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Reston, VA 20190

May 8, 2020

Mr. Mark Lee Greenblatt  
Inspector General  
U.S. Department of the Interior  
1849 C Street NW, Washington, DC 20240

Dear Mr. Greenblatt:

In March, we and eight other retired Interior public affairs specialists submitted a complaint to your office regarding potential ethical and procedural violations that may have occurred during the formulation and public announcement of the U.S. Fish and Wildlife Service's proposed rule regarding the Migratory Bird Treaty Act (MBTA). Last month, Mr. Michael I. Smith of your office advised us that the complaint would not be further investigated unless we provided the names of current employees who have been pressured to violate their professional ethics and responsibilities.

After sharing this response with our group, we have some remaining concerns. Before sending this letter, in order to better understand the mission, obligations, and limitations of the Office of Inspector General, we read materials available online that included FAQs, Semiannual Reports to Congress, memos, letters, articles, ethics principles, and investigative reports. In our previous letter there were several facets to our complaint, but in this follow-up letter we will narrow our focus.

Mentioned in an Investigative Report<sup>1</sup> from your office was: "Title 5 of the Code of Federal Regulations (C.F.R.) § 2635.101, Basic Obligation of Public Service states:

Employees shall act impartially and not give preferential treatment to any private organization or individual.

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<sup>1</sup> Office of Inspector General, March 30, 2004. Investigative Report on Allegations Against Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife and Parks.  
<https://www.doioig.gov/sites/doioig.gov/files/Macdonald.pdf>

Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.”

As previously stated in our letter of March 2020, we are concerned about what appear to have been violations of these basic obligations, and of the law itself. The Department’s January 30, 2020 press announcement appeared to be insulating the public from opposing views by including 28 quotes from outside groups whose statements were all supportive of the *proposed* rule. The announcement excluded any statements from groups opposed to it. Those 28 supporting statements should have been submitted as public comments *after* the normal comment period opened, not before. Including them in the press announcement created the appearance not only of a “sales pitch,” but also a public impression of prejudice due to apparent suppression of dissenting views.

And because those 28 statements were received before the public comment period opened, they are not part of the federal record. Therefore, they should not be considered in the rulemaking. If the Department’s evaluation of the proposed rule is based on comments already received that weren’t supposed to be considered before the proper time, then the decision becomes predetermined and the entire analysis is faulty. This is part of why we asked you to investigate emails of specific senior employees during a specific time period prior to the public announcement. Comments from those 28 outside groups should be thrown out if they are included or resubmitted during the public comment periods, because if not, their weight could be inappropriately considered and make the process look predetermined.

The fact that several of the 28 statements were made by large, well-funded groups that lobby for oil and gas development and against sensible climate change policy has amplified public perceptions of a lack of impartiality. The fact that over 90 percent of public comments subsequently received objected to this proposed rule further supports that. And because at least one of these lobby groups publicly objected to the Service’s incidental take permitting program just months before the proposed rule was published, it creates the

strong appearance of preferential treatment, especially when combined with the subsequent press announcement.<sup>2</sup>

An EIS is an acknowledgement by an agency that a proposed action could have significant environmental impacts – impacts that justify the highest level of public disclosure and that require the consideration of alternatives to the proposed action. A public process such as the proposed rule and Draft Environmental Impact Statement is not window-dressing for a predetermined decision. When an agency decision is made despite overwhelming opposition from members of the public who do not stand to financially benefit from a rulemaking that is likely to benefit its supporters, then regardless of what the public may know about NEPA or the Administrative Procedure Act, that decision feels arbitrary and capricious.

The same investigative report mentioned above stated: “Title 5 of the Code of Federal Regulations (C.F.R.), Chapter XVI, Subpart G, Standards of Ethical Conduct for Employees of the Executive Branch § 2635.703 Use of Nonpublic Information states:

- (a) Prohibition. An employee shall not...allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.
- (b) Definition of nonpublic information. ... Is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:
  - (1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation;
  - (2) Is designated as confidential by an agency; or
  - (3) Has not been actually disseminated to the general public and is not authorized to be made available to the public on request.”

With those 28 comments from outside groups included in that press release, the Department created the impression of improper and unauthorized advance use of nonpublic information, which has left the public wondering:

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<sup>2</sup> U.S. Chamber Letter on the Discussion Draft of the Migratory Bird Protection Act of 2019.  
<https://www.uschamber.com/letters-congress/us-chamber-letter-the-discussion-draft-of-the-migratory-bird-protection-act-of-2019>

how could those 28 outside groups have made such statements that specifically mention and support the *proposed* rule without advance knowledge of information that was not yet public? Each of those 28 statements appears to be an admission of advance nonpublic knowledge, and thus none are valid for consideration in the federal record. Therefore, we ask that the OIG investigate correspondence between the Department and these 28 groups, in order to establish whether or not improper advance sharing of nonpublic information occurred.

While we have become more aware of the immense OIG workload, we were disappointed when your office declined to investigate *any* aspect of our complaint unless we disclosed the names of employees who said they were being urged, if not pressured, to assist in providing misleading information to the public or to otherwise violate their professional standards. We did not realize that disclosure of these names was a prerequisite or condition for investigating any part of our complaint. If it is, then it is inconsistent with the OIG's ability to initiate an investigation based on an anonymous tip.

In our complaint we asked you to review email traffic between the Division of Migratory Bird Management and the Service's Office of External Affairs regarding a proposed or draft "Myths and Facts" document. We also provided you with an extensive list of names of senior officials and their titles, plus a reasonably short range of dates in which to search. The object was to ensure that professional staff in the Division of Migratory Bird Management and External Affairs Office were not concerned about possible retaliation for their refusal, on the basis of science, to support the proposed rulemaking.

The Department's OIG Hotline permits anonymous complaints, so it does not make sense that the names of these employees are being required in order to investigate *any* facet of our complaint. We were left with the understanding, hopefully mistaken, that unless we provided those names, no aspects of our complaint would be investigated. We understand that your office is offering limited promises of anonymity to anyone who comes forward, but in view of the recent history of retaliation against whistleblowers within this Administration, you can certainly understand why employees are not willing to risk trusting the process. We believe you can proceed, on the basis of the information we gave you, without asking for the names of whistleblowers.

Here is a list of questions that would not necessarily require the names of employees who complained about being pressured. Being cognizant of the OIG's huge workload, we respectfully resubmit them to you, and appreciate your time.

We would like to know:

1. If nonpublic information was disclosed to private sector sources.
2. Whether the Department violated impartiality (and possibly the law) by improperly insulating the public from opposing opinions, or by making a decision before the public process was begun.
3. If the Department gave preferential treatment to any organization or individual. The press release gives the appearance of favoritism and a violation of either the law and/or ethical standards.
4. If there is/has been pressure on biologists to alter biological information or data for the purpose of misleading or withholding information from the public. A search of emails of the names, offices and dates already provided could shed light.
5. What, if any, written criteria the OIG's office followed in its determination on our March complaint,
6. If the OIG's office prepared a written record or report on the disposition and current status of our March complaint. If so, we request a copy of the report or record.
7. Why OIG opened at least one previous case from an anonymous employee complainant, as was stated in an investigative report, on April 11, 2006, yet why in this case in 2020 you must have names or you won't investigate.

Thank you for your service and for your time. As stated in our previous letter, during our many years of service we supported DOI's mission and endeavored to carry out our duties with honesty and integrity. Millions of Americans care about the future of our migratory bird resources, and all of their views need to be considered equally. No interest group deserves preferential treatment, as appears to be the case in this rulemaking, and DOI

career professionals must be able to do their jobs in accordance with DOI policies for scientific integrity and without pressure or fear of reprisal.

Sincerely,

/s/ Megan Durham

/s/ Karen Sullivan

*On behalf of the following:*

Megan Durham

Retired, Deputy Assistant Director – External Affairs; formerly Chief of Public Affairs

U.S. Fish and Wildlife Service

Michael L. Smith

Retired, Deputy Assistant Director – External Affairs (Washington DC); formerly Assistant Regional Director – External Affairs (Region 6, Denver)

U.S. Fish and Wildlife Service

David Klinger

Retired, Assistant Regional Director – Public Affairs, Pacific Region (Portland); and Senior Writer Editor, National Conservation Training Center

U.S. Fish and Wildlife Service

Alan M. Levitt

DOI Office of the Secretary, Deputy Director, Office of Public Affairs (1984-1990); formerly, Chief of Current Information, U.S. Fish and Wildlife Service (1973-1984)

K. Mitchell Snow

Retired, Senior Legislative Affairs Communications Specialist, Bureau of Land Management; formerly Chief, Media Services, U.S. Fish and Wildlife Service and Public Affairs Specialist, U.S. Geological Survey.

Bruce Woods

Retired, Chief of Media Relations, Alaska Region, Anchorage

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Patricia Foulk

Retired, Assistant Field Supervisor – External Affairs, California State  
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Susan Saul  
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