U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

October 14, 2014

The Honorable Sally Jewell
Secretary
U.S. Department of the Interior
1951 Constitution Avenue, NW
Washington, DC 20240

Dear Secretary Jewell:

Thank you for your letter dated September 9, 2014 concerning the Committee on Natural Resource's ("Committee") oversight of the Department of the Interior ("DOI" or "Department"). As you know, is it my firm view that Congress has not always fulfilled its constitutional duty to conduct oversight of the Executive Branch and that one of my top priorities, first, as Ranking Member and, now, as Chairman, has been to reinvigorate the Committee's oversight function.

Courts have long recognized the authority of Congress to conduct oversight of the Executive Branch in connection with its constitutional authority to legislate, among other duties. "We are of opinion that the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function," the Supreme Court opined in 1927 in a case involving a Congressional investigation into the Department's Teapot Dome scandal. "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."[1]

As I stated in January, when the Committee voted to authorize me as Chairman to issue subpoenas in connection with certain oversight investigations, "Congress has a responsibility to the American people to hold the White House and the Executive Branch departments and agencies accountable, and to ask fair and thoughtful questions about their actions and decisions."

[1] McGrain v. Daugherty, 273 U.S. 135, 174-175 (1927).

Your letter, released the evening before the Committee's oversight hearing on September 10, 2014 with the Department's Solicitor, Hilary Tompkins, and the Director of the Fish and Wildlife Service, Dan Ashe, provides an incomplete picture of the Department's responses to the Committee's oversight requests. As that hearing made clear, the Department's efforts have fallen far short of its obligation to cooperate with Congressional oversight, needlessly increased the cost and delays for responding, and undermined the Obama Administration's pledge to be the most transparent in history.

Department's Review and Redaction Process Contributes to Cost and Burden

As I explained at last month's hearing, the Department should not consider its obligation to keep Congress and the American public informed about how it is implementing the laws authored by Congress or spending taxpayer money to be either a burden or a distraction. However, your letter states the Department has had to divert staff "from their regular duties carrying out the mission and important day-to-day operation of the Department and its bureaus." Keeping Congress and the public informed about Department activities is an important part of the Department's mission and it should not be marginalized, especially considering the considerable resources the Department has to manage these responsibilities.

In fact, the Department already receives significant appropriations from Congress and has several offices dedicated to responding to correspondence, oversight requests from Congress, and Freedom of Information Act ("FOIA") requests made by the public. For example, in FY 2014 the Department's Office of Congressional and Legislative Affairs and the Office of Executive Secretariat and Regulatory Affairs had combined budgets of more than $6.1 million and 44 full-time equivalent employees responsible for responding to Congressional and public requests for information, among other duties. The Office of Executive Secretariat, for example, handled "23 tribal trust projects, and 23 Congressional document productions for a total of 471,569 pages" and "managed over 8,761 pieces of controlled correspondence, an estimated 551,524 petitions, and over 762,396 e-mails" in 2013.[2]

In addition, the Department spent more than $12 million and 280,000 staff hours responding to more than 6,300 FOIA requests in fiscal year 2013.[3] The Secretary's Office alone spent more than $851,000 and 21,800 staff hours responding to more than 430 FOIA requests in fiscal year 2013, while the Fish and Wildlife Service spent more than $1.6 million and 54,700 staff hours responding to 1,242 FOIA requests and the Bureau of Land Management spent more than $2.8 million and 60,700 staff hours responding to 939 FOIA requests during the same time.[4]

Compared to the thousands of regulatory, policy, and permitting decisions made by the Department and the thousands of FOIA requests for information that the Department responds to each year, the Committee's oversight has been extremely limited and focused. As your letter acknowledges, the Committee has sought documents and information on only 16 topics in the

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[2] FY 2015 Department of the Interior Budget Justification, Office of the Secretary, at 52; available at: http://www.doi.gov/budget/upload/FY2015_OS_Grennbook.pdf.
[3] Department of the Interior, Freedom of Information Act 2013 Annual Report, at 7; available at: http://www.doi.gov/foia/upload/13anrep.pdf.
[4] *Id.* at 7 and 25.

past year and a half. Your letter also states that since January 2013 the Department has spent approximately $2 million and 34,000 staff hours to provide the Committee more than 60,000 pages on 16 distinct topics. However, about 15,000 of these pages were duplicates of what the Department has already collected and released to the public under FOIA.

There should have been no additional cost or burden associated with providing unredacted copies of these FOIA documents to the Committee. Unfortunately, that did not happen. As the recent hearing with Director Ashe and Solicitor Tompkins demonstrated, the Department has been wasting time and taxpayer money by going back over these already redacted FOIA documents to censor even more information and in some cases to black out entire pages from the Committee, even though these documents were already released to the public under FOIA. To put the Department's purported costs into context, it appears the Department is spending about $33 and 34 minutes of staff time for each page it has produced to the Committee. If the Department were truly committed to increasing transparency, minimizing burdens and costs, and cooperating with Congress, then it would spend less time undertaking the costly and laborious process of censoring documents already in the public domain and instead provide the Committee with unredacted documents in a timely manner when they are requested. The burdens and costs identified in your recent letter could have been avoided and are the direct fault of the Department.

Director Ashe Remains in Violation of the Committee's Subpoena

Your letter also highlights recent efforts to obtain information about the Department's enforcement of the Migratory Bird Treaty Act ("MBTA") and Bald and Golden Eagle Protection Act ("BGEPA"). However, as you may know, the Committee first requested information on this topic in May 2013. A month later the Service informed Committee staff that the requested documents were being collected from its field offices and Office of Law Enforcement without any apparent concern for burden or about the scope of the request. Committee staff offered to address any concerns the Service or the Department of Justice may have had about providing information on pending investigations and enforcement cases, but the Service did not follow up on this offer and no such concerns were raised at the time.

The requested documents, however, were not forthcoming. For example, more than six months passed before the Service released a copy of a two-page policy memorandum that had been issued by the Chief of the FWS' Office of Law Enforcement in 2012. This memorandum, which had already been released to the wind energy industry the year before, was directly responsive to the Committee's oversight inquiry but was only provided in December 2013 before a meeting between Committee staff and the Chief of the Office of Law Enforcement. In addition, of the 1,146 pages provided on this topic in 2013, all but 68 pages were duplicate copies of documents that the Service had already released to the public under FOIA, including documents containing significant redactions made pursuant to various FOIA exemptions.

It is unfortunate that such a step was necessary, but the Service's pattern of slow-rolling the Committee's request for almost 10 months prompted the issuance of a subpoena in March 2014. The subpoena focused and prioritized the May 2013 request in several ways. For instance, the subpoena sought unredacted copies of 55 individual documents that had previously

been provided to the Committee in redacted form. Fifty of these redacted documents were from the December 2013 production consisting of materials that had also been released to the public under FOIA. In addition, the subpoena sought documents about the development of specific policies and regulations from only 14 senior officials, as opposed to all MBTA and BGEPA enforcement policies, guidance, and legal analysis from all Department staff as the original request had sought. It also limited the request to information only about closed enforcement cases, not all records about both closed investigations and pending cases still being investigated.

Your letter also reiterates concerns first articulated by Director Ashe at a March 26, 2014 oversight hearing that the FWS has been forced to divert Office of Law Enforcement agents from the field in order to respond to the Committee's subpoena. In fact, a week before that March hearing, Committee staff confirmed to Department officials that the subpoena was seeking a subset of what was previously requested. Committee staff also questioned whether documents had in fact been collected in 2013. The Department official told Committee staff that an "exhaustive and timely search [] was performed when the Department received the original document request" but that it was "not sufficient to comply with the subpoena." Had the Department and FWS in fact searched for and collected all documents responsive to the May 2013 request, as it had repeatedly led Committee staff to believe had occurred, then there should have been no additional burden to respond to the Committee's subpoena.

These complaints seem to be manufactured to distract from the Service's failure to fully comply with the Committee's subpoena, let alone its woeful record of responding to the original May 2013 document request. As was explained to Director Ashe and FWS and Department staff after the March hearing, the burden claims being made now seem disingenuous and designed to create a false narrative given the fact that the Service failed to raise any questions or objections about the scope of the original request, that Service staff repeatedly asserted that documents were being collected last year in response to the original request, and how the subpoena issued in March clarified and narrowed the original document request.

In a good faith attempt to address concerns that the Service raised at the March hearing about providing documents about the closed enforcement cases, the Committee agreed, as an accommodation, to receive copies of executive summaries for any reports of investigation involving potential violations of the MBTA and BGEPA by the energy industry. However, any suggestion that the FWS has had to divert critical law enforcement agents from the field to provide unredacted copies of the 55 specific documents covered by the subpoena or documents from the 14 senior officials about the development of regulations and guidance documents defies logic. In the six months since the subpoena was issued, the Service has still not fully complied. The Service continues to withhold 10 of the documents specified in the subpoena as well as an untold number of other documents that are critical to understanding how the MBTA and BGEPA are being enforced.

Bladderpod Investigation Raises Questions about Peer Reviewer Independence

Your letter also discusses the Committee's oversight and subpoena for documents related to the FWS's December 2013 listing of the White Bluffs bladderpod as a threatened species under the Endangered Species Act ("ESA"). Although the Service purports to have completed

its response to the April subpoena for documents, it continues to withhold communications with the Center for Biological Diversity that discuss the White Bluffs bladderpod. The Service has claimed that such communications are protected from public disclosure, due to confidentiality rules for court-ordered mediation programs. However, Director Ashe has not provided a log of the withheld documents or any explanation of how each communication was part of the mediation process, as required under the instructions for the subpoena.

This inquiry has identified significant concerns and a lack of independence with how the Service conducts peer reviews under the ESA. FWS policy requires it to "incorporate independent peer review" when engaged in listing decisions by "solicit[ing] the expert opinions of three appropriate and independent specialists." Additionally, the Service's guidelines on scientific integrity and data quality require all information disseminated by the Service to be objective – meaning presented "accurately, clearly, and completely, and in an unbiased manner." However, the peer reviews conducted for this listing fell short of these basic requirements. It is troubling that the Service is making such important policy decisions, in response to arbitrary litigation deadlines, without full transparency and independent science.

Given questions about the peer review process, I requested that three FWS state office employees involved in recruiting and advising the peer reviewers be made available for interviews with Committee staff. Director Ashe refused. Instead, the former Director of the state office was allowed to speak with Committee staff. He told Committee staff that a DNA report provided by a local county as part of its comment on the proposed listing was "dead on arrival" and that he sought out peer reviewers who would support his view. This official is now the Assistant Regional Director for Science Applications in the Sacramento regional office. At the recent hearing, Director Ashe was asked about the peer review process for other listings and said the Service does not screen out peer reviewers based on their affiliations, which appears to contradict the FWS policies that peer reviewers be "appropriate and independent." The Committee will continue to focus its oversight on the use of peer review in the coming months.

Committee's Investigation into Ethics Program Highlights Recusal Problems

Finally, your September 9 letter acknowledges the Committee's longstanding oversight investigation into the Department's ethics program. Also on September 9, and in advance of the hearing with Solicitor Tompkins and Director Ashe, a Committee Majority staff report was issued detailing problems with how the Department identifies potential conflicts and develops and implements recusals for senior political appointees. For example, the Director of the Department's Ethics Office told Committee staff in an interview that she received direction from Solicitor Tompkins not to provide advice directly to political appointees without first clearing the advice with her immediate supervisor or a political appointee on the Solicitor's staff. It appears that this contributed to delays in responding to a request for ethics advice and in directing former Counselor to the Secretary Steve Black to recuse himself from matters involving NextEra Energy due to a romantic relationship he was having with a lobbyist for the company.

According to the staff report, Mr. Black informed the Ethics Office about the relationship and sought ethics advice in late September 2011 after he had had dinner and received a follow-up email from a NextEra official discussing transferring his girlfriend to the company's office in

Washington, D.C. At the same time, Mr. Black was touting a NextEra project to the White House as part of an effort to fast track environmental reviews for high-priority infrastructure projects. Apparently Mr. Black was first told he did not need to recuse himself before the Ethics Office reversed course and determined in March 2012 that his relationship raised a question of his impartiality warranting his recusal. Mr. Black's deputy, Janea Scott, was also advised to recuse herself around the same time due to a personal relationship with the same lobbyist that spanned several years and included at least one vacation together. At the hearing, Ms. Tompkins testified that she was informed about Mr. Black's relationship with the lobbyist in September 2011 and agreed with the timing and process for how the recusal was handled.

A significant number of the documents provided by the Department on this matter were copies of financial disclosure forms that are required to be made publicly available upon request under federal ethics law. As described in the staff report, a review of the financial disclosure forms by Committee Majority oversight staff identified several officials with real or potential conflicts that would warrant recusals; however, no such documentation had been provided to confirm these officials did recuse themselves in accordance with federal ethics laws.

A follow-up letter was sent to you on August 5, 2014 requesting clarification about the missing recusals for 25 named officials and copies of any recently filed financial disclosures and recusal documents. Your staff sent a separate letter, also dated September 9, 2014, that provided copies of Obama Administration ethics pledges for 25 senior political appointees and an additional 447 pages of financial disclosure forms. However, the Department's response did not address whether written recusals for these 25 officials were ever issued and, if so, why they have not already been provided to the Committee.

At the hearing, Ms. Tompkins was asked about the Department's incomplete response to my August 5 letter raising concerns about the missing recusal documents and was reminded that "we expect to get the recusal documents" on Rebecca Wodder, Michael Bean, and Michael Bromwich. On October 9, your staff sent a follow-up letter that included copies of recusals for you concerning your involvement with the National Parks Conservation Association and copies of your financial disclosure forms. The letter also provided copies of additional ethics pledges for political appointees, including for Ms. Wodder, Mr. Bean, and Mr. Bromwich, as well as additional financial disclosure forms for these officials. Although the letter included copies of emails discussing Ms. Wodder's known conflict of interest involving her former employer, American Rivers, the document production did not include copies of any written recusals for Ms. Wodder, Mr. Bean, or Mr. Bromwich.

My letter dated August 5 sought confirmation about whether the 25 named officials had issued, created, or received an ethics agreement, recusal, screening arrangement, ethics pledge, or waiver and, if so, requested copies of those documents. Despite the documents provided by your staff on October 9, the Department has still not confirmed whether these 25 officials ever issued written recusals, received ethics waivers, or otherwise documented how they were complying with the ethics laws, beyond filing financial disclosure forms or signing generic ethics pledges required for all Obama Administration officials. The Department's October 9 letter mistakenly suggests that the Committee's oversight interest was narrowed at the September 10 hearing to cover only recusals for Ms. Wodder, Mr. Bean, and Mr. Bromwich. To be clear, the

Committee is seeking a complete and timely response for all of the officials named in the August 5 request.

Without question Department officials should be conducting their jobs managing federal resources in accordance with the highest of ethical standards. Congress and the American people should expect the utmost transparency from the Administration on this topic. Given the importance of these issues, the incomplete responses by Department staff to date, and the ethics concerns documented in the recent staff report, it appears that your personal attention may be necessary to ensure a timely and complete response to the outstanding request for the any missing ethics documents.

Department's Conduct Shows Willful Disregard of Oversight Responsibilities

This letter provides but a few examples of where the Department has fallen short of its obligation to cooperate with the Committee's oversight requests – from defying duly authorized and issued subpoenas to redacting documents already disclosed under FOIA to not providing timely and complete responses to questions about how conflicts of interest and recusals are being addressed for senior political appointees.

In closing, as a co-equal branch of government, Congress has a constitutional duty to conduct vigorous oversight of Executive Branch programs, to ensure that the laws are being faithfully executed, and to identify and stop fraud, waste, and abuse from being perpetrated. Hopefully you will find this letter informative, as it demonstrates a track record of conducting such oversight in a thoughtful and deliberate manner that protects the prerogatives of Congress and the American public.

Sincerely,

Doc Hastings
Chairman