMING. OK. Either way, whether it is a FOIA request or a subpoena, what does that tell us?

Mr. ASHE. [No response.]

Dr. FLEMING. You are not going to answer. Does it tell us anything?

Mr. ASHE. What do you want to know, Congressman?

Dr. FLEMING. Well, we have provided numerous requests, both FOIA and subpoena. The subpoena was issued March 11, 10 months after the committee sent its initial document request. So we sent FOIA requests, then we sent, as I understand it, a subpoena. And again, this is the kind of non-information that we are receiving.

Now, when the Chairman asked you, you said that, and correct me if I am wrong about this, but I am sensing that you said this was not your decision to be non-responsive. Was that decision above you, someone above you in the Interior Department?

Mr. ASHE. My response was that I am not the one who is making determinations about redactions. The job of the Fish and Wildlife Service in the case of these all-document requests is to produce documents that we believe are responsive. And then that has to go through a process of review, and that involves—

Dr. FLEMING. But, as Director, you are obviously at the top of that bureaucracy, unless someone ahead of you is above you in the chain of command in the Department of the Interior.

So, my question is, is that final decision made by someone above you?

Mr. ASHE. The decisions about redactions are made through a process of review at many levels between the Fish and Wildlife Service—

Dr. FLEMING. But—

Mr. ASHE [continuing]. And the Department of the Interior—

Dr. FLEMING. Mr. Ashe, somebody has to make the final decision. Someone has to make the final call. And so, we sent FOIA requests, it is non-responsive.

Mr. ASHE. If—

Dr. FLEMING. You have already admitted that, even to the subpoena, you have been non-responsive. You say that it wasn’t your

decision. And you are diffusing it with this idea that it is a huge bureaucracy out there. Somebody has to finally, at the end of the day, make the call. All I am asking is, is that person above you in the Interior Department bureaucracy?

Mr. ASHE. When I send the committee a document, and when I respond to a request from the committee, I am responsible for any redactions or exclusions that are in the documents.

These redactions were not responsive to the committee. These redactions were responsive to a FOIA request that came from a non-congressional responder. We provided that to the committee as a courtesy.

Dr. FLEMING. Right. But let me correct you on something. That is right, this came as a FOIA request to the public. But then we requested in the subpoena to have this information, and we are still being refused—

Mr. ASHE. And as I said, Mr. Fleming, I think I have made superhuman efforts, as have my law enforcement agents and my agency in general, to respond to the subpoena. The time that you gave me to respond to that subpoena is completely unreasonable. We cannot physically respond—

Dr. FLEMING. Well, I am running out of time, so let me jump in here.

So, really, what I am hearing today is that you are unresponsive to the questions about the unresponsiveness of both the subpoena and the FOIA requests. Are you claiming executive privilege?

Mr. ASHE. I am not claiming anything.

Dr. FLEMING. You are not asserting executive privilege. Well then, can you explain to this committee why you should not be held in contempt?

Mr. ASHE. Again—

Dr. FLEMING. Contempt of Congress.

Mr. ASHE. Congressman, I am not a lawyer. And so, I guess contempt is an issue that the committee will have to judge based upon its own advice and interpretation. What I would say to you, again, is I have a personal record with this committee and with the Congress, as a whole.

As I said in my opening statement, I make myself available. I have never refused a request from this committee. I have never refused a request from any member of this committee or this body to come up here and meet and provide information and be responsive, and—

Dr. FLEMING. Well, I am running out of time. But just to respond to that, yes, you have never refused to come up and speak with us. But you and your Department are obviously refusing to give the information that Congress and the American people are entitled to. And, with that, I yield back.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from California, Mr. Huffman.

Mr. HUFFMAN. Thank you, Mr. Chair. And thank you, Director Ashe, for being here. I want to just get my head around this controversy, this tempest that we are dealing with here today.

My understanding is you provided an awful lot of documents to this committee by way of a FOIA request, as a courtesy. The Chair

acknowledged in his letter to you that courtesy production of documents had occurred. Correct?

Mr. ASHE. Correct.

Mr. HUFFMAN. There was redaction in those, as is appropriate in response to a FOIA request.

And then, on March 11, the subpoena was issued. And there were all sorts of new materials requested in that subpoena that went beyond, well beyond, the scope of the FOIA request. Correct?

Mr. ASHE. That is correct. And, in particular, the law enforcement documents that I mentioned in my oral statement were completely new. That was a completely new request, and a significant request by the committee.

Mr. HUFFMAN. So you had the task of not only determining which of the redactions in the appropriately redacted FOIA documents may or may not need to continue to be redacted, but you also had to assess these additional requests in the subpoena, and assess your ability to comply with those. And that was by way of a March 11 subpoena.

The deadline for production was March 24. So you were given 13 days to do all that. Is that correct?

Mr. ASHE. That is correct.

Mr. HUFFMAN. Would you like to perhaps speak to the burden that imposed upon you and your agency?

Mr. ASHE. Yes. As I said, I think that it is physically impossible for me to comply with the subpoena. So, the previous question about contempt, I feel like I have no way to meet the committee's expectations.

What I would suggest is that we sit down with the committee and find a reasonable pathway forward. And rather than exchanging letters and subpoenas, that we sit down, eyeball to eyeball, as good public servants, and find a way forward to get the committee the information that it needs. But with this subpoena, and especially a subpoena that gives us 2 weeks and raises substantial new issues, we simply can't comply.

Mr. HUFFMAN. I will just say that manner of collaborative problem-solving and information sharing would be really refreshing, if it was reciprocated by the committee. And I hope your suggestion is accepted by the Chair, because I think that is the way this committee ought to do business. Unfortunately, it hasn't done business that way with this administration. There has never been any attempt to resolve these things informally. Fights are picked, show hearings are held, like this one, and that is what leaves us where we are today.

I want to sort of go to the very premise of this particular show hearing, which is that you are giving some kind of special preference to the wind energy industry over fossil oil and gas. And it does seem to me that is rather preposterous, on its face. But let's just review some of the context of that.

You have 825,000 oil and gas wells in the United States versus 48,000 wind turbines. Correct?

Mr. ASHE. Correct.

Mr. HUFFMAN. And, given that overwhelming size advantage, magnitude difference, you are, nevertheless, investigating 17 wind facilities versus 20 oil and gas operations. Correct?

Mr. ASHE. Correct.

Mr. HUFFMAN. And of the 17 wind facilities you have investigated, you have referred 7 of those to DOJ. And that certainly would suggest, when those numbers are considered, that you are actually enforcing much more vigorously, relative to the size of the wind industry, than you are against the fossil fuel. Wouldn't that be a natural conclusion, just on the numbers alone?

Mr. ASHE. That is a reasonable conclusion, sir.

Mr. HUFFMAN. All right. Well, thank you for your testimony, and I am sorry that it has to be in the manner of one of these gotcha hearings, instead of a—

The CHAIRMAN. Would the gentleman yield?

Mr. HUFFMAN [continuing]. Want to do business with each other.

The CHAIRMAN. Would the gentleman yield?

Mr. HUFFMAN. Certainly.

The CHAIRMAN. For the record, the gentleman asserted that there hasn't been patience or cooperation from the committee standpoint. For the record, just want to say this. Everything that was in that subpoena that we asked for on March 11 has been asked for before. There is nothing new, regardless of what the Director has said. There is nothing new that has been asked.

Second, I want to make this point. We started this process in May of 2013. May of 2013. The first response, the first response we got from the Fish and Wildlife was in September. Now, that does not suggest to me that is cooperation and trying to work in a collaborative way. I am willing to work in a collaborative way. But when I look at the evidence and see the slow rolling that is even acknowledged in the response to me, I get pretty frustrated.

I thank the gentleman for yielding. I recognize Mr. Cramer, North Dakota.

Mr. CRAMER. Thank you, Mr. Ashe, for being here. Thank you, Mr. Chairman.

Frankly, I don't find these investigations for truth to be "mindless," as depicted by the Ranking Member. Frankly, I find it quite offensive, the terminology that we "dragged a woman in here last year." This has become the language of the angry left. And if you want comparisons, I find the Ranking Member's behavior today to be very similar to that of the Majority leader of the U.S. Senate lately.

I want to get to the bottom of this line of questioning, and we just heard the Chairman's clarification. I would be interested in your clarification. Were there extra documents requested that were not previously requested? In other words, does the subpoena include documents that were not part of the original redacted information that was provided?

Mr. ASHE. From my standpoint, Congressman, it certainly does. I mean we were not asked for case files in the previous document request. The subpoena requests all of our law enforcement case files, going back to 2009. Those are hundreds of files. And so to be responsive to the committee, we have to take all of those files and break them into separate documents. It is an extraordinarily time-consuming effort.

I wish we had the capability to just push a button and produce all this stuff, but people have to go through it, and they have to put it in the right format.

Mr. CRAMER. Sure.

Mr. ASHE. It is an extraordinarily——

Mr. CRAMER. How long would it take to get every document unredacted that has been redacted? How long would that take? Somebody has collected it, somebody must have it. Somebody in this room might even have it. How long would that take?

Mr. ASHE. I do not know. Well, I said just to comply with that one request, the third item in the committee's subpoena request on the law enforcement documents would take us 3 months of the effort that I described to provide for that one item.

Mr. CRAMER. Mr. Ashe, previous to getting elected to Congress, I spent nearly 10 years as an energy regulator in North Dakota. I oversaw 1,500 megawatts of new wind development in a State that is the second leading producer of oil. The very famous migratory bird case in North Dakota is very familiar to me.

And we want to talk about diverting agents from important international crime rings, and we talk about responding to a request for information as a gross diversion from that very important work of finding international criminals, your agents scoured Western North Dakota to find seven dead ducks, and then brought charges through the Justice Department against three oil companies, only to be thrown out, thank God, by a common-sense Federal judge in North Dakota, who, quite frankly, raised a very important point about the definition and the interpretation of what a "taking" is. What is your understanding of what a take is, given this new ruling that, to my knowledge, has not been challenged?

Mr. ASHE. Again, I am not an attorney. What I can tell you is our belief is that we have one district court, Congressman, we have dozens of prosecutions that have been upheld in the United States court about the take of migratory bird, and migratory birds in oil pits.

And so, we have won a district court decision which is anomalous to dozens of other court decisions over the history of implementation of the Migratory Bird Treaty Act. It is a strict liability statute, as the Chairman said. And if a bird is taken, then it is a violation of the law.

Mr. CRAMER. Except that, according to the judge's ruling, "taken" is not as easily described, or as defined as perhaps it once was. And has that been clarified, or are we still dealing with this sort of broad definition of interpretation based on some single agent's view, or perhaps a political view?

Mr. ASHE. As I said, there is one court that has taken that interpretation, many, many courts which have seen the Migratory Bird Treaty Act as we believe it is, a law that applies to all take of migratory birds, intentional and unintentional.

Mr. CRAMER. Well, one of the things that has frustrated me already today, and a lot of it comes from the opening statement of the Ranking Member, he references the lack of a single secretary policy, along with other things, as evidence that somehow our investigation for truth is "mindless"—again, to use his language. And

that, somehow, that lack of a policy is, and we have heard this a lot in here, is a lack of evidence of the lack of transparency.

And I would submit to you the lack of these policies and the lack of the clarity is the evidence of the lack of transparency. And we are just trying to have a much more transparent process.

When I was a regulator in North Dakota, if we provided redacted documents to the legislature, it would have been our last day on the job. I yield back, my time is up.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentlelady from Hawaii, Ms. Hanabusa.

Ms. HANABUSA. Thank you, Mr. Chair. Welcome, Director Ashe.

You know, it is a very curious position that I am in, because you and I have had many discussions, not necessarily on this specific issue, but on issues of take and of issues of endangered species. And I just would like to share with everyone that whenever I have asked for a meeting with you on those issues, you have always been more than willing to be there, and you have been always very willing to sit and discuss the plight of the various individuals affected.

And I would like to share with my colleagues here that on the Island of Kauai, for example, we have a bird that flies into the lights and it is a threatened species. And, as a result, every time it does that, it becomes a take. And what people may not know here is that in that particular situation, it has stopped all high school football games on evenings. And that may not sound like much, but it is a big deal.

And I do want to say that, in that context, you have been willing to discuss it, willing to discuss how we work around that. And, for that, I find it very difficult to comprehend why there seems to be the sense that what we are dealing with here is some kind of an unfair treatment. Because I do know that part of the policies of the Department is to protect those endangered species.

And on the same island we have issues with our State bird that is eating the taro, which is considered to be sacred to our native people. And you have also been willing to sit and discuss that. And those are endangered species, so you can imagine what the take issue is there, where, even if you put up a fence and they walk into the fence, it is a take.

I just share that as a background, because, as I read the testimony that we are discussing here, these are situations where permits have been issued on takes, and that is something that you and I have talked about as a possible resolution for what is going on. So I am kind of perplexed as to why there seems to be the sense that the Fish and Wildlife Service and, in particular, you and your Department, are not willing to deal with that, because that is absolutely contrary to my experience.

And I just wanted to ask you, Director Ashe, I assume that I am not getting any special treatment. So if anyone else has this concern and wants to discuss with you the issues of the take and the permits, I assume that you also make yourself available for those kinds of discussions, as well. Am I correct?

Mr. ASHE. You are correct. When I come to your office, I hope, when I leave you always feel like I have shown you some special aloha, perhaps.

Ms. HANABUSA. That is right.

Mr. ASHE. But any member of the committee, I believe I have provided the same level of courtesy and attention. And when I am asked, I come. And I bring, as I have in your office, my Assistant Director for Endangered Species, I bring the people who can answer your questions and address the concerns of your constituents. And I believe we extend that courtesy, regardless of geography or party representation.

Ms. HANABUSA. So, getting to the issue at hand, which is really the idea about this, the birds and the eagles, in this case, the bald and the golden eagles, and the fact that there seems to be some kind of implication, or inference that they are being given special treatment when it comes to the wind producers. Do you have, and I apologize for being late, I was at another event, do you have any information as to how many "takes" are at issue here?

Mr. ASHE. The issue of how many birds are taken from wind turbines is an issue that many researchers have been involved in the last several years. But I think the general estimate that seems to be accepted in the literature is somewhere around or above half a million birds a year. So that is 48,000 wind turbines, half a million birds. I guess if I do some quick math, that is about 10 birds per turbine per year.

In the oil and gas industry, the oil pits and stock tanks associated with the oil and gas industry, again, the literature says about 1 million to 2 million birds per year. Compare that to power lines, transmission power lines. The literature estimates the average of about 40 million birds per year.

And then something that is familiar to all of us, like automobiles and trucks, about 70 million birds per year.

So, lots of sources of take on migratory birds. And, as the Chairman has pointed out, these are strict liability laws, so we have to use our enforcement discretion. In looking at a take, we have a capable but small organization, and we have to put our resources in the field where we see the most significant take, and places where people are ignoring or not applying pretty simple and accepted best-management practices.

Ms. HANABUSA. Thank you.

The CHAIRMAN. The time of the gentlelady has expired. The Chair recognizes the gentleman from Colorado, Mr. Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman.

Director Ashe, your agency announced in December that you were going to start issuing licenses to kill for eagles. And these will be good for 30 years. How many of these licenses to kill have been issued so far?

Mr. ASHE. Since 2009, we have had a permit framework in place for the Bald and Golden Eagle Protection Act. And we did this as a necessary pre-condition to delisting the bald eagle. So in delisting the bald eagle, we had to demonstrate that we had a conservation framework going forward.

So, since 2009, we have had a permit process in place for people to get authorization for take of bald and golden eagles. And we have issued many permits since 2009 for airports, for scientific take, for industrial take, for religious take of bald and golden ea-

gles. And so what we do, in exchange for that, is we get commitments for conservation.

So, the idea is that we have a net benefit to the eagles——

Mr. LAMBORN. OK, thank you. Let me change subjects now, and ask about a memo. Director Ashe, on October 17, 2012, a 2-page directive was issued by Chief William Woody of the Fish and Wildlife Service's Office of Law Enforcement. This memo provides guidance for agents of the Office of Law Enforcement when investigating possible violations of the Migratory Bird Act arising from the take of protected birds in connection with industry and agriculture. And could staff please pull up Exhibit 1?

Are you familiar with this memo?

Mr. ASHE. I am roughly familiar with it.

Mr. LAMBORN. Thank you. And you are familiar with our committee's May 16, 2013 request, right?

Mr. ASHE. I am.

Mr. LAMBORN. OK. Now, the memo states, as you read it down, that OLE, Office of Law Enforcement, 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.

Why did it take the Fish and Wildlife Service until December 13, 7 months after the request was sent, for this memo to be provided to us?

Mr. ASHE. Because it was wrapped into a massive request for documents. Congressman, if you or Chairman Hastings or any member of this committee simply picked up the phone and called me or called Chief Woody, who is sitting right behind me, and asked us for that document, I would send it to you today. But when you wrap it into this massive request for documents, all the sudden I become unresponsive to you. And I understand that frustration. And that is a simple request. If you ask me for it, you will get it.

Mr. LAMBORN. OK. Director, what bothers me most about this particular document is that representatives of the wind industry told staff that they were given a copy of this memo right after it was issued.

Mr. ASHE. And if you had asked——

Mr. LAMBORN. And that is a year before we ever saw it.

Mr. ASHE. And if you had asked for it, you would have gotten it. But instead it gets wrapped up into this massive, unreasonable request for emails and all documents and all correspondence and——so you wrap up a very simple——

Mr. LAMBORN. So why did they get it? Did they ask for it?

Mr. ASHE. They asked for it. If you had asked for it, you would have gotten, hopefully, better treatment.

Mr. LAMBORN. Well, it is a year later, and now we are finally getting it. Something is wrong here.

Mr. ASHE. What is wrong is the way the request was made. It was made in the context of this massive, all documents, all emails, all correspondence request. And all you had to do is ask me for the document.

The CHAIRMAN. Will the gentleman yield?

Mr. LAMBORN. Yes.

The CHAIRMAN. Director Ashe, I appreciate the willingness to do that. But I will go back to the timeline here, where the frustration leads in. When I asked Mr. Huffman to yield to me, I will repeat again. We started asking for information on May 16, 2013. Now, that is when we made the first request. It may have been seen, I guess, as massive is in the eyes of the beholder.

The first response, however, the first response we got from you was in September, for goodness sakes. Now, if we sent a request in, one would think, OK, there might be a timeline here, or maybe some correspondence from you. What are you really asking for, and so forth. We didn't get anything like that, anything like that. So, we start this process, then, with a bit of, I guess, uncertainty, at least from our standpoint.

So, I just want to make that point, and I know the gentleman's time has expired. All right, his time has expired. I just want to make that point.

The Chair recognizes the gentlelady from New Hampshire, Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you. And I have to say that, from what I have heard you say, it seems as if there is equal treatment for the wind industry and all the other industries that you actually prosecute, about the same number, and there doesn't seem to be any great difference there.

So, I am sure, Director Ashe, that you have other things that you would like us to know. And so, let me also say that you have come to my office, and I have found that when I have had a question, you have been forthright there. And I appreciate that.

And so, I would like to ask you what you want us to know about this that we haven't asked you. And I would like to hear what you want to say about this issue now.

Mr. ASHE. Thank you, Congresswoman. I guess I would say on this general question of the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, I think we have an extraordinarily good record of what the Congress expects, which is common sense enforcement of the law, where we put our first priority on collaboration and communication with the affected industry, whether it is the oil and gas industry, or the communication tower industry, or the electric transmission industry, or the renewable energy industry, that our first step is always to begin a dialog with them, and identify and define best management practices.

Then, in a case like the oil industry, the practices for oil pits are fairly simple. You put nets over the top of the oil pits. Enforcement then becomes relatively simple, and we usually do it in conjunction with other enforcement, like easement-based enforcement, where we are flying over. It is pretty easy to see, there is an oil and gas facility, the pit is not netted. We will send our enforcement agents out.

Our enforcement agents, if they find birds in the oil pit, they advise the operator of their obligation to employ best management practice. "Put a net over the pit." We come back 6 months later. If they haven't done it, then we write them a ticket. This is a misdemeanor violation. And so we issue them a ticket with a small fine. We again remind them of their obligation. Then we come back

in another 6 months, and if they still haven't taken action, then we would begin a criminal prosecution.

And that is the way we have approached the wind industry. And, again, the Chairman's request for how we have worked with the wind industry is much the same way. We have sat down with the wind and the environmental community. We formed a Federal Advisory Committee, completely transparent, with the public having the opportunity to participate and see every aspect of that discussion. And we sat down and we worked out voluntary wind guidelines for the industry to follow in the siting and the design and the construction and operation of wind facilities. So we have a practice, a best practice, for the industry to follow.

And so, in the future, we will know if a wind facility, as it is constructed, has followed that template or not. We will know if they have a migratory bird conservation plan in place or not. And we will have an expectation about how that facility is going to perform, and that will guide our enforcement.

And so, I think we have followed a very transparent, very cooperative framework that has brought all parties to the table. And I expect that is how we will continue in the future.

Ms. SHEA-PORTER. Thank you. And it sounds like they have a year. They have two opportunities, they hear from your agency twice. If they are not in compliance before they actually have a real punishment, right?

Mr. ASHE. That is correct.

Ms. SHEA-PORTER. So that—

Mr. ASHE. And again, as I said in my statement, law enforcement and criminal prosecution is always our last resort. Our goal, our principal goal, is always to provide people with information first, and to do that in the context of recommending best management practices.

Ms. SHEA-PORTER. And can you tell me what percentage of organizations manage to fix the problems within a year?

Mr. ASHE. Oh, the vast majority. We would start with probably hundreds of investigations on an annual basis. We end up with, probably, 20 to 30 where we would be taking some kind of enforcement action, writing a ticket or some other enforcement action, and probably 5 or 6 in the course of any one year that we would recommend prosecution on.

Ms. SHEA-PORTER. Thank you very much. I yield back.

The CHAIRMAN. The time of the gentlelady has expired. I recognize the gentleman from Utah, Mr. Bishop.

Mr. BISHOP. Mr. Ashe, thank you for being here. As you said to one of the other questions that was given to you, the manner in which we ask impacts the way you respond. So, just assume anything I ask has the word "pretty please" after it.

For the record, I want to once again re-emphasize that when we asked last May 2013, there was a large group of both closed and open cases that were requested. The subpoena is actually a subset of that, narrowed down just to the closed cases. So I would, once again, I realize that you made a complaint that you are spending millions of dollars not giving us the information. I think if you would spend those millions giving us the information, or working closer with us, it would expedite that process.

I believe it was yesterday, it may have been a couple of days ago, the Western Governors Association, in a bipartisan resolution, passed a resolution that simply said the Endangered Species Act need to be reviewed. And, in view of that, there is a whole lot of questions that deal with the ESA. I know Western States are looking on sage grouse, and many of them are spending a great deal of money, and complain that the Fish and Wildlife Service is not necessarily helpful in that process.

But today's committee is looking at a very specific issue that deals with birds and taking issues, so I want to limit my comments to that. However, there are these other issues that are still out there.

I guess the question I would ask is, would it be possible for you to attend and meet with us again, that we could talk about the larger view of endangered species issues? Sometimes I realize that you are doing outreach with some of the folks over on the Senate side. I would appreciate it if we could invite you to join us again some time for a larger view of the issues of the Endangered Species Act.

Mr. ASHE. I would enjoy doing that.

Mr. BISHOP. Thank you. I appreciate that. Let me ask you specifically. You issued the 30-year eagle take rule last year. Did you conduct a NEPA analysis to determine the environmental impact of that rule?

Mr. ASHE. We complied with the National Environmental Policy Act in promulgation of that rule.

Mr. BISHOP. Did you do the NEPA analysis, or take a categorical exclusion on it?

Mr. ASHE. We made use of a categorical exclusion, which is compliance.

Mr. BISHOP. So, yes. I appreciate that, but there are some regulations or limitations on that, going from a 5-year period under the old rule to a 30-year period. That is a sixfold increase in the permit duration. And that means the agency determined that to be a technical amendment, housekeeping, administrative changes.

Mr. ASHE. If we write a 5-year permit for a wind facility that is going to be on the ground for 30 years, what we are going to have to do, then, is we are going to have to renew that permit on 5-year cycles. What we have done is just changed the timetable and say, "When we write a permit, we will write a permit for the operational life of the project, and we will do 5-year reviews."

Mr. BISHOP. OK.

Mr. ASHE. And so that is simply a change, a technical change, in the way we are writing the permit for that facility.

Mr. BISHOP. And I appreciate that. I am not actually challenging the validity of it. The process is the question I am after.

So, if we are doing a categorical exclusion, as you just talked about, it means you have to determine there is no extraordinary circumstances, no significant impacts on the resources of migratory birds, yada, yada, yada.

So I just would like to ask you a scenario. Since we are dealing with birds that are covered in the Migratory Bird Treaty, as well as protected birds under the Eagle Act, and something else, birds that are significant to cultural groups in the United States, to say

that this did not require an administrative review is something that I think could be subject to some lawsuit in the future. So I am going to ask you a scenario.

Let us assume that this is challenged in a court, that we didn't go through the entire NEPA analysis, we only did a categorical review, and that if, at some time, it is challenged in the court, and the court would rule, that what you did was do something that required a NEPA analysis, but did not happen. What then happens to the permits that would have been granted during that period of time?

Mr. ASHE. I am not a lawyer. It would depend upon the ruling of the judge, and specifically how they ruled. What they would probably do in that case, my guess is, that they would remand the rule back to us and they would ask us to do some higher level of NEPA review, either an environmental assessment or an environmental impact statement.

Mr. BISHOP. Thank you, I appreciate that. I hope that the avoidance of the full NEPA review doesn't come back to haunt us at some time in the future.

Mr. ASHE. We—

Mr. BISHOP. Thank you, Mr. Director.

Mr. ASHE. Thank you.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Idaho, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman. I have been really confused by your answers to some questions. And you seem like a very nice person.

Mr. ASHE. Thank you, sir.

Mr. LABRADOR. You seem like somebody who wants to work with people. But yet you keep complaining about the way that your questions have been asked. And I guess when we are in a process, and maybe I don't understand this process as well, I am just in my second term here, but it seems to me that the committee has tried to work with your staff. Is that not correct?

Mr. ASHE. I think there is a better way for us to work.

Mr. LABRADOR. I understand that you think there is a better way. But they have called your staff, you have had meetings with the committee staff. Has your staff not had meetings with the committee staff?

Mr. ASHE. We have had meetings and we have had phone conversations.

Mr. LABRADOR. OK. And have you expressed to the committee, for example, you said that you would love to have an information-sharing arrangement. When you received this subpoena, and I am looking at it right here, it is four pages long, three of the four pages are specific requests, so not these broad allegations that you are making. Only one page is broad. Three pages are specific requests. Did you call the Chairman, or did you call the committee and say, "Hey, I can get you these documents, can you give me a little bit more time to get you all the additional documents?"

Mr. ASHE. I did not make the—

Mr. LABRADOR. Did somebody on your staff do that?

Mr. ASHE. I do not know. I will have to ask that question.

Mr. LABRADOR. So it seems to me that it is great to come here before a hearing and claim that you want to work with us, but then to make the kinds of allegations that the people on the other side and yourself have made, I don't see how this has to be the kind of exchange that you are describing, when they have been trying to work with you and your staff.

Mr. ASHE. That is a fair point, Congressman. I do appreciate that. Although I would say I was not called and told that I was about to get a subpoena. And so, I will bear my part of the responsibility. And I think we can have a better relationship—

Mr. LABRADOR. And I don't disagree with that. I just think that, subpoenas usually, in this committee, especially under this Chairman, have been a last resort. This Chairman has not, in my experience, started with a subpoena. He has ended, after a long, frustrating process.

I do have some specific questions. Recent wind-mapping studies show that Idaho has approximately 25,000 megawatts of wind generation potential, it is the 13th largest potential in the United States. At present, wind plants provide approximately 8 percent of the electric energy consumed in Idaho. The taking of migratory birds and eagles is obviously an issue that is important to my State.

Mr. Ashe, what standard do you use when deciding whether someone should be prosecuted for a bird crashing into a building, an airplane, or even a wind turbine?

Mr. ASHE. I think the general practice that we follow is, was the take avoidable? Were there best management practices available to the individual in minimizing or avoiding that take? Have we communicated the obligations under Federal law to the individual, so they understand what their obligations are?

Mr. LABRADOR. So, in 2012, the Fish and Wildlife Service issued an 85-page document intended to help mitigate the negative effects of wind turbines on wildlife. If a wind company follows the 2012 guidance document, even if the project was constructed prior to 2012, will the company be a lower priority for enforcement and prosecution under the Migratory Bird Treaty Act?

Mr. ASHE. If they followed the voluntary wind turbine guidelines, our commitment is that they will be a low priority for law enforcement.

Mr. LABRADOR. So you set out a series of standards based on what you think is appropriate, and then those are the people you are giving low priority to. Is that correct?

Mr. ASHE. Well, we set out a process that was jointly determined through the Wind Federal Advisory Committee process—

Mr. LABRADOR. And that is for the wind turbines. Has the Fish and Wildlife Service developed a similar guideline for the oil and gas industry to help mitigate any birds taken that are covered under the Migratory Treaty Act?

Mr. ASHE. We have. We have best management practices that were developed in cooperation with the industry about the operation of oil pits, oil reserve pits.

Mr. LABRADOR. OK. And how will a company know if it has sufficiently followed the applicable guidance documents to avoid prosecution?

Mr. ASHE. They are very clear. With regard to an open pit, oil waste pit, they are supposed to net the facility so birds won't land in it and be oiled and killed. And so, they are very explicit and very simple measures that the operator can take.

Mr. LABRADOR. All right, thank you. I have no further questions.

The CHAIRMAN. And the time of the gentleman had expired, the timing is everything. The Chair recognizes the gentleman from Colorado, Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman. Mr. Ashe, thank you for taking the time to be here. In your written testimony you did mention that the service's focus is on developing partnerships with industry and other stakeholders in order to be able to minimize the take of migratory birds. Could you describe a little bit? What role does that cooperation between the administration play with industry in terms of enforcing violations?

Mr. ASHE. With which industry, sir?

Mr. TIPTON. With industry.

Mr. ASHE. Oh, industry in general.

Mr. TIPTON. Yes.

Mr. ASHE. I mean that is the principal approach that we take. I just spoke about the oil and gas industry, I will use the electric utility industry, the transmission industry.

We worked with the industry to develop best management practices, again, a voluntary framework for best management practices to avoid collision, which is the principal source of mortality, and electrocution, which are the principal sources of mortality associated with that industry. So the industry itself worked to work with us to develop those voluntary measures. And the industry, by and large, is implementing those measures.

And so, then potentially we have available mitigation measures to apply to other uses, because we know not just how to avoid migratory bird take and eagle take in the context of building transmission corridors, but we know how to reduce the take, or eliminate the take, by retrofitting existing facilities.

Mr. TIPTON. Great. I appreciate that. It is interesting. I am pleased to be able to hear the comments that we need to be able to work a little more closely, and to be able to have some better communication going back, because we have had some complaints that we have been made aware of from a variety of different industries that, when they are trying to be able to comply with the law, that there seems to be a real disconnect, in terms of being able to find the direct answers that they need to make sure that they are truly complying and trying to be able to eliminate, as best possible, any taking of birds from any kind of activities that are going on.

I am a little curious, given that we have talked to different industries. Are you aware of that disconnect, that there is some frustration out there?

Mr. ASHE. I guess there is always some frustration, sometimes at a project level, for whatever reason. I am not aware, and when you say "industry," in general, that is a pretty general statement.

Mr. TIPTON. We have some of our oil and gas operators that are saying that there is a disconnect that is going on when they are trying to be able to do it, because—

Mr. ASHE. I would be happy—

Mr. TIPTON. I guess frustration, as you say, it is very clear, apparently, some of the people that are trying to be able to get information doesn't feel it is very clear.

Mr. ASHE. With regard to——

Mr. TIPTON. Are you taking some efforts to be able to reach out to them for clarity?

Mr. ASHE. I would be happy to meet with you, Congressman, to better understand that, and figure out what we can do to address it. And maybe, their concern may be not with the Migratory Bird Treaty Act, it might be with Endangered Species Act, or some other aspect of the work that we do. But I would be happy to meet with you and better understand that, to see if we can address the issue.

Mr. TIPTON. We will be happy to follow up on that, because when we are talking about some of the migratory bird end of it, we are still also then getting into the Endangered Species Act, obviously, as well, and we are seeing impacts not only on some of the public lands, but then the encroachment now, in terms of a taking, effectively regulating some of the private lands, as well, which is critical to the Western United States, that we need to be able to seek some good, positive moves forward on.

So, with that, I yield back, Mr. Chairman.

The CHAIRMAN. OK, the gentleman yields back. The Chair recognizes the gentleman from California, Mr. LaMalfa.

Mr. LAMALFA. Anyway, thank you. I come from northern California. Here we have many, many concerns in our forested areas, but also cover a lot of flood zones that I will address here in my questions and comments that we have.

In the valley, there has been a listing that is proposed to be delisted of the valley longhorn elderberry beetle in northern California that has had a very detrimental effect on the ability to execute and complete levee repairs, levee construction along the Sacramento River, or other river systems that really need a lot of help from the levee neglect over a lot of years.

We even, so far as to, some years ago, in Yuba County, a levee broke after having known for many years it needed repairs, but inability to get permits, hold-ups on things such as the elderberry beetle. The elderberry bushes that you would find in some of these areas make it very difficult to execute any kind of repairs, maintenance, or new construction, where you might have an elderberry bush. So it has made it very expensive, very slow, very cumbersome to have this listing of the beetle, because of the habitat of the bush.

And so, California lost a \$450 million lawsuit a few years ago, because the levee that had broken, three lives were lost, hundreds of millions of dollars worth of damage, the neglect by government cost State government money on that.

So what we are looking at here is that the flood risk is still there, levee work needs to be done desperately, and a lot has been spent to set aside, for example, 50,000 acres of habitat for the beetle that really should not be listed any more. In 2006, the scientists from Fish and Wildlife have proposed delisting the beetle. Two years the Wildlife Service itself has proposed the delisting, and it has been a year since the comment period has closed.

So, what I am asking for, Mr. Ashe, as well as two lawsuits currently are underway, or have been brought, to get the job done. When will the Service act on the recommendation of its own scientists, and also in response to the lawsuits that are pointing out that this, the valley longhorn elderberry beetle, should be removed from the endangered species list, and we move forward for all the projects that are needed, et cetera?

Mr. ASHE. I know that, sir, that we are working on the delisting rule for the elderberry beetle. I don't know the current status of it, but I can find that out quickly, and I can call you today with that information, in terms of the latest status. And I will do that today.

Mr. LAMALFA. Why do you think it has been held up as long as it has on making the rule, as you say?

Mr. ASHE. Our endangered species program, in general, is a deadline-driven program. We have many, many deadlines to meet, and——

Mr. LAMALFA. Going in which direction, listing or delisting?

Mr. ASHE. Both.

Mr. LAMALFA. The listing seems to move fairly quickly.

Mr. ASHE. Well, actually, I mean, we just delisted the first fish ever, due to recovery, the Oregon chub in the State of Oregon. And so we are, I think, working rapidly, as rapidly as we can on delisting. I think we can do more with delisting. And let me check on the status of that, and I will get back with you today, sir.

Mr. LAMALFA. And what can we do more to help that process, if you find that there is some additional hold-up——

Mr. ASHE. One thing is, the President's budget has increases in our budget for our conservation account, which is where we support recovery and delisting, and that is a high priority for the U.S. Fish and Wildlife Service——

Mr. LAMALFA. Well, focused on the areas where delisting has been pursued or requested, et cetera.

Mr. ASHE. What we call "move the needle." What we are trying to do is identify places where we can really move the needle and, with fairly small investment, get species off of the list. And there actually are some great opportunities to do that. Hopefully, elderberry beetle is one of those.

Mr. LAMALFA. OK. Well, I appreciate that. There has been a huge success——

Mr. ASHE. Right.

Mr. LAMALFA [continuing]. With the bald eagle, for example. We have them in my backyard. We have eight of them in the immediate area, either adults or juveniles there. So it has been pretty amazing to have that in rice country, where I live.

But now, if we could just move the ball a little bit on the beetle, because we have extremely important levee work that needs to be done, and I don't want to see us risking people unnecessarily, and losing lawsuits on, really, their responsibility to get it done. So I would appreciate those answers——

Mr. ASHE. Thank you, sir.

Mr. LAMALFA [continuing]. Work with you on that.

Mr. ASHE. Thank you.

Mr. LAMALFA. Thank you.

The CHAIRMAN. Director Ashe, thank you very much for being here. I do appreciate it. And, as I mentioned in my opening statement, there is a sense of frustration. I think you saw that come out.

You mentioned, I don't think you used this word, I will use it, and correct me if I am wrong, that you were somewhat blind-sided by the subpoena. At least you characterized it that way, that is the way I took it.

Mr. ASHE. I did.

The CHAIRMAN. For the record, I just wanted to say, now, maybe this didn't get to your level, but on February 14 we did send you a letter, and we did reiterate all of the requests we had, going way back to May, and so forth. The last sentence of that letter, this was on February 14, we asked for full compliance by February 25. And the last letter, the last sentence of that letter said, "Should the information not be provided by February 25, its production may be compelled."

So you have said many times that you are not a lawyer. I am not a lawyer, either. But I think we all know that when we say something is going to be compelled, that the natural extension of that is a subpoena. Now, maybe it didn't get to your level, and so I will acknowledge that. But your Department was told that on February 14.

Now, in line with that, in your willingness to work on a case-by-case basis, there is another issue that has been completed. It happens to be in my State, and it deals with the White Bluff bladderpod. Now, that is pretty specific. On March 7, we sent you information, or sent a request for how that final determination was made, and that determination was made in December, so it can't be too complex, just come from the timeline of it. And we asked for that information, like, last Friday.

Last Friday came and went, or came and gone, whatever the proper English is on that. And we did not receive the information. Now, Director Ashe, I was walking into this hearing. I was prepared to tell you that we will subpoena that information. But in view of your willingness to work with us on a case-by-case basis, and this is pretty specific, it is the White Bluff bladderpod, you know, it doesn't go much farther than that, I will tell you this. If we don't receive that information in a week, which would be April 2, then I will subpoena that.

So, I will just tell you, you don't have to respond, you have the copy of the letter, you know the issue, it deals with DNA, you know that issue. So if that information is not forthcoming by April 2, I will tell you right now, so you won't be blind-sided, we will subpoena for that information. I would hope that you would have a voluntary compliance with that.

So, Director Ashe, once again, sometimes, as you know, you used to work here, and sometimes Members have follow-up questions that something has prompted. That may happen. Obviously, we welcome your timely response to the committee, so that all committee members can have it.

So, I will yield to the gentleman.

Mr. DEFAZIO. Thank you, Mr. Chairman. Are you aware how many requests have been made by this committee to the Department of the Interior in this Congress?

Mr. ASHE. It is my understanding——

Mr. DEFAZIO. For production of documents?

Mr. ASHE. Congressman, there are 16 requests pending before the Department.

Mr. DEFAZIO. OK. So my understanding is there has been more than two dozen requests; apparently eight, perhaps, have been complied with.

Mr. ASHE. Yes.

Mr. DEFAZIO. Have you seen any prioritization? I have had numerous conversations with the Secretary, she is very frustrated and has expressed, as you have, she is willing to produce specific information for a specific objective, but the fishing expeditions she feels, are just sopping up too much time and energy, just as we discussed earlier——

Mr. ASHE. The Secretary has told me that on several occasions she has spoken with the Chairman and asked to work with the committee to identify the priorities for the committee so that we could do a better job of being responsive.

Mr. DEFAZIO. Right, yes. It is my understanding there has been no prioritization. So if you have 16 pending requests, it is hard to determine which should go first.

Let me be more specific on this memo we were discussing. The memo from Mr. Woody, internal guidance for addressing possible violations Migratory Bird Treaty Act by industrial and agricultural facilities. Guidance states, "Fish and Wildlife has long employed an unwritten policy of encouraging industry and agriculture to employ best practices aimed at minimizing and avoiding the un-permitted take of protected birds, service agents refer for prosecution those takes that occur after the responsible party becomes aware of the condition or practice causing the take and fails to remediate it." That is——

Mr. ASHE. That is our policy, and we follow that policy.

Mr. DEFAZIO. And you have done that with the oil industry?

Mr. ASHE. We have done that with the oil industry, we have done that with——

Mr. DEFAZIO. The gas industry?

Mr. ASHE [continuing]. With the gas industry.

Mr. DEFAZIO. And now with the wind industry.

Mr. ASHE. Now——

Mr. DEFAZIO. Now that you have developed guidance that is——

Mr. ASHE. Correct. Cell tower, the communications tower industry, the utilities industry, the buildings industry, all of the above. The commercial fishing industry.

Mr. DEFAZIO. OK. So, in the case that one Member just raised, I think it was the gentleman from Colorado, where they feel that it is unclear what they need to do, will you, I don't know exactly how your agency works, is it like OSHA, can you ask for someone to come out and look and give an advisory opinion without giving you a ticket? Will you do that, and say, "Well, you are complying," or, "You are not complying; please make these changes"?

Mr. ASHE. We do that quite often.

Mr. DEFAZIO. And you would be willing to do that——

Mr. ASHE. We would be willing to do that.

Mr. DEFAZIO [continuing]. For Colorado. That is great. So, if, of course, your people aren't tied down to their desks, answering subpoenas. Yes, OK, that would be good.

So, I am a bit puzzled. Are you going to engage in more aggressive enforcement now against the wind industry? It seems to me that is kind of the point of this hearing, or these requests, is that they feel it has been discriminatory, have been too tough on oil and gas, which is putting them at a competitive disadvantage, and we should get tougher on wind. That seems to be where the Majority is headed with this. They feel you have really cut some slack to wind that you haven't cut to oil and gas. Are you going to go out now and go after the wind industry more rigorously and say "We don't care you are trying; you are killing too many birds"?

Mr. ASHE. Our enforcement agents go, as I said, where the facts take them, and the evidence takes them. And if we see cause to bring prosecution against wind or solar operators, we will. If we see cause to bring action against a utility operator, we will. But our first approach is cooperation.

And I think, going back to the example of the oil and gas industry, we have seen tremendous cooperation within the oil and gas industry, and that is why we bring as few cases as we do, because there is widespread compliance within the oil and gas industry. And the wind industry has been a very good and communicative partner. There are instances where bird take in wind facilities is substantial, as in the Duke Energy case. But, as I had said, in that case Duke took responsible action. They brought the information to us, and they were engaged in the process of coming to resolution in discussions with the Department of Justice.

Mr. DEFAZIO. OK. So your actions are not going to change. You will continue to go for advice, voluntary compliance, and then negligence or knowing non-compliance will be the standard for prosecution.

Mr. ASHE. That is correct. Yes, sir.

Mr. DEFAZIO. Glad to hear that. Thank you, Mr. Chairman.

The CHAIRMAN. Reclaiming my time, I do want to say this in regards to the discussion here of taking so much time. I find it hard to believe that part of the budgeting process is such that you have to know that your agency has been sued. You must set money aside because you have to respond to the courts and so forth. So I find it hard to believe that you know that you are going to have requests all the time, and you should budget for that, and there should be a plan for that. I just find that hard to believe, that the only problem, the only entity you have a problem responding to is the Congress.

And yet, it is the Congress's responsibility to have oversight of the executive branch. That is a long-held tradition. In fact, when I became Chairman of this committee I said, I think in the first meeting I had, that we are going to do more oversight, and I said I think the committee has been negligent in that with administrations on both sides of the aisle. We haven't done that.

Mr. ASHE. May I?

The CHAIRMAN. Yes, you certainly can.

Mr. ASHE. And I appreciate that. And I guess I would say to you what I feel like is you are setting me up for failure. When you say, like with the White Bluffs bladderpod, if I can't comply in a week, then you are going to send me a subpoena. Well, you are setting me up for failure. And I guess I would say——

The CHAIRMAN. Well, Director Ashe——

Mr. ASHE [continuing]. Can we—I will come here, and I will assign a senior official in my agency to work with you and your staff to try to find a better way forward.

The CHAIRMAN. Well——

Mr. ASHE. But if you lay down a gauntlet for me that I can't comply with, then I am just going to disappoint you. I am going to continue to——

The CHAIRMAN. Director Ashe, reclaiming my time, I just simply want to say we sent a letter on March 4. There has been absolutely no correspondence whatsoever from——

Mr. ASHE. Sir——

The CHAIRMAN [continuing]. From Fish and Wildlife. None at all. So what conclusion am I going to draw?

And I will say it from this standpoint. This decision was made in December. For goodness sakes, the evidence ought to be pretty darn fresh. It can't be hidden someplace in an archive. This decision was made in December. I don't understand how that is so hard, because we are pretty specific.

I don't know how your system is set up, but press "bladderpod." There is not a whole lot. I would guess that everything dealing with bladderpod had to deal with the White Bluffs. But if you want to be specific, press "White Bluffs bladderpod." Everything should be there. I just want to know how that decision was made, because there is serious, serious, serious issues, as it relates to DNA. And you know that issue. I just want to know how that decision was made, that is all. And so, that is why I tell you. It shouldn't be hard to figure that out, in my view.

Mr. GOHMERT. Mr. Chairman? Just one more——

The CHAIRMAN. All right, I will yield to the gentleman from Texas.

Mr. GOHMERT [continuing]. Mentioned that he was being set up for failure. I couldn't help but think about the companies that have strict liability, when they never intend any harm, they follow the services directly of your Department, and then you go after them anyway. You talk about being set up for failure. You haven't felt a fraction of what you have put and your Department has put other people through. So I hope you will keep that in mind in the future.

I yield back.

The CHAIRMAN. So, Director Ashe, you can sense the frustration here. And I take my responsibility as a Member of Congress and as Chairman of this committee and on the Oversight Committee. And again, I will go back. We started this process last May. The first response we got was in September, and it was only 66 pages of information.

Now, Director Ashe, maybe you haven't been served as well as you should be by those, and I will let you draw that judgment. But I just want to say it. This is important. I think the American peo-

ple need to know. When we have questions, those questions come, generally, from our constituents, those people that we have the privilege to represent. I guess there is always going to be tension between the executive branch and the legislative branch.

Frankly, I will be very honest with you. I think that tension is good for the Republic, I really do. I think that is good. But, nevertheless, I think that we have the obligation to try to get all the information that we need.

Now, getting back to the bladderpod issue, again, that shouldn't be hard to get that information. So, with that, again, I thank you very much, and I will acknowledge that, as other Members have, that you have been open, trying to deal with us. You have a lot of responsibilities. But the information that we have asked for simply has not been forthcoming, I will just simply say that.

If there is no further business coming before the committee, the committee stands adjourned.

[Whereupon, at 11:36 a.m., the committee was adjourned.]

[Additional Material Submitted for the Record]

PREPARED STATEMENT OF THE HONORABLE KEVIN CRAMER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Mr. Chairman, thank you for holding this hearing.

While representing the people of the United States in Congress means important oversight of the Government agencies they create, it should also mean full cooperation of these agencies to ensure full and timely disclosure of requested documents and evidence. The U.S. Fish and Wildlife Service has repeatedly demonstrated a lack of both transparency and responsibility in their slow response to this committee's request for documents and in their excessive redaction of information in the small amount of documents they did provide.

Like many in North Dakota, I am concerned the Obama administration is being selective in determining which energy producers are investigated or prosecuted, and why, under the Migratory Bird Treaty Act and the Bald [MBTA] and Golden Eagle Protection Act [GEPA]. Previous to being elected to Congress I spent nearly 10 years as an energy regulator in North Dakota. I oversaw 1,500 megawatts of new wind development in a State that is the second leading producer of oil. The famous migratory bird case in North Dakota is very familiar to me. Fish and Wildlife Service agents scoured western North Dakota to find seven dead ducks, and then brought charges through the Justice Department against three oil companies. Fortunately a common sense Federal judge threw the case out, but not until the Government wasted thousands of dollars prosecuting lawful commercial activity by corporate citizens who had to spend thousands of dollars defending themselves against arbitrary and frivolous charges.

To contrast, a 2013 study suggested up to 573,000 birds are being taken each year by wind farms and a 2013 Fish and Wildlife Service study found at least 85 eagle mortalities at wind farms between 1997 and 2012 with only one enforcement case brought against a wind farm operator so far.

I hope to find answers today as to why a well-funded and well-staffed agency as demonstrated by their prosecution efforts in North Dakota cannot respond to a congressional committee's request for documents essential to their oversight responsibilities. Further, I hope to gain an understanding of the agency's policies and procedures for enforcing the MBTA and GEPA.

Thank you Mr. Chairman.

PREPARED STATEMENT OF THE AMERICAN WIND ENERGY ASSOCIATION

The American Wind Energy Association [AWEA] appreciates this opportunity to submit a statement regarding the wind energy industry's wildlife impacts, our strong history of cooperation with wildlife agencies, and our long history of proactively working to reduce and mitigate our modest impacts. AWEA is the national trade association representing a broad range of entities with a common inter-

est in encouraging the expansion and facilitation of wind energy resources in the United States, including wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, utilities, marketers, and customers.

Wind energy is becoming mainstream energy. In the last 5 years, wind energy has represented 31 percent of all newly installed capacity, second only to natural gas. There are more than 61,000 megawatts of wind energy installed in 39 States and Puerto Rico. These wind turbines provide electrical output equivalent to 53 average coal plants or 14 average nuclear plants.

This deployment of wind energy has contributed to over \$20 billion of investment in the United States annually, 550 manufacturing facilities in 44 States serving the industry, support for 80,000 U.S. jobs, \$400 million in annual property taxes nationally to support schools and other community needs, and lease payments to landowners of around \$120,000 per turbine over its lifetime to support family farms and ranches, with 95–98 percent of the land remaining available for its original use.

Wind energy is affordable. Due to growing innovation, wind energy's costs have fallen 40 percent over just the last 5 years, with both the Energy Information Administration and Lazard, a widely respected private economic consulting firm, finding that wind energy is one of the most affordable options for new electric generation, second only to a natural gas combined cycle plant. Further, contracted wind energy is guaranteed to remain affordable years into the future because it offers long-term fixed price contracts for 15–25 years, something not available for traditional energy sources due to volatile fuel costs. Wind energy offers a hedge against such volatility in the same way a 30 year mortgage protects homeowners from rising interest rates.

Wind energy is reliable. Wind energy produces more than 25 percent of the electric generation in Iowa and South Dakota, 12 percent or more in 9 States and 5 percent or more in 17 States. Even higher levels of wind energy have been integrated by grid operators in the lower plains and Texas, 33 percent and 35 percent, respectively. In Chairman Hastings' home State, wind energy provides nearly 6 percent of the electric generation and 10 percent in Ranking Member DeFazio's State. Grid operators in the upper Midwest and in Texas have confirmed that integrating large amounts of wind has led to limited impact on the need for reserve power.

All forms of energy production have some impact on wildlife and their habitats. Wind energy is no exception. However, wind energy's impacts are modest. Wind farms are responsible for the mortality of less than 200,000 birds per year based on currently installed capacity. This estimate is based on 109 post construction studies from 71 wind energy facilities. The National Academy of Sciences found that less than three in 100,000 (i.e., .0003 percent) human-caused bird fatalities are attributable to wind energy. By contrast, buildings, high tension lines, communications towers, vehicles and environmental toxins kill millions to hundreds of millions of birds per year.

With respect to eagles, eagle fatalities occur at only a very small number of facilities. Collisions with wind turbines are responsible for less than 2 percent of all reported human-caused golden eagle fatalities; and only a handful of bald eagle fatalities ever. Vastly greater levels of mortality are attributable to power lines, vehicle strikes, lead poisoning, drowning in water tanks, and illegal shootings, among others.

The wind energy industry does more to study our impacts, collaborate with wildlife agencies, make project adjustments to avoid or reduce impacts, and mitigate for those that are unavoidable than any other industry of which we are aware.

The wind energy industry began the National Wind Coordinating Collaborative with State and Federal wildlife agencies and conservation organizations in 1994. The NWCC focuses on wind and wildlife research and site evaluation tools. In 2003, the wind industry joined Bat Conservation International in founding the Bats and Wind Energy Cooperative, which also includes support from Federal agencies, to focus on research and mitigation to reduce impacts from wind energy to bats. Industry representatives participated for more than 3 years along with State wildlife officials, conservation organizations and scientists on a Federal advisory committee established under President George W. Bush that concluded by making by unanimous recommendations on wind turbine siting guidelines to then Secretary Salazar. And, in 2007, the wind energy industry and eight conservation organizations established the American Wind Wildlife Institute to focus on wind and wildlife research, mapping, mitigation and education.

The wind energy industry has widely embraced the Land-Based Wind Energy Guidelines finalized by the U.S. Fish and Wildlife Service in March 2012. These guidelines help ensure that the wind industry adheres to a higher standard for wildlife protection than other industries. The guidelines go beyond what is required by

Federal law through commitments to study and protect unlisted bat species and habitat for unlisted species. The 71 pages of detailed guidance provide recommendations on duration, scope and methodology of pre-construction and post-construction monitoring (depending onsite risk, but generally one year or more); best management practices for construction, operations and decommissioning; and recommendations on adaptive management, mitigation and research.

In April 2013, the Service finalized the Eagle Conservation Plan Guidance for Land-Based Wind Energy. This 118 page document also provides detailed recommendations for multiple years of pre-construction research and post-construction monitoring, calculating estimated impacts, and fully mitigating any impacts such that there is no net loss to regional eagle populations.

The eagle take permit program process is more onerous than the permit process under the Endangered Species Act, which covers species that are more imperiled than the Bald and Golden Eagle Protect Act. Congress authorized permits for take under the Bald and Golden Eagle Protect Act decades ago. The original draft permit program for non-purposeful take was proposed during the administration of President George W. Bush in 2007. The permit is available for any non-purposeful activity that could take eagles. It is not specific to wind energy.

Finally, with respect to law enforcement actions, the Service and the Department of Justice Office have said they focus their resources on investigating and prosecuting those who take migratory birds, including eagles, without identifying and implementing reasonable and effective measures to avoid the take. With respect to prioritizing these enforcement efforts, both the Service and the Department of Justice have stated that they consider a company's level of cooperation and communication with the Service, as well as other agencies, as appropriate means of identifying and implementing reasonable and effective measures to avoid the take of species. Wind energy project developers talk to State and Federal wildlife officials as they're developing a project. They study the potential for wildlife impacts for a year or more before deciding whether to continue pursuing a project. They discuss the results of the studies with wildlife officials. If wildlife officials make recommendations, the developer will to the maximum extent practicable implement those recommendations, and maintain internal records sufficient to document responses to communications from officials. And, if issues arise after a project is built, the project owner and operator will provide the information to the Service and discuss ways to address the issue. Given this level of engagement, transparency, and effort to reduce and mitigate impacts on migratory birds, the wind energy industry has not been a high enforcement priority in the past and should not be one in the future.

Wind energy is an important part of a diverse energy portfolio. The industry takes our wildlife responsibilities seriously and will continue to strive to reduce our modest impacts, including through collaboration and cooperation with the Service, State wildlife agencies, and other stakeholders.

