Committee on Natural Resources
U.S. House of Representatives
Chairman Doc Hastings

Committee on Natural Resources
Oversight Hearing
September 10, 2014

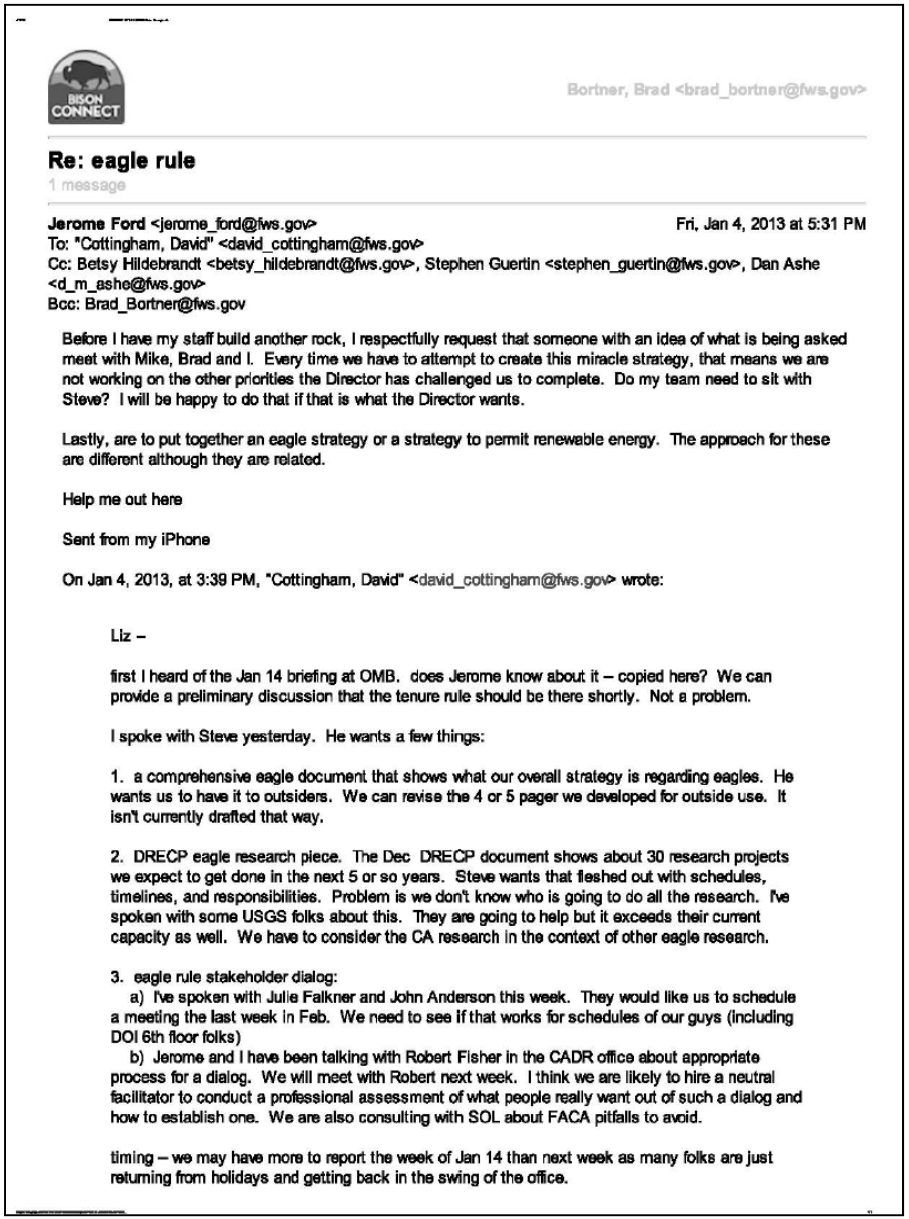
"The Status of the Fish and Wildlife Service's Responses to Committee Subpoenas and the Continued Lack of Transparency about Its Implementation and Enforcement of American Wildlife Laws, and Oversight of the Department of the Interior's Solicitor's Office."

Overview of Subpoena Compliance

- FWS has provided 45 of the 55 specified documents listed in subpoena. Continues to withhold 10 specific documents.
- FWS has provided **redacted** copies of documents in violation of subpoena, including DOJ and OMB comments on draft eagle take rule and wind energy guidelines.
- FWS provided documents in December 2013 that were duplicates of what had been provided to the Associated Press under FOIA.
- **In response to March 2014 subpoena, FWS went back and blacked out emails and documents that had already been provided as part of FOIA documents.**
- **FWS has also provided FOIA requesters documents that have never been provided to Committee – even in response to subpoena.**
- **Why is the FWS spending so much time and wasting so much taxpayer money to withhold documents from the Committee when the same documents were already released under FOIA?**

Exhibit 1

FWS provided this unredacted document in December 2013 to Associated Press and Committee.



Bortner, Brad <brad_bortner@fws.gov>

Re: eagle rule

1 message

Jerome Ford <jerome_ford@fws.gov> Fri, Jan 4, 2013 at 5:31 PM
To: "Cottingham, David" <david_cottingham@fws.gov>
Cc: Betsy Hildebrandt <betsy_hildebrandt@fws.gov>, Stephen Guertin <stephen_guertin@fws.gov>, Dan Ashe <d_m_ashe@fws.gov>
Bcc: Brad_Bortner@fws.gov

Before I have my staff build another rock, I respectfully request that someone with an idea of what is being asked meet with Mike, Brad and I. Every time we have to attempt to create this miracle strategy, that means we are not working on the other priorities the Director has challenged us to complete. Do my team need to sit with Steve? I will be happy to do that if that is what the Director wants.

Lastly, are to put together an eagle strategy or a strategy to permit renewable energy. The approach for these are different although they are related.

Help me out here

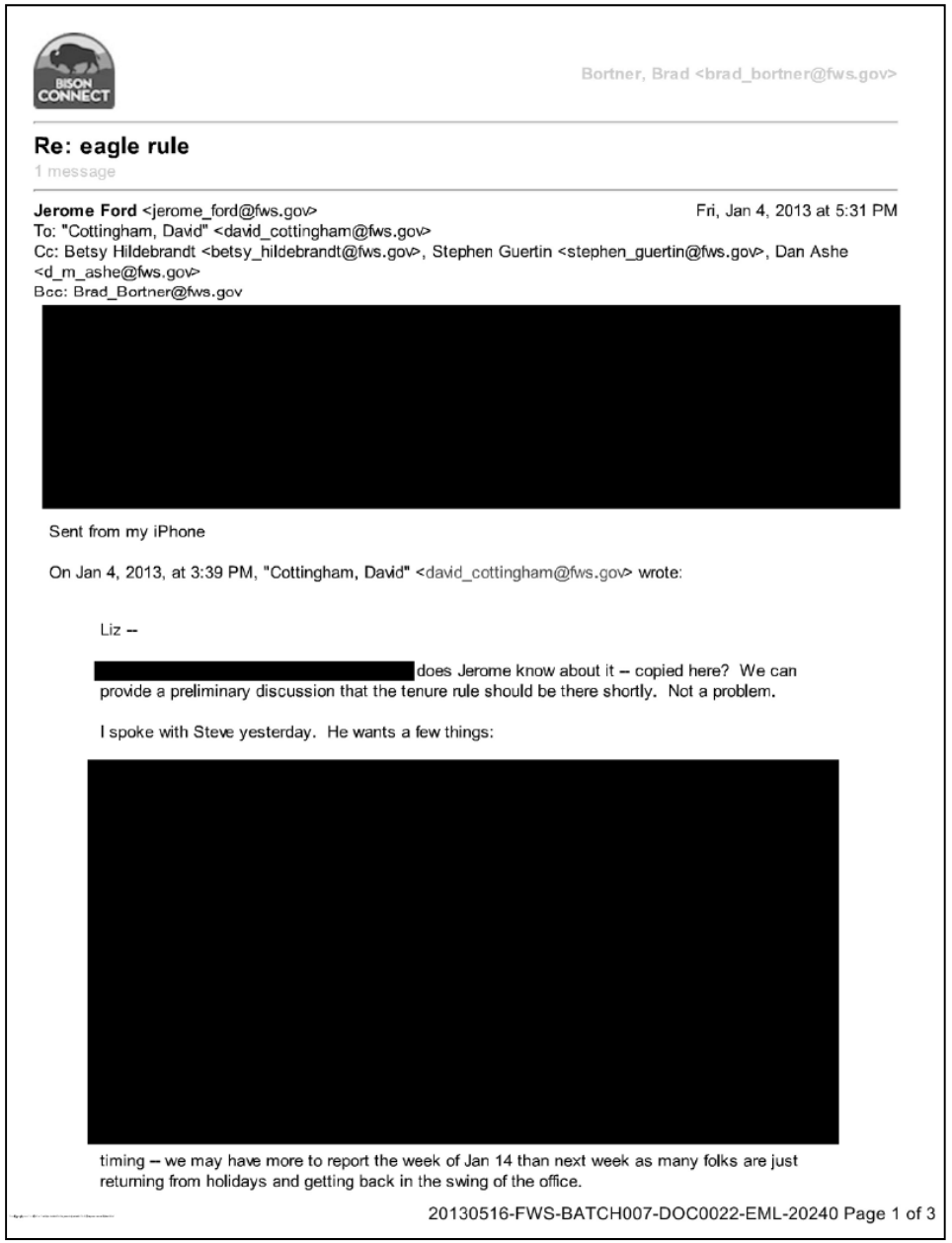
Sent from my iPhone

On Jan 4, 2013, at 3:39 PM, "Cottingham, David" <david_cottingham@fws.gov> wrote:

> Liz –
>
> first I heard of the Jan 14 briefing at OMB. does Jerome know about it – copied here? We can provide a preliminary discussion that the tenure rule should be there shortly. Not a problem.
>
> I spoke with Steve yesterday. He wants a few things:
>
> 1. a comprehensive eagle document that shows what our overall strategy is regarding eagles. He wants us to have it to outsiders. We can revise the 4 or 5 pager we developed for outside use. It isn't currently drafted that way.
>
> 2. DRECP eagle research piece. The Dec DRECP document shows about 30 research projects we expect to get done in the next 5 or so years. Steve wants that fleshed out with schedules, timelines, and responsibilities. Problem is we don't know who is going to do all the research. I've spoken with some USGS folks about this. They are going to help but it exceeds their current capacity as well. We have to consider the CA research in the context of other eagle research.
>
> 3. eagle rule stakeholder dialog:
> a) I've spoken with Julie Falkner and John Anderson this week. They would like us to schedule a meeting the last week in Feb. We need to see if that works for schedules of our guys (including DOI 6th floor folks)
> b) Jerome and I have been talking with Robert Fisher in the CADR office about appropriate process for a dialog. We will meet with Robert next week. I think we are likely to hire a neutral facilitator to conduct a professional assessment of what people really want out of such a dialog and how to establish one. We are also consulting with SOL about FACA pitfalls to avoid.
>
> timing – we may have more to report the week of Jan 14 than next week as many folks are just returning from holidays and getting back in the swing of the office.

Exhibit 2

Service provided REDACTED version of same document in June 2014 – three months after subpoena was issued.



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[redacted]

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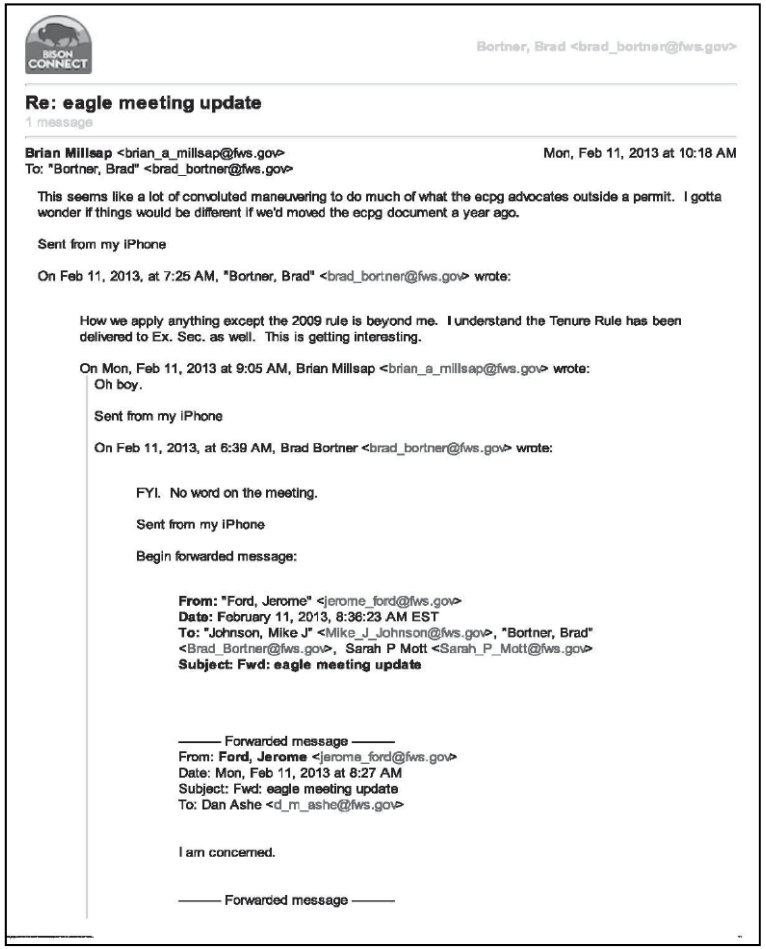
I spoke with Steve yesterday. He wants a few things:

[redacted]

timing -- we may have more to report the week of Jan 14 than next week as many folks are just returning from holidays and getting back in the swing of the office.

Exhibit 3

Unredacted document provided in December 2013 to AP and Committee



Bortner, Brad <brad_bortner@fws.gov>

Re: eagle meeting update

1 message

Brian Millsap <brian_a_millsap@fws.gov> Mon, Feb 11, 2013 at 10:18 AM
To: "Bortner, Brad" <brad_bortner@fws.gov>

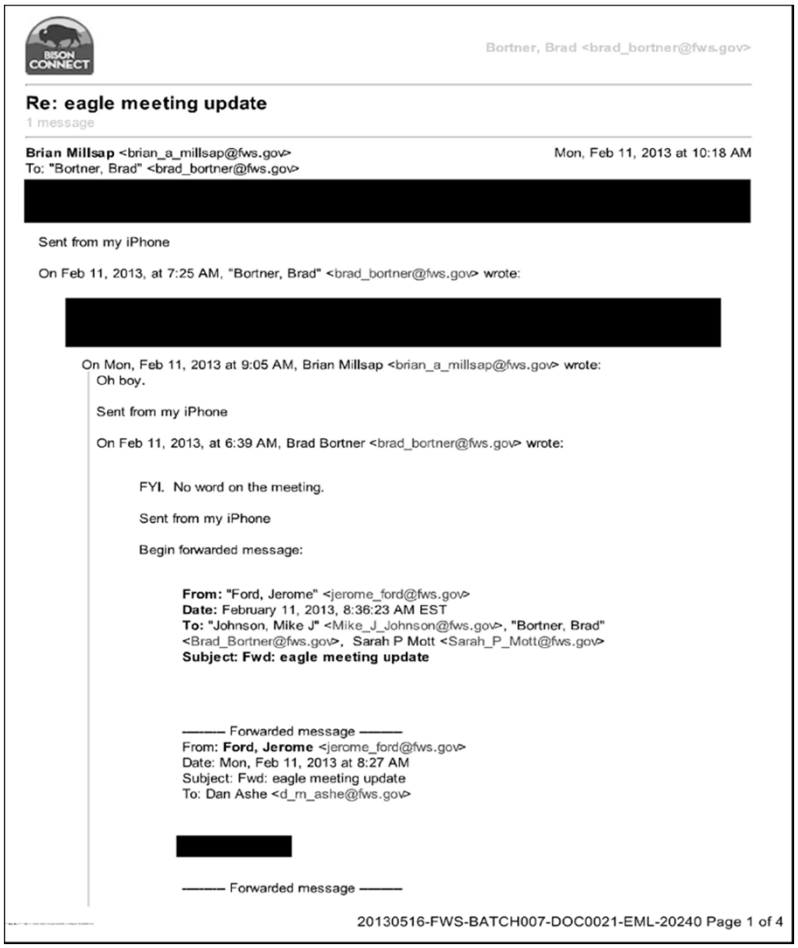
This seems like a lot of convoluted maneuvering to do much of what the ecpg advocates outside a permit. I gotta wonder if things would be different if we'd moved the ecpg document a year ago.

Sent from my iPhone

On Feb 11, 2013, at 7:25 AM, "Bortner, Brad" <brad_bortner@fws.gov> wrote:

> How we apply anything except the 2009 rule is beyond me. I understand the Tenure Rule has been delivered to Ex. Sec. as well. This is getting interesting.
>
> On Mon, Feb 11, 2013 at 9:05 AM, Brian Millsap <brian_a_millsap@fws.gov> wrote:
> Oh boy.
>
> Sent from my iPhone
>
> On Feb 11, 2013, at 6:39 AM, Brad Bortner <brad_bortner@fws.gov> wrote:
>
> > FYI. No word on the meeting.
> >
> > Sent from my iPhone
> >
> > Begin forwarded message:
> >
> > **From:** "Ford, Jerome" <jerome_ford@fws.gov>
> > **Date:** February 11, 2013, 8:36:23 AM EST
> > **To:** "Johnson, Mike J" <Mike_J_Johnson@fws.gov>, "Bortner, Brad" <Brad_Bortner@fws.gov>, Sarah P Mott <Sarah_P_Mott@fws.gov>
> > **Subject: Fwd: eagle meeting update**
> >
> > ——— Forwarded message ———
> > From: **Ford, Jerome** <jerome_ford@fws.gov>
> > Date: Mon, Feb 11, 2013 at 8:27 AM
> > Subject: Fwd: eagle meeting update
> > To: Dan Ashe <d_m_ashe@fws.gov>
> >
> > I am concerned.
> >
> > ——— Forwarded message ———

Service provided REDACTED document in June 2014 -- 3 months after subpoena



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To: "Bortner, Brad" <brad_bortner@fws.gov>

[redacted]

Sent from my iPhone

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> [redacted]
>
> On Mon, Feb 11, 2013 at 9:05 AM, Brian Millsap <brian_a_millsap@fws.gov> wrote:
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>
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> >
> > ——— Forwarded message ———
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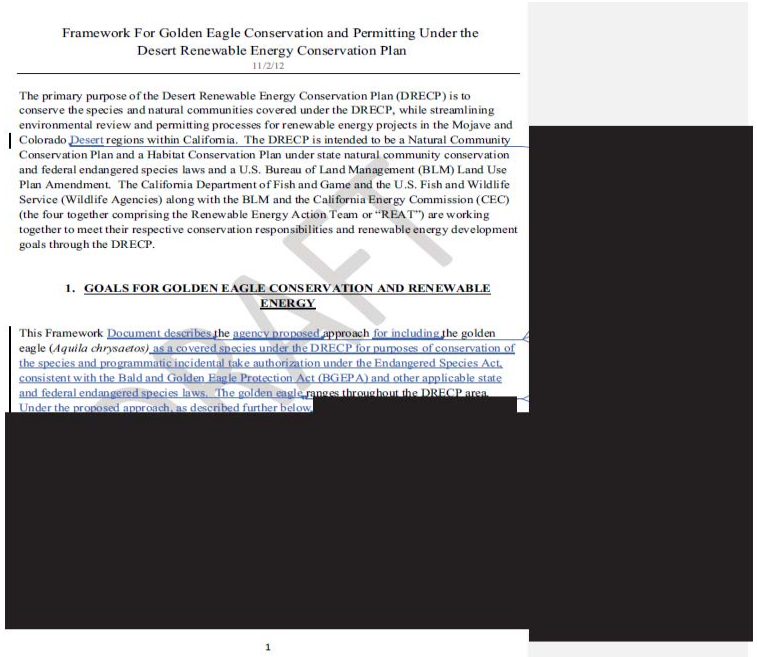
> > Date: Mon, Feb 11, 2013 at 8:27 AM
> > Subject: Fwd: eagle meeting update
> > To: Dan Ashe <d_m_ashe@fws.gov>
> >
> > [redacted]
> >
> > ——— Forwarded message ———

Exhibit 4

Partially redacted document provided in December 2013 to AP and Committee

Subpoena specifically requested unredacted copy of this document. Service REDACTED even more from the document in June 2014 -- after subpoena was issued



Framework For Golden Eagle Conservation and Permitting Under the Desert Renewable Energy Conservation Plan

11/2/12

The primary purpose of the Desert Renewable Energy Conservation Plan (DRECP) is to conserve the species and natural communities covered under the DRECP, while streamlining environmental review and permitting processes for renewable energy projects in the Mojave and Colorado Desert regions within California. The DRECP is intended to be a Natural Community Conservation Plan and a Habitat Conservation Plan under state natural community conservation and federal endangered species laws and a U.S. Bureau of Land Management (BLM) Land Use Plan Amendment. The California Department of Fish and Game and the U.S. Fish and Wildlife Service (Wildlife Agencies) along with the BLM and the California Energy Commission (CEC) (the four together comprising the Renewable Energy Action Team or "REAT") are working together to meet their respective conservation responsibilities and renewable energy development goals through the DRECP.

1. GOALS FOR GOLDEN EAGLE CONSERVATION AND RENEWABLE ENERGY

This Framework Document describes the agency proposed approach for including the golden eagle (*Aquila chrysaetos*) as a covered species under the DRECP for purposes of conservation of the species and programmatic incidental take authorization under the Endangered Species Act, consistent with the Bald and Golden Eagle Protection Act (BGEPA) and other applicable state and federal endangered species laws. The golden eagle ranges throughout the DRECP area. Under the proposed approach, as described further below

[redacted]

1

Framework For Golden Eagle Conservation and Permitting Under the Desert Renewable Energy Conservation Plan

11/2/12

[redacted]

1

Exhibit 5

Partially redacted document provided to bird conservation group under FOIA. Never provided to Committee.

March 26, 2013

Briefing Memorandum for Deputy Secretary

From: Dan Ashe, Director

Subject: Meeting with environmental groups and wind industry, March 27, 2013

Background

You are meeting with representatives of wind industry and environmental groups that wrote to Secretary Salazar last summer regarding comments on the Service's ANPR to revise the 2009 eagle permitting rule and the proposed rule to extend the term of eagle take permits from 5 to up to 30 years.

At a meeting with many of these groups in February, they asked for an opportunity to collaborate on some ideas they were forming about how to improve the Service's eagle conservation programs. At this meeting, they will present the result of those discussions. They will likely ask that:

1. The Department/Service not promulgate a final rule extending the duration of eagle take permits up to 30 years.
2. The Department/Service create a science advisory committee to develop a research program at selected (a few) operating and proposed wind projects to test risk models, evaluate advanced conservation practices, and monitor projects for eagle behavior and mortality.
3. The Service and Justice provide assurances that project operators participating in the research program would not be prosecuted if they took an eagle.

You should also be aware that an environmental group who was not a signatory to the initial letter has asked that we not meet with this group again. They contend that doing so would violate the Federal Advisory Committee Act (see attached talking points).

Service Comprehensive Eagle Conservation Program

The Service appreciates the efforts of the wind industry and environmental groups to collaborate. However, we believe the time has come to move ahead with:

1.
2.
3.
4.
5.

(b) (5)

1

Instead, Service provided more heavily REDACTED version in June 2014 -- after subpoena was issued.

March 26, 2013

Briefing Memorandum for Deputy Secretary

From: Dan Ashe, Director

Subject: Meeting with environmental groups and wind industry, March 27, 2013

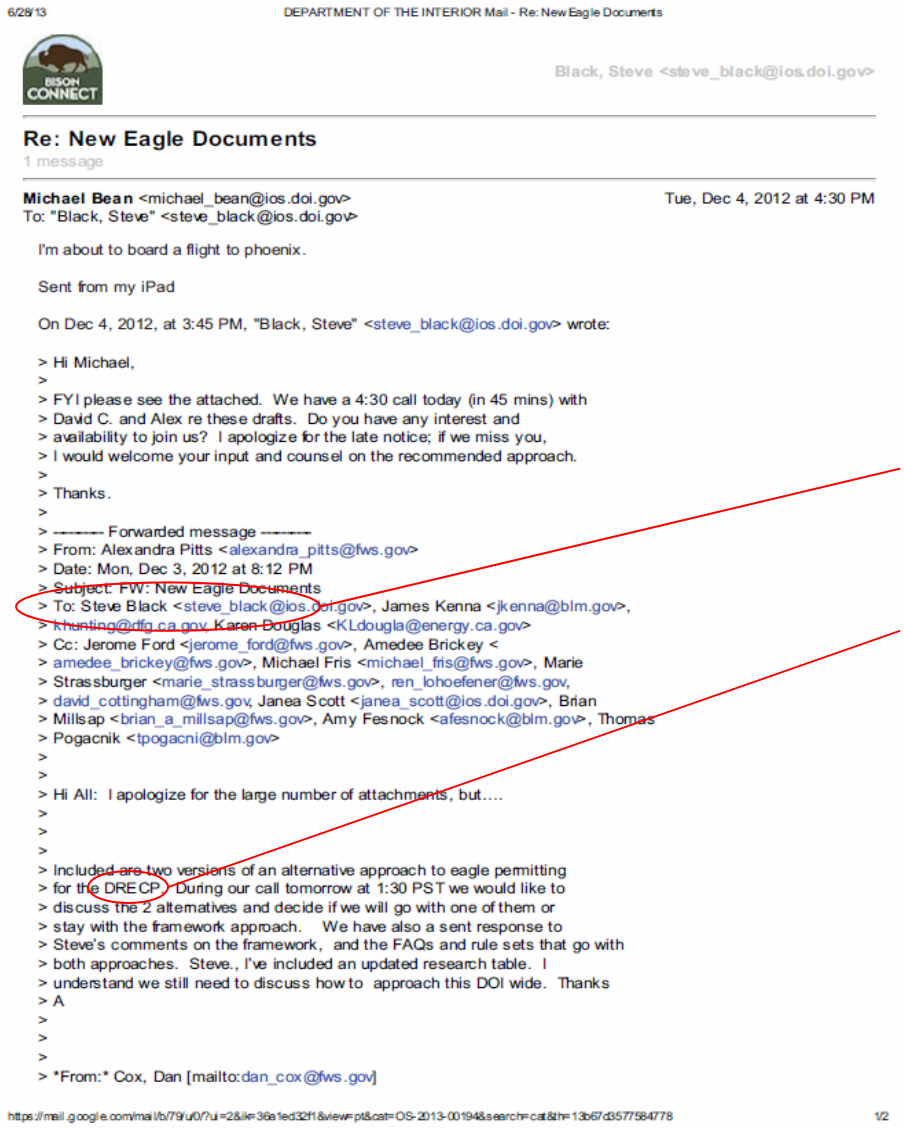
Background

[redacted]

1

20130516-FWS-BATCH006-DOC0023-BRF-20240 Page 1 of 4

Exhibit 6 – Document provided to bird group but not Congress



6/28/13 DEPARTMENT OF THE INTERIOR Mail - Re: New Eagle Documents

BISON CONNECT

Black, Steve <steve_black@ios.doi.gov>

Re: New Eagle Documents

1 message

Michael Bean <michael_bean@ios.doi.gov> Tue, Dec 4, 2012 at 4:30 PM
To: "Black, Steve" <steve_black@ios.doi.gov>

I'm about to board a flight to phoenix.

Sent from my iPad

On Dec 4, 2012, at 3:45 PM, "Black, Steve" <steve_black@ios.doi.gov> wrote:

> Hi Michael,
>
> FYI please see the attached. We have a 4:30 call today (in 45 mins) with
> David C. and Alex re these drafts. Do you have any interest and
> availability to join us? I apologize for the late notice; if we miss you,
> I would welcome your input and counsel on the recommended approach.
>
> Thanks.
>
> ---------- Forwarded message ----------
> From: Alexandra Pitts <alexandra_pitts@fws.gov>
> Date: Mon, Dec 3, 2012 at 8:12 PM
> Subject: FW: New Eagle Documents
> To: Steve Black <steve_black@ios.doi.gov>, James Kenna <jkenna@blm.gov>,
> khunting@dfg.ca.gov, Karen Douglas <KLdougla@energy.ca.gov>
> Cc: Jerome Ford <jerome_ford@fws.gov>, Amedee Brickey <
> amedee_brickey@fws.gov>, Michael Fris <michael_fris@fws.gov>, Marie
> Strassburger <marie_strassburger@fws.gov>, ren_lohoefener@fws.gov,
> david_cottingham@fws.gov, Janea Scott <janea_scott@ios.doi.gov>, Brian
> Millsap <brian_a_millsap@fws.gov>, Amy Fesnock <afesnock@blm.gov>, Thomas
> Pogacnik <tpogacni@blm.gov>
>
>
> Hi All: I apologize for the large number of attachments, but....
>
>
>
> Included are two versions of an alternative approach to eagle permitting
> for the DRECP. During our call tomorrow at 1:30 PST we would like to
> discuss the 2 alternatives and decide if we will go with one of them or
> stay with the framework approach. We have also a sent response to
> Steve's comments on the framework, and the FAQs and rule sets that go with
> both approaches. Steve., I've included an updated research table. I
> understand we still need to discuss how to approach this DOI wide. Thanks
> A
>
>
>
> *From:* Cox, Dan [mailto:dan_cox@fws.gov]

https://mail.google.com/mail/b/79/u/0/?ui=2&ik=36a1ed32f1&view=pt&cat=OS-2013-00194&search=cat&th=13b67d3577584778 1/2

Item 5.b of the Subpoena requests "complete and unredacted copies of all documents . . . sent from, to, or otherwise in the possession of . . . *Steve Black* . . . that were created in connections with . . . the *Desert Renewable Energy Conservation Plan ["DRECP"]*.

Steve Black was a recipient of this email, and forwarded it to a fellow Department of the Interior employee

This email clearly references the DRECP

Yet, the Committee has never been provided this email.

Why do FOIA requesters receive more responsive documents than a Congressional subpoena?

Exhibit 8

Email from FWS in June 2013 claims that it is working to respond to Committee's May 2013 request. No mention of burden.

From Matthew Huggler **Date** Monday, June 10, 2013 1:01:09 PM
To Brown, Byron
Cc Jason Buckner; Carlos Uriarte
Subject RE: Letter from Chairman Hastings

Byron,

Good talking to you this afternoon. As follow-up, below is a summary of where we are on our response to the May 16 letter, and the additional items you requested:

1) Reports of investigations, referrals to DOJ, etc. – FWS OLE and DOJ are working to assemble this information and determine what can and cannot be released. DOJ has expressed concern about releasing any information related to open investigations. You requested a call with FWS OLE, and potentially DOJ, to get a better idea of what these limitations might be before we finalized our response.

2) All communications between FWS and representatives of the wind industry, etc. – We received a recent FOIA request on this very issue, so have all the responsive documents relatively handy. We are reprocessing it to ensure the scope is the same and we are not redacting information that can be reviewed by Congress. You requested a copy of the FOIA request.

3) All policies, guidance, memos, etc. regarding LE discretion – FWS is conducting a data call to field and regional offices and hopes to have the raw information by next week to begin our review.

4) All emails, memos, etc. between FWS and AWWI – This information is currently under review by DOI SOL, who have expressed concerns about releasing confidential business information. You requested a conference call with SOL to better understand their concerns before we finalized our response..

5) Eagle take regulations – FWS is conducting a data call to field and regional offices and hopes to have the raw information by next week to begin our review.

You also indicated a rolling document production is acceptable. If there is anything I missed, please let me know. Thanks,

- Matt

Exhibit 9

The same June 2013 email from FWS says it is reprocessing FOIA documents to remove redactions – not add more redactions. Took FWS 6 months to provide these documents. They were still redacted.

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To Brown, Byron
Cc Jason Buckner; Carlos Uriarte
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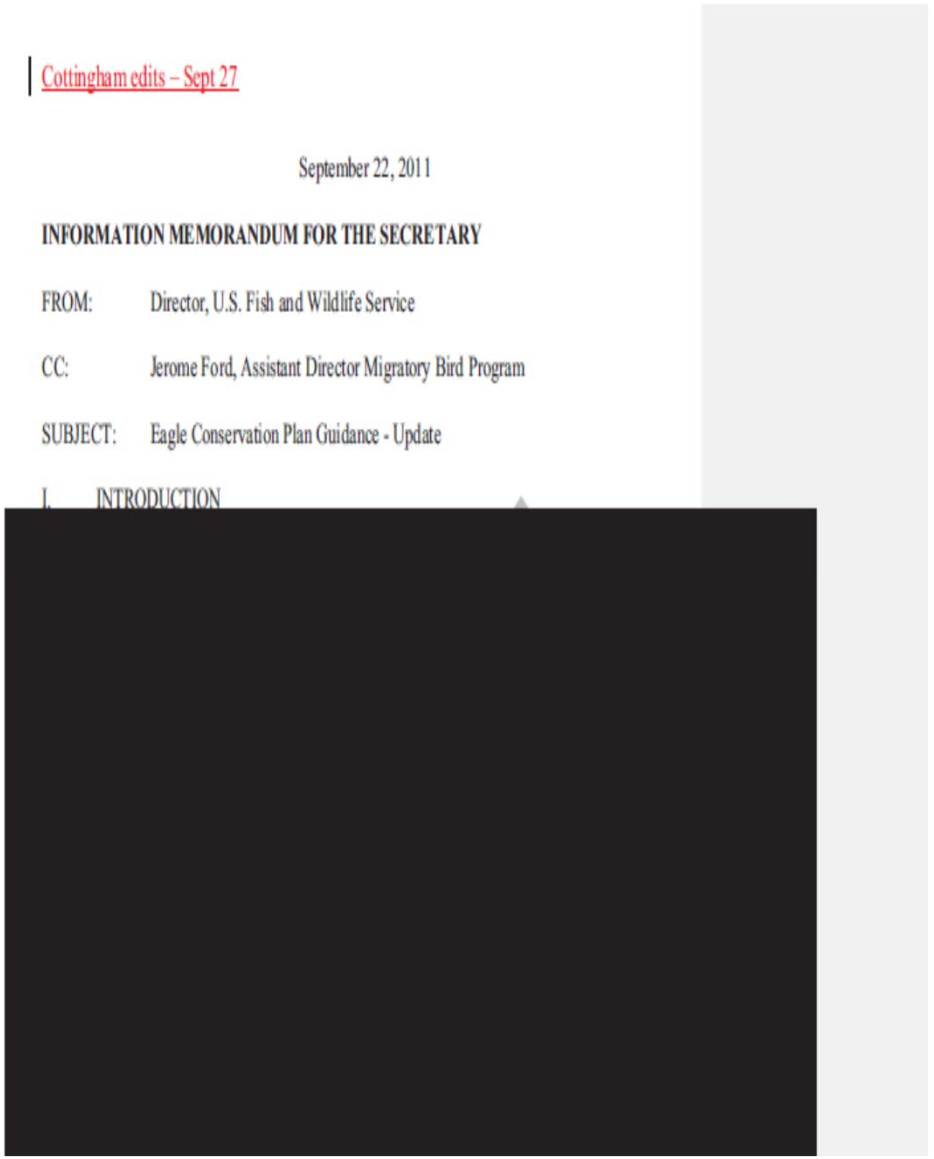
You also indicated a rolling document production is acceptable. If there is anything I missed, please let me know. Thanks,

- Matt

Exhibit 17

Draft memo to Secretary requested in subpoena. FWS has not provided it even though Executive Privilege still has not been asserted.



Cottingham edits – Sept 27

September 22, 2011

INFORMATION MEMORANDUM FOR THE SECRETARY

FROM: Director, U.S. Fish and Wildlife Service

CC: Jerome Ford, Assistant Director Migratory Bird Program

SUBJECT: Eagle Conservation Plan Guidance - Update

I. INTRODUCTION

[redacted]

Director Ashe Testimony for September 10 hearing:

Since the beginning of the 113th Congress, the Department and its bureaus have received 37 letters from the House Natural Resources Committee related to document requests on 16 distinct topics. The Department oversees the process used to respond to such requests by each of the individual bureaus, including the Service. To date, during this Congress, the Department has provided the Committee with more than 60,000 pages of documents and a number of related briefings. The Department has dedicated nearly 34,000 staff hours and more than $2 million in resources toward responding to Congressional document requests, most of which were from this Committee.

Department's Budget Already Supports Oversight

The Office of the Solicitor's Congressional 2015 Budget Justification notes that one of its roles is to "assist[] the bureaus in responding to . . . congressional . . . requests." Similarly, the 2015 Budget Justification for the Office of Congressional and Legislative Affairs notes that the Office works with the "Office of the Solicitor, and other agency personnel to coordinate and respond to document requests from Congressional Committees." Its budget in 2014 was more than $65 million.

In addition, the Department has several offices dedicated to responding to requests for information from Congress as well as requests made by the public under FOIA, not to mention staff and resources in the Solicitor's Office and individual bureaus that assist with the collection and review of documents.

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 requests for information, among other duties.

Spending More to Redact Committee Documents that FOIA

According to the Department's FY 2015 budget justification, the Office of Executive Secretariat in 2013 alone "managed over 8,761 pieces of controlled correspondence, an estimated 551,524 petitions, and over 762,396 e-mails." That office also has a dedicated Document Management Unit ("DMU") that in 2013 "processed 491,449 documents totaling 1,682,349 pages in the Electronic Records and Document Management Systems. The collection of documents was Department-wide from 17 bureaus and offices. In 2013, the DMU produced 23 tribal trust projects, **and 23 Congressional document productions for a total of 471,569 pages."**

DOI Oversight Costs and Burden Are Its Own Doing

In addition, the Department in fiscal year 2013 responded to more than 6,300 FOIA requests made by the public. The Department estimates that it spent more than $12 million and 280,000 staff hours responding to these FOIA requests. The Secretary's Office itself 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.

Why does it cost DOI more than $2 million and 34,000 staff hours to respond to 16 oversight requests, when the Department spends only $12 million and 280,000 staff hours to respond to 6,300 FOIA requests?

Why is DOI so less efficient and spending more responding to far fewer Congressional oversight requests?