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

May 31, 2012

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JEFFREY DUNCAN
DEMOCRATIC STAFF DIRECTOR

The Honorable Ken Salazar
Secretary
U.S. Department of the Interior
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

Daniel M. Ashe
Director
U.S. Fish & Wildlife Service
1849 C Street, N.W. – Mail Stop 3351
Washington, D.C. 20240

Dear Secretary Salazar and Director Ashe:

The Committee on Natural Resources (“Committee”) has jurisdiction over matters involving fisheries and wildlife, including the Endangered Species Act of 1973 (“ESA”), 16 U.S.C. §§ 1531-1599. The goal of the ESA was to preserve, protect and recover key domestic species. However, today the law is failing to achieve its primary purpose of species recovery and instead has become a tool for litigation that drains resources away from real recovery efforts and blocks job-creating economic activities. At the Committee’s February 15, 2012 hearing to consider the Department of the Interior’s (“Department”) FY 2013 budget request, I asked how much the Department spends on litigation and settlements involving the ESA. It is concerning that there was not a readily available answer to this question, and to date, the Department has yet to provide a response.

In May and July 2011, the Obama Administration agreed to two litigation settlements involving petitions to list 779 species and designate critical habitat under the ESA through more than 85 lawsuits and legal actions. These settlements (“Settlements”) mandate that over 250 candidate species must be reviewed for final listing as either threatened or endangered under the ESA, and a total of 1205 decisions to be made on multiple species by FY 2016. Adding 779 species would represent a nearly 40% increase in the current number of species listed, as there are 1,995 species listed now, according to data provided by the U.S. Fish & Wildlife Service Species Report. This would require a significant and costly increase in listing activity over a very compressed timeframe. The U.S. Fish and Wildlife Service’s (“the Service”) FY 2013

budget request includes an increase in funding that could result in 88 more species being listed and critical habitat being designated just next year alone.

The case leading to this settlement was a multi-district litigation formed in 2010 by combining 13 federal court cases filed either by the WildEarth Guardians (“WEG”) or the Center for Biological Diversity (“CBD”). The original litigation dealt with 133 species; however, the settlement agreements greatly expand the number of species to include hundreds that were not part of the original federal court complaint. These settlements raise serious policy and legal questions. A thorough and complete response on behalf of the Service is important for the Committee to carry out its oversight responsibilities. Through this letter, it is requested that the Department and the Service produce the documents and information described below. A complete written response to all items should be received no later than June 14, 2012.

Information to be Produced

1. All documents and communications, including drafts and memoranda within the Service and between the Service, Department, and/or other federal agencies, including the Office of Management and Budget and the Justice Department, regarding the Settlements between January 1, 2010 and present.
2. All documents and communications, between the Service and the Department and/or other federal agencies, including the Office of Management and Budget and the Justice Department and WildEarth Guardians regarding the Settlements between January 1, 2010 and present.
3. All documents and communications, between the Service and the Department and/or other federal agencies, including the Office of Management and Budget and the Justice Department and Center for Biological Diversity regarding the Settlements between January 1, 2010 and present.
4. A copy of each listing petition and each 60-day notice of intent to sue for each species referenced, listed, or discussed in the Settlements.
5. Please provide the total amount of funds paid to WildEarth Guardians and Center for Biological Diversity and any other organization as part of the settlement of these cases; include any money for court costs and attorney fees. Please also provide the date and source of all funds paid, whether from the Treasury’s Judgment Fund or from Service or Department appropriations.
6. Please provide the total amount of funds paid to WildEarth Guardians and Center for Biological Diversity from Service or Department appropriated funds, or as a result of a settlement or legal action, from January 1, 2008 through present.
7. Please provide the estimated total cost to the Service or Department for each species listed.

8. Please provide the estimated total cost to the Service or Department for each acre of critical habitat designated and any other costs determined by economic analyses.
9. Please provide a full accounting of all species (not included in the above reference settlement) that are currently the subject of a 60-day notice.

An attachment to this letter provides additional information about responding to this request, including definitions and instructions for compliance. Please contact Machalagh Carr, Counsel, Office of Oversight and Investigations, with any questions regarding this request, or to make arrangements for the production. Thank you for your prompt attention to this matter.

Sincerely,



Doc Hastings
Chairman

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, 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 document 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. Send all responsive documents and records to:

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JEFFREY DUNCAN
DEMOCRATIC STAFF DIRECTOR

Ignacia S. Moreno
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resource Division
P.O. Box 7415
Ben Franklin Station
Washington, D.C. 20044

Dear Assistant Attorney General Moreno:

As you know from the letter to you dated March 19, 2012, there are concerns about the amount of litigation the federal government is involved in related to the Endangered Species Act ("ESA"). In your response dated May 8, 2012, you provided a list of all cases from the Environment and Natural Resource Division's ("Division") case management system that include a cause of action under the ESA or in which the Division is enforcing alleged violations of the ESA. As discussed by staff and referenced in your May 8, 2012 letter, there are some specific cases where additional information is requested.

According to the information provided, the attorney fees paid in National Wildlife Federation, et al. v. National Marine Fisheries Service equaled \$1.89 million; in Natural Resources Defense Council, et al. v. Norton equaled more than \$1.9 million; Pacific Coast Federation of Fishermen's Association, et al. v. Gutierrez, et al., for more than \$2.1 million; and more than \$1.9 million for Florida Key Deer, et al. v. Gale Norton. These four cases equal more than \$7.7 million in attorney fees alone. These numbers do not include the costs to litigate these matters, or the cost of enforcement for the settlements reached. There is a concern about transparency and whether these payments represent a prudent use of the taxpayer's money, whether these types of payments sets a precedent for additional opaque and expensive settlements on attorney fees, and whether the fee-shifting provision under the Endangered Species Act is being used to create and perpetuate expensive, debilitating lawsuits.

A thorough and complete response on behalf of the Department is important for the Committee to carry out its oversight responsibilities. Through this letter, it is requested that the Department produce the documents and information described below. A complete written response to all items should be received no later than June 14, 2012.

Please provide the following information for the cases listed below:

1. National Wildlife Federation Et Al. v. National Marine Fisheries Service, Division case number 01-640:
 - a. All documents and communications within the Department or between the Department and NOAA and/or BPA and the White House Council on Environmental Quality or Office of Management and Budget regarding the March 2012 Settlement, including drafts and memoranda.
 - b. All documents and communications between the Department and the Plaintiffs regarding the Settlement, including drafts, memoranda, and the Settlement agreement.
 - c. Please provide the specific amount of legal fees and any costs paid to each of the fifteen Plaintiffs. Please also provide the source of each payment, whether from the Treasury's Judgment Fund or from Department, NOAA, or BPA appropriations. Please include all documentation supporting the justification of the attorney fees including invoices, hourly fee, billing statements and time sheets for counsel.
 - d. Please explain why the Department agreed to pay legal fees as part of the Settlement and whether any approval was sought and/or obtained by the Office of Management and Budget or the Council on Environmental Quality.
 - e. Please explain whether the Department anticipates agreeing to pay legal fees in the pending case regarding the 2008/2010 Biological Opinion in the U.S. District Court of Oregon and in any future litigation regarding these Biological Opinions.
2. Natural Resources Defense Council, et al. v. Norton, Division case number 05-1207 and 05-690:
 - a. All documents and communications within the Department or between the Department and any other federal agency regarding the February 2011 payment of \$1.9 million to Trent Orr, including drafts and memoranda.
 - b. All documents and communications between the Department and the Plaintiffs regarding the settlement of this case, including drafts, memoranda, and the Settlement agreement.
 - c. Please provide the specific amount of legal fees and any costs paid to the plaintiff. Please include all documentation supporting the justification of the

attorney fees including invoices, hourly fee, billing statements and time sheets for counsel.

- d. Please explain why the Department agreed to pay legal fees as part of the settlement and whether any approval was sought and/or obtained by the Office of Management and Budget or the Council on Environmental Quality.
- e. Please advise whether this case is closed, and whether the Department anticipates paying additional attorney fees related to this matter.

3. Pacific Coast Federation of Fishermen's Association, Et Al. v. Gutierrez, et al., Division case number 06-245:

- a. All documents and communications within the Department or between the Department and any other federal agency regarding the March 2011 payment of \$2,117,219.00 to Michael Sherwood for attorney fees and \$76,281.00 to Michael Sherwood for court costs, including drafts and memoranda.
- b. All documents and communications between the Department and the Plaintiffs regarding the settlement of this case, including drafts, memoranda, and the Settlement agreement.
- c. Please provide the specific amount of legal fees and any costs paid to the plaintiff. Please include all documentation supporting the justification of the attorney fees including invoices, hourly fee, billing statements and time sheets for counsel.
- d. Please explain why the Department agreed to pay legal fees as part of the settlement and whether any approval was sought and/or obtained by the Office of Management and Budget or the Council on Environmental Quality.

4. Florida Key Deer, et al. v. Gale Norton, Division case number not provided, listed on page 273 of 276 from the listing provided on May 8, 2012.

- a. All documents and communications within the Department or between the Department and any other federal agency regarding the December 2008 payment of \$1,909,725.28 to Randolph Sargent for attorney fees, \$15,371.12 for court costs, as well as the \$130,000 to National Wildlife Federation for attorney fees, including drafts and memoranda.
- b. All documents and communications between the Department and the Plaintiffs regarding the settlement of this case, including drafts, memoranda, and the Settlement agreement.

- c. Please provide the specific amount of legal fees and any costs paid to the plaintiff. Please include all documentation supporting the justification of the attorney fees including invoices, hourly fee, billing statements and time sheets for counsel.
- d. Please explain why the Department agreed to pay legal fees as part of the settlement and whether any approval was sought and/or obtained by the Office of Management and Budget or the Council on Environmental Quality.
- e. Please advise whether this case is closed, and whether the Department anticipates paying additional attorney fees related to this matter.

Please provide the following information:

- 5. Please provide any Departmental guidance, including internal memorandum, on the determination of how attorney fees are awarded, the process for allocating funds, documentation required for the assessment of fees, and Departmental guidance on determining appropriate amount of payments.

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Dr. Jane Lubchenco
Under Secretary of Commerce for Oceans and Atmosphere
& NOAA Administrator
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Dr. Lubchenco:

In March 2012, the National Oceanic and Atmospheric Administration was involved in a stipulation or settlement for attorney fees associated with the 2004 and 2008 Federal Columbia River Power System Biological Opinion ("Settlement") between the Department of Justice ("Department"), the National Oceanic and Atmospheric Administration ("NOAA"), the Bonneville Power Administration ("BPA"), fifteen plaintiff organizations ("Plaintiffs"), and other intervening parties. The Settlement included the payment of \$940,000 in legal fees to the Plaintiffs. Additionally, in May 2007, the federal government also stipulated to pay an additional \$950,000 in legal fees to the Plaintiffs. There is a concern about transparency and whether these payments represent a prudent use of the taxpayers' money, whether this sets a precedent for additional opaque and expensive settlements on attorneys fees, not just with this litigation, but with other litigation associated with the Endangered Species Act and whether the fee-shifting provision under the Endangered Species Act is being used to create and perpetuate expensive, debilitating lawsuits.

A thorough and complete response on behalf of NOAA is important for the Committee to carry out its oversight responsibilities. Through this letter, it is requested that NOAA produce the documents and information described below. A complete written response to all items should be received no later than June 14, 2012.

Information to be Produced

1. All documents and communications within NOAA or between NOAA and the Department and/or BPA and the White House Council on Environmental Quality or Office of Management and Budget regarding the March 2012 Settlement, including drafts and memoranda.

2. All documents and communications between NOAA and the Plaintiffs regarding the Settlement, including drafts, memoranda, and the Settlement agreement.
3. Please provide the specific amount of all legal fees and any costs paid to each of the fifteen Plaintiffs. Please also provide the source of each payment, whether from the Treasury's Judgment Fund or from Department, NOAA, or BPA appropriations.
4. Please explain why NOAA agreed to pay legal fees as part of the Settlement and whether any approval was sought and/or obtained by the Office of Management and Budget or the Council on Environmental Quality.
5. Please explain whether NOAA anticipates agreeing to pay legal fees in the pending case regarding the 2008/2010 Biological Opinion in the U.S. District Court of Oregon and in any future litigation regarding these Biological Opinions.

An attachment to this letter provides additional information about responding to the Committee's request, including definitions and instructions for compliance. Please contact Machalagh Carr, Counsel, Office of Oversight and Investigations, with any questions regarding this request, or to make arrangements for the production. Thank you for your prompt attention to this matter.

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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, 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.
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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. Send all responsive documents and records to:

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

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TODD YOUNG
CHIEF OF STAFF

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

May 31, 2012

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JEFFREY DUNCAN
DEMOCRATIC STAFF DIRECTOR

Steve Wright
Administrator and Chief Executive Officer
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208

Dear Administrator Wright:

In March 2012, Bonneville Power Administration was involved in a stipulation or settlement for the payment of attorney fees associated with the 2004 and 2008 Federal Columbia River Power System Biological Opinion (“Settlement”) between the Department of Justice (“Department”), the National Oceanic and Atmospheric Administration (“NOAA”), the Bonneville Power Administration (“BPA”), fifteen plaintiff organizations (“Plaintiffs”), and other intervening parties. The Settlement included the payment of \$940,000 in legal fees to the Plaintiffs. Additionally, in May 2007, the federal government also stipulated to pay an additional \$950,000 in legal fees to the Plaintiffs. There is a concern about transparency and whether these payments represent a prudent use of the taxpayers’ money, whether this sets a precedent for additional opaque and expensive settlements on attorneys fees, not just with this litigation, but with other litigation associated with the Endangered Species Act and whether the fee-shifting provision under the Endangered Species Act is being used to create and perpetuate expensive, debilitating lawsuits.

A thorough and complete response on behalf of BPA is important for the Committee to carry out its oversight responsibilities. Through this letter, it is requested that BPA produce the documents and information described below. A complete written response to all items should be received no later than June 14, 2012.

Information to be Produced

1. All documents and communications within BPA or between BPA and NOAA and/or the Department and the White House Council on Environmental Quality or Office of Management and Budget regarding the March 2012 Settlement, including drafts and memoranda.

2. All documents and communications between BPA and the Plaintiffs regarding the Settlement, including drafts, memoranda, and the Settlement agreement.
3. Please provide the specific amount of legal fees and any costs paid to each of the fifteen Plaintiffs. Please also provide the source of each payment, whether from the Treasury's Judgment Fund or from Department, NOAA, or BPA appropriations.
4. Please explain why BPA agreed to pay legal fees as part of the Settlement and whether any approval was sought and/or obtained by the Office of Management and Budget or the Council on Environmental Quality.
5. Please explain whether BPA anticipates agreeing to pay legal fees in the pending case regarding the 2008/2010 Biological Opinion in the U.S. District Court of Oregon and in any future litigation regarding these Biological Opinions.

An attachment to this letter provides additional information about responding to the Committee's request, including definitions and instructions for compliance. Please contact Machalagh Carr, Counsel, Office of Oversight and Investigations, with any questions regarding this request, or to make arrangements for the production. Thank you for your prompt attention to this matter.

Sincerely,



Doc Hastings
Chairman

Responding to Committee Document Requests

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