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

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DAVID WATKINS
DEMOCRATIC STAFF DIRECTOR

April 2, 2015

The Honorable Dan Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street NW
Washington, DC 20240

Dear Director Ashe:

At the joint hearing before the Subcommittees on Water, Power, and Oceans and Federal Lands held on March 19, 2015, you confirmed that the Fish and Wildlife Service (“FWS”) has not consulted with the Environmental Protection Agency (“EPA”) on whether two major forthcoming EPA Clean Air Act rules¹ may affect any species or critical habitat listed under the Endangered Species Act (“ESA”).

While the ESA and its implementing regulations require EPA to initiate consultation procedures if it determines that its promulgation of new rules under the Clean Air Act may affect a listed species or designated critical habitat, the responsibility and authority to initiate Section 7 consultation is not vested solely with the EPA. Your agency is charged with meeting the vast majority of the Secretary’s obligations to conserve endangered and threatened species under the ESA. Your own consultation regulations provide that you, as the Director of the FWS, may “request a Federal agency to enter into consultation if [you] identif[y] any action of that agency that may affect listed species or critical habitat and for which there has been no consultation.”² It is therefore well within your authority to request that the EPA consult with the FWS on the impact of the EPA’s proposed rules on listed species or habitat.

¹ *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34830, 34933 (June 18, 2014), Docket ID: EPA-HQ-OAR-2013-0602 (“Clean Power Plan”); *Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 1430 (January 8, 2014), Docket ID No. EPA-HQ-OAR-2013-0495 (“GHG NSPS”).

² 50 C.F.R. § 402.14(a)

ESA regulations task each Federal agency with “review[ing] its actions at the earliest possible time to determine whether any action *may affect* listed species or critical habitat.”³ According to the Fish and Wildlife Service’s Endangered Species Consultation Handbook, which is intended to guide Federal agencies through ESA consultation requirements, a “may affect” determination should be made “when a proposed action may pose **any** effects on listed species or designated critical habitat.”⁴

At the March 19 hearing, you stated that “it’s quite obvious that the discharge from [the Big Bend Power Station] is having a direct and substantial impact on the manatee.” The generation facility in question, the Big Bend Power Station, is even designated as a primary warm-water refuge for the endangered manatee.⁵

In light of your acknowledgement that the Big Bend Power Station has a direct and substantial effect on the manatee, it is troubling that neither the EPA nor the FWS has initiated consultation. According to an official with Tampa Electric, the operator of Big Bend, EPA’s proposed rule may result in “one or more units” at the Big Bend Power Station being closed by 2025, 10 to 25 years ahead of schedule.⁶

Please answer the following questions regarding the failure of the FWS and the EPA to enter into ESA consultation on the effects of EPA’s new Clean Air Act rules. Please send your response close of business April 10, 2015.

1. The EPA found that the Clean Power Plan proposed rule did not trigger ESA consultation requirements under section 7(a)(2) in part because “the projected environmental effects of this proposal are positive: reductions in overall GHG emissions, and reductions in PM and ozone precursor emissions (SOX and NOX).”⁷ In your view, should these effects that EPA describes as “positive” be considered “beneficial effects” or as having “no effect” for the purposes of EPA reviewing its proposed regulation in accordance with section 7? Please explain your answer.
2. The EPA also compared the effects of its proposed Clean Power Plan rule on endangered species to the effects of another regulation for which it concluded that “any potential for a specific impact on listed species in their habitats associated with these very small changes

³ *Id.* (emphasis added).

⁴ U.S. Fish and Wildlife Service, Endangered Species Conservation Handbook, p. xvi (emphasis in original).

⁵ The Fish and Wildlife Service and the Florida Fish and Wildlife Conservation Commission have both concluded that protecting warm-water refuges are necessary for the conservation of the manatee. See U.S. Fish and Wildlife Service, Florida Manatee Recovery Plan, *available at* <http://www.fws.gov/northflorida/manatee/Documents/Recovery%20Plan/MRP-start.pdf>; Florida Fish and Wildlife Conservation Commission, Florida Manatee Management Plan, *available at* http://www.eswr.com/docs/latest/manateeplan_fwc.pdf.

⁶ <http://www.miamiherald.com/news/nation-world/national/article15397277.html>

⁷ Clean Power Plan, 79 Fed. Reg. 34830, 34933.

in average global temperature and ocean pH is too remote to trigger the threshold for ESA section 7(a)(2).”⁸ EPA states that the same conclusions apply to the Clean Power Plan rule.⁹ In your view, should effects that EPA describes as “very small changes” and/or “remote” be considered as “insignificant” and/or “discountable” or as having “no effect” for the purposes of EPA reviewing its proposed regulation in accordance with section 7? Please explain your answer.

3. Is it your view that and a change in or elimination of the cooling water discharges from the Big Bend Power Station would have an effect on manatees? Please explain your answer.
4. Should the EPA consult with the FWS prior to taking any action that might cause the retirement of the Big Bend Power Station, or otherwise affect the station’s ability to provide a warm-water refuge for the manatee? Please explain your answer.
5. Do you intend to request EPA to enter into consultation over either of these proposed regulations? If not, please explain why.

Enclosed with this letter are instructions and definitions for responding to this request. Please have your staff contact Rob Gordon or Michael Freeman with the House Natural Resources Committee at 202-225-2761 with any questions. Your prompt and full cooperation is expected in this important matter.

Sincerely,



Rob Bishop
Chairman
Committee on Natural Resources

cc: Raúl Grijalva, Ranking Member, Committee on Natural Resources

⁸ *Id.* at 34934

⁹ *Id.*

Responding to Committee Document Requests

A. Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, recorded notes, letters, notices, confirmations, receipts, checks, envelopes, presentations, pamphlets, brochures, interoffice and intra office communications, electronic mails (e-mails), notations of any type of conversation, telephone call, voice mail, phone mail, meeting or other communication, diaries, analyses, summaries, messages, correspondence, circulars, opinions, work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and electronic, mechanical, and electric records or representations of any kind, and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, discussions, releases, personal delivery, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this document request. The singular includes the plural. The masculine includes the feminine.
4. As used herein, “referring” or “relating” means and includes “constituting,” “pertaining,” “evidencing,” “reflecting,” “describing,” or “having anything to do with,” and in each instance, directly or indirectly. These terms mean, without limitation, any reference or relationship which either (a) provides information with respect to the subject of the inquiry, or (b) might lead to individuals who, or documents which, might possess or contain information with respect to the subject of the inquiry.

B. Instructions

1. In complying with this document request, you are required to produce all responsive documents, materials, or items that are in your possession, custody, or control, whether held by you or your past or present agents, employers, employees, representatives, subsidiaries, affiliates, divisions, partnerships, and departments acting on your behalf. You are also required to produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. No records, documents, data or information called for by this request shall be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization, or individual denoted in this document request has been, or is also known by any other name than that herein denoted, the document request shall be read also to include them under that alternative identification.
3. Each document produced shall be produced in a form that renders that document capable of being printed or copied.
4. Documents produced in response to this document request shall be produced together with copies of file labels, dividers, envelopes, or identifying markers with which they were associated when this document request was served. Documents produced to this document request shall also identify to which paragraph from the document request such documents are responsive. Moreover, please include with your response, an index identifying each record and label (preferably by bates stamping) the documents. The Committee prefers, if possible, to receive all documents in electronic format.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses documents that are non-identical or identical copies of the same document.
6. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer back-up tape), state the form in which it is available and provide sufficient detail to allow the information to be copied to a readable format. If the information requested is stored in a computer, indicate whether you have an existing program that will print the records in a readable form.
7. If compliance with the document request cannot be made in full, compliance shall be made to the extent possible and shall include a written explanation of why full compliance is not possible.
8. In the event that a document is withheld, in whole or in part, based on a claim of privilege, provide the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter of the document; (d) the date, author, and any recipients; and (e) the relationship of the author and recipients to each other. Claims of privileges are considered under Committee on Natural Resources Rule 4(h) and, similar to all common-law privileges, are recognized only at the discretion of the Committee.
9. If any document responsive to this document request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.
10. If a date or other descriptive detail set forth in this document request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

11. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon location or discovery subsequent thereto.

12. Production materials should be delivered to:

Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington D.C. 20515