



OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

INVESTIGATIVE REPORT OF ALLEGED IMPROPER INFLUENCE BY THE SECRETARY OF THE INTERIOR IN THE FWS' SCIENTIFIC PROCESS

This is a revised version of the report prepared for public release.

SYNOPSIS

We initiated this investigation after receiving allegations that Secretary of the Interior David Bernhardt, when he was the Deputy Secretary, interfered with the U.S. Fish and Wildlife Service's (FWS') scientific process during an assessment of the effects of pesticides on endangered species. We investigated whether Bernhardt exceeded or abused his authority by influencing consultations between the FWS and the U.S. Environmental Protection Agency on the proposed registration or re-registration of three pesticides, and whether his involvement violated his ethics pledge or Federal ethics regulations.

We found that Bernhardt reviewed a draft FWS opinion on the potential biological effects that one of the three pesticides could have on endangered species, and he instructed the FWS team developing the opinion to change its method for determining the potential effects. This change has delayed the completion of the opinion, but we found no evidence that Bernhardt exceeded or abused his authority or that his actions influenced or altered the findings of career FWS scientists. We also found no evidence that Bernhardt's involvement in this matter violated his ethics pledge or Federal ethics regulations. We provided this report to the Chief of Staff for the Office of the Secretary for any action deemed appropriate.

DETAILS OF INVESTIGATION

We initiated this investigation based on congressional requests to investigate the circumstances surrounding Secretary of the Interior David Bernhardt's involvement, as Deputy Secretary, in the alleged delay of a U.S. Fish and Wildlife Service (FWS) biological assessment of the effects of pesticides on endangered species. Bernhardt's alleged involvement was outlined in a *New York Times* article.

We investigated the actions Bernhardt took during formal consultations that the FWS was conducting with the U.S. Environmental Protection Agency (EPA) to assess potential effects of several companies' proposed registration or re-registration of three pesticides—malathion, diazinon, and chlorpyrifos—on endangered species. We also analyzed whether anything Bernhardt did with relation to these consultations violated his ethics pledge or any Federal ethics regulations.

No Evidence That Bernhardt Improperly Influenced FWS Pesticide Consultations

The Endangered Species Act (ESA) directs all Federal agencies to work to conserve endangered and threatened species and to use their authorities to further the purposes of ESA Section 7, "Interagency Cooperation." ESA Section 7 is a mechanism by which Federal agencies ensure the actions they take, fund, or authorize do not jeopardize the existence of any species listed in the ESA.

Under ESA Section 7, a Federal agency must formally consult with the FWS when any action the agency proposes to take, fund, or authorize may affect listed species. During a formal consultation, the FWS and the agency proposing the action work together to determine whether the action would be likely to jeopardize the continued existence of endangered or threatened

species. As part of the consultation, the FWS issues a “biological opinion” document, in which it gives its opinion on whether the proposed activity would jeopardize the continued existence of species. In this case, the proposed activity was EPA determining whether to approve or disapprove the registration or re-registration for several companies to produce the named pesticides.

Bernhardt’s Involvement in Draft Biological Opinion for Malathion

We interviewed a career FWS official, who stated the FWS developed a draft biological opinion on the pesticide malathion as part of consultations with the EPA on the EPA’s review of the registration of the three pesticides. The official explained to us that during a consultation, the FWS evaluates all of the direct and indirect effects of a proposed action; in this case, he said, the FWS considered the direct effect to be the registration of the pesticide, which would allow it to be manufactured, and the indirect effects to be the impacts to protected species or habitats that were “reasonably certain” to occur when the pesticide was used. The official told us the EPA asked for consultations on the effects of the three pesticides in January 2017, and the FWS began drafting the biological opinion for malathion the same month. He said malathion was the first pesticide (out of the three) for which the FWS had drafted its biological opinion.

When we spoke with Bernhardt about his role in the consultation, he said he sent the career FWS official an email in the fall of 2017 telling the official he wanted to “get up to speed on the issue.”¹ He said he did not remember why he made this request, but someone at the EPA or the Council on Environmental Quality might have told him about the consultation. Bernhardt said pesticide consultations were notable because they were “the most complex consultations on the planet,” and therefore the agencies that conducted them often struggled to complete them.

Bernhardt told us he was “extremely troubled” when he reviewed the draft biological opinion for malathion because “a massive amount of work” had gone into the consultation process and the draft opinion was “completely inconsistent with our regulatory paradigm.” According to Bernhardt, the FWS did not clearly convey where the pesticide would be used, how the use would occur, and what the effects of the use would be. He believed the FWS consultation team had struggled with how to analyze the potential effects on species, so the team had decided to base its analysis on the pesticide’s approved usage (that is, the usage authorized by the EPA), rather than analyzing how it had actually been used in the years it had been on the market. In his opinion, he said, the team’s approach did not “fall within the law.”

Bernhardt said that after he reviewed the draft opinion in late 2017 he asked to meet with the attorneys who had worked on it and learned that the U.S. Department of the Interior’s (DOI’s) Office of the Solicitor (SOL) had received the draft opinion for legal review only about 2 weeks before he saw it. Bernhardt thought the FWS team’s work on the consultation without earlier involvement by the SOL had been a “pathetic waste of energy, effort, and resources.”

Bernhardt recalled that when the SOL attorneys did review the draft opinion, they agreed with him that the opinion should be based on actual past usage of the pesticide. He said he and the SOL attorneys discussed the need to find data on where the pesticide had been applied in the past

¹ Our review of emails for this investigation did not reveal this particular message.

and what the actual effects were on species so they could complete the biological opinion in a way that met the regulatory requirements.

The FWS official and a second career FWS official both told us they attended a meeting with Bernhardt after he reviewed the draft malathion opinion. The first official said Bernhardt asked relevant questions at the meeting about the work the FWS consultation team had done, including whether the indirect effects were reasonably certain to occur and the basis for the team's conclusion. The second official said Bernhardt expressed concerns during the meeting because the team's analysis was based on the pesticide's approved usage levels, not on its actual past usage.

The second FWS official also told us that in February 2018 Bernhardt asked the principals and staff from all of the agencies involved in the consultations, including the U.S. Department of Agriculture and the U.S. Department of Commerce's National Marine Fisheries Service, to meet at the FWS office. This official said that during the daylong meeting Bernhardt asked the agencies to collect data on past usage of all three pesticides. Afterward, the official said, the FWS formed work groups that collected the requested data until they felt they had exhausted all available data sources. The official later informed us that the work groups were in the process of incorporating the data they had collected on malathion into a new analysis for a new draft biological opinion.

No Evidence That Bernhardt's Actions Concerning Pesticide Consultations Were Improper

We found no evidence that Bernhardt exceeded or abused his authority or that his actions influenced or altered the findings of career FWS scientists. Our interviews of four current and former career SOL employees and six career FWS employees (including the two FWS officials referenced earlier in this report) who had been involved in the pesticide consultations confirmed that Bernhardt did not influence the consultations' scientific or biological aspects. All four of the SOL attorneys and four of the six FWS employees we asked said he influenced the legal interpretation of the ESA and the ESA's implementing regulations; none said, however, that they believed his influence was improper. In addition, none of these employees were aware of any formal DOI or FWS process for reviewing consultations or draft biological opinions. The SOL attorneys said that after they reviewed the draft biological opinion on malathion they agreed with Bernhardt's observations, and that he raised valid legal concerns.

We asked seven of the SOL and FWS employees whether a political appointee such as Bernhardt would typically become involved in a consultation; one SOL attorney said it was not the norm but not unusual, while two SOL attorneys and four FWS employees said it was unusual but not unprecedented. As an example, one of the FWS officials said that former Interior Secretary Sally Jewell became involved when the EPA was consulting the FWS on an action relating to rules governing the permitting of cooling water intake structures for industrial facilities.

In addition, all four of the SOL attorneys and five of the FWS employees we asked told us pesticide consultations were especially complex, difficult, and controversial. An FWS fish and wildlife biologist explained to us that one reason for this was that these consultations were determining the effects of pesticides, which can be used across the Nation, on all of the

endangered species listed in the ESA. The biologist said that no matter what the FWS did during the consultations it would be criticized, either for overestimating the effects on endangered species or for not being conservative enough with its estimates.

No Evidence That Bernhardt Violated Ethics Pledge or Ethics Regulations

We found that Bernhardt's involvement in the pesticide consultations did not constitute a conflict of interest. We confirmed that none of the companies the FWS had listed as registrants for the pesticides were former clients or otherwise on Bernhardt's recusal list. In addition, we did not find any evidence that Bernhardt's former employer, Brownstein Hyatt Farber Schreck, LLP, represented any of the registrants.

We interviewed DOI Designated Agency Ethics Official Scott de la Vega and a DOI ethics law and policy official, both of whom told us they did not know of any actions Bernhardt took during his involvement with the pesticide consultations or the draft biological opinion on malathion that violated his ethics pledge or any Federal ethics regulations. Both told us no one had ever raised questions or concerns with them about Bernhardt's involvement in the consultations, and de la Vega agreed with our finding that no conflicts of interest existed.

SUBJECT

David Bernhardt, Secretary of the Interior.

DISPOSITION

We provided this report to the Chief of Staff for the Office of the Secretary for any action deemed appropriate.

