

Committee on Natural Resources  
Subcommittee on Oversight and Investigations  
Louie Gohmert, Chairman  
Hearing Memorandum

April 27, 2015

To: All Natural Resources Committee Members

From: Oversight and Investigations Subcommittee, Majority Staff  
Casey Hammond, (5-7107)

Hearing: Oversight hearing titled “*Zero Accountability: The Consequences of Politically Driven Science.*”

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The Subcommittee on Oversight and Investigations will hold an oversight hearing titled “*Zero Accountability: The Consequences of Politically Driven Science,*” on **Wednesday, April 29, 2015 at 2:00 pm in room 1334 Longworth**. The hearing will focus on improving the transparency of federal agencies where science intersects with policy making.

**Policy Overview**

- Quality research benefits the country when it is sound, reliable, authentically peer-reviewed, paired with transparent access to data, and available to policy makers. Science is not science at all when outcomes are manipulated to reach ends predesigned by government employees carrying the federal mantle.
- Egregious examples around the nation highlight the devastating impacts to jobs and human safety<sup>1</sup> caused by unaccountable federal bureaucracies that often engage in delay and denial.
- There is not a level playing field between agents of the federal government and private individuals, small businesses, or even local governments. The federal government’s regulations and enforcement tools often enables it to outspend and outwait any possibility that outcomes inconsistent with their agenda will ultimately prevail in a dispute.
- Recent concerning examples suggest that the Department of the Interior has tolerated and failed to address, what one United States Senator called “abuse of science” within its sub-agencies’ actions, and that employees were “emboldened” to “fabricate the science” to

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<sup>1</sup> “Help Save Drakes Bay Oyster Company.” *Farm-to-Consumer Legal Defense Fund*. 22 July 2014. Web. 20 April 2015. [http://www.farmtoconsumer.org/news\\_wp/?p=3256](http://www.farmtoconsumer.org/news_wp/?p=3256); FEMA gives OK to recovery work in Bastrop County toad habitat.” *ABC KVUE*. 11 January 2012. Web. 20 April 2015. <http://www.kvue.com/story/news/2014/05/20/2296488/>

justify their purposes.<sup>2</sup> Even more troubling, some employees were apparently rewarded for this behavior.<sup>3</sup> Federal employees should be discouraged, not encouraged from engaging in “advocacy.”<sup>4</sup>

### **Witnesses Invited**

#### **Mrs. Kathleen Hartnett-White**

Distinguished Senior Fellow-In-Residence &  
Director, Armstrong Center for Energy and Environment  
Texas Public Policy Foundation  
Austin, Texas

#### **The Honorable Clara Beckett**

Bastrop County, Commissioner, Precinct 2  
Bastrop, Texas

#### **Mr. Kevin Lunny**

Owner  
Drake’s Bay Oyster Company  
Point Reyes, California

#### **Professor Naomi Oreskes, Ph.D.**

Professor of the History of Science and Director of Graduate Studies  
The Department of the History of Science,  
Harvard University  
Cambridge, Massachusetts

### **Background**

The subcommittee is expected to hear examples about the consequences of questionable science and how a lack of accountability, and use of selective science by federal agencies, can cause serious impacts on the health, safety and livelihoods of Americans.

#### **Drake’s Bay Oyster Farm**

Kevin Lunny owned and operated Drake’s Bay Oyster Company on a lease within Point Reyes National Seashore. Kevin’s family had been ranching in the area as far back as 1946 and was drawn into the park boundaries by an Act of Congress in 1962. In 1972, the oyster farm

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<sup>2</sup> “Feinstein 'stunned' by data manipulation allegations.” *ABC7 Eyewitness News, Los Angeles*. March 29 2012. Web. 20 April 2015. [http://abclocal.go.com/story?section=news/assignment\\_7&id=8601050](http://abclocal.go.com/story?section=news/assignment_7&id=8601050).

<sup>3</sup> Dianne Feinstein. Letter to Ken Salazar, Secretary of the Interior: Falsification of Science at Point Reyes National Seashore. 29 March 2012. <https://oysterzone.files.wordpress.com/2011/11/03-29-12-feinstein-letter-to-salazar-re-nps-repeated-misconduct1.pdf>

<sup>4</sup> DOI Memorandum from Deputy Solicitor Arthur E. Gary and Attorney-Advisor Gavin M. Frost to Will Shafroth, Acting Assistant Secretary for Fish and Wildlife and Parks. 22 March 2011. Page 35. <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=238859>

(owned at the time by the Johnson Family) sold the onshore acreage and secured a 40 year reservation of use with a renewal clause.<sup>5</sup>

In 2005, the Lunny Family purchased the oyster operation and the lease that was set to expire in 2012 without an approved renewal from the National Park Service (NPS). However, in 1976 Congress had already passed the Point Reyes Wilderness Act, which included the farm as “potential wilderness,” allowing for its designation should the conditions ever be appropriate (free of commercial use). In 2006, the NPS – through a series of critical reports and statements-- began to build its case against the farm, claiming that it had a negative impact on the resources of the park – including water quality and harbor seal population.

Some of the controversial actions by the NPS include:

- To evaluate the impacts of noise from the oyster operations, NPS used measurements from a 70 horsepower, 2-stroke Jet Ski (taken in New Jersey) to represent the noise from a 20 horsepower motor boat and a jackhammer to represent a small handheld pneumatic tool. Formal peer reviewers of the Draft Environmental Impact Statement were unaware these measurements had not been taken at the oyster farm.<sup>6</sup>
- In an attempt to catch oyster workers harassing harbor seals, the NPS secretly placed cameras and took more than 300,000 pictures.<sup>7</sup> However, the NPS relied on observer accounts of seal pupping disturbances even though it could have been disputed by their own covert operation.<sup>8</sup> Ultimately, the cameras were discovered (before they were disclosed by the NPS) by a scientist interested in the issue.<sup>9</sup>

Ultimately, The DOI Inspector General found that the Point Reyes senior scientist “misrepresented research,”<sup>10</sup> failed to correct the record after being informed by USGS scientists whose work was inaccurately portrayed,<sup>11</sup> and was unresponsive to FOIA requests for specific, germane documents.<sup>12</sup>

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<sup>5</sup> *Drakes Bay Oyster Company v. Jewell*. D.C. No.4:12-cv-06134-YGR. U.S. Court of Appeals for the Ninth Circuit. Page 9. 2014.

<sup>6</sup> Corey S. Goodman. “National Park Service Used Falsified Acoustic Data to Intentionally Deceive the Public and the ATKINS Review of the NPS Draft Environmental Impact Statement on Drakes Bay Oyster Company.” 2012. Print.

<sup>7</sup> “Reading Room: Photographs and Videos, Point Reyes.” *U.S. National Park Service*. Department of the Interior. Web. 20 April 2015. [http://www.nps.gov/pore/learn/management/planning\\_reading\\_room\\_photographs\\_videos.htm](http://www.nps.gov/pore/learn/management/planning_reading_room_photographs_videos.htm).

<sup>8</sup> DOI Memorandum from Deputy Solicitor Arthur E. Gary and Attorney-Advisor Gavin M. Frost to Will Shafroth, Acting Assistant Secretary for Fish and Wildlife and Parks. “Public Report on Allegations of Scientific Misconduct at Point Reyes National Seashore, California.” Page 7. 22 March 2011.

<sup>9</sup> “History of False Science about DBOC.” *Save our Drakes Bay Oyster Farm*. Web. 20 April 2015. <http://savedrakesbay.com/core/history-of-false-science-about-dboc/>

<sup>10</sup> Earl E. Devaney. “Department of the Interior Office of the Inspector General Investigative Report: Point Reyes National Seashore.” Page 2. 2008. Print.

<sup>11</sup> *Ibid* Page 16.

<sup>12</sup> *Ibid* Page 2.

A National Academy of Sciences report found that one NPS report “gave an interpretation of the science that exaggerated the negative and overlooked the beneficial effects of the oyster culture operation.” This NPS behavior “cast doubt on the agency’s credibility and motivation.”<sup>13</sup>

The Office of the Solicitor at DOI found that “the evidence instead confirms that the NPS employees needed...more effective supervision; someone in their chain-of-command should have recognized the errors, sounded the alarm, and demanded disclosure.”<sup>14</sup> Furthermore, “misconduct arose from incomplete and biased evaluation and from blurring the line between exploration and advocacy through research.”<sup>15</sup>

In a 2012 letter to a California state government official on the matter, Senator Dianne Feinstein (D-CA) stated: “I found that the science regarding the impacts of the oyster farm had been manipulated, and that the oyster farm operator had been treated in a biased and unfair manner. The Park Service has repeatedly misrepresented the scientific record since 2006 to portray the farm as environmentally harmful, and it is my belief that the Park Service is doing everything it can to justify ending the oyster farm’s operations.”<sup>16</sup> Feinstein separately wrote that “The Park Service has falsified and misrepresented data, hidden science and even promoted employees who knew about the falsehoods, all in an effort to advance to an unwavering bias against the oyster farm and historic ranches.”<sup>17</sup>

In 2009, legislation was enacted to provide the Secretary the Interior clear and unambiguous authority to extend the lease. However, in 2012, then Secretary Salazar rejected the opportunity and decided to close the farm and transform the area into designated wilderness. In 2014, after years of fighting to keep the family run Drake’s Bay Oyster Farm operating, Mr. Kevin Lunny was forced to remove his equipment and watch as millions of dollars of oysters were unceremoniously dumped onto the shore to sit and rot. The United States Supreme Court decided not to hear his case and his last lifeline may have been extinguished.<sup>18</sup>

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<sup>13</sup> National Academy of Sciences. “Shellfish Mariculture in Drakes Estero, Point Reyes National Seashore, California.” Page 73. 2009. Print.

<sup>14</sup> DOI Memorandum from Deputy Solicitor Arthur E. Gary and Attorney-Advisor Gavin M. Frost to Will Shafroth, Acting Assistant Secretary for Fish and Wildlife and Parks. “Public Report on Allegations of Scientific Misconduct at Point Reyes National Seashore, California.” Page 32. 22 March 2011.

<http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=238859>

<sup>15</sup> Ibid Page 35.

<sup>16</sup> Dianne Feinstein. Letter to Daniel Richards, President, California Fish and Game Commission: Drakes Bay Oyster Company. 22 May 2012. <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=601fe5b6-41c2-4712-860c-ab0548b7373b>

<sup>17</sup> Dianne Feinstein. Letter to Ken Salazar, Secretary of the Interior: Falsification of Science at Point Reyes National Seashore. 29 March 2012. <https://oysterzone.files.wordpress.com/2011/11/03-29-12-feinstein-letter-to-salazar-re-nps-repeated-misconduct1.pdf>

<sup>18</sup> “The Oyster Shell Game.” *Newsweek*. Updated 18 January 2015. Web. 20 April 2015. <http://www.newsweek.com/2015/01/30/oyster-shell-game-300225.html>

## Whooping Cranes in Texas

Faulty science by the U.S. Fish and Wildlife Service (FWS) regarding whooping cranes was utilized to sue the Texas Commission on Environmental Quality (TCEQ) in an attempt to alter their right to make water allocations. The contention was that the commission's water management policies adversely impacted whooping cranes in the Aransas National Wildlife Refuge constituting takes under the Endangered Species Act (ESA).

For 29 years, one FWS employee conducted aerial counts of the cranes. Because the FWS official counted 23 fewer birds in the winter 2008-09 survey, FWS concluded they had died (although only 4 carcasses were found).<sup>19</sup> Even though the area of the refuge encompasses nearly 115,000 acres,<sup>20</sup> if a crane was not where he expected it to be it was counted as dead.<sup>21</sup> Although, the FWS was aware in 2008 that its counting method "may bias the result,"<sup>22</sup> it wasn't until 2012 that multiple deficiencies and "major concerns" were acknowledged.<sup>23</sup> Nevertheless, in March 2013, a federal district court judge agreed with the plaintiff in its claim against TCEQ, opening the door to new federal incursions into state water management.<sup>24</sup>

In 2014, with millions of dollars spent by TCEQ in its defense, the Fifth Circuit Court of Appeals reversed the federal district court with evidence that derailed the assumption that deaths had occurred, or if they did, that causality could be traced to TCEQ.<sup>25</sup> While further appeals are still making their way through the courts at a significant cost in legal expenses borne by taxpayers, admirers of the whooping crane can celebrate that 17 of the reported 23 dead birds reappeared in 2010.<sup>26</sup>

## Houston Toad in Bastrop County, Texas

The Houston toad was listed under the ESA as an endangered species in 1970.<sup>27</sup> Bastrop County, Texas contains the best remaining habitat for the toads and has a 124,000 acre conservation plan in place.<sup>28</sup> However, the 2011 Bastrop County Complex fire raged for weeks

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<sup>19</sup> The Aransas Project v. Shaw. No. 13-40317. U.S. Court of Appeals for the Fifth Circuit. Page 3. 2014. <http://www.ca5.uscourts.gov/opinions/pub/13/13-40317-CV0.pdf>.

<sup>20</sup> "Statistical Data Tables for Lands Under Control of the Fish & Wildlife Service." Page 27. 30 September 2014. Print. [http://www.fws.gov/refuges/land/PDF/2014\\_Annual\\_Report\\_of\\_LandsDataTables.pdf](http://www.fws.gov/refuges/land/PDF/2014_Annual_Report_of_LandsDataTables.pdf)

<sup>21</sup> Colleen Schreiber. "Whooper Case Could Be Precedent For All River Basins In Texas." *Livestock Weekly*. 2 May 2013. Web. 20 April 2015. <http://www.livestockweekly.com/papers/49/whl2mcswhoopingcranecase.asp>

<sup>22</sup> Brad Strobel, Matthew Butler, Grant Harris. "Aransas-Wood Buffalo Whooping Crane Abundance Survey (2011 – 2012)." Page 5. Washington D.C: U.S. Fish and Wildlife Service. 2012. [http://www.fws.gov/uploadedFiles/FY12\\_ANWR\\_WWCAS\\_Review\\_01OCT12-508.pdf](http://www.fws.gov/uploadedFiles/FY12_ANWR_WWCAS_Review_01OCT12-508.pdf)

<sup>23</sup> Ibid.

<sup>24</sup> Colleen Schreiber. "Whooper Case Could Be Precedent For All River Basins In Texas." *Livestock Weekly*. 2 May 2013. Web. 20 April 2015. <http://www.livestockweekly.com/papers/49/whl2mcswhoopingcranecase.asp>

<sup>25</sup> The Aransas Project v. Shaw. No. 13-40317. U.S. Court of Appeals for the Fifth Circuit. Page 38. 2014. <http://www.ca5.uscourts.gov/opinions/pub/13/13-40317-CV0.pdf>.

<sup>26</sup> Lee Wilson. "Analysis of the Science: The Whooping Crane Decision, The Aransas Project v. Shaw." Page 14. Austin, TX: The Texas Public Policy Foundation. 2013. Print.

<sup>27</sup> "Houston Toad." *Texas Parks and Wildlife*. Web. 20 April 2015. <http://tpwd.texas.gov/huntwild/wild/species/htoad/>

<sup>28</sup> Bastrop County Lost Pines Habitat Conservation Plan Administrator. "What You Need to Know about the Houston Toad, the Endangered Species Act and Bastrop County's Lost Pines Habitat Conservation Plan" Page 2. 2011. Print.

and destroyed much of the toad habitat along with at least 1,600 homes.<sup>29</sup> When it came time to help people impacted by the fire, cleanup and recovery were hindered and delayed because of regulations introduced by the FWS.

For example, survivors went without electricity because restoring power required special “toad monitors” and federal permits.<sup>30</sup> The FWS requirements resulted in additional costs and delays, while it remains unclear whether or not science was conducted to justify the federal decisions or whether any real evidence was obtained to justify that such actions would help toads. Despite the nearly 45 years of federal protections there are only 3,000 to 4,000 toads remaining in the world.<sup>31</sup>

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<sup>29</sup>“Houston Toad Poses Obstacles For Rebuilding After Devastating Fire.” *CBS Houston*. Web. 19 January 2012. <http://houston.cbslocal.com/2012/01/19/houston-toad-poses-obstacles-for-rebuilding-after-devastating-fire/>

<sup>30</sup> “Debris removal in Bastrop slows as biologists check on the endangered toad.” *Statesman*. Web. 6 February 2012. <http://www.statesman.com/news/news/local/debris-removal-in-bastrop-slows-as-biologists-check/nRkJD/>

<sup>31</sup> “Houston Toad.” *eNature*. Web. 20 April 2015. <http://www.enature.com/fieldguides/detail.asp?recnum=AR0645>