



FLASH MEMORANDUM

February 12, 2018

To: Republican Members

**From: Chairman Trey Gowdy
Chairman Blake Farenthold, Subcommittee on
Interior, Energy and Environment**

**Re: Administrative Abuses at the U.S. Fish & Wildlife Services in the Waning
Days of the Obama Administration**

Executive Summary

On January 19, 2017—the last full day of the Obama administration—outgoing U.S. Fish & Wildlife Service (FWS) Director Dan Ashe issued a Director’s Order targeting hunting and fishing on and off federal property. The Order prohibited the use of lead ammunition and fishing tackle on FWS property and on non-federal lands when hunting migratory birds, which constituted a drastic change for hunters and anglers across the country. Documents obtained by the Committee show that the Order resulted from a disorderedly, last-minute process undertaken by the departing Administration in a unilateral attempt to impose a policy that lacked public input and did not cite to scientific support. Specifically, those documents showed:

- FWS hastily prepared the Order days before President Obama left office;
- One FWS official was author and the primary driver of the Order;
- FWS violated agency procedures by failing to seek public comments on the Order;
- Ashe used a non-standard process in drafting the Order within FWS, excluding multiple FWS employees who normally work on Director’s Orders; and
- FWS created no plan to implement the Order after its issuance.

Background

Lead represents a common element of fishing tackle and ammunition used by American hunters and anglers.¹ However, claims about lead's potential harm to wildlife resulted in calls from environmental groups to ban its use in hunting and fishing, including an unsuccessful petition to EPA to ban lead-based ammunition.² Opponents of banning lead in this context assert that no credible scientific evidence exists that lead in bullets and fishing tackle negatively impacts wildlife.³

On January 19, 2017, outgoing FWS Director Dan Ashe released Director's Order No. 219 pertaining to "Use of Nontoxic Ammunition and Fishing Tackle."⁴ The Order established a new FWS policy barring the use of lead in ammunition and fishing tackle "to the fullest extent practicable for all activities on [FWS] lands, waters and facilities by January 2022"⁵ The Order also applied to the hunting of migratory birds on non-federal lands.⁶ Without citing any scientific evidence for the claim, the Order asserted, "[e]xposure to lead ammunition and fishing tackle has resulted in harmful effects to fish and wildlife species."⁷ The Order cited to multiple statutes as providing authority for the Order, including the Endangered Species Act, the Fish and Wildlife Act of 1956, and the National Wildlife Refuge Recreation Act.⁸

Findings

Finding 1: One senior Fish & Wildlife Service official prepared Director's Order No. 219, only days before President Obama's term ended.

- Director Ashe expressed an interest in issuing a Director's Order on October 13, 2016 and specifically noted that FWS

On Fri, Jan 20, 2017 at 10:14 AM, [REDACTED] <[REDACTED]@fws.gov> wrote:
I don't think so.

This falls into the last minute category. I didn't even know that it got signed or posted.
Noah had the lead.
[REDACTED]

¹ E.g., *Lead Ammunition and Fishing Tackle Ban*, CONG. SPORTSMEN'S FOUND., <http://sportsmenslink.org/policies/state/lead-sinker-ban> (last accessed May 2, 2017).

² E.g., Tim Devaney, *Court: EPA Cannot Regulate Lead Bullets*, THE HILL, Dec. 23, 2014, available at <http://thehill.com/regulation/227972-epa-prohibited-from-regulating-lead-bullets-court-says>; see also, e.g., Press Release, Am. Bird Conservancy, EPA Denies Petition to Protect Wildlife from Toxic Lead-based Ammunition (Aug. 28, 2010), available at <https://abcbirds.org/article/epa-denies-petition-to-protect-wildlife-from-toxic-lead-based-ammunition/>.

³ CONG. SPORTSMEN'S FOUND., *supra* note 1.

⁴ U.S. Fish and Wildlife Serv., Director's Order No. 219 (2017).

⁵ *Id.*

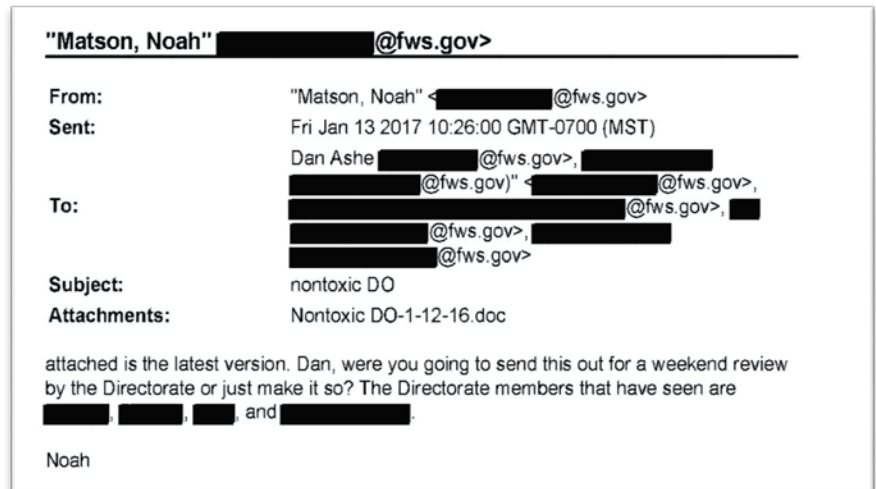
⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

must “work with states.”⁹ However, FWS staff did not act until about a month remained in President Obama’s term, when a Special Assistant at the agency began compiling information on the issue for Director Ashe on or around December 22, 2016.¹⁰ FWS Senior Advisor Noah Matson, who previously spent over a decade¹¹ in a senior position with the activist environmental group Defenders of Wildlife,¹² “had the lead” on completing the Order before January 20, 2017.¹³

- On January 13, 2017, only one week before the inauguration, Matson emailed a colleague about the Order and stressed, “it is in the works for release next week.”¹⁴ Matson then emailed the draft Order to Director Ashe and advised that only four other persons viewed it.¹⁵ He suggested either sending the draft to the FWS Directorate, or avoiding their input completely and, instead, to “just make it so.”¹⁶



- FWS emails from mid-January 2017 show that Ashe chose a Director’s Order for the lead ban because he could issue an Order faster than other means of promulgating FWS policies, and unilaterally. On January 13, 2017, an advisor counseled Matson that a draft Order making the ban permanent was impermissible, since permanent actions were only possible if included in the FWS Service Manual.¹⁷ Clarifying that Director’s Orders were not permanent under FWS policy, the advisor explained, “We wrote the policy that way to encourage programs to start with chapters and not Orders.”¹⁸ Yet putting the lead ban in the Service Manual would require multiple time-consuming steps, including seeking comment

⁹ Email from Dan Ashe, Dir., Fish and Wildlife Serv., to Deputy Dir. for Operations, Fish and Wildlife Serv. (Oct. 13, 2016, 3:43 p.m.) (on file with the Committee).

¹⁰ Email from Special Assistant, Fish and Wildlife Serv., to Dan Ashe, Dir., Fish and Wildlife Serv. (Dec. 22, 2016, 11:00 a.m.) (on file with the Committee).

¹¹ Noah Matson, LINKEDIN, <https://www.linkedin.com/in/noahmatson> (last visited Apr. 3, 2017).

¹² *Noah Matson*, DEFENDERS OF WILDLIFE BLOG, <http://www.defendersblog.org/author/nmatson/> (last visited Jan. 24, 2018).

¹³ Email from Chief, Nat’l Wildlife Refuge Sys., Fish and Wildlife Serv., to Assistant Dir. External Affairs, Fish and Wildlife Serv. (Jan. 20, 2017, 10:14 a.m.) (on file with the Committee).

¹⁴ Email from Noah Paul Matson, Senior Advisor, Fish and Wildlife Serv., to Div. of Policy, Performance, and Mgmt. Programs Emp., Fish and Wildlife Serv. (Jan. 13, 2017, 12:09 p.m.) (on file with the Committee).

¹⁵ Email from Noah Paul Matson, Senior Advisor, Fish and Wildlife Serv., to Dan Ashe, Dir., Fish and Wildlife Serv. (Jan. 13, 2017, 10:26 a.m.) (on file with the Committee).

¹⁶ *Id.*

¹⁷ Email from Div. of Policy, Performance, and Mgmt. Programs Emp., Fish and Wildlife Serv., to Noah Paul Matson, Senior Advisor, Fish and Wildlife Serv. (Jan. 13, 2017, 12:35 p.m.) (on file with the Committee).

¹⁸ *Id.*

and review by persons inside and outside FWS and undertaking a detailed editing process.¹⁹ Accordingly, an FWS employee advised that the terms of a Director's Order lasted only 18 months, but "if Dan [Ashe] wants an Order he gets an Order."²⁰

On Jan 13, 2017, at 12:35 PM, [REDACTED]@fws.gov> wrote:

Ok. Thanks for the heads up.

Please take a look again at the format for Director's Orders. Our policy at 012 FW 1 sets a effective time limit of 18 months, and that should be in your final paragraph. After 18 months, if the authoring program hasn't put the content into a Service Manual chapter, they have to request another year's extension. This goes on and on until the Order expires or it is incorporated into the Service Manual. We wrote the policy that way to encourage programs to start with chapters and not Orders.

It looks like you took out the 18 month language, but that doesn't change the fact that it still will expire in 18 months unless an extension is requested. If the intention is to keep this Order in place until 2022, it should be a Service Manual chapter and not an Order. All that said, if Dan wants an Order he gets an Order. Let me know when you need me to edit it. I'm off this afternoon, but I am working all next week, including Friday.

- The few FWS personnel aware of Director's Order No. 219 before January 19 noted the unprecedented and rushed drafting and promulgation of the Order. On January 18, 2017, an FWS employee emailed a colleague asking, "are you aware of all these orders being pushed [through] by Noah Mattson [sic]? I have never seen [it] done this way"²¹ The colleague agreed that she also had "never seen [a Director's Order] done this way . . ." writing that the extraordinary rush to complete the Order occurred solely "because Dan [Ashe] wants [the Order] signed before he leaves" office on January 20, 2017.²²

On Wed, Jan 18, 2017 at 6:59 AM, [REDACTED], [REDACTED]@fws.gov> wrote:

are you aware of all these orders being pushed thru by Noah Mattson? I have never seen done this way, this is the second one. Am I missing something? please advise....

¹⁹ FISH AND WILDLIFE SERV., FISH & WILDLIFE SERVICE MANUAL 011 FW 3 (2013).

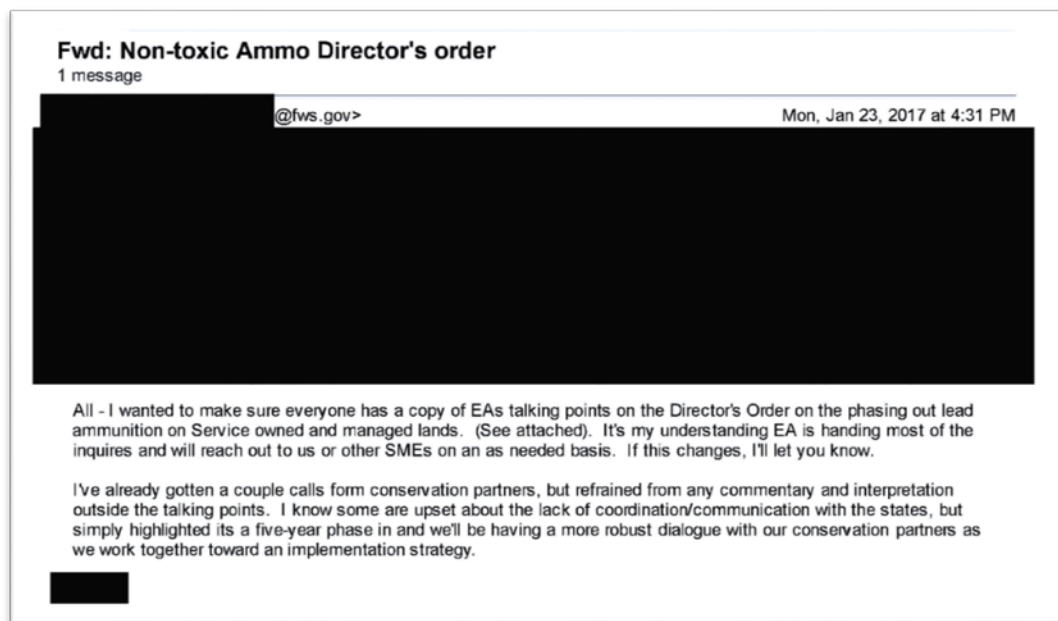
²⁰ Email from Div. of Policy, Performance, and Mgmt. Programs Emp., to Noah Paul Matson, Senior Advisor, Fish and Wildlife Serv., *supra* note 17.

²¹ Email from Chief, Correspondence Control Unit, Fish and Wildlife Serv., to Div. of Policy, Performance, and Mgmt. Programs Emp, Fish and Wildlife Serv. (Jan. 18, 2017, 6:59 a.m.) (on file with the Committee).

²² Email from Div. of Policy, Performance, and Mgmt. Programs Emp., to Chief, Correspondence Control Unit, Fish and Wildlife Serv. (Jan. 18, 2017, 7:41 a.m.) (on file with the Committee).

Finding 2: Senior FWS officials hastily drafting the Order failed to consult with or notify states and outside groups of the Order, in clear violation of FWS policy.

- Director's Order No. 219 caught those affected by surprise. States and interested organizations that customarily received advance notice of such Orders, and the ability to provide preliminary feedback, had no opportunity to be heard. Leading outdoor groups including the Association of Fish & Wildlife Agencies,²³ the National Shooting Sports Foundation,²⁴ and the American Sportfishing Association expressed disappointment with the Order after learning of its release.²⁵ In particular, the Association of Fish & Wildlife Agencies asserted that finalizing the Order without prior consultation with the states "flies squarely in the face of a long and constructive tradition of states working in partnership" with FWS.²⁶ An FWS Deputy Division Chief emailed several FWS colleagues on January 23, 2017 acknowledging frustration outside of FWS with the lack of notice about drafting the Order, admitting, "I know some are upset about the lack of coordination/communication with the states"²⁷



²³ Press Release, Assoc'n of Fish and Wildlife Agencies, Statement from the Association of Fish and Wildlife Agencies Regarding U.S. Fish and Wildlife Service Director's Order 219 (Jan. 20, 2017), *available at* http://www.fishwildlife.org/index.php?section=afwa_press_releases&prid=332.

²⁴ Press Release, Nat'l Shooting Sports Found., NSSF Calls Foul on USFWS Director's Parting Shot on Traditional Ammunition (Jan. 19, 2017), *available at* <http://www.nssfblog.com/nssf-calls-foul-on-usfws-directors-parting-shot-on-traditional-ammunition/>.

²⁵ Press Release, Am. Sportfishing Assoc'n, Sportfishing Industry Angered by Last-Minute U.S. Fish and Wildlife Services' Director's Order (Jan. 23, 2017), *available at* <http://asafishing.org/sportfishing-industry-angered-last-minute-u-s-fish-wildlife-services-directors-order/>.

²⁶ Press Release, Assoc'n of Fish and Wildlife Agencies, *supra* note 23.

²⁷ Email from Deputy Chief, Div. of Migratory Bird Mgmt., Fish and Wildlife Serv., to Chief, Div. of Migratory Bird Mgmt., Fish and Wildlife Serv. et al. (Jan. 23, 2017, 4:31 p.m.) (on file with the Committee).

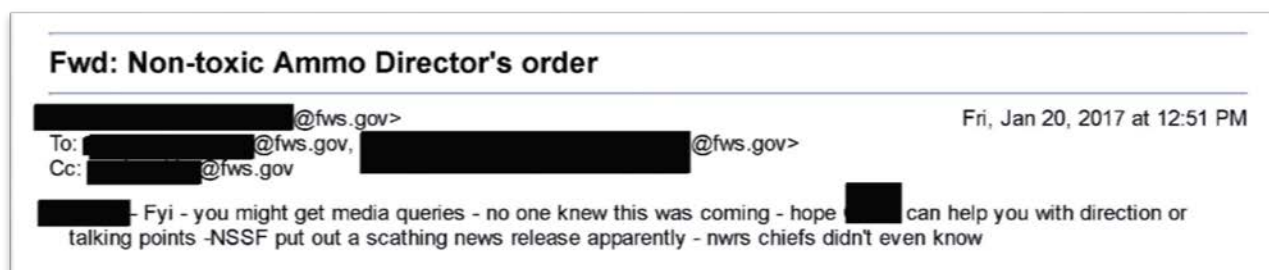
- The release of Director's Order No. 219 violated FWS policy requiring that it first appear in the *Federal Register*, and that FWS seek public comment before finalizing it. Section 1.11 of FWS Manual Part 12 states:

“1.11 When does the Service publish draft Director's Orders in the Federal Register? For some Orders, you should ask for public comment by publishing a notice of availability of the draft in the Federal Register. PDM can assist you. **If the Order meets one of the following four criteria, seek public comment:**

- A. You can reasonably anticipate that it will lead to an annual effect of \$100 million or more or **adversely affect in a material way the economy or a sector of the economy.**
- B. **Raises highly controversial issues related to interagency concerns or important Administration priorities.**
- C. **Establishes initial interpretations of statutory or regulatory requirements, or changes in interpretation or policy.**
- D. **Is about innovative or complex scientific or technical issues.”**
(Emphasis added)²⁸

This Director's Order implicates all four of the above requirements to demand publication in the *Federal Register*, and the solicitation of public comments before finalization occurs.²⁹

Finding 3: Multiple FWS personnel usually involved in drafting, reviewing and managing Director's Orders received no notice of the Order until its issuance.



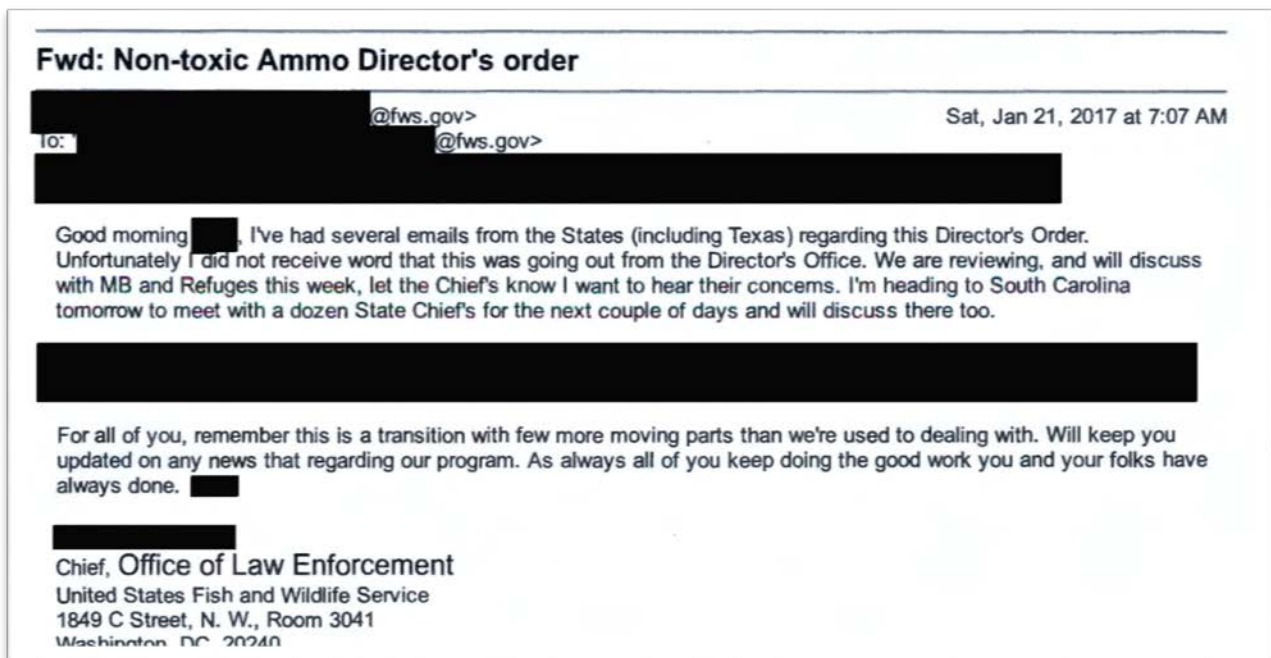
- Release of the Order surprised many FWS officials accustomed to receiving notice of major actions like the one at issue. When asked to discuss it on January 20, 2017 the FWS Chief of Public Affairs exclaimed the release “took me by surprise today!”³⁰ That same day another

²⁸ FISH AND WILDLIFE SERVICE, *supra* note 19 at 012 FW 1.1 (emphasis added).

²⁹ Subsection A is met based on claims that the Order would financially hurt the outdoor industry and local economies dependent on hunting and fishing. Subsection B is met based on the highly controversial nature of the ban. Subsection C is met since the Order relies upon interpretations of eight different statutes as legal authority. Subsection D is met based on the argument that the Order cites to no scientific support.

³⁰ Email from Chief of Pub. Affairs, Fish and Wildlife Serv., to Staff Members, Am. Bird Conservancy (Jan. 20, 2017, 2:18 p.m.) (on file with the Committee).

FWS official emailed a colleague about the Order, stating, “no one knew this was coming. . . nwr’s [National Wildlife Refuge System] chiefs didn’t even know[.]”³¹



- The FWS Chief of Law Enforcement sent an email on January 21, 2017, indicating that the lack of notice left him wholly unprepared to discuss the Order with states and interest groups.³² Specifically he wrote, “I’ve had several emails from the States (including Texas) regarding this Director’s Order. Unfortunately I did not receive word that this was going out from the Director’s Office.”³³
- On January 23, 2017, an FWS employee emailed six colleagues regarding Director’s Order No. 219 asking them, “were any of you asked to comment on this [Order] before it went out?”³⁴ All six employees tersely denied any knowledge of the Order before its issuance.³⁵

³¹ Email from Assistant Reg’l Dir. External Affairs, Fish and Wildlife Serv., to Deputy Assistant Reg’l Dir. External Affairs, Fish and Wildlife Serv., and Pub. Affairs Officer, Fish and Wildlife Serv. (Jan. 20, 2017, 12:51 p.m.) (on file with the Committee).

³² Email from Chief, Office of Law Enforcement, Fish and Wildlife Serv., to Special Agent in Charge, Sw. Region, Office of Law Enforcement, Fish and Wildlife Serv. (Jan. 21, 2017, 7:07 a.m.) (on file with the Committee).

³³ *Id.*

³⁴ Email from Special Agent in Charge, Investigations Unit, Office of Law Enforcement, Fish and Wildlife Serv., to Law Enforcement Officials, Office of Law Enforcement, Fish and Wildlife Serv. (Jan. 23, 2017, 9:23 a.m.) (on file with the Committee).

³⁵ Email from Law Enforcement Official, Office of Law Enforcement, Fish and Wildlife Serv., to Special Agent in Charge, Investigations Unit, Office of Law Enforcement, Fish and Wildlife Serv. (Jan. 23, 2017, 9:28 a.m.) (on file with the Committee); Email from Senior Special Agent, Office of Law Enforcement, Fish and Wildlife Serv., to Special Agent in Charge, Investigations Unit, Office of Law Enforcement, Fish and Wildlife Serv. (Jan. 23, 2017, 9:30 a.m.) (on file with the Committee); Email from Law Enforcement Official, Office of Law Enforcement, Fish and Wildlife Serv., to Special Agent in Charge, Investigations Unit, Office of Law Enforcement, Fish and Wildlife Serv. (Jan. 23, 2017, 9:32 a.m.) (on file with the Committee); Email from Assistant Special Agent in Charge, Ne.

Finding 4: FWS was completely unprepared to implement the Order.



- Given the lack of notice of Director’s Order No. 219, FWS officials were predictably unprepared to implement or discuss it with the press or stakeholders. On January 20, 2017, an FWS employee in the Midwest learned of the Order and emailed coworkers asking if “[a]nyone [has] heard of talking points, FAQs or any guidance on communications for this [Order]?”³⁶ In response, an FWS Deputy Assistant Director of External Affairs asked, “BTW – Did we even have a communications strategy in draft on this? Or was it totally out of the blue?”³⁷ He went so far as to ask if the Order was even supposed to issue, or instead “was signed and then posted by mistake.”³⁸
- After learning of the Order on January 20, 2017, the FWS Chief of Public Affairs expressed surprise and promised to try to assemble talking points by stating: “This is news to me!! I’ll try and put something together.”³⁹

Region, Office of Law Enforcement, Fish and Wildlife Serv., to Special Agent in Charge, Investigations Unit, Office of Law Enforcement, Fish and Wildlife Serv. (Jan. 23, 2017, 9:41 a.m.) (on file with the Committee); Email from Senior Special Agent, Office of Law Enforcement, Fish and Wildlife Serv., to Special Agent in Charge, Investigations Unit, Office of Law Enforcement, Fish and Wildlife Serv. (Jan. 23, 2017, 10:12 a.m.) (on file with the Committee); Email from Senior Special Agent, Headquarters Investigations Unit, Office of Law Enforcement, Fish and Wildlife Serv., to Special Agent in Charge, Investigations Unit, Office of Law Enforcement, Fish and Wildlife Serv. (Jan. 23, 2017, 11:25 a.m.) (on file with the Committee).

³⁶ Email from Assistant Reg’l Dir. External Affairs, Midwest Region, Fish and Wildlife Serv., to Chief of Pub. Affairs, Fish and Wildlife Serv. et al. (Jan. 20, 2017, 9:28 a.m.) (on file with the Committee).

³⁷ Email from Deputy Assistant Dir. External Affairs, Fish and Wildlife Serv., to Chief of Pub. Affairs, Fish and Wildlife Serv. (Jan. 23, 2017, 3:52 p.m.) (on file with the Committee).

³⁸ *Id.*

³⁹ Email from Chief of Pub. Affairs, Fish and Wildlife Serv., to Assistant Reg’l Dir., External Affairs, Midwest Region, Fish and Wildlife Serv. (Jan. 20, 2017, 9:33 a.m.) (on file with the Committee).

Re: Non-toxic Ammo Director's order

[REDACTED]@fws.gov>

Fri, Jan 20, 2017 at 9:33 AM

To: [REDACTED]@fws.gov>

This is news to me!! I'll try and put something together.

- FWS struggled to develop guidance for the Order. On January 24, 2017, an FWS official stated, “I would hope someone in HQ refuges is working on guidance for project leaders but maybe that is wishful thinking given how this has gone.”⁴⁰ The following day, FWS officials continued debating how best to discuss implementing the Order. The FWS Deputy Assistant Director of External Affairs wrote that one proposal “makes it sound like we didn’t know about the D[irector’s] O[rder] and we finalized it without being prepared. Regardless of whether that is true or not, I am not sure we want to give that impression.”⁴¹

Re: Lead DO Statement Re Implementation

[REDACTED]@fws.gov>

Wed, Jan 25, 2017 at 1:44 PM

To: [REDACTED]@fws.gov>

Cc: [REDACTED]@fws.gov>, [REDACTED]@fws.gov>

I understand what you are saying, but the makes it sound like we didn't know about the DO and we finalized it without being prepared. Regardless of whether that is true or not, I am not sure we want to give that impression.

[REDACTED]
—
[REDACTED]
Deputy Assistant Director - External Affairs
U.S. Fish and Wildlife Service Headquarters, MS: EA
5275 Leesburg Pike
Falls Church, VA 22041-3803

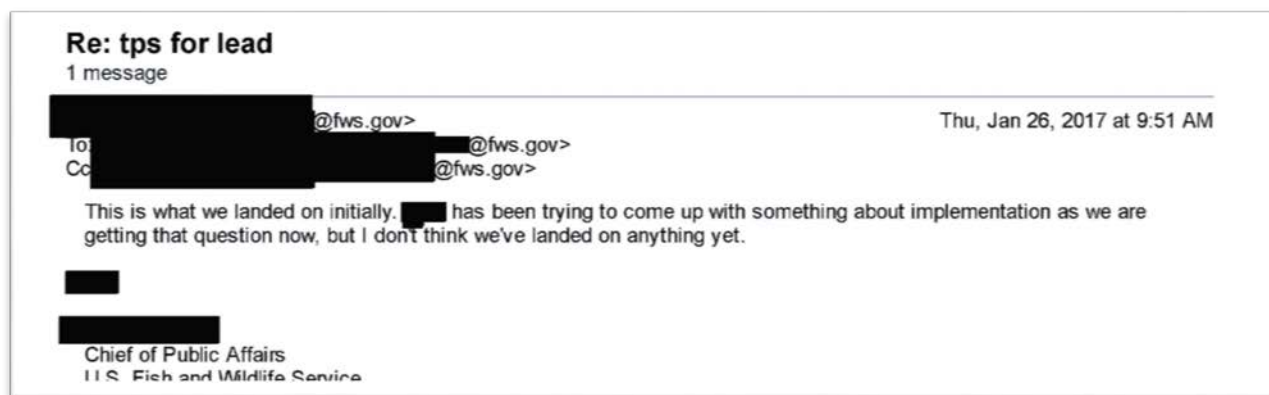
- On January 26—a full week after issuance of the Order—FWS still struggled to explain it to the public. At that time, the FWS Public Affairs Chief advised a colleague attempting to prepare a statement: “We have now been asked to just say that we are looking into the impacts of this order and leave it at that—so dialing back considerably from what we have been saying and no background. Will update you if this changes.”⁴²

⁴⁰ Email from Deputy Assistant Dir. External Affairs, Fish and Wildlife Serv., to Chief of Pub. Affairs, Fish and Wildlife Serv. (Jan. 24, 2017, 8:11 p.m.) (on file with the Committee).

⁴¹ Email from Deputy Assistant Dir. External Affairs, Fish and Wildlife Serv., to Chief, Div. of Partners and Intergovernmental Affairs, External Affairs, Fish and Wildlife Serv. (Jan. 25, 2017, 1:44 p.m.) (on file with the Committee).

⁴² Email from Outreach and Educ. Coordinator, Fish and Wildlife Serv., to Cent. Flyway Representative, Div. of Migratory Bird Mgmt., Fish and Wildlife Serv. (Jan. 26, 2017, 1:58 p.m.) (on file with the Committee).

- The confusion was not limited to only a few staffers. On January 26, a reporter emailed Ashe requesting more information on the Order and “to what extent [the] order will make a big difference in saving birds’ lives.”⁴³ With Ashe gone from FWS, another FWS employee forwarded the request to colleagues asking, “How should we respond?”⁴⁴
- With regard to carrying out the lead ban, a week after its release, the FWS Chief of Public Affairs admitted, “I don’t think we’ve landed on anything yet.”⁴⁵



- Moreover, in response to an FWS staffer concerned about discussing the Order with outside groups, another FWS worker cautioned “please exercise restraint in providing any interpretation or setting expectation[s] on implementation” of the decree.⁴⁶ Another FWS employee expressed frustration with the futility of dealing with the Order, believing “that the order is going away” with the incoming administration.⁴⁷

Conclusions and Recommendations

The documents obtained by the Committee offer a glimpse into how the Fish & Wildlife Service enacted major policy changes in the waning days of the Obama Administration. The documents show that FWS officials ignored state and local governments, stakeholders, their own coworkers, and FWS policies in favor of a rushed, poorly planned course of action. FWS documents provided no explanation for such a hasty process other than to promulgate the policy before President Trump took office. Director’s Order No. 219 further shows how the sudden,

⁴³ Email from Freelance Science Writer and Artist, to Dan Ashe, Dir., Fish and Wildlife Serv. (Jan. 26, 2017, 4:45 p.m.) (on file with the Committee).

⁴⁴ Email from Exec. Assistant, Fish and Wildlife Serv., to Deputy Assistant Dir. External Affairs, Fish and Wildlife Serv. (Jan. 26, 2017, 5:30 p.m.) (on file with the Committee).

⁴⁵ Email from Chief of Pub. Affairs, Fish and Wildlife Serv., to Assistant Dir. External Affairs, Fish and Wildlife Serv. (Jan. 26, 2017, 9:51 a.m.) (on file with the Committee).

⁴⁶ Email from Chief, Div. of Migratory Bird Mgmt., Fish and Wildlife Serv., to Deputy Chief, Div. of Migratory Bird Mgmt., Fish and Wildlife Serv. (Jan. 20, 2017, 12:38 p.m.) (on file with the Committee).

⁴⁷ Email from Chief, Div. of Partners and Intergovernmental Affairs, External Affairs, Fish and Wildlife Serv., to Deputy Assistant Dir. External Affairs, Fish and Wildlife Serv. (Jan. 25, 2017, 1:16 p.m.) (on file with the Committee).

back-room actions of one overzealous unelected bureaucrat can potentially devastate an entire industry.

Secretary Zinke's rescission of Director's Order 219 was an important step in correcting this overstep of the Fish & Wildlife Service. However, nothing prevents a future director from similar overreaches in the future. Director's Order No. 219 demonstrates the need for protections against last minute, unilateral actions that circumvent Congress and the American public. Strengthening the power to reverse regulations using the Congressional Review Act (CRA) by allowing Congress to consider a joint resolution disapproving multiple regulations at the same time, or extending or removing the deadline for congressional action under the CRA, are examples of possible changes to combat executive overreach.⁴⁸ In addition, the Department should review its policies for issuing Director's Orders, regulations, and other directives to ensure proper compliance with the law and agency and administrative procedures so that future orders issue only after appropriate policy consideration and stakeholder consultation.

Ultimately, exposing the flawed process in examples like Director's Order No. 219 strengthen efforts to ensure that such activities do not occur in future administrations.

⁴⁸ See H.R. 21, 115th Cong. (2017).