Restricted Activity

- Engage in a "lobbying activity" as defined by the Lobbying Disclosure Act (LDA)

33

Engage in a Lobbying Activity

You engage in a "**lobbying activity**" if you:

- Make a lobbying contact
  - Written or oral communications
  - With covered executive or legislative branch officials
  - On behalf of a client
  - For financial or other compensation
  - 19 exceptions

OR

- Engage in behind-the-scenes efforts in support of such lobbying contact

34

Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

35

Paragraph 1: "With respect to" that agency

A lobbying activity occurs "with respect to" that agency if the activity involves :

- A communication to a covered executive branch official at that agency *(component designations may be available)*

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official at that agency

36

Paragraph 3: "With respect to" certain officials

A lobbying activity occurs "with respect to" certain officials if the activity involves :

- A communication to a covered executive branch official or non-career SES

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official or non-career SES

37

Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency = Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

38

Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency *MEANS:* Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

39

Paragraph 3: Examples

- Write to various exec branch officials seek support for his client's research
- Assist his client in preparing for a meeting with one of the officials
- Assist his client in understanding grant application process and guidelines that agency established for research projects
- Request the status of an action affecting his client.

I agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

40

Paragraph 1: Examples

Write to a covered executive branch official at NIH to seek support for his client's research

Assist his client in preparing for a meeting with the FDA official

Contact covered legislative branch official to discuss pending legislation that could affect NIH research projects

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

41

LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

42

Question 7: Land and Water Conservation

For more than 50 years, the Land and Water Conservation Fund has been one of the most powerful tools we have available to preserve and ensure access to America's most iconic landscapes. It is a tool that has created or expanded thousands of treasured hunting, fishing and hiking opportunities and it has protected our cultural heritage. That's why the Land and Water Conservation Fund is supported by hundreds of organizations from around the country representing sportsmen, conservationists, veterans and outdoor enthusiasts from all backgrounds. In fact, according to a recent Western States Survey, more than 80 percent of people supported reauthorizing the LWCF.

Mr. Bernhardt, do you think Congress should directly and fully fund the Land and Water Conservation Fund at its authorized level so it is not subject to future appropriations?

Mr. Bernhardt, if Congress appropriated the fully authorized $900 for the Land and Water Conservation Fund for fiscal year 2020, how would the Department of the Interior use those funds?

Mr. Bernhardt, how would funding at the full level compare to what the LWCF would accomplish under the President's FY 2020 budget request?

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

Question 8: Offshore Drilling

Last year, your predecessor Secretary Zinke directed the Bureau of Ocean Energy Management to develop the National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024. The program would attempt to allow oil and gas drilling in over 90 percent of U.S. coastal waters, including off the Washington state coastline. This is unprecedented and along with many of my colleagues, I have heard from communities and businesses throughout my state and they are extraordinarily concerned about the impacts offshore drilling with have on local economies. In fact, local legislators, governors, businesses, and others affected by these decisions told Secretary Zinke and the Department of Interior that they do not want to expand offshore drilling activities on coasts—especially in the Pacific.

Mr. Bernhardt, do you support opening any or all waters off the coat of Washington state to offshore drilling and gas exploration, development of production?

Mr. Bernhardt, do you value public comment on proposed Department of the Interior activities? How do you plan to weigh and incorporate public comments on the National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024?

Mr. Bernhardt, if there is Congressional opposition, opposition from a state's Governor and the State is under a federal offshore drilling moratorium until 2022, will you commit to removing that state from the National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024?

Response: In formulating an Outer Continental Shelf leasing program, the Outer Continental Shelf Lands Act (OCSLA) requires the Secretary of the Interior, through the Bureau of Ocean Energy Management, to set a schedule of proposed lease sales that indicates the size, timing, and location of leasing activity that "best meets national energy needs." The OCSLA also specifically requires the Secretary to invite and consider comments from the Governors of any affected state. Comments from the public, governors, Members of Congress, tribes, and stakeholders are an integral part of Program development. The governing statute provides multiple opportunities for participation though public meetings, scoping meetings, and open houses. In addition, if confirmed, I will be happy to meet with governors, Members, and other interested parties affected by the development of offshore energy whether it be in the form of fossil fuels or renewable energy.

Question 9: North Cascades Grizzly Bear Recovery

Last year, former Secretary Zinke visited Washington state and on Friday March 22, 2018, former Secretary Zinke publicly stated his support for Grizzly Bear Restoration in North Cascades National Park and the surrounding ecosystem. A quote from former Secretary Zinke in a U.S. Department of the Interior press release stated:

"Restoring the grizzly bear to the North Cascades ecosystem is the American conservation ethic come to life," **said Secretary Zinke.** ***"We are managing the land and the wildlife according to the best science and best practices. The loss of the grizzly bear in the North Cascades would disturb the ecosystem and rob the region of an icon. We are moving forward with plans to restore the bear to the North Cascades, continuing our commitment to conservation and living up to our responsibility as the premier stewards of our public land."***

According to a poll conducted by Tulchin Research, found that 81% of those who were pulled agree that "the State of Washington should make every effort to help grizzly nears recover and prevent their disappearance."

The Federal Government has invested over $1 million dollars over four years in North Cascades Grizzly Recovery and the work is not complete.

Congressional Report language in the 2019 Consolidated Appropriations Act stated:

The Conferees direct the Service to work with ranchers, conservation groups, local governments, and other local partners to reduce conflicts between grizzly bears and livestock. These efforts should draw upon lessons learned with the Wolf Livestock Loss Demonstration Program to improve conservation outcomes while limiting effects to agricultural producers. Not less than 30 days after the date of enactment of this Act, and for a duration of not less than 90 days, the Service and the National Park Service are directed to re-open the public comment period regarding the draft environmental impact statement with proposed alternatives for the restoration of grizzly bears to the North Cascades Ecosystem. Any member of the public in attendance at any of the associated public forums and wishing to voice their opinion must be afforded the opportunity to do so.

Mr. Bernhardt, can you describe at what stage is the current North Cascades Grizzly Bear Environmental Impact Statement (EIS)?

Response: The National Park Service and Fish and Wildlife Service held a public comment period on the draft EIS with proposed alternatives for the restoration of grizzly bears to the North Cascades Ecosystem in early 2017 and received over 126,000 comments. In accordance with the Congressional Report language, the two bureaus are preparing to reopen the comment period to allow additional opportunity for public input.

Mr. Bernhardt, when will the Department re-open the public comment period on the North Cascades Grizzly Bear EIS? Will the Department host additional public meetings? When and where will these public meetings occur?

Response: In accordance with the Congressional Report language, the National Park Service and Fish and Wildlife Service are preparing to reopen the comment period to allow additional opportunity for public input. I expect the notice to be published in the coming weeks, and for public meetings to be held shortly thereafter.

Mr. Bernhardt, following the additional public comment period, will the Department finalize the North Cascades Grizzly Bear EIS? What is the timeline for finalizing the EIS?

Response: Following the additional public comment period, the next steps for the National Park Service and Fish and Wildlife Service include review of comments received; preparation of a final EIS (which will include written responses to public comments); issuance of the final EIS; and issuance of a final Record of Decision. The timeline for that process will depend on the number of public comments received and the scope of those comments.

Mr. Bernhardt, do you support your predecessor's statement on the need to restore the grizzly bear in the North Cascades ecosystem?

Response: I believe that we all benefit from the conservation of the grizzly bear. In addition, any effort to introduce bears must fully address the impacts to people and communities from such efforts, including public safety.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Question 10: Goat Mountain Mining Project

On December 3, 2018, the Bureau of Land Management released the Finding of No Significant Impact (FONSI) and Decision Record (DR) on the Goat Mountain Hard Rock Prospecting Permit Applications. This decision awards a mining company, Ascot USA, two hard rock prospecting permits within the Gifford Pinchot National Forest, about 12 miles northeast of Mount St. Helens and adjacent to and extending from the boundary of the Mount St. Helens National Volcanic Monument.

The Green River valley is a very popular recreation destination for hunting, fishing, backcountry horse riding, hiking, and camping due to its scenic beauty, healthy fish and wildlife populations, and proximity to the Monument. In addition, the Green River has been found by the Forest Service to be eligible for designation as a Wild and Scenic River and has been designated by the state of Washington as a Wild Steelhead Gene Bank. The Green River is also an important human resource, as it flows into the Cowlitz River, which supplies municipal drinking water for hundreds of people that live in downstream communities.

The Forest Service purchased the land on which the Goat Mountain Project is proposed in 1986 with funding from the Land and Water Conservation Fund. As such, mineral development can only be authorized by the Secretary of the Interior, when advised by the Secretary of Agriculture, that "such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture to protect such purposes." 5 U.S.C App. 1, 402. Before purchasing this land, the Forest Service sent a letter to Washington's Congressional delegation stating that the Forest Service's acquisition of the property would be to "aid in the preservation of the integrity of the Green River prior to its entering the National Volcanic Monument, and will also aid in the preservation of the scenic beauty of this area which is to become an important Monument portal."

I believe hard rock mining does not meet the intention of conserving the land for recreation purposes. The uses are inconsistent and commercial extraction of non-renewable natural resources seems completely at odds with the core principle of the Land and Water Conservation Fund.

Mr. Bernhardt, do you believe hard rock mining, including exploratory drilling, should occur on lands purchased through the Land and Water Conservation Fund?

Response: As you note, Congress specifically addressed the conditions where it is appropriate to consider such activities by adding the condition you referenced. If that is the case, it would seem the agency's decision would depend on whether or not "such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture to protect such purposes."

Question 11: Bureau of Indian Affairs Reorganization

At the 2019 Tribal Nation's Policy Summit winter session of the National Congress of American Indians, you stated the Bureau of Indian Affairs will remain intact and "will remain intact as we move forward with any plans to improve the Department of the Interior."

Mr. Bernhardt, can you confirm the Department of the Interior's reorganization plan does not include any changes to the Bureau of Indian Affairs programs?

Mr. Bernhardt, can you confirm the Department of the Interior's reorganization plan, or any other plan, does not include moving the location of the Bureau of Indian Affairs?

Response: As a result of tribal consultations carried out by the Department, the Bureau of Indian Affairs, the Bureau of Indian Education, and the Office of the Special Trustee for American Indians will not realign their regional structures to align with the other bureaus.

Question 12: Impact of Shutdown on National Parks

Local businesses and communities were harmed as a result of the 2018-2019 government shutdown. One example is the closure of Hurricane Ridge Winter Sports at the top of Hurricane Ridge in Olympic National Park because the road up to the ridge was closed because no National Park Service (NPS) personnel were available to plow snow. Likewise, at Olympic and Rainier National Parks, there were clear impacts to local communities and businesses from partial closure of the parks, with closed campgrounds and restrooms and other impacts leading to huge reductions in visits.

Mr. Bernhardt, what is the total amount of fee dollars obligated during the recent government shutdown and how many parks elected to use fee dollars? Please provide details on what specific activities were performed using fee revenues and in which parks? Can you please provide the list of parks and amount of fee dollars used and projects performed?

Mr. Bernhardt, can you detail the analysis regarding the likely impacts (contractors, partners, etc) of using fee dollars during the shutdown?

Mr. Bernhardt, how many NPS staff were paid using fee revenues during the lapse in appropriations?

Mr. Bernhardt, how much revenue was lost during the shutdown because no entrance or other forms of recreation fees were being collected?

Mr. Bernhardt, what was the total cost of repair to parks as a result of visitation to parks during the shutdown?

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Mr. Bernhardt, given your decision to replenish the lost fee dollars with the passage of the FY19 appropriations bills, what specific accounts had to be decreased in your operating budget in FY19?

Mr. Bernhardt, it's been reported that you have directed that all planned fee projects be halted until you approve the use of the fee dollars? What is your rationale for that?

Response: During the lapse in appropriations, the NPS, using retained fees collected under the Federal Lands Recreation Enhancement Act (FLREA) and in accordance with law, was able to address issues with restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and basic visitor services. Excepted staff that worked on specified allowable activities under FLREA were paid. Approximately 100 national parks were approved for the use of FLREA funds during this time.

While many of the smaller sites around the country remained closed, use of these funds allowed the American public to safely visit many of our national parks while providing these treasures additional protection and allowing NPS to meet its dual mandate. Importantly, the use of FLREA funds allowed continued visitor access to some park units, contributing to the economies of the respective gateway communities. It also meant that those employees who were providing these services were assured that they would receive a timely paycheck, an assurance that was comforting to some.

Congress, in the Fiscal Year 2019 Further Additional Continuing Appropriations Act (Public Law 116-5) that extended appropriations through February 15, 2019, explicitly made such funds cover the prior period during the lapse. Pursuant to this direction, the NPS was able to move obligations incurred during the appropriations lapse from the FLREA fee account to the account for which the charges were originally planned, including the NPS operating account, where most of these obligations would have been charged. The actions taken under these provisions, which were confirmed by the Office of Management and Budget, allowed NPS to fully restore FLREA balances to pre-lapse levels.

The Department is currently evaluating impacts to natural resources and infrastructure that occurred during the period of this lapse of appropriations from available funding. The Department is also collecting information related to the amount of revenue obligated during this period, and anticipates that additional information will be available early in the third quarter of operations. FLREA projects have been reviewed to ensure consistency with the law, and are continuing to be implemented across the country.

I hope that we will not be faced with another lapse of appropriations. However, I believe that this action provides critical direction for similar situations in the future. First, our national parks should not be made the public face of another lapse in funding, and we will be prepared to use these fees, as available, immediately for appropriate staffing, basic services, and other bureau needs in accordance with the authorities provided by law. In addition, we have modified our

contingency plans for the NPS and for the other relevant bureaus to ensure that in the event of a future lapse, we are prepared to use these fees for these allowable purposes.

Question 13: National Register of Historic Places

The Department of the Interior is proposing new regulations for the National Register of Historic Places that establishes weighted objections to listings by allowing the percent of land ownership to be a determining factor in objections.

Mr. Bernhardt, can you explain under what Congressional authority are you able to create a rule change that effectively changes the American voting structure?

Response: The proposed rule does not change the American voting structure. The proposed regulations you reference are intended to implement amendments to the National Historic Preservation Act included in the National Park Service Centennial Act of 2016 and to ensure that, if the owners of a majority of the land area in a proposed historic district object to listing, the proposed district will not be listed over their objection. Importantly, the 60-day comment period on these proposed regulations is open and will close on April 30, 2019, after which the NPS will carefully consider the comments received on this proposal.

Question 14: Disposable Plastic Water Bottle Recycling and Reduction

In August of 2017, the Department of the Interior overturned the prior Administration's "Disposable Plastic Water Bottle Recycling and Reduction" program, which was effectively a ban on the sale of plastic water bottles inside units of our National Park System. I absolutely support efforts to preserve customer choice, but plastic pollution remains one of the great environmental challenges of our time.

Mr. Bernhardt, as you prepare to more formally assume leadership of the Department of the Interior, I ask that you make time to focus on this issue of plastic pollution. Consistent with that request, I have a couple questions:

Following the decision in August of 2017 to overturn the prior Administration's ban on plastic water bottle sales inside units of the National Park System, has the Department undertaken any work on alternative approaches to mitigating or preventing plastic pollution on our federal lands and in our federal waters?

If not, can you please commit to providing me and the committee with a plan to do so within four months of being confirmed by the Senate?

Response: The NPS continues to promote recycling and reduce plastic waste while still providing as many safe, healthy hydration options as possible to visitors. Many parks have worked with partners to provide free potable water in bottle filling stations located at visitor

centers and near trailheads. At other parks, concessioners have implemented disposable water bottle reduction programs in consultation with park management and many parks conduct an annual clean-up, typically in partnership with the local community, and have information available in visitor centers on the importance of reducing waste. Several coastal parks also participate in research and monitoring projects related to marine debris and microplastics.

For FY 2018, the NPS reported that its solid waste management efforts are improving, as measured by the waste reduction rate, which measures parks' success in diverting waste from landfills. The rate for FY 2018 was 41.97%, compared to 31% for FY 2017. I will continue to support the effort to increase the diversion of waste from landfills.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Sanders

Climate Change

Question 1: The Department of the Interior's (DOI) mission, as stated on DOI's website, is to "conserve and manage [our] Nation's natural resources and cultural heritage." The vast majority of scientists tell us that climate change poses a number of serious risks to our nation's precious natural resources and cultural heritage, and that burning fossil fuels is the primary driver of climate change. Therefore, extracting and burning fossil fuels directly threatens our nation's natural resources and cultural heritage.

In the hearing to consider your nomination for DOI Deputy Secretary, you stated the following regarding your views on climate change:

"We are going to look at the science, whatever it is, but policy decisions are made. This president ran, he won on a particular policy perspective. The perspective is not going to change to the extent that we have the discretion under the law to follow it...we're absolutely going to follow the policy perspective of the president."

a. Do you agree that climate change is the greatest threat to our nation's natural resources and cultural heritage? If not, why not? If so, why did you not mention the threat of climate change at all in your testimony?

Response: As I indicated at that hearing, I recognize the climate is changing and that man is contributing to that change and the science, including in the fourth assessment, indicates that there is a lot of uncertainty in projecting future climate conditions.

b. Please outline your plan, including a timeline, for addressing climate change by ending any DOI activities, such as the extraction of fossil fuels from our nation's public lands that contribute to climate change.

Response: As I indicated at my hearing, I recognize that the climate is changing, man is contributing to that change, and the science indicates there is uncertainty in projecting future climate conditions. The Department of the Interior's role is to follow the law in carrying out our responsibilities using the best science. The laws governing Interior - such as the Federal Land Policy and Management Act - require us to manage our onshore federal resources on the basis of multiple use and sustained yield, which includes energy development. We are carrying out that statutory mission and will do so until Congress directs us differently. While I agree that the impacts of a changing climate need to be understood and addressed, the Department's role is to follow the law in carrying out our responsibilities. The laws that govern our resources management actions on public lands and offshore areas generally require us to manage these areas for maximum sustained yield of multiple uses, including energy development.

Question 2: On March 28, 2017, the president issued an Executive Order, *Promoting Energy Independence and Economic Growth*, which included several provisions that would cause DOI to increase the extraction of fossil fuels, thereby violating its mission to conserve and manage our nation's natural resources and cultural heritage as well as contributing to climate change. Those provisions include:

a. Lifting any and all moratoria on federal land coal leasing activities related to Secretary's Order 2228.

b. Reviewing and suspending, revising, or rescinding the rules entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," "General Provisions and Non-Federal Oil and Gas Rights," and "Management of Non Federal Oil and Gas Rights," all of which limit fossil fuel extraction on public lands.

If confirmed, will you carry out the DOI's mission to protect our nation's natural resources and cultural heritage, or will you instead carry out the policy laid out in the aforementioned Executive Order? Are there any other policies of the President you intend to carry out that would violate DOI's mission protect our nation's natural resources and cultural heritage?

Response: I do not agree with the assertion that there is an inconsistency between the Executive Order and the Department's mission as set out in law. As I indicated in response to the previous question, while I agree that the impacts of a changing climate need to be understood and addressed, the Department's role is to follow the law in carrying out our responsibilities. The laws that govern our resources management actions on the public lands and offshore areas generally require us to manage these areas for maximum sustained yield of multiple uses, including energy development.

Question 3: In a March 20, 2019 CBS interview, EPA Administrator Andrew Wheeler stated that "most of the threats from climate change are 50 to 75 years out." However, the vast majority of the world's scientists tell us that climate change is already causing rising sea levels, increasing hunger and illness, extinction of species, and more frequent and intense extreme weather all around the world.

Do you agree with the vast majority of scientists, or do you agree with Administrator Wheeler's statement that "most of the threats from climate change are 50 to 75 years out"?

Response: I am unfamiliar with Administrator Wheeler's comments or the context in which he made them. My views are reflected above in the previous response

Question 4: Do you accept the following findings from the Fourth National Climate Assessment on climate change-related impacts happening now?

a. Declines in surface water quality due to intensifying droughts, increasing heavy downpours, and reduced snowpack.

b. Increased air quality and health risks from wildfire and ground-level ozone pollution due to changes in temperature and precipitation.

c. Increased damage to America's trillion-dollar coastal property market and infrastructure due to increased frequency of high-tide flooding events driven by sea level rise.

d. Decreasing productivity of certain fisheries and damage to the marine ecosystems on which many of our coastal communities rely for livelihoods and recreation due to rising water temperatures, ocean acidification, retreating arctic sea ice, coastal erosion, and heavier precipitation.

Response: As I indicated at that hearing, I recognize the climate is changing and that man is contributing to that change and the science, including in the fourth assessment, indicates that there is a lot of uncertainty in projecting future climate conditions.

Public Lands

Question 5: In the hearing to consider Ryan Zinke's nomination for DOI Secretary, he told me that he was "absolutely against the sale or transfer of public land." In response to my questions for the record for the hearing to consider your nomination for DOI Deputy Secretary, you stated that you shared then-Secretary Zinke's "opposition to the sale or wide scale transfer of federal lands." And, in a March 6, 2019 speech to the North American Wildlife and Natural Resources Conference, you stated that the Trump administration opposes "large scale transfer [of public lands]."

After he was confirmed, then-Secretary Zinke conducted the largest rollback of federal land protection in our nation's history by proposing to slash the boundaries of the Bears Ears and Grand Staircase-Escalante National Monuments by more than two million acres. He also proposed to open the majority of U.S. coastal waters to oil and gas drilling in the largest offshore lease sale in American history and ordered the largest ever lease sale of the National Petroleum Reserve.

a. Do you believe it is appropriate for cabinet nominees, such as yourself, to lie to United States Senators during their constitutionally-mandated confirmation process?

Response: I do not agree with the premise of your question that Secretary Zinke lied. I believe it is unwise for any public official, whether elected or otherwise, to be untruthful.

b. Given that the Trump administration opposes the large scale sale or transfer of public lands, please outline your plan, including a timeline, for reversing the decisions to shrink the boundaries of the Bears Ears and Grand Staircase-Escalante National Monuments, open up U.S. coastal waters and land to increased oil and gas drilling, and conduct the largest ever lease sale of the National Petroleum Reserve.

Response: To be clear, the President's proclamations issued under the Antiquities Act did not sell or transfer any lands out of federal ownership. Rather, as you may be aware, the Department, as it did before the issuance of the proclamations, continues to manage the public lands that were included within the original boundaries of Bears Ears and Grand Staircase-Escalante National Monument. Similarly, the authorizations of conventional or renewable energy development do not include the sale or transfer of any lands out of federal ownership.

Oil and Gas Leases

Question 6: In January 2018, DOI issued an internal Instruction Memorandum on oil and gas leasing rules that would make the National Environmental Policy Act review processes optional for potential oil and gas leases, eliminate the requirement for oil and gas lease site visits by DOI officials, and shrink the lease sale parcel protest period from 30 days to 10 days.

In response to my questions for the record for the hearing to consider your nomination for DOI Deputy Secretary, you stated that you would "advance Secretary Zinke's conservation agenda in a manner that is rooted in and supported by input from a wide array of stakeholders, particularly those state and local communities most directly affected by the decisions the Department makes." Furthermore, in your testimony, you stated that you would "actively seek input and listen to varied views and perspectives to help ensure the conclusions [you] draw are well informed."

Given that the January 2018 Instruction Memorandum on oil and gas leasing rules would severely limit input from state and local communities most impacted by DOI's decisions on oil and gas leases, please describe your plan, including a timeline, for withdrawing the Memorandum and replacing it with guidelines that are "rooted in and supported by input from a wide array of stakeholders, particularly those state and local communities most directly affected by the decisions the Department makes."

Response: The Department values meaningful public participation and an efficient environmental review process in the implementation of its onshore oil and gas program. The BLM observed a trend regarding protests over the past several years in which the percentage of parcels protested from the original sale notice had increased dramatically. This 10 day period is in addition to multiple opportunities for public participation and engagement through the BLM planning process under FLPMA and NEPA processes.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Question 7: In my questions for the record for the hearing to consider your nomination for DOI Deputy Interior Secretary, I asked you if you could commit to the highest environmental protections for the Atlantic Region, Pacific Region, and Alaska Region, including the Beaufort, Chukchi, and North Aleutian Basin Planning Areas, identical with those provided by the Obama Administration, in your execution of President Trump's April 28, 2017 Executive Order to open our outer continental shelf to oil and gas drilling. You responded by stating that you were unaware of the details regarding the ongoing review of the Five Year Offshore Leasing Program.

Given that you have now had ample time to familiarize yourself with this plan, will you commit to the highest environmental protections for the Atlantic Region, Pacific Region, and Alaska Region, including the Beaufort, Chukchi, and North Aleutian Basin Planning Areas, identical with those provided by the Obama Administration? If so, please provide a plan, including a timeline, for withdrawing the 2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program and instead working to end all drilling in the Outer Continental Shelf. If not, why not?

Response: The Department's offshore energy development and safety activities are an important component of the Administration's policy of ensuring long term energy and economic security. The Administration's America First Offshore Energy Strategy calls for boosting domestic energy production to stimulate the Nation's economy and to ensure national security, while providing for responsible stewardship of the environment. The process of review and development of draft documents and proposals is currently ongoing. BOEM's management of the Nation's OCS oil and gas, marine minerals, and renewable energy resources will continue to be informed through environmental assessments, studies, and partnerships conducted under its Environmental Programs. These efforts are vital to ensuring that the impacts of OCS activities on the environment are understood and effective protective measures are put in place.

Question 8: In September 2018, DOI proposed eliminating safety rules for offshore oil and gas drilling that were adopted following the Deepwater Horizon accident, which killed 11 people and spilled 134 million gallons of oil into the Gulf of Mexico. This spilled oil decimated local economies and ecosystems. DOI now says that less rigid inspection and equipment requirements would have "negligible" safety and environmental risks.

a. Do you believe worker deaths are a negligible safety risk?

Response: No, I do not.

b. Do you consider 134 million gallons of spilled oil to be a "negligible" environmental risk? If not, please outline your plan, including a timeline, for withdrawing DOI's proposal to modify these safety rules.

Response: No, I do not. The Department's efforts, through the Bureau of Safety and Environmental Enforcement, to review the 2016 Well Control Rule for consistency with the

policy set forth in Executive Order 13795, are aimed at improving the rule by codifying longstanding internal policies; revising provisions from which requests for alternate procedures or equipment were routinely granted; adding explanatory text to clarify existing regulations; and revising or removing provisions that provided no additional safety benefit, but increased regulatory complexity. These efforts are informed by career subject matter experts as well as independent organizations. In the wake of, and in response to, the Deepwater Horizon tragedy, 14 different organizations issued 26 separate reports. These reports contained a total of 424 recommendations to BSEE. BSEE considered the recommendations of these 14 organizations as inputs from outside, independent experts. The effect of this input is reflected in the draft revised Well Control Rule in that no proposed revision conflicts with or ignores any of the 424 recommendations made by those organizations.

BSEE also solicited input from a variety of stakeholders to identify potential revisions to the regulations promulgated through the draft revised Well Control Rule that would clarify unclear provisions of the original rule or reduce regulatory burdens without impacting safety and environmental protection.

Question 9: On January 22, 2019 I joined 13 of my Senate colleagues in sending you a letter requesting information on the Bureau of Ocean Energy Management's (BOEM) decision to continue work on the National Outer Continental Shelf Oil and Gas Leasing Program during the partial government shutdown. DOI's response, sent by BOEM Acting Director Walter Cruickshank, ignored several important aspects of our letter, so I will repeat those questions here.

In the Explanatory Statement accompanying the Consolidated Appropriations Act of 2018, Congress provided $171,000,000 for BOEM in Fiscal Year 2018, and included full funding for the five-year offshore leasing program through regular appropriations. At the time of our letter, what specific accounts, subaccounts, and programs were DOI and BOEM relying on to fund the continuation of the oil and gas activities referenced in our letter? Were these funds being used for other activities under the BOEM December 2018 contingency plan following the start of the government shutdown, and if so, what were those activities? Were these funds being used for other activities under the normal operations of the government prior to the shutdown on December 22, 2018, and if so, what were those activities?

a. Were BOEM's essential functions of emergency response and support for Bureau of Safety and Environmental Enforcement permitting operations short-staffed during the ongoing shutdown? If so, could the carryover funds used to support the 40 on-call employees working on the National OCS program have otherwise been used to support these shorthanded essential functions?

Response: To support activities and employees identified as "exempt" under the January 2019 contingency plan, BOEM utilized the direct appropriations and offsetting collections funds provided by the Consolidated Appropriations Act, 2018, to the Ocean Energy Management

account, specifically the Conventional Energy, Environmental Programs, and Executive Direction budget activities. BOEM had a limited amount of these funds left over from FY 2018 (such funding is termed "carryover") that was therefore available to fund FY 2019 mission functions in a manner consistent with appropriations language. Because this carryover was appropriated in FY 2018 and not expired (direct appropriations are available for two years and offsetting collections are available until expended), it was not subject to the FY 2019 lapse in appropriations.

Carryover funds were not used for activities identified in the Contingency Plan published December 27, 2018. That version of the plan stated that none of the employees performing excepted functions were funded ("Number of exempt employees whose compensation is financed by a resource other than annual appropriations (carryover): None"). BOEM refers to guidance from the Office of Personnel Management on the determination and definition of excepted (vice exempt) functions and how employees performing those functions are paid during a lapse in appropriations. Prior to the shutdown on December 22, 2018, carryover funds had been used to support ongoing mission work similar to the work undertaken during the shutdown.

b. Was the scope of activities related to the Environmental Compliance Monitoring program, which include monitoring for compliance with the Clean Air Act and Clean Water Act, at all curtailed during the shutdown, and if so, to what extent? Please include any reductions in personnel, inspections or other relevant activities.

Response: There was no potential of short-staffing. BOEM's contingency plan provides for over 60 BOEM employees to be on call to respond to BSEE requests for support in emergency situations.

Land and Water Conservation Fund

Question 10: On February 15, 2019, you tweeted the following:

"There's a lot to agree on in the #public lands package from the senate. The Trump administration fully supports reauthorizing #LWCF and we included it in our budget last year."

President Trump's FY2020 budget request would slash the Land and Water Conservation Fund's (LWCF) budget by 95 percent. A 95 percent budget reduction is not consistent with support for the LWCF. If confirmed, will you commit to submitting a FY2021 budget request for full funding for the LWCF of $900 million?

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. LWCF has only been fully funded by Congress twice since its enactment in 1965. Whatever funding level Congress chooses for this program, the Department under my leadership will faithfully execute the goals of LWCF.

<u>Questions from Senator Sanders</u>

Question 11: If, like in FY19, Congress chooses to ignore the President's budget request and appropriate the LWCF budget at a higher level than the President's budget request in future fiscal years, will you commit to ensuring that all grant funds are awarded and delivered to their recipients in an expeditious manner?

Response: I commit to implementing the LWCF in accordance with laws passed by Congress.

Arctic National Wildlife Refuge

Question 12: Public Employees for Environmental Responsibility recently released a number of DOI documents which show that federal scientists believe there are significant gaps in scientific information related to fossil fuel extraction on the coastal plain of the Arctic National Wildlife Refuge (ANWR), and that numerous additional scientific studies related to vegetation, caribou, polar bears, birds, water, subsistence, cultural resources, fish, and public health are necessary before moving forward with fossil fuel extraction-related activities in ANWR. DOI attempted to hide these documents from the public, failed to clearly identify them in the draft Environmental Impact Statement (EIS) to implement an oil and gas leasing program within ANWR, and refused to release them in response to relevant Freedom of Information Act requests.

a. If confirmed, will you commit to publicly releasing any pertinent documents from federal scientists regarding this draft EIS? If so, please provide a timeline for releasing these documents.

b. Will you commit to ensuring that the draft EIS is revised and re-released to include all areas for which federal scientists believe more scientific research is necessary? If so, please provide a timeline for revising and re-releasing the draft EIS.

Response to a and b: DOI routinely releases scientific papers that have bearing on the Department's programs to the public, and this case is no different. The referenced documents were considered in the development of the leasing program and Draft EIS. The Department and the Bureau of Land Management are complying with the requirements of the authorizing legislation, the Tax Cuts and Jobs Act of 2017, the National Environmental Policy Act, and other relevant statutes, as we move toward conducting lease sales and providing for responsible development of these important resources. The agencies involved determined that data from the suggested studies were unnecessary to assure that the Draft EIS contained a robust environmental analysis of potential impacts of leasing for each of the referenced resources.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Stabenow

Question 1: It seems that I should remind you of the critical role the Interior Department plays in preserving the health of the Great Lakes, which hold 21% of the world's surface freshwater, provide drinking water to more than 30 million people, and support a $6 trillion economy.

The U.S. Fish and Wildlife Service, and the U.S. Geological Survey provide key research on water-quality and fish stocks, and conduct essential work to prevent the spread of invasive species like Asian carp that would decimate the Great Lakes.

But either this Administration has forgotten about this vital work, or considers it unimportant, because it has proposed a 14 percent budget cut to the USGS and a 16 percent cut to the US Fish and Wildlife Service for fiscal year 2020 – including a 28 percent cut to their efforts to combat Asian carp – which as I explained during your confirmation hearing for Deputy Secretary, are an eminent threat to the Great Lakes.

Given your and this administration's efforts to suppress science and exploit natural resources for mineral extraction and fossil fuel production, how can we trust you to protect the Great Lakes, especially when it's not even a priority for this President?

Response: I do not agree with the premise of your question. I support scientific integrity and have great respect for the work that Department scientists carry out. The Department is one of our country's principal stewards for the Great Lakes and we recognize the connection between the health of the Great Lakes Watershed and human health and the economy. The Department's budget request includes over $66 million for ecosystem work in the Great Lakes, and $107 million for invasive species work. This funding will support a number of federal and non-federal partnerships focused on critical restoration activities, including projects for aquatic invasive species management, including Asian Carp and habitat protection and restoration. Upon your request, if confirmed I would like to work with you on addressing the Asian Carp situation.

Question 2: During your confirmation hearing for Deputy Secretary, you promised me you would be "honest" to science – that you would look at it, evaluate it, and honor it. You said you were certain that scientists at the Interior Department were not under attack. However, under your leadership, the DOI has gone through great lengths to suppress science and limit public access to information – all, I might add, in the interest of fossil fuel projects that benefit companies you once represented as a private attorney. You signed Secretarial Order 3360 that abolished directions to use the best available science to increase understanding of climate change. On your watch, the DOI disbanded its Advisory Committee on Climate Change and Natural Resource Science; and proposed a rule restricting public access to information through the FOIA process – a proposal so alarming that even my Republican colleagues have called foul play. The DOI has deleted its top-level climate change web page, and has implemented a new screening process requiring scientific grants over $50,000 to be reviewed by political appointees.

Scientists at the Interior Department and 12 other federal agencies recently reaffirmed the real threat of climate change in the Fourth National Climate Assessment. Isle Royale National Park in Northern Michigan is already experiencing significant impacts from climate change. However, as I understand, the Interior Department has removed all mention of climate from its latest draft resource management plan for the park. President Trump said he doesn't believe federal scientists, and this administration has clearly proven it has different priorities. The President's budget for fiscal year 2020 once again promotes fossil fuels at the expense of clean energy and conservation; and during the Trump Shutdown, you recalled workers to make sure oil and gas permitting continued – even while safety and environmental review personnel and national park employees remained furloughed.

I would like to know what has changed, then, since we last spoke. Either you have forgotten the commitments you made to me and this Committee, or thought we wouldn't notice your office's blatant attacks on science. Can you square with me how all of these activities demonstrate your commitment to be fair to science, and not this administration's desire to promote fossil fuels over all else?

Response: I do not agree with the premise of your questions. Science plays a critical role in our decision making process as does the law. Within the Department of the Interior over the last two years, the number of formal complaints of breach of scientific integrity have decreased. In addition, to further our application of well-grounded science, I have appointed a career scientist to serve as the Science Advisor to the Acting Secretary/Deputy Secretary, and if I am confirmed, he will continue to serve in the Immediate Office of the Secretary. There is no question that scientific integrity should underpin agency actions. As I have stated, my view is that an agency's decisions should be predicated on the best information, including an evaluation of science and application of the law. I believe when scientific data is evaluated on its merits and used as a basis to make legal and policy decisions that are honest to the science, conflicts will be reduced and those decisions will be reliable and legally sound. I believe when the Department picks and chooses between data, it is obligated to articulate a reason why it has done so, and it must be able to connect its conclusions to the facts it finds in a rational manner.

This is why I issued Secretary Order 3369 last September promoting open science. This Order is intended to ensure that the Department of the Interior bases its decisions on the best available science and provides the American people with enough information to thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions.

Question 3: **When Mr. Zinke testified before this Committee during his confirmation hearing, he gave us his "full commitment" to support the Land and Water Conservation Fund. He recognized it as an "important program" and pledged to work with Congress to make it permanent. But to the disappointment of many of my colleagues, he fell short of his commitments and instead defended a FY2019 Interior budget that proposed a 95 percent cut to the program.**

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

This year, both parties in Congress came together to permanently authorize the Land and Water Conservation Fund as part of the John D. Dingell Jr. Conservation, Management, and Recreation Act. The Senate overwhelmingly passed this far-reaching lands bill by a vote of 92 to 8, and the House passed it by 363 to 62. So it seems both sides agree that America's most important conservation and recreation program merits permanent authority.

LWCF has leveraged over $329 million to protect special places across Michigan. In fact, one of the largest LWCF investments in the country is our very own Sleeping Bear Dunes National Lakeshore, where LWCF has invested over $96 million to protect the park's 65-mile shoreline and 400-foot dunes for generations more of hikers, kayakers, wildlife watchers, and fishermen.

Mr. Bernhardt, weeks after signing a bill that permanently authorizes the LWCF, President Trump sent Congress a budget proposal that guts its funding in fiscal year 2020. I don't understand how you can be a champion for the LWCF and lead a department that has effectively called for eliminating it. Please explain.

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. LWCF has only been fully funded by Congress twice since its enactment in 1965. Whatever funding level Congress chooses for this program, the Department under my leadership will faithfully execute the goals of LWCF.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Cassidy

Question 1: Knowing much of the current focus in the Gulf for energy development is in deep water exploration and production, folks in my state are concerned about how we "revive" energy development activity specifically in shallow water and on the Outer Continental Shelf. Royalty rates for new leases on the Outer Continental Shelf (OCS) were lowered from 18.75 to 12.5 percent but according to the Bureau of Safety and Environmental Enforcement, shallow water bids decreased by 25 percent compared to August 2018.

What are your thoughts on additional measures that can be taken to stimulate further oil and gas exploration and production activity on the OCS?

Response: The prudent development of our abundant offshore energy resources is an important component of our economic prosperity. There are a number of factors that contribute to positive market conditions for development of these resources including the economy, energy prices, and the regulatory environment. As market conditions fluctuate, the Department has the statutory authority to adjust royalty rates for future offshore lease sales in accordance with federal law. The law also requires the Secretary to conduct lease sales on the OCS that ensure fair market value to the taxpayer. Within this legal framework, I will ensure that the Department continues to examine ways to improve our programs.

Question 2: It is my understanding that the U.S. Coast Guard and the Bureau of Ocean Energy Management (BOEM) have not been able to reach a satisfactory agreement to avoid siting offshore energy project leases in recognized maritime navigation lanes, including port access routes. Improper siting can result in collisions between vessels and derricks.

As we continue to expand our offshore energy footprint and seek to ensure the safety of mariners and energy project workers, will you direct BOEM to conclude a siting agreement for offshore leases with the U.S. Coast Guard as soon as possible?

Response: Yes, I will work to ensure an appropriate agreement is in place.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Martin Heinrich

Question 1: My office has been in regular contact with staff from your office and the Bureau of Reclamation involved in implementing the Aamodt Indian Water Rights Settlement. Specifically, the parties have been negotiating a path forward to resolve the forecasted cost-overrun associated with the construction of the Pojoaque Basin Regional Water System.

Can you confirm that the Bureau of Reclamation will allow for and move forward with limited construction of the System once the parties agree to a project design, cost, and cost allocation that addresses the forecasted System cost overrun, pending congressional authorization of an agreed upon ceiling raise?

Response: The Department has been working diligently with the parties to reach agreement, we are making progress and hope to reach an agreement soon. We are committed to working with you on next steps once that agreement is reached.

Question 2: The Compensatory Mitigation Instruction Memorandum issued by the Bureau of Land Management seems to contradict itself. The IM states "FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation as a condition of obtaining authorization for the use of the public lands." In the next paragraph, the IM states "Even if FLPMA authorizes the use of compensatory mitigation, it does not require project proponents to implement compensatory mitigation."

Which one is it? Does BLM have the authority or not to require compensatory mitigation?

Response: FLPMA does not provide the BLM with the authority to require compensatory mitigation as a condition of authorization for the use of public lands or to require that project proponents implement compensatory mitigation. Because of this, the IM referenced in your question clarifies that the BLM will consider compensatory mitigation only as a component of compliance with mitigation programs authorized under a state's policy or statute, federal law other than FLPMA, or when voluntarily offered by a project proponent.

Question 3: In 2018, the Mexican Wolf Recovery Program reported 21 wolf deaths, which is an alarmingly high number given last year's total population estimate for New Mexico and Arizona combined was only 114 Mexican wolves.

What is the Fish and Wildlife Service's plan to address and curb this high mortality rate of endangered Mexican wolves, especially with the data revealing more than half of these wolf mortalities were illegal kills?

Response: The Fish and Wildlife Service recorded 21 Mexican wolf mortalities in 2018, the highest documented number of mortalities to occur in a single year. In 2018 compared to prior

years, more Mexican wolves were radio-collared providing improved mortality detection, which is the likeliest explanation for the increase in documented mortalities. The Mexican wolf population continues to expand in terms of both area occupied and number of wolves. In addition to promoting Mexican wolf conservation through education and outreach programs, the FWS continues to investigate and help prosecute illegal Mexican wolf killings.

Question 4: I am glad to learn that the Department of the Interior is talking with the pueblos about conducting a pueblo-led study of tribal cultural heritage in the Greater Chaco Area. Such a study could demonstrate how beneficial it is for all the stakeholders in the development process to have tribal leaders involved from the very beginning.

However, I am concerned that the initial proposed study area is entirely within the buffer area where the pueblos (and the New Mexico Congressional Delegation) believe no development at all should take place.

Would you be willing to work with pueblo leadership to identify a more appropriate area for this first tribal cultural resource study outside the immediate buffer area around the park?

Response: As I indicated to you at the hearing, I would be more than happy to visit the site and meet with you and your constituents about potential development matters there at your request.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Hirono

Question 1: Recently in response to questions regarding the new grant review process being implemented over at DOI Mr. Scott Cameron commented that DOI was in the midst of finalizing the streamlining process.

When will the entire process be finalized and what will the new grant review process entail, including the established timeline for each grant review?

Response: The Department just published a proposed rule in the Federal Register, the Financial Assistance Interior Regulation, which addresses longstanding ethics issues identified by the Inspector General in the Department's past administration of grants. In addition, the Department is currently in the process of implementing a new grants management platform called GrantSolutions, which is an HHS product. This platform will allow standardization of business processes across the Department along with providing all of the grants information in a single repository. This will provide increased transparency, and greater efficiency in processing, accountability, and management. The complete transition to such a program will likely take years.

Question 2: In July of last year the Department of the Interior, under your leadership, and NOAA Fisheries proposed a set of sweeping regulatory changes to the Endangered Species Act that would drastically undermine this law and make it harder for imperiled species to recover.

What is the status of these proposed regulatory changes?

Response: The proposed revisions to regulations that implement portions of the ESA are in interagency review.

Question 3: One focus of the Endangered Species Act regulatory proposals released last summer by DOI and NOAA was the scope of impacts that could be considered when listing a species or when evaluating actions that could affect listed species and their designated critical habitats.

In particular, there are at least two proposed changes to the regulations that seem to minimize or eliminate consideration of the effects of climate change on species survival. In the proposed changes to Section 4 regulations, the definition of foreseeable future – which is used to determine whether to list a species as threatened – would be limited to "only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future *are probable*."

In the proposed changes to Section 7 regulations, a planned activity by a federal agency would be exempt from consultation with the Services if that activity has "effects that are

***manifested through global processes*" if those effects "(i) cannot be reliably predicted or measured at the scale of the species' current range, or (ii) would result in very small or insignificant impact on the species or critical habitat, or (iii) are such that the risk of harm to a listed species or critical habitat is remote."**

These two components of the proposed regulations seem to allow the Services to circumvent consideration of climate change when enforcing the ESA, despite the widespread scientific consensus on the significant impacts of climate change on species and habitats. The ESA relies on use of the best available science, and its mandate is to prevent extinction, so is it not incumbent upon DOI to understand and incorporate information on climate change into its enforcement of this law?

Response: As I indicated at that hearing, I recognize the climate is changing and that man is contributing to that change and the science, including in the fourth assessment, indicates that there is a lot of uncertainty in projecting future climate conditions. An objective of this proposed revision to portions of the ESA implementing regulations is to clarify the meaning of certain ambiguous terms that are in the ESA itself but not defined in the Act. For example, the law allows us to list species as threatened when they are likely to become endangered in the foreseeable future, but it does not explain what "foreseeable future" means. We aim to provide the public and our federal agencies with a shared terminology that will increase regulatory certainty.

Question 4: The Department of the Interior is currently rewriting the regulations that protect threatened and endangered species. As part of those changes, you are proposing removing the current, comprehensive protections species receive when they are listed as threatened and instead only granting protections under a species-specific rule. At the same time, your Department has recommended slashing the funding appropriated to the Fish and Wildlife Service for their listing program.

How do you reconcile requiring the agency to do more work to make sure species receive the necessary protections and providing them with less money to do that work?

Response: The U.S. Fish and Wildlife Service's (USFWS) focus on the recovery of species has resulted in twelve species being delisted and downlisted, and nine species proposed for delisting and downlisting in this Administration. Our FY 2020 budget request includes $95 million dedicated to the recovery of species listed under the ESA. By recovering species and returning them to state and tribal management, we further our commitment to being a good neighbor by working with states and private landowners on conservation activities, and we are able to focus our limited resources on those species of greatest conservation need. With proposed FY 2020 Recovery funding, the USFWS anticipates proposing or finalizing 36 delisting or downlisting rules.

The request also includes $26.4 million for conservation and restoration activities that can help keep at-risk species off the threatened and endangered species lists and under the management of

our state and tribal partners. The USFWS is committed to strengthening delivery of conservation under the ESA by making it easier to work with the agency on proactive conservation efforts for species. By investing in reducing threats to species and their habitats before they become critically imperiled, future conservation efforts are likely to be less costly, more flexible, and more likely to result in successful conservation over time.

Question 5: On Tuesday the 26th the NYT reported that you personally intervened in the biological opinions for chlorpyrifos and two other pesticides and that four years of work by career scientists that was ready for review by the public was shelved subsequent to your intervention. The story included the newly released analysis by FWS career staff, which included the finding that almost 1400 endangered species are being put on the path to extinction by chlorpyrifos.

Is it true that under the Endangered Species Act a biological opinion must be based on the best available science at the time?

In the 18 months that you have been Deputy Secretary, how many biological opinions have you personally intervened in? How many times has the Department purposefully withheld or delayed the sharing of scientific information with the public? Is it also true that the Endangered Species Consultation Handbook does not contemplate Secretary level review of any biological opinion but instead that they are to be reviewed by the director of the USFWS?

Response: I serve as Deputy Secretary in an operating environment where there is no Senate confirmed Solicitor, Assistant Secretary for Fish and Wildlife and Parks, or a Director of the U.S. Fish and Wildlife Service. As a result, over the course of the last nineteen months I have found myself engaged in many activities that I would greatly prefer others were spending their time and focus on.

However, my lawful ability to be engaged in a vast array of activities within the Department of the Interior flows from the reality that I act with all of the Authority of the Secretary of the Interior. I serve as his or her alter ego. Theoretically, I can exercise all of the authority of the Secretary of the Interior.

I disagree with the factual premise of your question. Science related to the biological opinions for the pesticide related consultations have not been "shelved", but are undergoing further review and improvement.

Biological Opinions must be consistent with the law and science. They must comport with FWS' regulations. I am aware of no case in which the Department has purposely withheld or improperly delayed the sharing of scientific information with the public, where disclosure was appropriate during my tenure. I issued Secretary's Order 3369 last September promoting open science. This Order is intended to ensure that the Department of the Interior bases its decisions on the best available science and provides the American people with enough information to

thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions.

Under section 7(a)(2) of the ESA, each federal agency involved in the consultation is required to use the best scientific and commercial data available. The ESA assigns authority for implementing the Department's role in Section 7 to the Secretary, but that authority is also delegated to the Assistant Secretary of Fish Wildlife and Parks, and then to the Director of the Fish and Wildlife Service and further delegated by the Fish and Wildlife Service Manual to career senior executives or their subordinate managers. The Consultation Handbook reflects the Service's internal delegations, and decision authority for the pesticide biological opinions follow those delegations.

Question 6: I understand you have been realigning DOI regions to create 12 unified regions.

a. NPS has seven regions. Do you intend to hire 5 new regional directors or what is your plan?

Response: The unified boundaries went into effect in August 2018, pursuant to a Congressional reprogramming. As a result, the National Park Service consists of a headquarters office, twelve regions, and multiple parks and support units. In some cases a NPS Regional Director may oversee more than one region, or the NPS may choose to make other organizational changes over time.

b. How is this realignment impacting career staff and morale?

Response: The realignment enables all bureaus, except for the Bureau of Indian Affairs, the Bureau of Indian Education, and the Office of the Special Trustee for American Indians, who are not participating at this time, to operate on a common geographic framework. This structure should have a positive impact on employees as it improves communication and increases interaction among staff across bureaus, while also setting the stage for improving delivery of shared services. Inter-bureau teams were formed to provide input on all aspects of reorganization, and many participants found the interactions so useful that they have independently continued their regular meetings.

c. What is the opportunity cost and what impact does this realignment have on the bureau's budget?

Response: Establishing unified regions is designed to improve service delivery to the American public. The Department will leverage the unified regional structure to improve coordination and streamline business operations using shared services and best practices across the Department, focusing primarily on human resources, information technology, and acquisition services. Work is underway in 2019 to plan implementation, conduct analysis, and identify areas for

collaboration. The FY 2020 budget request for NPS includes $5.7 million to support the reorganization.

d. Will staff be asked to relocate?

Response: Currently there are no announced plans to relocate staff as part of implementing the Unified Regions.

Can you report on what precisely you are doing with the funds that were appropriated in FY19?

Response: The Department has been working with each of the relevant bureaus to finalize their 2019 implementation strategies since the funds became available in February 2019, and taking a careful and methodical approach in order to spend this money wisely. The 2019 funding will help implement changes needed within the bureaus to align their field operations to the new unified regional structure. Funds will be used to finalize proposals to relocate some staff out West. This 2019 funding will also be used to identify the best strategies for implementing smarter ways of doing business through shared services at the regional, bureau, and national levels.

The FY20 DOI Budget in Brief gives little detail as to how the proposed $28 million would be used. Please expand on how those funds would be used and justify how that number was arrived at.

Response: In FY 2020, the Department will continue implementing the reorganization effort, including standing up the unified regions, relocating a small number of headquarters staff and functions as appropriate, and improving operations through the use of technology, shared services and consistent best practices. We are working now to redesignate the bureau's prior regional assignments to the new boundaries. We expect to complete revisions to the Departmental Manual to reflect the unified regions this Spring.

We have received the first of three third party reviews of the Department's acquisition, information technology, and human capital services, which will help us identify the best business decisions and inform an implementation strategy that will improve the quality and efficiency of "back office" functions, allowing us to shift resources to public-facing work.

What agencies do you intend to move to the West?

Response: We propose to move some functions in the Bureau of Land Management closer to field operations. The USGS also proposes to move some leadership functions and staff to Colorado, phased over time.

Do you still intend to have Interior Regional Directors? What is your plan for having any centralized command?

Response: The current budget proposal contemplated Interior Regional Directors.

Please report on the progress to date in the four focus areas. What exactly do you mean by "collaborative conservation"? What is your plan for recreation and permitting?

Response: The six focus areas are the 3 mission areas (Recreation, Collaborative Conservation, and Permitting), along with three administrative areas with potential shared services in information technology, acquisition, and human resources. Regional teams of experts in each mission area have been working together for many months to plan and accomplish priority activities.

- Collaborative conservation involves leveraging the bureaus' individual efforts to plan and implement programs and activities in the areas of species and habitat conservation, such as creating wildlife corridors and invasive species management.

- Enhanced recreation has been a Departmental priority since the beginning of the reorganization effort. We recently launched an online portal that helps people find recreation opportunities on Department-managed lands from one web page. The plan is to continue to increase opportunities for recreation and afford the American people greater access to their public lands.

- Permitting is a mission area where the bureaus have already made great strides in improving customer service to our many permittees. Improvements include expedited, but still legally compliant timelines and more clear and concise documents. We are planning additional improvements as the bureaus continue to work together through the unified region structure to improve cooperation and communication at the local and regional levels. The local bureau leaders are most familiar with the issues and the landscape or context for those issues and the unified region structure ensures better informed decisions by focusing decision-making on the same geography and stakeholders.

Question 7: During your last nomination hearing I also asked how you will balance fossil fuel interests with the health of our economy and environment. You responded by saying "...my view is that policy decisions should be predicated on the evaluation of science and application of the law. If confirmed, I will make decisions with an open mind, actively seeking input and listening to varied views and perspectives."

From whom are you seeking input? Is it from your own internal experts and career scientists or is it from outside sources?

Response: I have a deep appreciation for the dedicated career public servants and the work that they do at the Department. In my personal statement submitted for my confirmation hearing, I indicated that I seek out varied views, even when we disagree. During my tenure as Deputy Secretary, I have had more meetings with environmental, conservation, and sporting groups than

any other type of external group. However, the vast majority of my information comes from internal experts, comments submitted by the public in regulatory proceedings, and other federal agency sources.

Question 8: In September 2018, the Bureau of Land Management made final its methane rule, which significantly altered the previous rule by eliminating its most significant requirements to reduce extensive waste of natural gas on federal lands. The 2016 rule was finalized after years of collecting data and stakeholder input as well as broad public support. This 2016 rule not only would have protected public health and reduced potent greenhouse gas emissions, it would have recouped millions of taxpayer dollars.

The Trump Administration's rule allows operators to waste a significant amount of taxpayer-owned methane every year during production. Adding to the waste, operators pay royalties on a fraction of wasted methane, costing taxpayers even more money. The BLM estimates that the new rule will cost taxpayers up to $80 million in lost royalty revenue and decrease natural gas production on federal lands by 250 billion cubic feet (bcf) over 10 years.

Why has the Department repealed this rule and put in place a rule that jeopardizes public health and costs taxpayers?

Response: I disagree with your premise that the 2010 rule "jeopardizes public health and costs taxpayers." The Department has provided a lengthy explanation to describe its action in the preamble to the rule which is available to you. Essentially, the explanation is that the rule was revised to reduce unnecessary compliance burdens; to be consistent with the Bureau of Land Management's existing statutory authorities; and to re-establish long-standing requirements that had been replaced. The final rule became effective on November 27, 2018. It is my personal view that the 2016 rule was an unlawful assertion of authority that Congress had not provided the Department, and if Congress wants to provide such authority it could do so at any time.

Question 9: In a recent speech at the North American Wildlife and Natural Resources Conference, you reportedly stated that the Trump administration "generally" opposes "large-scale transfer [of public lands]," but later added that "not everything is required to stay in federal hands."

If confirmed as Secretary, will you commit to not selling federal lands?

Response: My views on the disposal of public lands have not changed since I was confirmed to be Deputy Secretary of the Department of the Interior in 2017. As I noted at that time, I oppose the sale or wide scale transfer of federal lands. I will, however, faithfully execute the laws that Congress has put in place, including for example the provisions of the Federal Land Policy and Management Act. In addition the recent lands package contained a provision allowing certain Alaska Native Veterans of Vietnam to make land selections in Alaska.

Question 10: In September 2017, you were the lead on a Secretarial order restricting environmental reviews under the National Environmental Policy Act (NEPA). The order reduces the time allowed for staff to conduct environmental assessments, while also limiting the scope of the studies by setting and enforcing arbitrary page limits of 150 pages, or 300 pages for an assessment considered "complex."

Do you agree that many decisions that DOI makes are complex, involve many stakeholders and require thorough scientific reviews? If so, why is the agency taking steps to limit studies and require arbitrary page and time limits?

Response: The primary goal of the order referenced in your question is to streamline the Department's environmental reviews while continuing to meet or exceed the National Environmental Policy Act requirements for informed decision making and public participation in environmental impact statements and environmental assessments. The Department's own NEPA regulations at 43 C.F.R. 46.240 direct the bureaus to set time limits. The framework is intended to encourage bureau and Departmental leadership to carefully scrutinize internal processes, when warranted. The order does not set arbitrary limits. Instead, it establishes a process to secure a waiver for any EIS that will exceed either the time completion goal or page goal. I have approved many timeline and page limit waivers upon request.

Question 11: In response to a request from your former client the Independent Petroleum Association of America, DOI reversed longstanding, bipartisan interpretations of the MBTA in order to end all enforcement of incidental takes, and removing any liability by oil and gas companies under the law. Since that time, you have received opposition from a large bipartisan group of former DOI officials and Flyaway Councils representing most state wildlife agencies in the country, and the Justice Department has questioned the changes. Despite all of this, the M-Opinion stands as the Department's current interpretation of the law.

Does the Department have scientific data to back-up this opinion that stands at odds with so many others who have longstanding experience on the issue?

Response: Solicitor opinions are based on the law. On December 22, 2017, after reviewing the text, history, and purpose of the MBTA, the Solicitor issued M-37050, which takes into account the positions of various Federal Courts of Appeals.

M-Opinions are issued by the Solicitor and they are some of the most important and serious work undertaken by the Office of the Solicitor. This important legal guidance is to be based on the law, not outside influence. The work to develop an opinion is a thoughtful and studious exercise.

I did not personally review the research or the prior case law before M-37050 was issued. However, I reviewed a draft and possibly drafts of this legal opinion, that would become the legal guidance for the entire Department.

I certainly informed the drafters that I thought they had done a good job analyzing an important legal question.

It is my personal opinion that the direction and need for the Office of the Solicitor to issue an M-Opinion on the Migratory Bird Treaty Act and its application was the direct result of an M-opinion issued on January 10, 2017, which was suspended very early in the Trump Administration. It is my view that the opinion should not have been issued as the Solicitor was walking out the door, a Solicitor who would not be burdened by the responsibility of implementation and defense of that position, particularly in light of contrary case law in multiple Federal Courts of Appeals. Obviously, a broad and diverse set of interests care about the scope of lawful authority of the Migratory Bird Treaty Act and its overall application. Many have views on it, and Congress can impose any liability standard it would like to affirmatively impose.

I have neither a personal or professional relationship with the IPAA or its employees.

Question 12: Has the National Park Service conducted a damage assessment and report on the total costs to park system (e.g. damage to visitor centers, buildings, restrooms, equipment, roads, forests, trails, signs, petroglyphs, entry fee lost, etc.) due to the recent federal government shutdown? If so, can you provide the report to the committee and if not, can you provide to the Committee a complete accounting?

Response: The Department is currently evaluating impacts to natural resources and infrastructure that occurred during the period of this lapse of appropriations from available funding. The Department is also collecting information related to the amount of revenue obligated during this period, and anticipates that additional information will be available early in the third quarter of operations and will share this information with the Committee.

Question 13: Between 2011 and 2017, park visitation increased by 19%, but staffing has been reduced by 11%. How does the Department justify the decrease in staffing levels with record level visitation in our parks?

Response: There are many things that occurred during the prior administration that I find need careful review. This is certainly one of them. I do think we are too constrained on the front lines. The staffing levels proposed in the FY 2020 budget are an estimate of what could be funded and are not a specific target. Department-wide studies are underway looking at ways to manage back-office functions like human resources, information technology, and procurement more efficiently including developing and adopting consistent best practices across bureaus and offices to potentially reduce the overall personnel needs in these areas, thereby freeing up resources and staff who interact with the public. Additionally, numerous park employees have suggested to me that we reassess the policy of not hiring and paying for permanent employees with park fees perhaps that is something we need to consider.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Question from Senator Hyde-Smith

Question: On July 17, 2014, the Department of the Interior U.S. Fish and Wildlife Service Leadership Team issued a memorandum to Regional Refuge Chiefs regarding agricultural practices for wildlife management on national wildlife refuges. Specifically, the memorandum stated that neonicotinoid pesticides could not be a part of a farmer's integrated pest management plan. In addition, it directed refuge chiefs to phase out the use of genetically modified (GMO) crops unless it was determined their use is essential to accomplishing refuge purposes. On August 2, 2018, your office issued a memorandum withdrawing the neonicotinoid and GMO prohibition. I applaud your agency for that decision. Please provide an update and timeline as to when farmers will be allowed to incorporate GMOs and neonicotinoid pesticides into their integrated pest management plans when engaged in agricultural production on wildlife refuges.

Response: The August 2, 2018, memorandum reversed the decision to ban the use of genetically modified crops and neonicotinoid pesticides on National Wildlife Refuges. Refuges are now determining the use of those crops and pesticides on a case-by-case basis, in compliance with all relevant laws, rules, and regulations. Interested farmers are now requesting the use of genetically modified crops and neonicotinoid pesticides with the appropriate refuge manager. The USFWS is currently developing programmatic NEPA compliance on the use of genetically modified crops in the Southeast and anticipates completion in early 2020. In addition to NEPA compliance approximately 30 National Wildlife Refuges in the Southeast are initiating determinations for the use of genetically modified crops. The USFWS believes that genetically modified crops and neonicotinoids, consistent with these determinations, could be used on National Wildlife Refuges in crop year 2020.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator King

Question 1: As the leader of a Department that has been fraught with ethical violations in the past, it is imperative that the head of the Department to act with the upmost ethical standards beyond just what is required by law.

Beyond the letter of the law, how do you plan to enforce a culture of ethical standards at the Department of Interior?

Response: As I stated at my hearing, I believe that public trust is a public responsibility and that maintaining an ethical culture is critical. Enforcing a culture of ethical standards begins at the top. On a personal level, I have fully complied with my ethics agreement, the ethics laws, and my ethics pledge. I will continue to do so in the future.

In addition, because I believe the Department needs to move to a culture of ethical compliance throughout its offices and bureaus, I have begun to implement significant changes to the program. For years, the Department's Ethics program has been subject to a great deal of criticism, and oversight, and a lack of funding. To address this, we have hired highly qualified and experienced career leaders to lead this office. Since the beginning of this administration, we have hired a total of 42 career, professional ethics advisors, including: a new Designated Agency Ethics Official; an Alternate Designated Agency Ethics Official; a Financial Disclosure Supervisor; an Ethics Education and Training Supervisor with the Departmental Ethics Office; and new Deputy Ethics Counselors at the National Park Service, BLM, and other bureaus and offices. We have elevated the Designated Agency Ethics Official to directly reporting to the Solicitor--the third-ranking person in the Department. And, by the end of Fiscal Year 2019, we will have doubled the number of career ethics officials that the previous administration hired in its entire eight years.

With these efforts, we are starting to make tremendous strides in creating a better and more robust ethics program at the Department, but we have much ahead of us. I look forward to working with you, if confirmed, as we continue these efforts.

Question 2: As I mentioned during the hearing, the entire Maine state federal delegation, Maine's legislature and Maine's Governor are all opposed to any activities relating to the development or extraction of fossil fuel off the coast of New England.

Please explain in detail how the Bureau of Ocean Energy Management is legally obligated to take the comments, opinions and laws of a coastal state and the coastal state's elected representatives and officials into account when making decisions on all geological and geophysical surveying permits.

Response: Geological and geophysical surveying activities are conducted for a wide array of activities on the OCS aside from locating subsurface oil and gas resources. For instance, G&G activities are used to: map the seafloor for OCS wind turbine placement, identify OCS sand

resources for coastal restoration and beach replenishment, and identify subsea hazards. Aside from our permitting process, under the Coastal Zone Management Act, a state can review those OCS permits identified in its Coastal Zone Management Program for federal consistency. If a state wants to review a permit that is not identified, it follows NOAA's procedures to ask permission to review and add the permit to its Program. The state must concur with or object to the lessee's consistency certification within a designated time period. If the state does not meet the deadline, CZMA provisions render the permit consistent. If the state concurs, BOEM can approve the permit, and the lessee can begin activities.

If the state objects, the bureau is prohibited from approving the permit, and the applicant can appeal the state's decision to the Department of Commerce, or the applicant can amend the proposed activities and associated permit application and resubmit it to BOEM for approval and to the state for federal consistency review. There are also public commenting opportunities during the development of the associated National Environmental Policy Act analyses.

Question 3: If the Department of Interior was directed to permit oil and gas leasing on the Outer Continental Shelf, could these leases be permitted to go through and be acted on over the wishes of any state governor, state legislature, congressional delegation or state law relevant to the permitted activities?

Response: Under the OCS Lands Act, the states have several specific roles in the decision-making process for OCS leasing and development. First, in deciding whether to include an area in the leasing program, the laws goals and policies of affected states, as identified by the Governor, is one of eight factors the Secretary must consider. Governors are afforded specific review and comment opportunities under the Act. For individual lease sales, the Secretary shall accept recommendations of the Governor if he determines that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.

As for development of existing leases, any activity must be consistent with the enforceable policies of an affected state's coastal management program, pursuant to the Coastal Zone Management Act. In addition to review of OCS permitting for geological and geophysical surveying as described in my previous response, under the Coastal Zone Management Act, states can review OCS exploration and development and production plans for Federal consistency. If a state objects to the plans, BOEM is prohibited from approving it. In this instance, the lessee can appeal the state's decision to the Department of Commerce or the lessee can amend the proposed activities associated permit and resubmit it to BOEM for approval and to the state for Federal consistency review.

Question 4: In a House Appropriations Subcommittee on the Interior hearing in April 2018, Former Secretary of Interior Ryan Zinke said that "in the state of Maine, most of the areas, A) you don't have the resources off of the coast, B) you don't have infrastructure in place and, C) most of the districts along the coast and communities are not in favor of oil and gas."

a. Given these factors as reported from the Interior Department, can you report that the New England coastline will not be suitable for drilling or geological and geophysical surveying?

Response: Right now, the Department continues to analyze and assess information gathered during the comment period following the publication of the Draft Proposed Program. The three factors you mention are among those taken into account during the National OCS Program development. It is the Department's obligation to consider any and all laws, comments and views of affected states and communities. Of the eight factors outlined in the Outer Continental Shelf Lands Act, which include the views of each affected state, the Secretary may not ignore the other factors and base his decision on one factor. However, it is reasonable to assume that the three factors you reference would weigh heavily on any analyses.

I do recognize that there are certain areas where these activities are appropriate and there are areas where they are not. As I reaffirmed to you at my confirmation hearing, the views of states and Congressional delegations will be a major factor in the balancing analysis I will take, should I be confirmed, in making these decisions. I will further commit to you that any leasing or permitting decision I make will be grounded squarely within the law, consistent with the Department's mission, informed by public engagement and supported by science.

Geological and geophysical survey permitting is a separate process with stringent requirements and mitigation measures that ensure safe and appropriate geological and geophysical activities in specific areas of the Outer Continental Shelf.

b. Are these three factors determining factors in where fossil fuel development leasing and permitting will be done?

Response: Under Section 18 of the OCS Lands Act, the Secretary must consider eight factors when determining the size, timing, and location of potential oil and gas lease sales:

- Geographical, Geological, and Ecological Characteristics
- Equitable Sharing of Developmental Benefits and Environmental Risks
- Location with Respect to Regional and National Energy Markets and Needs
- Other Uses of the Sea and Seabed
- Laws, Goals, and Policies of Affected States Identified by Governors
- Interest of Potential Oil and Gas Producers
- Environmental Sensitivity and Marine Productivity
- Environmental and Predictive Information

The Secretary has the discretion to assign the weight he deems appropriate to these eight factors when considering the timing and location of the areas to be included in the National OCS Program.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Cortez Masto

Question 1: It was recently reported that during the 35-day government shutdown earlier this year, BLM under your supervision, approved 267 drilling permits and 16 leases applied for by oil and gas companies – two of your former lobbying clients were among the companies that received approval for their applications. This is during a time that you recalled some, but not all, furloughed workers who regularly review these applications. It is also my understanding that such supporting staff that contribute to these application reviews, such as those that review details concerning environmental and cultural resources, remained furloughed during this time period.

On February 15, you were quoted in the Carlsbad Current-Argus that work on oil and gas development continued "...because the fees were still coming in...There's also safety. We need to keep things safe. We need to keep things going. I'm very comfortable with what we did during the lapse. We could do more next time."

Why was this safety ethic not applied to your decision to keep the National Parks opened, which we now know led to acts of vandalism, destruction of precious resources like we've seen in Joshua Tree National Park, the safety of countless visitors travelling through the parks without park rangers available to act in case of emergencies, or the safety of visitors?

Response: I do not agree with the premise of your question. A safety ethic was applied to decisions involving the National Park Service. For the National Park Service, the length of the lapse in appropriations brought significant challenges. As a result, I instructed that the National Park Service's contingency plan be modified to ensure people were safe, park resources were protected, and at least some employees would be guaranteed to receive a paycheck on a set date. I also directed that fees collected by the NPS under the Federal Lands Recreation Enhancement Act (FLREA) be used to address resource protection and visitor safety concerns, including issues with restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and basic visitor services. Use of these funds allowed the American public to safely visit many of our national parks while providing these treasures additional protection and allowing NPS to meet its dual mandate of resource protection and visitor enjoyment.

With respect to comparisons between the BLM and the NPS, the two agencies operate on different funding regimes and have different options for dealing with a general lapse in appropriations. I would be happy to visit about this matter in detail with you in the future if you want to do so.

Question 2: Since you became Deputy Secretary of the Interior in August 2017, the Bureau of Land Management has offered more than 17 million acres of public land for oil and gas leasing. This is clearly in line with this Administration's priority of making oil and gas development the dominant use of our public lands, no matter the negative impact it might have on any other value public lands yield to the American people, like recreation or renewable energy development.

Nation-wide, only 15 percent of the acreage offered for lease at competitive sale under your watch has been purchased. That number is even lower in Nevada where, since August 2017, industry has purchased just 9 percent of the acreage offered for lease and, of that, 83 percent was purchased for the minimum bid of $2 per acre.

Besides reflecting low demand, this apparent practice of indiscriminately opening lands for leasing allows speculators to purchase leases noncompetitively for incredibly small sums of money while preventing management for other, perhaps better uses.

What is the intention behind this Administration continuing to push to broadly open federal public lands when it appears to be decoupled from industry demand?

A. Should you be confirmed, can you please identify the concrete steps you will take to ensure that oil and gas leasing takes place only on lands that:

(1) Have real potential for mineral development; and

(2) are not better managed for other uses like wildlife, recreation, or wilderness?

B. Can you identify the concrete steps you will take to prevent land speculators from obtaining oil and gas leases on public lands?

Response: This year we saw some lease sales where the bids exceeded $81,000 per acre. The overall collections of revenue has markedly increased on our watch. As you know, the BLM is required by law to offer eligible lands that are available for lease by competitive auction on a quarterly basis. As part of the competitive leasing process, the BLM accepts informal expressions of interest and noncompetitive presale offers from the public that identify potential federal minerals for leasing.

Regarding which lands may be made available for development, the Federal Onshore Oil and Gas Leasing Reform Act of 1987 abolished criteria requiring that lands offered be within "Known Geologic Structures" and instead relies on the free market to establish value. The BLM is also required by law to hold quarterly lease sales wherever eligible lands are available for leasing and for which leasing is in the public interest. In this regard, the BLM relies on current land-use planning documents to ensure a balance between environmental protection and opportunities for responsible resource development.

As Secretary I will ensure that all of our onshore leasing activities are carried out diligently and in compliance with appropriate laws and BLM leasing development requirements.

Question 3: Last year, the Trump Administration issued new guidance pertaining to land parcel reviews for oil and gas leasing, as part of their "Energy Dominance" agenda to open more public lands for potential leasing. Prior to the Administration's new guidance, the

public was assured a 30-day comment period before parcels were included on a lease sale list and 30-days to file a protest.

Under the new guidance, comment periods are optional and the protest period is 10-days. Do you view the public input process as an impediment to leasing?

A. By reducing the public's ability to have a say in the process, what public benefit does this new guidance serve?

B. Would you commit to a meaningful public participation and environmental review process for all oil and gas leasing activities, including by restoring the previous process, as well as any other measures necessary to fully engage the public, tribes, local governments, state wildlife agencies, and affected landowners?

Response: The Department values meaningful public participation and an efficient environmental review process in the implementation of its onshore oil and gas program. The BLM observed a trend regarding protests over the past several years in which the percentage of parcels protested from the original sale notice had increased dramatically. This 10 day period is in addition to multiple opportunities for public participation and engagement through the BLM planning process under FLPMA and NEPA processes.

Question 4: I have been hearing concerns from sportsmen and women, the conservation community, tribal communities, local state legislators, and many others about the potential loss of bighorn sheep habitat and a loss of public recreational and conservation access that would result from the proposed military expansion within the Desert National Wildlife Range. The proposed expansion could cumulatively lead would lead to a loss of over 1 million acres of land directly managed or co-managed by the U.S. Fish and Wildlife Service, much of which is habitat currently managed for the benefit of emblematic Nevadan desert species, like bighorn sheep. While I certainly acknowledge the need for facilities that ensure military readiness, I am concerned about how the existing 4,531 square miles of federal land already under the military's control is supposedly no longer sufficient, and I am concerned about the potential effects such a land withdrawal would have on wildlife habitat.

To what extent have you been involved in these discussions, and, understanding this is ultimately a decision to be made by Congress, what is the position of the Department of the Interior on the military's request to take over administrative control of one of the largest expanses of protected wildlife habitat in the lower 48 states?

A. Are you concerned about such a large amount of land being re-purposed from under your purview?

Response: I am advised that the current legislative withdrawal for Nellis Air Force Range, which was overlaid upon the original Desert National Wildlife Refuge, is set to expire in 2021,

that efforts are underway to prepare for renewal of that withdrawal, and that some of the alternatives evaluated include expansion of the withdrawal. This effort is led by the Department of the Air Force, and includes coordination with the Bureau of Land Management and the Fish and Wildlife Service. I understand that this matter will ultimately be resolved by the Congress, and Congress would need to consider the potential benefits and detriments to the public in rendering a decision.

Question 5: Ethics laws require officials to avoid even the appearance of a conflict of interest or partiality. Given that 20 of your former clients have actively lobbied Interior since the beginning of 2017, how are you able to adequately meet this standard as Secretary?

Response: I have fully complied with my ethics agreement, the ethics laws, and my ethics pledge and I will do so in the future. I have actively sought and consulted with the Department's designated ethics officials for advice on particular matters involving clients and I have implemented a robust screening process to ensure that I do not meet with my former firm or former clients to participate in particular matters involving specific parties that I have committed to recuse myself from. My senior staff is well versed in matters at the Department and they either manage such matters without any consultation with me, or re-route issues to different offices within the Department of the Interior, as appropriate.

Question 6: I understand that you are barred from closed meetings with your former lobbying clients. But that doesn't stop former clients like the Petroleum Association from lobbying Interior—instead, they are presumably meeting with your subordinates. Have you ever had a conversation before or after they met with a Petroleum Association representative? How do you ensure you are not influencing your subordinates actions with your former clients?

Response: My subordinates are here to work on behalf of the American people. They have no interest in benefitting my former clients, nor do I.

Recusals are designed to ensure that the recused individual does not participate in a particular matter involving specific parties where one of the parties was either a represented client or an employer. They do not restrict the entity who had the relationship from petitioning other employees of the United States Government. In the Immediate Office of the Secretary, my entire team is very sensitive of the need for me to not participate in any particular matter involving specific parties in which my former firm or a former client is either a party or represents a party.

I have made clear we are here to work for the American people, no one else. Indeed, once a subordinate is involved with a particular matter in which a former client is a party or my former firm represents a party there is no communication between us on that particular matter involving specific parties. As a result, I do not provide any communication to them before or after meetings, and I would likely not ever be aware of the reality that such a meeting was occurring absent public disclosure.

In addition, in the unlikely event a matter is raised directly to me, I would explain that I am recused and that they need to ensure they are going through the appropriate person on my staff on such particular matters involving specific parties and, if necessary, the Department's Ethics Office, to determine how best to handle a matter.

Question 7: A recent New York Times report suggests you effectively continued lobbying on behalf of one of your former clients, Westlands, after you became Deputy Interior Secretary. You participated in agency actions that advanced the same goals that you pursued as a lobbyist, potentially in violation of your ethics pledge. You lobbied for years to limit the application of a specific Endangered Species Act protections that limit water diversion to your former lobbying client, and then you joined government and effectively continued those efforts. Did it occur to you that advancing the same goals at Interior that you used to promote as a lobbyist would create the appearance that you are using your official authority to benefit your former client?

A. Will you commit to asking for written ethics advice on any matters related to your former lobbying clients and lobbying activities, and to instructing your subordinates to do the same before the purposed action takes place?

B. What other mechanisms do you intend to put in place to ensure subordinates track and avoid potential ethics violations, especially if they enter government with a long list of former lobbying clients who conduct business in front of the agency?

C. Will you commit to recusing from matters involving your former lobbying clients for the entirety of your tenure at Interior?

Response: I have not "effectively continued lobbying" on behalf of any former client at any time. I have fully complied with my ethics agreement, the ethics laws, and my ethics pledge and I will do so in the future. I have actively sought and consulted with the Department's designated ethics officials for advice on particular matters involving former clients and I have implemented a robust screening process to ensure that I do not meet with my former firm or former clients to participate in particular matters involving specific parties that I have committed to recuse myself from.

I have committed to securing written advice before taking any action involving former lobbying clients, and instructing my subordinates to do the same.

When the referenced New York Times article was published, I requested that the Departmental Ethics Office examine prior ethics advice and counsel I had received involving the issues raised in the article. The DEO carefully and extensively reviewed the matter and provided a memorandum explaining that "broad matters" are outside the scope of paragraph 7 of the Ethics Pledge. Furthermore, when responding to a letter from Senator Warren and Senator Blumenthal on this same issue and article, the Department's Designated Agency Ethics Official concluded that my actions have complied with all applicable ethics laws, rules and other obligations,

including the requirements of President Trump's Ethics Pledge. A copy of that correspondence is included for your convenience.

Attachment to Response
to Sen. Cortez Masto
Question 7

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

March 25, 2019

The Honorable Elizabeth Warren
United States Senate
317 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Richard Blumenthal
United States Senate
706 Hart Senate Office Bldg.
Washington, DC 20510

Dear Senator Warren and Senator Blumenthal:

Thank you for your letter of February 26, 2019 regarding your expressed concerns of the actions of the Acting Secretary of the Department of the Interior (Department or DOI). Your letter references an article published by the *New York Times* on February 12, 2019 discussing the Acting Secretary's legal practice prior to joining the Department as Deputy Secretary in August 2017. Specifically, you asked about the Acting Secretary's involvement with the Central Valley Project (CVP) in California and whether his actions, "violated his ethics pledge and federal conflict of interest regulations by participating in decisions that directly affect a former client." As discussed below, we have found the Acting Secretary's actions have complied with all applicable ethics laws, rules and other obligations, including the requirements of President Trump's Executive Order 13770 entitled, "Ethics Commitments by Executive Branch Appointees" (Jan. 28, 2017) (Ethics Pledge).

As an initial matter, I would like to take this opportunity to inform you and your colleagues of recent developments and improvements with the DOI ethics program that will enhance our ability to prevent conflicts of interest at all levels of the Department. Since our arrival at the Department in April 2018, Deputy Director Heather Gottry and I have overhauled an ethics office that was previously characterized by both DOI employees and numerous Inspector General reports as passive and ineffectual. With the strong support of the Acting Secretary, we have spearheaded a long-overdue build-out of the Departmental Ethics Office (DEO) as well as the ethics programs of the various Bureaus and Offices throughout the Department.

Our top priority as non-partisan, career ethics officials, is to prevent conflicts of interest at the DOI and ensure that DOI employees are aware of and comply with all applicable ethics laws and standards. We understand the importance of our program in helping the American people have trust and confidence in the lawful and proper administration of the Department.

Please know that my office takes all credible allegations of potential ethics violations by any DOI employee very seriously and allegations against senior officials are an extremely high priority. Consequently, when the *New York Times* published its article, I immediately sought to understand the facts and carefully analyzed the applicable legal authorities. We note that the Acting Secretary also immediately requested that my office look into this matter and to examine the prior ethics advice and counsel he had received.

Of critical importance, we note that the Acting Secretary does not have any financial conflicts of interest related to either his former client, Westlands Water District, or the CVP generally. As reflected in his Ethics Agreement, dated May 1, 2017, and his Ethics Recusal memorandum, dated August 15, 2017, the Acting Secretary was required under 5 C.F.R. § 2635.502 to recuse for one year (until August 3, 2018) from participating personally and substantially in any "particular matters involving specific parties" in which Westlands Water District was a party or represented a party. Because Westlands Water District is an agency or entity of a state or local government it is excluded from the requirements of paragraph 6 of the Ethics Pledge. Additionally, consistent with U.S. Office of Government Ethics (OGE) guidance, it was determined that the law the Acting Secretary had lobbied on for Westlands Water District, Public Law 114-322, should not be categorized as a "particular matter" because the law addressed a broad range of issues and topics. Therefore, because he did not lobby on a "particular matter" for Westlands Water District, he was not required to recuse himself under paragraph 7 of the Ethics Pledge either from "particular matters" or "specific issue areas" related to Public Law 114-322. Accordingly, the Acting Secretary's recusal related to Westlands Water District ended on August 3, 2018, and was limited in scope to "particular matters involving specific parties" under 5 C.F.R. § 2635.502.

I have enclosed the transmittal e-mail from me to the Acting Secretary with a detailed memorandum attached wherein the DEO consolidates and memorializes prior ethics advice and guidance on certain issues involving the CVP. Of particular importance for a legal analysis of the scope of the Acting Secretary's recusals related to Westlands Water District, the memorandum analyzed and categorized certain issues involving the CVP and related State Water Project as "matters," "particular matters of general applicability," and "particular matters involving specific parties." As I state in the transmittal e-mail, these legal categorizations are critical in determining whether an official complies with the various ethics rules. As reflected in the memorandum, we determined that both the Notice of Intent to Prepare a Draft EIS and the development of a 2019 Biological Assessment are appropriately categorized as "matters," not "particular matters." Our determinations are supported by Federal law and OGE opinions and though the matters involved may sound like "particular matters" or "specific issue areas," they are legally broad matters outside the scope of 5 C.F.R. § 2635.502. As noted above, the Acting Secretary's lobbying on behalf of Westlands Water District on Public Law 114-322 was not categorized as a "particular matter" and did not require an additional recusal under paragraph 7 of the Ethics Pledge. Therefore, the Acting Secretary was not required under either 5 C.F.R. § 2635.502 or the Ethics Pledge to recuse from participation in either the Notice of Intent to Prepare a Draft EIS or the development of a 2019 Biological Assessment. Attached, for your convenience, please find the legal reference materials addressed in the memorandum – I believe our interpretation and application of the relevant legal authorities is both reasonable and prudent.

I have advised the Acting Secretary, at his request, that he and his staff should continue to consult with the DEO prior to participating in any matter that is potentially within the scope of his Ethics Agreement, Ethics Recusal memorandum, the Ethics Pledge, or any other ethics law or regulation. Additionally, to eliminate any potential for miscommunication, I have instructed my staff that all ethics guidance to the Acting Secretary be in writing prior to his participation in a decision or action that reasonably appears to come within the purview of his legal ethics obligations.

In closing, and to be responsive to your final requests, the DEO has not issued any authorizations or ethics waivers to the Acting Secretary or other Interior officials on the topics you raised, nor have we referred any matters to the IG on these topics. It is worth noting that the Acting Secretary meets with me and my senior staff frequently and that I have a standing meeting with him once a week to discuss any significant ethics issues at the DOI. Pursuant to the Acting Secretary's direction, my senior staff also meets with his scheduling staff and other top officials twice a week, at a minimum, to ensure we are aware of who the Acting Secretary is meeting with and the issues he will be discussing. These efforts, supported by the Acting Secretary and his staff, are designed to ensure his compliance with applicable ethics rules and protect the integrity of the Department's programs and operations. My experience has been that the Acting Secretary is very diligent about his ethics obligations and he has made ethics compliance and the creation of an ethical culture a top priority at the Department.

If you have any other questions or concerns, please do not hesitate to contact me.

Sincerely,

Scott A. de la Vega
Director, Departmental Ethics Office and
Designated Agency Ethics Official

Enclosure

de la Vega, Scott <scott.delavega@sol.doi.gov>

Legal Categorization of CVP/SWP Issues

1 message

de la Vega, Scott <scott.delavega@sol.doi.gov> Tue, Feb 19, 2019 at 8:03 PM
To: David Bernhardt <dwbernhardt@ios.doi.gov>
Cc: Daniel Jorjani <daniel.jorjani@sol.doi.gov>, Heather Gottry <heather.gottry@sol.doi.gov>, "McDonnell, Edward" <edward.mcdonnell@sol.doi.gov>
Bcc: Scott de la Vega <scott.delavega@sol.doi.gov>

Acting Secretary Bernhardt:

Recently, you requested that my office examine prior ethics advice and counsel you had received from the Departmental Ethics Office (DEO) in regards to issues, decisions, and/or actions pending at the DOI involving the Central Valley Project (CVP) and the State Water Project (SWP) in California. You have also asked for my recommendations on any additional best practices to implement to fully ensure that you are in compliance with your Ethics Agreement, Executive Order 13770 (the "Ethics Pledge"), and all other ethics laws and regulations.

Attached, please find a detailed memorandum wherein the DEO reviews and explains the prior guidance you have received from this office and, of utmost importance, categorizes CVP and SWP issues as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties." These legal categorizations are critical in determining whether an official complies with the various ethics rules. Reports that conflate these categories are sometimes confusing, however, the legal analysis and conclusion that Public Law 114-322 is not a "particular matter" and that both the Notice of Intent to Prepare a Draft EIS and the development of a 2019 Biological Assessment are "matters," not "particular matters" are supported by Federal law and Office of Government Ethics opinions. Consequently, these broad matters are outside the scope of paragraph 7 of the Ethics Pledge despite colloquially sounding like a "specific issue area."

Going forward, you and your staff should continue to consult with my office in advance of your participation in any matter that is potentially within the scope of your Ethics Agreement, the Ethics Pledge, or any other ethics laws or regulations. In addition, to eliminate any potential for miscommunication, misunderstanding or error, I have instructed my staff that all guidance to you be in writing before you decide to participate in a decision or action that reasonably appears to come within the purview of your legal ethics obligations. The implementation of these two recommendations will facilitate addressing any future question raised by your participation in a "matter," "particular matter of general applicability," or a "particular matter involving specific parties."

Finally, I am attaching reference materials that highlight many of the concepts discussed in the memorandum. Please let me know if you have any questions or would like to discuss any of these issues further and thank you for your conscientious approach to ethics compliance.

Scott A. de la Vega

Director, Departmental Ethics Office

& Designated Agency Ethics Official

Office of the Solicitor

U.S. Department of the Interior | MIB 5309

(O) (202) 208-3038

(C) (202) 740-0359

scott.delavega@sol.doi.gov

Visit us online at: www.doi.gov/ethics

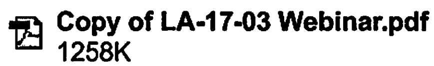
Public service is a public trust.

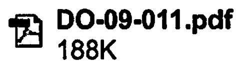
---

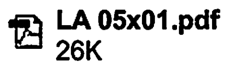
6 attachments

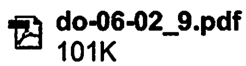
Legal Categorization Memo CVP 2.19.19.pdf
1203K

LA-17-03.pdf
190K


Copy of LA-17-03 Webinar.pdf
1258K


DO-09-011.pdf
188K


LA 05x01.pdf
26K


do-06-02_9.pdf
101K

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MEMORANDUM

TO: Scott A. de la Vega, Director, Departmental Ethics Office & Designated Agency Ethics Official

FROM: Heather C. Gottry, Deputy Director for Program Management and Compliance, Departmental Ethics Office & Alternate Designated Agency Ethics Official

Edward McDonnell, Deputy Director for Ethics Law and Policy, Departmental Ethics Office

DATE: February 19, 2019

RE: Ethics Guidance on How to Categorize Issues, Decisions, and/or Actions Pending at DOI and Involving the Central Valley Project and State Water Project as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

This memorandum consolidates and memorializes prior ethics advice and guidance provided by the Department Ethics Office (DEO) about whether issues, decisions, and/or actions pending at the U.S. Department of the Interior (DOI) involving the Central Valley Project (CVP), and coordination of operations with the State Water Project (SWP) should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" pursuant to the definitions of those terms in ethics regulations and guidance from the Office of Government Ethics (OGE). 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"* (Oct. 4, 2006) (OGE DO-06-029). As a general matter, while it is clear that there are many broad policy determinations impacting the entire CVP and/or SWP that would not constitute either "particular matters of general applicability" or "particular matters involving specific parties," case-by-case factual analysis and ethics review will be required in most circumstances in order to determine whether an issue, decision, or action involving the CVP and/or SWP and pending before the DOI should be categorized as a "matter," "particular matter of general applicability," or "particular matter involving specific parties". This categorization will in turn govern whether certain DOI employees may participate in the issue, decision, or action involving the CVP and/or SWP and pending before the DOI, or whether they are required to disqualify themselves or recuse from participation pursuant to 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the requirements of paragraphs 6 and 7 of Executive Order 13770

entitled, "Ethics Commitments by Executive Branch Appointees" (Jan. 28, 2017) (Ethics Pledge).

This memorandum first provides background information on the CVP and the SWP. Second, the memorandum provides a summary of the applicable and governing legal definitions of "matters," "particular matters of general applicability", or "particular matters involving specific parties" found in the ethics regulations and other OGE guidance. Third, this memorandum applies these definitions to the deliberations and discussions that resulted in the publication of a *Notice of Intent to Prepare a Draft Environmental Impact Statement, Revisions to the Coordinated Long-Term Operation (LTO) of the CVP and the SWP, and Related Facilities (Draft EIS NOI)* in the Federal Register on December 29, 2017, or the DOI process that resulted in the *Reinitiation of Consultation on the Coordinated LTO of the CVP and SWP, Final Biological Assessment (2019 BA)*, dated January 2019, in order to determine whether they should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" as defined in the ethics regulations. Finally, this memorandum provides general guidance on how the DEO categorizes issues, decisions, and/or actions involving the CVP and/or SWP pending before the DOI as "matters," "particular matters of general applicability," or "particular matters involving specific parties."

I. <u>Background of the CVP and SWP</u>

As set forth in *2019 BA*, Congress authorized the U.S. Bureau of Reclamation (Reclamation)[1] to develop the CVP for the public good of delivering water and generating power, while providing flood protection to downstream communities and protecting water quality for water users within the system.[2] *2019 BA* at 1.1.1., 1-3. In its authorization to Reclamation, Congress envisioned that the CVP would be composed of a large, complex project integrated across multiple watersheds that Reclamation would operate to ensure the most beneficial use of water released into the system. *Id.*

---

[1] Reclamation's mission is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public. *2019 BA* at 1-1. Reclamation is the largest wholesale water supplier in the United States, and the nation's second largest producer of hydroelectric power. *Id.* Its facilities also provide substantial flood control, recreation, and fish and wildlife benefits. *Id.* In California, Reclamation operates the CVP in coordination with the State of California Department of Water Resources' (DWR) operation of the SWP. *Id.* The mission of the DWR is to manage the water resources of the State of California, in cooperation with other agencies, to benefit the state's people and to protect, restore, and enhance the natural and human environment. *Id.*

[2] The Rivers and Harbors Act of 1935 authorized Reclamation to take over the CVP from the State of California and its initial features were authorized for construction. In 1992, Public Law 102-575 included Title 34, the Central Valley Project Improvement Act (CVPIA) that refined water management for the CVP. *2019 BA* at 1.1.1, 1-4. The CVPIA added fish and wildlife mitigation, protection, and restoration as a project purpose with the same priority as water supply, and also added fish and wildlife enhancement as a project purpose with the same priority as power generation. *Id.* In addition, the CVPIA prescribed a number of actions to improve conditions for anadromous fish and provided for other fish and wildlife benefits. The Secretary of the Interior assigned the primary responsibility for carrying out the many provisions of CVPIA to Reclamation and the U.S. Fish and Wildlife Service (USFWS).

Currently, Reclamation operates the CVP consistent with the CVP's federally authorized purposes, which include: river regulation; improvement of navigation; flood control; water supply for irrigation and municipal and industrial uses; fish and wildlife mitigation, protection, and restoration; power generation; and fish and wildlife enhancement. *Id.* at 1.1.1, 1-4. The CVP consists of 20 dams and reservoirs that together can store nearly 12 million acre-feet (MAF) of water. *Id.* at 1-1. Reclamation holds over 270 contracts and agreements for water supplies that depend upon CVP operations. *Id.* Through operation of the CVP, Reclamation delivers water in 29 of California's 58 counties. *Id.* The CVP serves farms; homes, and industry in California's Central Valley as well as the major urban centers in the San Francisco Bay Area; it is also the primary source of water for much of California's wetlands. In addition to delivering water for farms, homes, factories, and the environment, the CVP produces electric power and provides flood protection, navigation, recreation, and water quality benefits. While the CVP's facilities are spread out over hundreds of miles, the CVP is financially and operationally integrated by the DOI as a single large water project.

The SWP is a water storage and delivery system of reservoirs, aqueducts, powerplants, and pumping plants operated by the State of California.[3] *2019 BA* at 1-1. Its main purpose is to store and distribute water to 29 urban and agricultural water suppliers in Northern California, the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California. Of the contracted water supply, 70 percent goes to urban users and 30 percent goes to agricultural users.

In 1986, Congress directed the Secretary of the Interior to execute the Coordinated Operations Agreement (COA) between the CVP and SWP. *2019 BA* at 1.1.1, 1-4. The COA between the U.S. Government and the State of California was signed by DWR and Reclamation in 1986. The COA defined CVP and SWP facilities and their water supplies, coordinated operational procedures between the DOI and the State of California, identified formulas for sharing joint responsibility between the DOI and the State of California for meeting Delta standards (such as those in D-1485), identified how unstored flow is shared between the CVP and SWP, and established a framework for exchange of water and services between the projects between the CVP and SWP. *Id.* In 1999, the California State Water Resources Control Board issued D-1641, obligating the CVP and SWP to the 1995 Bay-Delta Water Quality Control Plan. Revised in 2000, D-1641 provided standards for fish and wildlife protection, municipal and industrial water quality, agricultural water quality, and Suisun Marsh salinity. *Id.*

---

3 The Burns-Porter Act, approved by the California voters in November 1960 (Water Code [Wat. Code] §§ 12930–12944), authorized issuance of bonds for construction of the SWP. DWR's authority to construct state water facilities or projects is derived from the Central Valley Project Act (CVPA) (Wat. Code § 11100 et seq.), the Burns-Porter Act (California Water Resources Development Bond Act) (Wat. Code §§ 12930–12944), the State Contract Act (Pub. Contract Code § 10100 et seq.), the Davis-Dolwig Act (Wat. Code §§ 11900–11925), and special acts of the State Legislature. *2019 BA* at 1.1.1, 1-4. In 1978, the SWRCB issued Water Rights Decision 1485 (D-1485). D-1485 required spring outflow and set salinity standards in the Delta while setting standards for the diversion of flows into the Delta during winter and spring. *Id.*

The complex and varied activities of DOI with respect to the CVP and SWP are governed by a variety of laws, including the Water Infrastructure Improvements for the Nation Act (WIIN Act) (Pub. L. 114–322, 130 Stat. 1628). Section 4001 of the WIIN Act directs the Secretary of the Interior and the Secretary of Commerce to provide the maximum quantity of water supplies practicable to CVP contractors and SWP contractors by approving, in accordance with federal and applicable state laws, operations or temporary projects to provide additional water supplies as quickly as possible, based on available information. Consistent with authorizations and directions provided by Congress, the DOI routinely analyzes and takes action on a wide variety of both macro and micro operational and programmatic issues, decisions, and/or actions involving the operation of the CVP and coordination with the SWP.

II. Applicable Legal Definitions of "Matters," "Particular Matters of General Applicability," and "Particular Matters Involving Specific Parties"

For purposes of analyzing under ethics laws, regulations, and rules whether and to what extent a DOI employee is required to recuse from participating in a policy, operational and/or programmatic issue, decision, and/or action involving the operation of the CVP and coordination with the SWP depends on whether it is categorized as a matter, particular matter of general applicability, or particular matter involving specific parties. These are terms of art with established meanings defined in ethics laws and regulations as well as guidance from the OGE. 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"* (Oct. 4, 2006).

A. Definition of "Matter"

In the context of the ethics statutes and regulations, the unmodified term "matter" can refer to virtually all Government work from the broadest to the most narrow issue, decision, and/or action. OGE DO-06-029 at 10-11. The broad definition of "matter" also includes any "particular matter", including "particular matters of general applicability" or "particular matters involving specific parties." *Id* at 11. However, if an issue, decision, and/or action pending at the DOI can be categorized as a "particular matter of general applicability" or a "particular matter involving specific parties" then there are specific recusal and disqualification requirements that will apply to a DOI employee's participation in the issue, decision, and/or action in question. Such recusal and disqualification requirements may arise if a DOI employee has a financial interest that could be directly and predictably effected by the issue, decision, and/or action, if the DOI employee has a "covered relationship" (such as former employer, former client, spousal employer, *etc.*) with one of the parties involved in the issue, decision, and/or action, or if the DOI employee lobbied on the same particular matter prior to employment with the DOI. These recusal and disqualification requirements will generally not apply if the issue, decision, and/or action is not categorized as either a "particular matter of general applicability" or a "particular matter involving specific parties."

While the term "matter" is not affirmatively defined in the ethics regulations, for purposes of determining whether the specific recusal and disqualification requirements which apply to "particular matters of general applicability" or "particular matters involving specific

parties" are applicable to an issue, decision, and/or action pending at the DOI, a working definition can be derived from examples in the ethics regulations of the types of issues, decisions, and/or actions that OGE does not consider to be "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3)(Ex. 1)(regulations changing the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants); 5 C.F.R. § 2641.201(h)(2)(Ex. 3)(formulation of policies for a nationwide grant program for science education programs targeting elementary school children is not a particular matter).

Therefore, we apply the generally accepted definition that the consideration of broad policy options that are directed to the interests of a large and diverse group of persons, such as health and safety regulations applicable to all employers or a legislative proposal for tax reform would not qualify as either "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3). Hereinafter, for purposes of the analysis and discussion in this memorandum, the term "matter" is used to describe the consideration of broad policy options that are directed to the interests of a large and diverse group of persons.

Therefore, if an issue, decision, and/or action pending at the DOI is (1) broad and (2) directed to the interests of a large and diverse group of persons, then the recusal and disqualification requirements found in ethics laws, regulations, and rules for "particular matters of general applicability" and "particular matters involving specific parties" would not apply, and a DOI employee will generally be able to fully participate in the issue, decision, and/or action.[4]

B. Definition of "Particular Matter"

The term "particular matter" means any matter that involves "deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons." 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.103(a)(1).[5] The term "particular matter", however, "does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2635.402(b)(3). Based on this definition it is clear that "particular matters" may include matters that do not involve specific parties and are not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000) (Van Ee).[6]

[4] The term "matter" is found in the one-year post-employment restrictions in 18 U.S.C. § 207(c) and (d) for "senior employees" and "very senior employees." Therefore, those restrictions will be applicable even to issues, decisions, and/or actions at the DOI that are (1) broad and (2) directed to the interests of a large and diverse group of persons. 5 C.F.R. § 2635.402(b)(3).

[5] Please note that for purposes of the Ethics Pledge, the term "particular matter" has the same meaning as set forth in 18 U.S.C. § 208, and 5 C.F.R. § 2635.402(b)(3). Ethics Pledge, Sec. 2(r).

[6] In Van Ee, the D.C. Circuit construed 18 U.S.C. § 205(a)(2), which bars executive branch employees and others from "act[ing] as agent or attorney" for others "before any department, agency, [or] court" in connection with certain "covered matters" in which "the United States is a party or has a direct and substantial interest." The D.C. Circuit concluded that 18 U.S.C. § 205(a)(2) does not prohibit the communications which the plaintiff in the case, a career employee, proposed to make:

The term "particular matter" generally covers two categories of matters: "(1) those that involve specific parties, and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession." OGE DO-06-029 at 8. These two types of particular matters are generally referred to as "particular matters involving specific parties" and "particular matters of general applicability," and the definitions of each type of "particular matter" is discussed further below starting with the broader category of "particular matter of general applicability."

1. Definition of "Particular Matter of General Applicability"

A "particular matter of general applicability" is broader than a "particular matter involving specific parties." 5 C.F.R. § 2641.20(h)(2). A "particular matter of general applicability" does not involve specific parties, but is a matter that focuses on the interests of a discrete and identifiable class, such as a particular industry or profession. *See* OGE DO-06-029 at 8. Examples of "particular matters of general applicability" includes rulemaking, legislation, or policy-making, as long as it is narrowly focused on a discrete and identifiable class such as a particular industry or profession. For instance, a "particular matter of general applicability" at the DOI might include a regulation prescribing safety standards for operators of oil rigs in the Gulf of Mexico or a regulation applicable to all those who have grazing permits on DOI public lands. On the other hand, a land use plan covering a large geographic area and affecting a number of industries (*e.g.*, agriculture, grazing, mining, timber, recreation, wind, solar, and/or geothermal power generation, *etc.*) would not generally constitute a "particular matter of general applicability" but, rather, would still fall within the broader definition of "matter," as it constitutes a broad policy directed to the interests of a large and diverse group of persons.

2. Definition of "Particular Matter Involving Specific Parties"

The narrowest type of matter under the ethics laws, regulations, and rules is a "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but OGE has advised that the meaning remains the same, focusing primarily on the presence of specific parties.[7] OGE

> We hold that § 205 is inapplicable to Van Ee's uncompensated communications on behalf of public interest groups in response to requests by an agency at which he is not employed for public comment on proposed environmental impact statements related to land-use plans; these proceedings lack the particularity required by the statute, will not result in a direct material benefit to the public interest groups, and do not create a real conflict of interest or entail an abuse of position by Van Ee.

Van Ee, 202 F.3d at 298-99. In reaching this conclusion, the D.C. Circuit analyzed the components required in order for an agency issue, action, and/or decision to be categorized as a "particular matter." This analysis is not limited to 18 U.S.C. § 205, but rather it provides guidance on how to categorize agency issues, actions, and/or decisions for other ethics statutes and regulations, including, but not limited to 18 U.S.C. § 203, 18 U.S.C. § 207, 18 U.S.C. § 208, and 5 C.F.R. § 2635.502.

[7] For example, in the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used. 18 U.S.C. § 207(a)(1), (a)(2). Similar language is used in 18 U.S.C. §§ 205(c) and 203(c), which describe the limited restrictions on representational activities applicable to

DO-06-029 at 10-11. As set forth in 5 C.F.R. § 2641.201(h)(1), a particular matter involving specific parties "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case." Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties. 5 C.F.R. § 2641.201(h)(2). The regulations further advise that "[i]nternational agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests." *Id.; see also* OGE DO-06-029 at 2-5.

Additionally, in its preamble to the final rule implementing 5 C.F.R. part 2641, the OGE stated that "OGE does not necessarily equate 'Government program' with 'particular matter involving specific parties.' For one thing, some Government programs are not even, in and of themselves, particular matters involving specific parties. For example, a Government program to understand the causes of a particular disease is not, in and of itself, a particular matter involving specific parties, even though the program may involve several grants, contracts or cooperative agreements all designed to support or implement different aspects of the overall program. *See, e.g., OGE Informal Advisory Letter* 80 x 9; 5 C.F.R. § 2637.201(c)(1) (Ex. 4)." *Post-Employment Conflict of Interest Restrictions Action: Final Rule*, 73 Fed. Reg. 36168, 36177 (June 25, 2008).

---

special Government employees. In contrast, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); *see OGE Informal Advisory Letter 00 x 12*. OGE has also issued certain regulatory exemptions, under 18 U.S.C. § 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Additionally, the distinction between "particular matters involving specific parties" and broader types of particular matters (*i.e.*, those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g). OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain special Government employees. 5 C.F.R. § 2635.807(a)(2)(i)(4). The Ethics Pledge states that for purposes of paragraphs 6 and 7 the term "particular matter involving specific parties" will be defined as set forth in 5 C.F.R. § 2641.201(h) "except that it shall also include any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." Ethics Pledge, Sec. 2(s).

III. Analysis of Whether the *Draft EIS NOI* or *2019 BA* Should Be Categorized as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

A. The *Draft EIS NOI* is a "Matter"

On December 29, 2017, Reclamation published the *Draft EIS NOI*[8] which set forth Reclamation's intent to prepare a programmatic environmental impact statement for analyzing potential modifications to the continued LTO of the CVP, for its authorized purposes, in a coordinated manner with the SWP, for its authorized purposes. *Draft EIS NOI*, 82 Fed. Reg. 61789 (Dec. 29, 2017). Reclamation proposed to evaluate alternatives that maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species. *Id.* Reclamation sought suggestions and information on the alternatives and topics to be addressed and any other important issues related to the proposed action. *Id.*

After review, the DEO has determined that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* do not constitute a "particular matter" (either a "particular matter involving specific parties" or a "particular matter of general applicability") and, therefore, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and

---

[8] Under the National Environmental Policy Act (NEPA), codified at 42 C.F.R. §4321 *et seq.*, a Federal agency must prepare an environmental impact statement (EIS) if it is proposing a major federal action significantly affecting the quality of the human environment. In this case, Reclamation and DWR propose to continue the long-term operation of the CVP and SWP to maximize water supply delivery and optimize power generation consistent with applicable laws, contractual obligations, and agreement; and to increase operational flexibility by focusing on non-operational measures to avoid significant adverse effects. Reclamation and DWR propose to store, divert, and convey water in accordance with existing water contracts and agreements, including water service and repayment contracts, settlement contracts, exchange contracts, and refuge deliveries, consistent with water rights and applicable laws and regulations. The proposed action includes habitat restoration that would not otherwise occur and provides specific commitments for habitat restoration.

The EIS process begins with publication of a Notice of Intent (NOI), stating the agency's intent to prepare an EIS for a particular proposal. The NOI is published in the Federal Register, and provides some basic information on the proposed action in preparation for the scoping process. The NOI provides a brief description of the proposed action and possible alternatives. It also describes the agency's proposed scoping process, including any meetings and how the public can get involved. The NOI will also contain an agency point of contact who can answer questions about the proposed action and the NEPA process. The scoping process is the best time to identify issues, determine points of contact, establish project schedules, and provide recommendations to the agency. The overall goal is to define the scope of issues to be addressed in depth in the analyses that will be included in the EIS.

interpretations of Environmental Impact Statements and is supported by the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in Van Ee.

As discussed in Van Ee, whether an administrative proceeding is a "particular matter" is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Van Ee, 202 F.3d at 309. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties is the proceeding considered a particular matter. *Id.* In Van Ee, the D.C. Circuit examined whether the public comment phase on a proposed EIS related to land use plans was a "particular matter," and determined that because the focus of the decision to be made by the agency following the public comment phase on the proposed EIS was not on the interests of particular groups or individuals, the public comment phase of a proposed EIS on a land use plan did not constitute a "particular matter." *Id.*

In this instance, Section VIII of the *Draft EIS NOI* identifies the following purposes: (1) to advise other agencies, CVP and SWP water users and power customers, affected tribes, and the public of Reclamation's intention to gather information to support the preparation of an EIS; (2) to obtain suggestions and information from other agencies, interested parties, and the public on the scope of alternatives and issues to be addressed in the EIS; and (3) to identify important issues raised by the public related to the development and implementation of the proposed action. *Draft EIS NOI*, 82 Fed. Reg. at 61791. Similar to the facts underlying the D.C. Circuit's decision in Van Ee, the deliberations and discussions leading up to the publication of the *Draft EIS NOI* and the potential impact of the EIS itself was not focused on the interests of a discrete and identifiable class of persons and, accordingly, it should not be categorized as a "particular matter" but rather as a "matter" as defined above.

In Van Ee, the D.C. Circuit noted the types of proposed actions generally set forth in EISs are focused on diverse sets of interests, such as how to reconcile or balance recreational, conservation, and commercial interests in a land use plan covering considerable territory. Van Ee, 202 F.3d at 309. Similarly, Section II of the *Draft EIS NOI*, notes that Reclamation intends to analyze potential modifications to the LTO of the CVP, in a coordinated manner with the SWP, to achieve the following goals:

- Maximize water supply delivery, consistent with applicable law, contracts and agreements, considering new and/or modified storage and export facilities.
- Review and consider modifications to regulatory requirements, including existing Reasonable and Prudent Alternative actions identified in the Biological Opinions issued by the USFWS and NMFS in 2008 and 2009, respectively.
- Evaluate stressors on fish other than CVP and SWP operations, beneficial non-flow measures to decrease stressors, and habitat restoration and other beneficial measures for improving targeted fish populations.
- Evaluate potential changes in laws, regulations and infrastructure that may benefit power marketability.

Draft EIS NOI, 82 Fed. Reg. at 61790. Additionally, Section III of the *Draft EIS NOI* states: "[t]he purpose of the action considered in this EIS is to continue the operation of

the CVP in a coordinated manner with the SWP, for its authorized purposes, in a manner that enables Reclamation and California Department of Water Resources to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species." *Id.*

Sections II and III of the *Draft EIS NOI* establish that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, focused on the broad policy option of remedying reduced availability of water for delivery south of the Delta by continuing operation of the CVP in a coordinated manner with the SWP in a manner that enables Reclamation and DWR to maximize water deliveries and optimize marketable power generation, consistent with applicable laws, contractual obligations, and agreements, while augmenting operational flexibility by addressing the status of listed species.

These discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, they are not appropriately categorized as "particular matters" as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) ("particular matters involving specific parties"), or 5 C.F.R. § 2641.201(h)(2) ("particular matters of general applicability"). Rather, they were focused on the broad policy of restoring, at least in part, water supply, in consideration of all of the authorized purposes of the CVP as discussed in greater detail above. Accordingly, the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, are appropriately categorized as "matters" and do not trigger the specific recusal and disqualification requirements that are applicable when an issue, decision, and/or action pending at the DOI is a "particular matter of general applicability" or a "particular matter involving specific parties." Consistent with this, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

B. The *2019 BA* is a "Matter"

On August 2, 2016, Reclamation and DWR[9] requested reinitiation of Section 7 consultation under the Endangered Species Act of 1973 (ESA), codified at 16 U.S.C. § 1531 *et*

---

[9] While 5 C.F.R. § 2641.201(h)(1) includes "application" as an example of a "particular matter involving specific parties," in this case, DWR should not be considered an applicant as the word is traditionally defined. While DWR was listed as an applicant for the reinitiation of Section 7 consultation in 2016, they are not included as an author of the *2019 BA*, Indeed, based on available information, DWR is not applying for a specific permit or license to carry out an activity through the consultation process. Instead, DWR, along with BOR, requested reinitiation of formal consultation under Section 7 of the ESA on the continued operation of the CVP and the SWP, both of which are massive water projects serving multiple purposes throughout a large portion of the State of California. Further, under the consultation process set forth in Section 7 of the ESA, only federal agencies can request consultation from the USFWS and the NMFS to review the impacts proposed significant federal action. 16 U.S.C. § 1536. Accordingly,