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**Committee on Natural Resources**  
**Washington, DC 20515**

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November 18, 2016

The Honorable Dan Ashe  
Director  
U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, D.C. 20240

Dear Director Ashe:

The Committee is conducting oversight of the U.S. Fish and Wildlife Service's (FWS) use of voluntary payments by energy developers to mitigate impacts on migratory birds. In 2001, Executive Order 13186 directed "departments and agencies to take certain actions to further implement the [Migratory Bird Treaty] Act."<sup>1</sup> In an effort to implement the 2001 Executive Order, the Federal Energy Regulatory Commission's (FERC) Office of Energy Projects and FWS entered into a Memorandum of Understanding (MOU) on March 30, 2011.<sup>2</sup>

The 2011 MOU states that "[i]t is in the interests of [FERC and FWS] that potential impacts, direct and indirect, are thoroughly assessed and unavoidable impacts are appropriately mitigated . . . ."<sup>3</sup> Adopted from the National Environmental Policy Act (NEPA), the MOU defines "mitigation" as:

- a) avoiding the impact altogether by not taking a certain action or parts of an action,
- b) minimizing impacts by limiting the degree or magnitude of the action and its implementation,
- c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment,

<sup>1</sup> Exec. Order No. 13186, 66 Fed. Reg. 3853 (Jan. 17, 2001).

<sup>2</sup> Memorandum of Understanding Between the Fed. Energy Reg. Comm'n and the U.S. Dep't of the Interior United States Fish and Wildlife Serv. Regarding Implementation of Exec. Order 13186, "Responsibilities of Fed. Agencies to Protect Migratory Birds" (Mar. 31, 2011) available at <https://www.fws.gov/migratorybirds/pdf/management/mouferc.pdf> [hereinafter *2011 MOU*].

<sup>3</sup> *2011 MOU* at 3.

- d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action, or
- e) compensating for the impact by replacing or providing substitute resources or environments<sup>4</sup>

The Department of the Interior (DOI) further interprets NEPA's § 1508.20(e) as authority for FWS to "seek compensatory mitigation for removed habitat which was used by either migratory birds (under E.O. 13186 and the 2011 MOU between FERC and [FWS]) or by listed species (under [the Endangered Species Act])."<sup>5</sup> Additionally, according to FWS comments to a private energy developer on its Draft Migratory Bird Conservation Plan for a pipeline project, FWS "uses a process called Habitat Equivalency Analysis (HEA) to estimate the amount of mitigation land required to recover the lost services of impacted habitat."<sup>6</sup>

FWS further stated that the "HEA process provides an objective and fair method for estimating mitigation across a variety of projects and habitats."<sup>7</sup> In a letter to the private energy developer FWS also wrote that it had "completed a preliminary estimate for compensatory mitigation" for the pipeline project, and would discuss the estimate in-person at a scheduled meeting between the agency and the energy developer.<sup>8</sup>

The Committee seeks to better understand FWS's decision-making process in determining voluntary mitigation contribution amounts for private energy developers. Therefore, in order to assist the Committee's oversight, please produce the following documents and information, and designate appropriate officials to provide a briefing to the Committee staff as soon as possible, but no later than 5:00 p.m. on December 1, 2016:

1. Documents sufficient to explain how each of the eight FWS regions use HEA to determine voluntary mitigation contribution amounts for federal and non-federal pipeline and transmission line projects;
2. All documents and communications, including but not limited to, briefing presentations by FWS regional offices, referring or relating to compensatory mitigation requirements for private energy developers engaged in pipeline and transmission line projects;

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<sup>4</sup> Nat'l Env'tl. Policy Act, 40 C.F.R § 1508.20 (2005), *cited in 2011 MOU* at 9.

<sup>5</sup> Letter from Lindy Nelson, Regional Env'tl. Officer, U.S. Dep't of the Interior Office of Env'tl. Policy and Compliance, Philadelphia Region, to Kimberly D. Bose, Sec'y, Fed. Energy Regulatory Comm'n (Dec. 18, 2014) *available at* [http://elibrary.ferc.gov/idmws/file\\_list.asp?accession\\_num=20141222-5336](http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20141222-5336).

<sup>6</sup> Letter from Lynn Lewis, Assistant Regional Dir., Ecological Services, Midwest Region, U.S. Fish and Wildlife Serv., to Joey Mahmoud, Energy Transfer (Apr. 20, 2016) *available at* [http://elibrary.ferc.gov/idmws/file\\_list.asp?accession\\_num=20160526-5092](http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20160526-5092).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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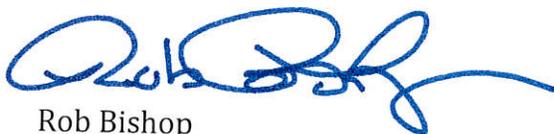
3. Documents sufficient to show the total dollar amount of all voluntary mitigation contributions made by private energy developers at the recommendation of FWS from March 30, 2011 through November 10, 2016; and
4. Documents sufficient to identify the names of all organizations that have served as third party fiduciaries to receive funds from private energy developers for voluntary mitigation contributions at the recommendation of FWS from March 30, 2011 through November 10, 2016. Please also provide corresponding contribution amounts and names of the donors.

In addition, please preserve all records, documents, data, and communications related to FWS's use of compensatory mitigation or voluntary payments by energy developers to mitigate impacts on migratory birds.

Please deliver your response to room 1324 of the Longworth House Office Building. The Committee prefers, if possible, to receive your response in electronic format. An attachment contains additional instructions for responding to the Committee's request.

Please contact Sang Yi and Casey Hammond of the Oversight and Investigations Subcommittee staff at (202) 225-7107 with any questions about this request. Thank you for your attention to this matter.

Sincerely,



Rob Bishop  
Chairman  
Committee on Natural Resources



Louie Gohmert  
Chairman  
Subcommittee on Oversight and  
Investigations

Enclosure

cc: The Honorable Raúl Grijalva, Ranking Member, Committee on Natural Resources  
The Honorable Debbie Dingell, Ranking Member, Subcommittee on Oversight and  
Investigations