



Investigative Report of U.S. Fish and Wildlife Service Refuge Manager

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SYNOPSIS

At the request of Congressman Walter B. Jones, Jr., we investigated a complaint that a U.S. Fish and Wildlife Service (FWS) refuge manager and other FWS employees engaged in activities that violated anti-lobbying restrictions during Congress' consideration of a bill introduced in 2012, but never enacted, entitled the "Corolla Wild Horses Protection Act." In the complaint, Representative Jones, who sponsored the bill, provided the response he received from FWS after expressing his concerns to FWS.

During our investigation, the FWS refuge manager and a FWS project leader acknowledged communicating with Ducks Unlimited (DU) about the bill. Both the refuge manager and the project leader said that DU initiated the communication but both said that they were aware that DU intended to write a letter to the Senate opposing the legislation using the information that they provided. Our investigation also determined that FWS local and regional officials knew about these communications on or around the times that the refuge manager and the project leader made them.

We found that the FWS Deputy Assistant Director of External Affairs, drafted a majority of FWS' response to Representative Jones, with legal guidance and input from a former FWS special assistant to the Assistant Secretary for Fish and Wildlife and Parks, who consulted with GAO and determined that the email communications violated the anti-lobbying provisions contained in the 2012 Department of the Interior and Related Agencies Appropriations Act.

We presented this case to the Public Integrity Section within the Department of Justice (DOJ), which the United States Attorney's Manual designates as responsible for prosecuting violations of 18 U.S.C. § 1913. We also presented this case to the U.S. Attorney's Office (USAO) for the Eastern District of North Carolina. DOJ and the USAO expressed no interest in pursuing the matter.

BACKGROUND

The Corolla Wild Horses Protection Act Bill

The Corolla Wild Horses Protection Act bill was intended to provide for management of wild horses in and around the Currituck National Wildlife Refuge. The U.S. Fish and Wildlife Service (FWS) publicly opposed the bill during testimony to Congress on July 27, 2010, and April 7, 2011, asserting that wild horses were feral animals that the refuge was not established to manage. Ducks Unlimited (DU) opposed the bill because it believed that the increased presence of horses would endanger the natural habitat of ducks and that the refuge was intended for duck conservation and paid for with proceeds from the sale of duck stamps.

Representative Walter B. Jones, Jr. of North Carolina introduced the bill on January 18, 2011, and the House of Representatives passed it on February 6, 2012. On July 26, 2012, former North Carolina Senator Kay Hagan introduced the bill in the Senate and referred it to the Committee on Environment and Public Works. The bill did not pass in the Senate prior to the end of the 112th Congress. The bill was reintroduced in the House during the 113th Congress in January 2013 and passed the House in June 2013, but it was not introduced in the Senate during this session. The bill

has never been enacted into law.

On April 10, 2012, a DU chapter chairman sent a letter to a DU executive, encouraging him to oppose the bill. The executive sent a letter of opposition to California Senator Barbara Boxer on May 21, 2012.

Lobbying Restrictions

Several statutory provisions, as well as departmental policy, impose constraints on activities by U.S. Department of the Interior (DOI) employees that relate to communication with the public on legislative matters. The primary statute, 18 U.S. Code (U.S.C.) § 1913, known as the Anti-Lobbying Act, generally prohibits the use of appropriated funds for certain activities designed to influence members of Congress regarding any legislation or appropriation, subject to several exceptions. Section 1913, as amended in 2002, now provides that a violation is punishable by civil monetary penalties provided by 31 U.S.C. § 1352(a), rather than by fine, imprisonment or removal from office. In pertinent part, the statute states: “No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation . . .” It further states that “this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member . . . through the proper official channels . . . for the efficient conduct of the public business . . .”

The U.S. Department of Justice (DOJ) prosecutes violations of this law, and in several published opinions, the DOJ Office of Legal Counsel interpreted the statute to prohibit “substantial ‘grass roots’ lobbying campaigns . . . designed to encourage members of the public to pressure Members of Congress to support Administration or Department legislative or appropriations proposals.” According to DOJ, a “grass roots” campaign uses telegrams, letters, and other private forms of communication asking recipients to contact members of Congress. DOJ has further advised that a substantial campaign prohibited by 18 U.S.C. § 1913 would involve a Government official spending \$50,000 or more in appropriated funds.

DOJ’s guidance states that many activities are excluded from the purview of 18 U.S.C. § 1913. For example, the law does not apply to direct communications to Congress or to public speeches, appearances, or writings. Government officials, according to DOJ, may publicly advance agency positions, even to the extent of calling on the public to encourage Congress to support those positions. The statute also does not apply to private communications designed to inform or promote those positions to the public. Therefore, the law does not restrict private communications with members of the public as long as no significant amount in appropriated funds (in DOJ’s opinion, less than \$50,000) is spent to solicit pressure on Congress.

A provision in the Departmental Manual (410 DM 2) also states that employees are “prohibited from using Government office equipment at any time for . . . participating in any improper lobbying activity, or engaging in political activities.” The manual does not define an “improper

lobbying activity.” Likewise, 470 DM 1 states that employees are responsible for “understanding the difference between official public communications made in their official capacity and other public communications . . . made in their individual capacity” and maintaining and portraying a clear distinction between the two. The manual states that DOI supports a culture of openness with the news media and the public that values the free exchange of ideas.

Congress routinely includes two other limitations on using appropriated money for lobbying in the annual Department of the Interior appropriations bills. The DOI appropriations bill enacted by Congress for fiscal year 2012 included a provision that states: “No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which Congressional action is not complete other than to communicate to Members of Congress as described in 18 U.S.C. 1913.”

Another section of the 2012 Consolidated Appropriations Act more broadly prohibits use of funds by any agency “for publicity or propaganda purposes.” Unlike Section 1913, the U.S. Government Accountability Office (GAO), rather than DOJ, interprets and enforces these appropriations law limitations.

DOI’s Solicitor issued a guidance memorandum in 2003 pertaining to both 18 U.S.C. § 1913 and the applicable appropriations provisions. An appendix to this memorandum lists specific guidelines for employees to follow in complying with the laws. One such directive states that: “Non-PAS [Presidentially-Appointed, Senate-Confirmed] Employees MAY NOT ‘ghostwrite’ letters to the editor, speeches, or other materials dealing with Proposals for anyone in a non-Federal position.” In contrast, the memorandum further provides that: “Non-PAS Employees MAY send information about Proposals to individuals or groups that have asked for this information, or that regularly receive information from the Department. This material may be sent by mail, facsimile, or Internet. This material may include information about the status of Proposals and the Administration’s position on Proposals but may not, directly or indirectly, encourage the public to contact Members of Congress, jurisdictions, and/or government officials regarding the Proposals.”

We confirmed through email discussion with an attorney in the Office of the Solicitor that this memorandum remains the official guidance issued by the Solicitor, but we could not locate the document on any official DOI website or other source.

DETAILS OF INVESTIGATION

On August 6, 2014, we received a complaint from Representative Walter B. Jones, Jr.’s staff alleging that a FWS refuge manager violated anti-lobbying provisions and laws by communicating inappropriately with DU regarding opposition to the Corolla Wild Horses Protection Act bill. The alleged communications, from April 20, 2012, to October 12, 2012, consisted primarily of a series of emails between the refuge manager, a FWS project leader, and a DU executive. In the complaint, Representative Jones also provided the results of FWS’ inquiry into the issue—sent to him by FWS in a letter dated February 14, 2013—that FWS conducted after Representative Jones initially expressed concerns to FWS in an October 16, 2012 letter.

Potential Violation of Anti-Lobbying Provisions and Laws

We interviewed the refuge manager, who said that he communicated with DU representatives regarding feral horses at the Currituck National Wildlife Refuge. The refuge manager said that a DU chapter chairman initiated contact with him in person on the Currituck/Knotts Island Ferry in March 2012, asking questions about the bill. The refuge manager said that he provided the chapter chairman with information about FWS' documented position. The refuge manager primarily derived the information about FWS' position on the issue from previous congressional testimony provided by senior FWS officials and from Title 50 of the Code of Federal Regulations, which pertains to the organization and operations of FWS.

We searched the Internet to determine whether the previous FWS testimony to Congress opposing the bill that the refuge manager used to provide information to DU was publicly available. We also searched for a North Carolina State University study that the refuge manager cited as the source of most of his data regarding the potential impact of feral horses on the refuge. We found two separate copies of testimony dated July 27, 2010, and April 7, 2011, written by Greg Siekaniec, FWS Assistant Director of the National Wildlife Refuge System, that opposed the legislation. We also found the scientific study, "Vegetative Impact of Feral Horses, Feral Pigs, and White-tailed Deer on the Currituck National Wildlife Refuge, North Carolina," conducted from May 2010 through May 2012 by Kimberly M. Porter, et al., from North Carolina State University.

During his interview, the refuge manager said that he contributed to the April 10, 2012 letter written by a DU chapter chairman and sent to a DU executive by providing a written summary of the facts derived from congressional testimony and the study conducted by Kimberly Porter. He said that he drafted the document at home on his personal computer but did not keep a record of it. He said that he also reviewed the letter before the chapter chairman sent it to the DU executive. The refuge manager stated that he only told the project leader about the information he contributed to the letter authored by the chapter chairman, and that a FWS project leader told the refuge manager to continue to provide information to DU just as he would to the public. The refuge manager added that another DU executive called him to follow up on the chapter chairman's letter to verify the facts prior to DU sending its letter from the DU executive to Senator Boxer on May 21, 2012. Several other senators were provided copies of the letter, including James Inhofe, Richard Burr, Kay Hagan, Mark Warner, and Jim Webb.

The refuge manager said that he copied his supervisor (the project leader) and others on some of his emails with DU, and he believed that officials from both the Southeast Region and FWS headquarters knew of his activities because of conference calls he had conducted with representatives from both offices. He stated that he was never told he may be violating rules or regulations until Representative Jones contacted FWS.

During our investigation, we reviewed the emails that Representative Jones provided to us in his complaint, including five emails that the refuge manager sent to a DU executive and one sent to the chapter chairman between May 6, 2012, and October 12, 2012. The project leader was copied on an email sent on August 7, 2012, and a FWS Southwest regional employee and a FWS congressional and legislative affairs employee were both copied on an email sent on May 6,

2012. The congressional and legislative affairs employee's email address was incorrectly spelled, however, which prevented him from receiving the email. We determined that the three other emails we reviewed did not appear to have been distributed to anyone else. It also did not appear that the refuge manager copied anyone else on the email that he sent to the chapter chairman on August 30, 2012.

We asked the refuge manager about the May 6 email that he sent to a DU executive, a FWS Southwest regional employee, and a FWS congressional and legislative affairs employee. Representative Jones' office provided us with this email as part of his complaint, but it did not appear in the package of emails that the refuge manager provided to FWS on November 19, 2012, for its inquiry into the matter. The refuge manager said that he did not find this email during his search for all FWS communication with DU about the bill. The refuge manager searched his email during our interview and still could not locate the email in question.

We also reviewed two emails that the project leader sent to a DU executive. On April 20, 2012, the project leader emailed a DU executive and copied the refuge manager, a FWS Southwest regional employee, and a former FWS refuge supervisor. He also emailed a DU executive on May 3, 2012, but he did not copy others; however, the DU executive copied a FWS Southwest regional employee, a FWS congressional and legislative affairs employee, the refuge manager, and the former refuge supervisor when he replied to the refuge manager.

We interviewed the DU chapter chairman, who also works on the Currituck/Knotts Island Ferry. He said that after reading an article in the local newspaper about the bill, he approached the refuge manager during the refuge manager's daily commute on the ferry to ask him about potential effects of the bill. The chapter chairman said that the refuge manager was reluctant at first to speak with him about the bill, although the chapter chairman did not understand why. The chapter chairman said that he continued to question the refuge manager, and that the refuge manager eventually provided him with answers, both on the ferry and telephonically. The chapter chairman said that he and the refuge manager never communicated via email.

When we interviewed the DU executive, he said that he communicated with either the refuge manager or the project leader about the bill because DU volunteers from the local area surrounding the refuge alerted DU headquarters of their concerns regarding the potential effects of the bill. The DU executive stated that another DU executive asked him to verify the information in the chapter chairman's letter in anticipation of sending a letter from DU headquarters to the Senate. He added that he initiated all contact with FWS employees in an effort to obtain information and data about the refuge. He said that he authored the letter to the Senate, which consisted substantively of the same information that the chapter chairman provided in his letter to DU.

The DU executive did not recall receiving anything in writing from FWS employees. If he had, though, he believed that it would have been draft legislation. The DU executive said that no one from FWS assisted him with writing the letter to the Senate. He further stated that the emails he received from the refuge manager were responses and follow-up to telephone conversations they had. The DU executive believed the purpose of the emails from the refuge manager was to convey that if DU intended to send a letter to Congress, as expressed during previous telephone

conversations, the letter would have a greater impact if sent sooner rather than later.

We also interviewed a FWS southwest regional employee, who said that she contacted a former FWS regional director after receiving the April 20, 2012 email that the project leader sent to a DU executive. The email provided recent congressional testimony to support DU's efforts to write a letter to Congress, and she said that she told the former regional director that the email could potentially violate anti-lobbying provisions. The FWS southwest regional employee said that she did not receive any feedback from the former regional director on the issue.

When we asked the former regional director about this issue, he could not recall whether the FWS southwest regional employee contacted him as she had asserted.

The project leader, when interviewed, said that he communicated with DU representatives regarding feral horses at the refuge. The project leader said that he and the refuge manager received inquiries about the bill from environmental groups, including DU, interested in obtaining information related to the anticipated biological impacts to the refuge if the legislation passed. He said that interest from environmental groups grew as the legislation was introduced in each Congress, and that the groups often contacted FWS for information on its position regarding the bill. The project leader said that FWS previously provided testimony to Congress expressing its opposition, and that the information provided to these groups was substantially the same as that provided in the testimony. He said that he and others from the region provided input to the testimony because of their intimate knowledge of the area.

The project leader said that a DU executive contacted him to request technical information to support DU's letter to Senator Boxer. The project leader said that he and the refuge manager both provided answers to DU's specific questions, although the refuge manager likely provided the bulk of the details. He said that he had also spoken with another DU executive on the telephone about the issues pertaining to the effects that the bill would have on the refuge.

The project leader said that he was not aware that the refuge manager had written any part of the letter from the chapter chairman to a DU executive. He said that the refuge manager mentioned to him sometime in April 2012 that he had provided publicly available information to DU regarding FWS' position for a letter DU intended to write. The project leader said that the refuge manager asked his opinion about what type of information he could provide to DU, and the project leader told him that he could provide factual, publicly available information, just as they would to any citizen.

FWS' Response to Representative Jones

On October 16, 2012, Representative Jones sent FWS Director Dan Ashe a letter requesting that FWS provide "copies of all communication between the Fish and Wildlife Service and Ducks Unlimited regarding the Corolla wild horses over the past three years." A FWS official led the collection and review of the communications between FWS employees and DU staff and directed a search for pertinent emails down to the regional level. The FWS official sent an email to southeast region staff, including FWS Southeast Regional Director Cynthia Dohner, a FWS assistant regional director, a FWS southwest regional employee, and a former regional director

indicating that FWS should respond the same way it would to a document production request through the Freedom of Information Act.

In response to FWS' request, on November 19, 2012, the refuge manager sent an email to an acting FWS executive that contained all of his email communications with DU that he located during a search of his electronic records. In addition, when we interviewed the project leader, he confirmed that he and the refuge manager provided everything to the southeast region that they could find in their electronic records.

During our investigation, we reviewed approximately 473 emails that we independently obtained from DOI Email Enterprise Records and Document Management System archives of the refuge manager's, the project leader's, and Dohner's email between January 1, 2012, and April 30, 2013. Our search identified two additional emails between the refuge manager and the chapter chairman that the refuge manager did not provide to FWS in his response to Representative Jones' inquiry. When we asked the refuge manager about these emails, he said that he did not intentionally omit them, but rather missed them during his search.

We also identified emails between Dohner and a DU executive that Dohner did not provide during the FWS review. We found that in these emails, Dohner informed the DU executive on May 3, 2012, that she would be at the DU facility the following week, and Dohner thanked the DU executive for his "support on the Currituck National Wildlife Refuge horse issue." The DU executive replied on May 3, 2012, that he would be out of town during her visit. On May 6, 2012, Dohner emailed the DU executive again, expressing her disappointment that they would not be able to meet. Another email from Dohner to the DU executive, sent on October 13, 2012, discussed an event Dohner had recently attended that included representation from DU. Again, she thanked the DU executive for his help "on the horse issue." When we asked Dohner about these emails, she said that she did not remember sending them, and she did not discover them when she conducted a search of her email during the FWS review. In addition, when we interviewed the DU executive, he said that he did not recall interacting with any FWS employees directly on the issues regarding the potential effects of the bill.

We interviewed FWS Director Dan Ashe, who told us that it was FWS' position that horses at the refuge were not native wildlife or part of the fauna for which FWS had conservation responsibility. Ashe said that the refuge manager and the project leader, in their communications with DU, accurately reflected FWS' position regarding the bill. Ashe also said that the refuge complex was established specifically for migratory bird conservation, and the growing population of these horses was damaging the refuges.

Ashe recalled that the FWS officials conducting the review of communications between FWS employees and DU did not find any actual violations of the anti-lobbying provisions. Ashe said, however, that FWS officials believed the emails created the perception of an inappropriate relationship between FWS and DU personnel. As a remedy, the southeast region provided counseling to the refuge manager and the project leader to avoid future occurrences.

FWS responded to Representative Jones' request with a letter from Ashe, dated February 14, 2013, stating that FWS conducted "a comprehensive review of our records . . . which include a

series of email exchanges between a refuge manager and [a DU executive]. We believe the exchange violates the intent of the anti-lobbying provisions . . . Regional and field-based leaders across the Service are completing a thorough review of these provisions to ensure everyone understands and is familiar with what is and is not permitted.”

When we interviewed a FWS official, he said that he authored Ashe’s letter with assistance from a former FWS special assistant to the Assistant Secretary for Fish and Wildlife and Parks. We obtained an email suggesting that he also received input from a FWS special assistant and Dohner during the review process.

We interviewed the former special assistant to the Assistant Secretary for Fish and Wildlife and Parks, who told us that she reviewed the email exchange between FWS and DU personnel that occurred from April 20, 2012, through October 12, 2012. She said that as a result of her review, she consulted with DOI’s Office of the Solicitor, which told her to refer the issue to the Office of Inspector General. She could not, however, recall whom she spoke with at the Office of the Solicitor. The former special assistant added that she had an informal conversation with DOI’s Deputy Inspector General Mary Kendall about the matter.

The former special assistant also told us that she contacted GAO, which she said instructed her to conduct an internal review and then consult with GAO if necessary. She could not recall whom she spoke with from GAO.

Upon completion of FWS’ review, the former special assistant said that she determined the email communications between FWS and DU violated the anti-lobbying provisions included in the annual Department of the Interior and Related Agencies Appropriations Act. She said that she made her determination by reviewing previous GAO decisions. She said that she determined the appropriate remedy would be counseling and training to prevent future violations, so she created a PowerPoint presentation that she delivered personally on January 30, 2013, in Washington, DC, to many FWS executives and directorship.

We also interviewed a FWS regional chief of the National Wildlife Refuge System, who said that he verbally counseled the refuge manager and the project leader regarding the anti-lobbying provisions during their communications with DU. The regional chief said that either Dohner or a former FWS regional director told him to counsel the refuge manager and the project leader.

When we asked Dohner about providing counseling to the refuge manager and the project leader, she said that she believed a former FWS regional director directed the regional chief to counsel them. She also told us that she provided the regional directorate team with the PowerPoint training, which was subsequently passed down to the southeast region project leaders, to include the refuge manager and the project leader, who she believed received additional training.

The refuge manager and the project leader both confirmed that they were required to complete anti-lobbying training and stated that they did complete the training though both were unclear as to what format of training they received.

SUBJECT(S)

1. Cynthia Dohner, Director, Southeast Region, FWS.
2. FWS refuge manager.
3. FWS project leader.

DISPOSITION

We are providing this report to Representative Jones' office, the Assistant Secretary for Fish and Wildlife and Parks, and the FWS Director for any action deemed appropriate.