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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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May 28, 2014

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

Dear Mr. Ashe:

The Committee on Oversight and Government Reform is conducting oversight of the U.S. Fish and Wildlife Service. The Committee is concerned about the FWS's publicly stated decision to pursue federal criminal charges against Mr. Ernesto Pulido in the wake of an alleged violation of the Migratory Bird Treaty Act¹ (MBTA). Public statements from FWS officials indicate that the agency is referring the case to the Department of Justice for criminal charges that carry a maximum fine of \$15,000 and six months in jail. FWS officials state that the U.S. Attorney is expected to file formal charges within a week.²

Media reports indicate the U.S. Postal Service hired Mr. Pulido's tree cutting service to prune trees by the Civic Center Annex branch parking lot in Oakland, California. USPS officials reportedly hired Mr. Pulido to trim the trees because birds were defecating on the mail trucks.³ On May 3, 2014, Mr. Pulido cut tree limbs containing nesting Black-Crowned Night Herons, one of approximately 1026 species of bird⁴ protected by the MBTA.⁵

Reportedly, FWS's own investigation found no birds were killed in the incident.⁶ Five birds were injured and taken to International Bird Rescue in Fairfield, California.⁷

¹ 16 U.S. Code § 703

² Carolyn Jones, Tree trimmer to face federal charges in Oakland birds case, San Francisco Chronicle, May 21, 2014, *Available at*: <http://www.sfgate.com/bayarea/article/Tree-trimmer-to-face-federal-charges-in-Oakland-5496220.php>

³ *Id.*

⁴ U.S. Fish and Wildlife Service, List of Migratory Bird Species Protected by the Migratory Bird Treaty Act as of December 2, 2013, *Available at*:

<http://www.fws.gov/migratorybirds/regulationspolicies/mbta/MBTANDX.HTML>

⁵ Jones, *Id.*

⁶ *Id.*

A spokesman for that facility clarified that the herons suffered “scrapes and bruises and one had a fractured beak, but that they expected to recover and be released into the wild.”⁸ All accounts indicate the activity which disturbed the bird’s nesting area was unintentional. A *San Francisco Chronicle* story from May 21, 2014, notes that Mr. Pulido is currently voluntarily paying for the care of injured birds.⁹

Prosecutions under the MBTA for incidental activity have previously been rebuked by federal courts. In one recent notable example, North Dakota federal district Judge Daniel Hovland dismissed a complaint by the Department of Justice that three oil companies had violated the MBTA when “six Mallard ducks and one Say’s Phoebe waded into oil pits the companies operated.”¹⁰ In this case, unlike the one FWS announced it is bringing against Mr. Pulido, the birds died.

In dismissing the complaint, Judge Hovland argued that the 1918 law is “vague and ambiguous as it relates to criminal sanctions for lawful commercial activity that may indirectly injure or kill migratory birds.”¹¹ He goes on:

As previously noted, the critical issue regarding the scope of the Migratory Bird Treaty Act’s prohibitions is whether to ‘take’ or ‘kill’ a migratory bird refers to and prohibits any activity that may proximately cause a bird death or whether it only covers conduct directed against wildlife. If the Migratory Bird Treaty Act concepts of ‘take’ or ‘kill’ were read to prohibit any conduct that proximately results in the death of a migratory bird, then many everyday activities would become unlawful- and subject to criminal sanctions... [f]or example, ordinary land uses which may cause bird deaths including cutting brush and trees, and planting and harvesting crops. In addition, many ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat, inevitably cause migratory bird deaths.¹²

Judge Hovland also noted the Fish and Wildlife Service’s own estimate that wind turbines cause 33,000 bird deaths per year.¹³ Moreover, starting in December 2013, FWS began issuing 30-year permits to wind energy developers to allow for the unintentional

⁷ *Id.*

⁸ *Id.*

⁹ Tree trimmer to face federal charges over birds, *Herald-Tribune*, (May 22, 2014) available at: <http://www.heraldtribune.com/article/20140522/APN/305229937?tc=ar>

¹⁰ “Dodo of the Year.” *The Wall Street Journal*, (Jan. 25, 2012), available at:

<http://online.wsj.com/news/articles/SB10001424052970204616504577170853989728824?mg=reno64-wsj>.

¹¹ ¹¹ *US v. Brigham Oil and Gas L.P.*, Case No. 4:11-po-005, Filed Jan. 17, 2012, available at:

http://www.eenews.net/assets/2012/01/24/document_pm_01.pdf

¹² *Id.*

¹³ *Id.*

killing or taking of Bald Eagles and Golden Eagles, birds protected not only by the MBTA but also by the Bald and Golden Eagle Protection Act.¹⁴

The Committee also questions whether or not FWS's decision to pursue charges against Mr. Pulido were driven by public outcry, as initial reports indicated baby birds were fed through a wood-chipper.¹⁵ It is worth noting, however, that many voices calling for state and local officials to take action have directed their ire primarily at the U.S. Postal Service. For example, Raptors Are The Solution (RATS), a Berkeley-based non-profit that encourages the preservation of raptor populations as an alternative to rat poison, has solicited its members to contact state officials to advocate for further prosecution, but also wrote on May 22 that they "certainly hope that the U.S. Fish and Wildlife Service intends to focus on and fine the U.S. Postal Service as well...it appears that the tree trimmer is doing a *lot* more than the postal service to accept blame."¹⁶

The Committee is concerned that Mr. Pulido is being subjected to an unfair and unnecessary prosecution because FWS is responding to public pressure to act but does not want to seek redress from a fellow federal agency, the U.S. Postal Service. During my time as Chairman of the House Oversight Committee, many agencies have failed to take action and the Justice Department has declined or failed to prosecute federal employees for offenses including: receiving thousands of dollars in impermissible gifts from lobbyists¹⁷; watching pornography on government computers while on the job¹⁸; operating private businesses from their offices¹⁹; lying on official timecards for years²⁰; and spending outrageous sums of taxpayer dollars at Las Vegas conventions²¹. When so many government workers are offered a pass, referring and prioritizing charges against a private citizen for incidental and relatively minor injuries to a non-endangered species – commissioned by a federal agency no less – appears nothing short of bureaucratic bullying.

¹⁴Federal Register notice FWS-R9-MB-2011-0054 "Changes in the Regulations Governing Eagle Permitting", December 9, 2013, *Available at*: <https://www.federalregister.gov/articles/2013/12/09/2013-29088/eagle-permits-changes-in-the-regulations-governing-eagle-permitting>

¹⁵Carolyn Jones. "Shorebird wood chipper massacre reported in Oakland." San Francisco Chronicle, (May 7, 2014) *available at*: <http://www.sfgate.com/bayarea/article/Shorebird-wood-chipper-massacre-reported-in-5458395.php>.

¹⁶ Raptors Are The Solution (RATS). Facebook, May 22, 2014, *Available at*: <https://www.facebook.com/RaptorsAreTheSolution/posts/694504453944887>.

¹⁷Lenny Bernstein and Ann E. Marimow. Washington Post. (October 1, 2013) *available at* http://www.washingtonpost.com/national/health-science/second-ex-epa-official-questioned-over-taking-car-discount-pushing-for-bonuses-for-friend/2013/10/01/45621264-2ad2-11e3-b139-029811dbb57f_story.html

¹⁸ CJ Ciaramella. "Extreme Pornography Agency." The Washington Free Beacon. (May 7, 2014) *available at* <http://freebeacon.com/issues/extreme-pornography-agency/>

¹⁹ EPA OIG briefing of Oversight and Government Reform Committee Staff, February 24, 2014.

²⁰ *Id.*

²¹Lisa Rein. "GSA Las Vegas spending scandal: Inspector general refers case to Justice for possible investigation." Washington Post. (April 13, 2012) http://www.washingtonpost.com/blogs/federal-eye/post/gsa-las-vegas-spending-scandal-inspector-general-refers-case-to-justice-for-possible-investigation/2012/04/13/gIQArGcFT_blog.html

The Honorable Daniel M. Ashe
May 28, 2014
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To help the Committee understand all circumstances related to the incident, please provide the following to the Committee no later than 5:00 p.m. June 11, 2014: all documents, including e-mails, related to the charges filed against Mr. Ernest Pulido related to the alleged violation of the Migratory Bird Treaty Act at the Civic Center Annex Branch Post Office in Oakland, California, on May 3, 2014, and the subsequent investigation. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

In addition, please direct FWS staff to provide a briefing for Committee staff as soon as possible but no later than June 4, 2014.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request. If you have any questions about this request, please contact Ali Ahmad or Drew Colliatie of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
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WASHINGTON, DC 20515-6143

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Minority (202) 225-5051

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.