MAR 31 2019

The Honorable Joe Manchin III
Ranking Member, Committee on
Energy and Natural Resources
United States Senate
Washington, DC 20510

Dear Senator Manchin:

Enclosed you will find my responses to the written questions submitted following the March 28, 2019, hearing on my nomination to be Secretary of the Department of the Interior.

Please feel free to contact me if I can be of further assistance.

Sincerely,

David L. Bernhardt

Enclosure

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Question from Chairman Murkowski

Question: Mr. Bernhardt, as you know, the Interior Department conducted oil exploration in the National Petroleum Reserve-Alaska (NPR-A), leaving behind well sites in need of environmental remediation. As we discuss increased development in the NPR-A, which I fully support, I think it's important that the federal government complete the clean-up of these "legacy wells." If you are confirmed as Secretary, will you commit to working with me to develop a plan to expedite the cleanup of all remaining wells?"

Response: Yes, I look forward to working closely with you to identify the resources necessary to expedite the clean-up of these legacy wells. The Bureau of Land Management will complete an update to the 2013 Legacy Well Strategic Plan during this fiscal year, and the BLM is also actively coordinating with the U.S. Army Corps of Engineers to determine whether the NPR-A or specific well sites are eligible for environmental remediation by the USACE as Formerly Used Defense Sites.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Ranking Member Manchin

Question 1: Hardrock Mining Fees.

The General Mining Law of 1872 continues to mandate the existing patent-claim structure for hard rock mining on Federal lands in the west. Because of this, the Federal government does not collect a royalty for hardrock mining. This just doesn't make sense to me. Furthermore, the way hardrock mining is done today has changed significantly compared to when the law was enacted. I understand coal mining is much different from hardrock mining, but the Federal government has collected a royalty for taxpayers from coal production on Federal lands for decades. For the most part, these funds are shared evenly between the state where the operation took place and the Federal government. It strikes me as fair that taxpayers get a share of the profits in exchange for the privilege of being granted access to conduct operations on Federal lands.

(a) Do you agree it is time to reform the Mining Law? What are your thoughts and concerns?

Response: I believe that most programs, including the General Mining Law of 1872, could be modernized and improved. If confirmed I would look forward to assisting Congress in any effort that ensures that the American public receives an appropriate return for resource development that takes place on federal lands.

(b) Do you support instituting a royalty on hardrock mining?

Response: I support ensuring that the American public receives an appropriate return for resource development that takes place on federal lands. What form that takes in the context of hardrock mining has been the subject of debate for several decades in Congress. I stand ready to assist you and the Committee as you explore changes to the General Mining Law of 1872.

Question 2: Land and Water Conservation Fund.

Both the Senate and the House recently voted to permanently reauthorize the Land and Water Conservation Fund by huge bipartisan majorities in the public lands bill that President Trump signed into law earlier this month. Yet for the past two years, and again in the FY2020 budget proposal, the Administration has proposed drastic cuts in spending for the LWCF program. This year's budget proposal proposes to spend only $8 million on federal land acquisition and no appropriated funds for the LWCF state grant program. These levels are recommended despite the $900 million permanent authorization for the federal and state LWCF programs.

(a) Will you commit to support use of the LWCF?

Response: Yes, I am a supporter of the LWCF and will continue to work with Congress to move this important program forward.

(b) Will you support legislation to make the LWCF available for spending without annual appropriation?

Response: I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

(c) Will you support some form of permanent funding?

Response: This is a matter for Congress. I stand ready to assist your deliberations in any way I can. The recently achieved permanent reauthorization was a step forward. I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

Question 3: Conservation in Parks.

The National Park Service Organic Act states that the "fundamental purpose" of the national parks "is to conserve the scenery and the natural and historic objects and the wildlife," and to provide for their enjoyment "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." In its Management Policies, the National Park Service has said that "when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant."

I have concerns that the appropriate balance was not struck during the shutdown. By keeping the national parks open during the recent government shutdown without adequate staff to protect park resources, it seems public access was prioritized over conservation of park resources. You kindly discussed the shutdown with me during our meetings.

(a) Can you please elaborate on those decisions for the committee as well? And share with us some lessons learned?

Response: As you note, the National Park Service has a dual mission, to conserve park resources and provide for their enjoyment. As we discussed during the lapse in appropriation on the phone, I took action to strike an appropriate balance between these two objectives. In my opinion, the National Park Service's initial contingency plan was not achieving those dual purposes in a lengthy period of lapse.

Using retained fees collected under the Federal Lands Recreation Enhancement Act (FLREA), the NPS, in accordance with law, was able to address issues with restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and basic visitor services. Excepted staff that worked on specified allowable activities under FLREA were paid. While many of the smaller sites around the country remained closed, use of these funds allowed the American public to safely visit many of our national parks while providing these treasures additional protection and allowing NPS to meet its dual mandate. Importantly, the use of FLREA funds allowed continued visitor access to some park

units, contributing to the economies of the respective gateway communities. It also meant that those employees who were providing these services were assured that they would receive a timely paycheck, an assurance that was comforting to some.

Congress, in the Fiscal Year 2019 Further Additional Continuing Appropriations Act (Public Law 116-5) that extended appropriations through February 15, 2019, explicitly made such funds cover the prior period during the lapse. Pursuant to this direction, the NPS was able to move obligations incurred during the appropriations lapse from the FLREA fee account to the account for which the charges were originally planned, including the NPS operating account, where most of these obligations would have been charged. The actions taken under these provisions, which were confirmed by the Office of Management and Budget, allowed NPS to fully restore FLREA balances to pre-lapse levels.

I hope that we will not be faced with another lapse of appropriations. However, I believe that this action provides critical direction for similar situations in the future. First, our national parks should not be made the public face of another lapse in funding, and we will be prepared to use these fees, as available, immediately for appropriate staffing, basic services, and other bureau needs in accordance with the authorities provided by law. In addition, we have modified our contingency plans for the NPS and for the other relevant bureaus to ensure that in the event of a future lapse, we are prepared to use these fees for these allowable purposes.

(b) Do you believe that where there is a conflict between public enjoyment and conservation of park resources, the law requires the National Park Service to give priority to resource conservation?

Response: I believe that the law requires that the National Park Service meet its dual mandate, and that it cannot be arbitrary in its actions in a way that ignores either mandate.

Question 4: Public Engagement at BLM.

I believe we can and should be taking a hard look at simplifying, streamlining, and making improvements to the permitting processes for oil and gas leasing on public lands. We can do so in a way that provides for robust public engagement on these important decisions. The Bureau of Land Management issued an instruction memorandum in February 2018 that changed the way the agency conducts land use planning and lease parcel reviews. The changes give BLM the option of soliciting public comments in the NEPA review process, where before it was required. It also reduced the protest period from 30 days and instead imposed a 10-day deadline for public protests of proposed lease sales. Furthermore, BLM issued this memo without any public notice. I understand the courts have prevented the implementation of the memo in parts of the country with sage grouse habitat; however, it is the guidance used by federal land managers in other regions.

This 10-day period strikes me as a bit short especially for those rural areas where BLM operates. It is harder for citizens to access have the same level of resources, such as high speed internet, in order to actually weigh in with their concerns.

(a) What was the reason for reducing the protest period while you also accelerated oil and gas lease parcel reviews?

(b) Do you agree that robust public input is an important part of the BLM decision making process that ensures fairness for those most closely affected who deserve to have an honest chance of airing their grievances?

Response to a and b: The Department values meaningful public participation and an efficient environmental review process in the implementation of its onshore oil and gas program. The BLM observed a trend regarding protests over the past several years in which the percentage of parcels protested from the original sale notice had increased dramatically. This 10 day period is in addition to multiple opportunities for public participation and engagement through the BLM planning process under FLPMA and NEPA processes.

Question 5: Sportsmen and Recreation.

As avid sportsmen, you and I both know the value of hunting and fishing in terms of a way of life but also in terms of dollars to the economies of rural towns. Hunting contributes $270 million to the economy in West Virginia and supports 5,000 jobs. Last month, Senator Murkowksi and I were able to get several long awaited sportsmen provisions included in the Public Lands package, and these were enacted into law two weeks ago. And just last week, you signed Secretarial Order 3733—directing the Bureau of Land Management to consider public access for outdoor recreation, which includes hunting, fishing, and target shooting, in any Federal land transactions. These are important victories that have been long sought by our sportsmen and sportswomen, and I want to do more and would like to discuss with you what you think should be next.

(a) Will you work with us to develop and enact additional legislation that would make it easier for outfitters and the public to access our Federal lands, in addition to securing full funding for the Land and Water Conservation Fund?

Response: As discussed at my hearing, increasing access to outdoor recreation opportunities is a priority for me and for the Department. Outdoor recreation opportunities provide physical and mental health benefits and allow Americans to more fully experience our public lands and waterways. Recreation also creates jobs and economic benefits for local communities. The LWCF has been a powerful tool in increasing recreation opportunities, particularly for states and local communities. If confirmed, I will stand ready to assist Congress in efforts to work on legislation that provides for easier access for outfitters and the public to our federal lands, and I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

(b) Do you have specific ideas on what should be done regarding outdoor recreation in order to create new jobs, particularly in rural communities?

Response: Outdoor recreation access and facilities are often insufficient to support recreation based tourism in our public land locked rural communities. We should work with state and private partners to develop and maintain recreation access facilities and infrastructure such as multi-use trails, roads, parking lots, boat ramps, entrance stations, and other forms of infrastructure associated with access to recreation sites. For example, the Bureau of Reclamation has an excellent track record in that regard as it seeks out and maintains partnerships with non-Federal government entities such as states, counties, cities, and irrigation districts for recreation opportunities associated with lands and waterways under its jurisdiction. More can and will be done to streamline the processes relating to recreation permitting activities. We want these public recreation resources to be accessible and to present economic opportunities to the gateway communities that surround them.

Question 6: Outer Continental Shelf Production.

The U.S. is producing 11.9 million barrels per day as of February 2019. The Energy Information Administration (EIA) is now predicting that U.S. crude oil production continues to set annual records through 2027 and remains greater than 14 million barrels per day through 2040. The EIA states that Lower 48 onshore production continues to be the "main source of growth in total US crude oil production." Not offshore. About 6% of the Outer Continental Shelf is currently available for leasing. The Bureau of Ocean Energy Management is proposing to open approximately 90% of the OCS. This is an extraordinary increase in access for oil production. And it seems out of alignment with the large amounts of production and the opportunities already available.

Given the administration's push to increase oil and gas production in the OCS, can you tell me today if you anticipate the crude oil that will be produced will be primarily produced for domestic use or for export?

Response: I have no anticipation in either direction. It would be my hope that we are never dependent on foreign sources of oil from unstable regimes in the future. Petroleum production resulting from OCS leasing under the Bureau of Ocean Energy Management's 2019-2024 plan would likely not begin to be realized for several years, given the approximately 7 to 10-year timeframe from leasing to development. Between now and then many onshore reservoirs currently under production will become depleted. Accordingly, other discoveries of oil, including in the OCS, could be needed to offset the loss in production from current oil and gas operations in order to prevent a reduction in overall U.S. production levels.

Question 7: Solicitor's Opinion on Migratory Birds.

On March 28, 2019, Senator Van Hollen sent you a follow-up letter (attached) about your role in Solicitor's Opinion (M-37050) on the Migratory Bird Treaty Act (MBTA). The Solicitor's Opinion, or M-Opinion, on the MBTA was released on December 22, 2017, without any public or scientific input or environmental analysis, abruptly removing

longstanding protections for migratory birds. Please clarify in writing your role in the M-Opinion and the relationship with the Independent Petroleum Association of America (IPAA), and explain how you intend to ensure industry operators implement best practices so that migratory birds do not suffer unnecessary harm.

Response: On December 22, 2017, after reviewing the text, history, and purpose of the MBTA, the Solicitor issued M-37050, which takes into account the positions of various Federal Courts of Appeals.

M-Opinions are issued by the Solicitor and they are some of the most important and serious work undertaken by the Office of the Solicitor. This important legal guidance is to be based on the law, not outside influence. The work to develop an opinion is a thoughtful and studious exercise.

I did not personally review the research or the prior case law before M-37050 was issued. However, I reviewed a draft and possibly drafts of this legal opinion, that would become the legal guidance for the entire Department.

I certainly informed the drafters that I thought they had done a good job analyzing an important legal question.

It is my personal opinion that the direction and need for the Office of the Solicitor to issue an M-Opinion on the Migratory Bird Treaty Act and its application was the direct result of an M-opinion issued on January 10, 2017, which was suspended very early in the Trump Administration. It is my view that the opinion should not have been issued as the Solicitor was walking out the door, a Solicitor who would not be burdened by the responsibility of implementation and defense of that position, particularly in light of contrary case law in multiple Federal Courts of Appeals. Obviously, a broad and diverse set of interests care about the scope of lawful authority of the Migratory Bird Treaty Act and its overall application. Many have views on it, and Congress can impose any liability standard it would like to affirmatively impose.

I was unaware of meetings IPAA had at the Department of the Interior on the MBTA issue until I saw references to such meetings in the media. I have neither a personal or professional relationship with the IPAA or its employees.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Wyden

Question 1: Public lands are truly one of America's shining features -- they provide multiple uses for the American public and are economic engines, particularly in the rural west. The Department of the Interior is the nation's largest land management agency, and is a critical agency for timber towns and ranching communities in every corner of Oregon. However, there has been talk of privatizing these public lands.

Will you commit to not selling off public lands in the United States, and to work to expand recreational access to lands managed by the Department of the Interior?

Response: I have previously indicated my opposition to the sale or wide scale transfer of federal lands. My views have not changed. There are some situations in which commitments have previously been made, inholdings need to be swapped or exchanged, or land banks are well situated to address the needs of growing urban areas. These decisions should be reviewed on a case by case basis. With regard to public access, as I indicated at my hearing last week I believe that access to our public lands for hunting, fishing, and recreating, is critically important. I recently issued a Secretarial Order that requires that before the Bureau of Land Management exchanges or disposes of any land, they must first consider what impact the disposal or exchange of land will have on public access.

Question 2: Please outline your views on the recreation economy in the U.S., and explain your views on the economic potential recreation holds for rural communities.

Response: I have said before that the Department manages about 1 of every 5 acres of land in the United States, supporting almost every aspect of the American economy. Millions of Americans access the lands we manage every year, to hunt, fish, camp, ride and carry out other recreational activities. The Department of Commerce Bureau of Economic Analysis has reported that the outdoor recreation economy accounted for 2.2 percent, $412 billion, of current-dollar GDP in 2016. Recreation visits to Bureau of Land Management and National Park Service lands alone support more than 350,000 jobs. These are numbers that have a significant economic impact many rural communities.

Under President Trump's leadership, the Department has made significant progress to improve the management of our public lands in a way that grows the economy. I talked about several of these things at my hearing. This Administration has opened access to previously unavailable or restricted public lands for all types of recreation; added hundreds of miles to the national recreation trails system; increased access to hundreds of thousands of acres of National Wildlife Refuge land for hunting and fishing; added new NPS sites; and is exploring public/private partnerships to identify new recreation opportunities on public lands so more Americans can enjoy our land. I am also making implementation of the recently enacted bipartisan public lands package a priority.

Question 3: I know how well-versed you are in the laws and policies governing the Department's responsibilities to protect wildlife species. In that context, I was surprised by your comment during our meeting that the BLM's revisions of critically important sage-grouse plans in six states amounted to nothing more than a "sanding of rough edges." I am pleased to see the Department work with Governor Brown of Oregon to uphold the hard work and collaborative efforts of farmers and ranchers in Oregon, and keep the Obama-era plans largely intact in my state.

However, it deeply concerns me that your rollback of protections *elsewhere* may well spur a need to list the species as threatened or endangered *everywhere.* And whether or not you recognize and agree with that concern, I want to make sure the Department under your leadership will meet its responsibilities to manage the sagebrush ecosystem for more than just oil and gas development; to keep the sage-grouse off the endangered species list, to protect the traditional way of life in rural states, and to be transparent with this Committee.

As we consider your nomination, how can we be assured that the BLM will comprehensively monitor impacts of federal-lands oil and gas activity on the sage-grouse and the sagebrush ecosystem, and that Congress will be kept informed of those impacts?

Response: Protecting sage-grouse habitat remains a priority for the Department of the Interior. BLM budgeted approximately $60 million for sage-grouse habitat in 2018 and remains committed to similar funding levels. In each sage-grouse state, governors committed to the goals of either "no net loss" or "net conservation gain" which are reflected in our land use plans. States continue to invest significant resources for sage-grouse conservation. Each Resource Management Planning Amendment was narrowly tailored to align with state plans and contains extensive restrictions and requirements for oil and gas activity. Our goal is to maintain a healthy, working landscape for wildlife and for people. The Department will continue to work in cooperation with western governors and state wildlife agencies to achieve these conservation goals.

Question 4: Can you assure us that the Fish and Wildlife Service will complete a full and unbiased sage-grouse status review in 2020, on time and with all the resources the Service requires, so we can know whether listing becomes necessary as the BLM's revised land-use plans are implemented?

Response: Our state fish and wildlife agency partners are taking the lead in assessing the range-wide status of greater sage-grouse. We are assisting them in their efforts and remain committed to the success of the species.

Question 5: A year ago, Secretary Zinke sat before this Committee for a hearing on the Department's 2019 budget, and I pointed out that promises your former boss made to this Committee during *his* confirmation hearing were immediately and consistently broken as

evidenced by the budgets he brought us. The issue I highlighted then was the Land and Water Conservation Fund, a vital program that secures outdoor recreation lands and access, wildlife habitat, historic sites, and other irreplaceable assets for the American people — which Mr. Zinke promised us he would fully support before basically zeroing it out in his budgets. Now, we recently passed, and the President just three weeks ago signed, landmark legislation permanently reauthorizing LWCF. At the time you noted your own and the administration's support for this popular program — even though I see that the budget you submitted the very next week contained even LESS than zero for LWCF, with proposed spending and rescissions that would cut the program by a net *105 percent.*

What would you do as Secretary to provide *actual* support for LWCF instead of lip service?

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. It is my understanding that LWCF has only been fully funded by Congress twice since its enactment in 1965. Whatever funding level Congress chooses for this program, the Department under my leadership will faithfully execute the goals of LWCF.

Question 6: The Bureau of Reclamation is a key player in the Klamath Basin and for decades has worked to help stakeholders negotiate a Basin-wide solution to ongoing water challenges. Are you familiar with the water-related challenges of Klamath, and the current state-of-play in the Basin?

Response: I have a general familiarity with the Klamath issues.

Question 7: Will you commit to working with me and the other members of the Oregon delegation, and to support the Bureau of Reclamation and their efforts to help solve this complex problem in the Klamath Basin?

Response: It is my general understanding that the Bureau of Reclamation is already working with the Congressional delegation.

Question 8: Controlling the 10-year average cost of fires by freezing it at a certain level, like Congress did when they passed my legislation last year -- the Wildfire Disaster Funding Act -- will result in savings for the Department of the Interior that can then be used to accomplish additional hazardous fuels treatments, forest resiliency work, and increasing the timber program.

Will you commit to using the savings created by the implementation of the Wildfire Disaster Funding Act to accomplish forest restoration and fuels treatments?

Response: I am committed to supporting active forest management, and I am working to implement Secretarial Order 3372, titled "Reducing Wildfire Risks on Department of the Interior Lands through Active Management." Active management is critical to reducing the intensity and number of wildfires, to supporting healthy forests and rangelands, and to protecting homes and important infrastructure. The Administration submitted its FY 2020 budget request and the targeted forest management reform proposals that accompany that request.

Question 9: I'm sure you're aware of the situation that unfolded at the Malheur National Wildlife Refuge in Harney County, Oregon, in 2016. Federal officials coordinated closely with county and state officials to ensure that the community was safe, and the rule of law preserved. However, incidents like this, led by extremists, compromise our public lands and terrify both the public and land managers responsible for maintaining access to these public lands.

If you are confirmed as the Secretary of Interior, you will be in charge of managing National Wildlife Refuges, Wilderness Areas, and recreation lands, in an era where hostility toward federal lands and federal officials is rampant, particularly in rural areas.

What will you do to ensure the protection of not only our incredible public lands that have been set aside by Republican and Democratic Presidents and Congresses, but also the protection of your employees, like the employees at the Malheur Refuge, who are not just federal employees, but Oregonians?

Response: As we fulfill our mission to conserve and manage the Nation's natural resources and cultural heritage, the safety of our employees and our visitors is of paramount importance. The Department is home to over 4,000 federal law enforcement officers. Their duties are as varied as our bureaus' missions. To ensure the continued protection of employees and visitors, the FY 2020 budget increases funding for law enforcement and health and safety programs across the board.

Question 10: Oregonians and all West Coast residents are becoming increasingly concerned about the next major earthquake, which has become a matter of "when" and not "if." Preparation is key, and even just a few seconds of warning is enough to take steps to prevent casualties and mitigate destruction. In a few seconds, supplies of oil, natural gas, and chemicals can be turned off, trains and cars can be slowed or stopped, sensitive data can be secured, and people can get to safe places. This is a bipartisan priority and we need to get warning systems finished. Failing to prepare for these events is not an option, and could have dire consequences for West Coast populations. Given the importance of this technology to provide the kind of warning that exists for hurricane, winter storms, and other extreme events, how would you, if confirmed, work with USGS to ensure ShakeAlert becomes fully operational for the west coast?

Response: Should I be confirmed, I will work to ensure the U.S. Geological Survey continues to prioritize making science and technology available to protect communities from natural hazards, including earthquakes. I appreciate the importance of and the USGS's role in providing reliable early warning systems in protecting people and property from these and other natural hazards. The USGS has committed to improving the fundamental earthquake monitoring infrastructure to ensure that early warning will eventually be possible where it is needed. In the FY 2020 budget the Earthquake Hazards program is funded at $64.3 million and prioritizes funding to maintain robust national earthquake monitoring and reporting capabilities, including $8.2 million for operations and maintenance of existing ShakeAlert Earthquake Early Warning systems in conjunction with State and local partners.

Question 11: Can you assure us that the annual budgets you would propose would back up your stated commitments with actual conservation and maintenance dollars?

Response: You have my commitment that the annual budgets that I will propose, should I be confirmed, will further the President's priorities and, in that context, will comprise funding and programs consistent with the best interests of the Department and its missions.

Question 12: Originally established in 2000 and recently reauthorized in 2016, the Fisheries Restoration and Irrigation Mitigation Act (FRIMA) provides funding in the Pacific Northwest (Oregon, Washington, Idaho, Montana and now California) to carry out fish passage projects and screen irrigation channels to reduce fish mortality. This program was recently reauthorized, but authorized funding was drastically reduced. In fact, since its inception, the program has only received $13.1 million in appropriations, with the last round of funding occurring in fiscal year 2017. Are you familiar with this program, and would you support funding for the implementation of this critical program that benefits farmers and fish?

Response: The Department of the Interior values the role of FRIMA to directly support irrigation districts in addressing fish screening and passage. This aids in securing water delivery in association with aquatic conservation, to benefit multiple interests. I would be glad to work with Congress on this program as we weigh multiple demands on the Federal budget.

Question 13: I value science-based decisions in determining land management outcomes. Recent news reports suggest you may feel otherwise. If confirmed, how will you ensure Interior uses the best science in making transparent land management and policy decisions?

Response: Science plays a critical role in our decision making process as does the law. Within the Department of the Interior over the last two years, the number of formal complaints of breach of scientific integrity have decreased. In addition, to further our application of well-grounded science, I have appointed a career scientist to serve as the Science Advisor to the Acting

Secretary/Deputy Secretary, and if I am confirmed, he will continue to serve in the Immediate Office of the Secretary. There is no question that scientific integrity should underpin agency actions. As I have stated, my view is that an agency's decisions should be predicated on the best information, including an evaluation of science and application of the law.

I believe when scientific data is evaluated on its merits and used as a basis to make legal and policy decisions that incorporate the science, conflicts will be reduced and those decisions will be reliable and legally sound. I believe when the Department picks and chooses between data, it is obligated to articulate a reason why it has done so, and it must be able to connect its conclusions to the facts it finds in a rational manner.Secretary Order 3369 last September promotes open science. This Order is intended to ensure that the Department of the Interior bases its decisions on the best available science and provides the American people with enough information to thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions.

Question 14: Explain your views on how the Department of the Interior can do more to advance clean energy development on public lands?

Response: I recognize the role renewable energy can play in U.S. energy security and economic growth. For instance, in December, the Department shattered the record for offshore wind leasing, garnering a total of $405 million for wind leasing areas off the coast of Massachusetts. By streamlining our processes and reducing paperwork, all within our statutory responsibilities and without compromising important environmental standards, renewable energy projects will enjoy greater permitting efficiency. This is how we have advanced clean energy development on public lands in the past two years and how I believe we can continue to do so.

Question 15: The state of Oregon is vehemently opposed to offshore drilling occurring off the coast of Oregon. If confirmed, how do you intend to incorporate state input when determining where to site offshore oil and gas exploration?

Response: The Outer Continental Shelf Lands Act prescribes the major steps involved in developing the program, including extensive opportunities for public comment and specific opportunities for input from states. The Department, through the Bureau of Ocean Energy Management, seeks a wide array of input during this process from all stakeholders, including affected states, in the process to determine the size, timing and location of leasing activity on the OCS. Additional public meetings will occur after the publication of the Proposed Program and Draft Programmatic Environmental Impact Statement. If confirmed, I will ensure the states and the public have every opportunity to have their views heard and considered as the Department moves forward with developing the National OCS Program.

16: Do you believe American taxpayers should get a fair return on all natural resources development on public lands?

Response: I believe that American taxpayers should receive fair market value for public resources.

Question 17: Reports show that natural gas companies are venting and flaring hundreds of millions of dollars of methane. The former Methane Rule was designed to reduce the need for flaring, and ensure royalties are paid for gas otherwise vented into the atmosphere or burned off.

Do you believe that the Department's rollback of the methane rule is fair to taxpayers?

Response: Yes, it is my opinion and belief that the government should not issue an unlawful rule. The former Bureau of Land Management Methane Rule imposed many requirements that overlapped with the EPA's regulatory authority and state authorities under the Clean Air Act. Of note, 99% of federal oil and gas production in 10 states is subject to state regulatory provisions regarding venting and flaring of methane.

Question 18: There are a number of tribes in Oregon, and around the country, that were terminated and then subsequently restored who now face significant challenges in securing law enforcement funding through self-determination contracts. They are not currently eligible for funding for basic operations, and yet in many cases are spending significant Tribal resources to provide law enforcement services on their reservations as well as for the larger community. In both the FY18 and FY19 Appropriations bills there was language requiring BIA to work with affected Tribes to assess their law enforcement needs and to submit a report detailing the amounts necessary to provide sufficient law enforcement capacity for these Tribes. Congress has still not received this report.

Will you ensure that BIA completes a comprehensive report detailing the tribes affected, as well as their needs, in a timely manner?

Response: If confirmed, I expect the Bureau of Indian Affairs to comply with its statutory requirements, including completing reports required by Congress. Ensuring adequate law enforcement resources and training in Indian Country is an important responsibility for the Department met by the BIA's Office of Justice Services. They have the lead for the Department on the Opioid Reduction Task Force and in training tribal police and first responders.

Question 19: The Oregon congressional delegation is increasingly concerned about the management of the Chemawa Indian School in Salem, Oregon. Responses to our inquiries have been near impossible to extract from the Department, and incomplete when delivered. School staff, who are also my constituents, have been directed not to communicate with

congressional offices. If confirmed, what steps will you personally take to provide transparency to the issues facing Chemawa?

Will you commit to developing a Chemawa-specific plan to improve the school's performance, its treatment of students and staff, and management of the land surrounding the school?

Response: I am committed to achieving the mission of the Bureau of Indian Education (BIE) to provide a culturally relevant, high-quality education that prepares Indian students with the knowledge, skills, and behaviors needed to flourish in the opportunities of tomorrow, become healthy and successful individuals, and lead their communities and sovereign nations to a thriving future that preserves their unique cultural identities. I also sincerely appreciate your same commitment to our students attending Chemawa Indian School.

It should not have taken until March 15th to receive a formal written reply to the Oregon Delegation's letter dated June 8, 2018. I assure you that DOI as a whole, and Indian Affairs specifically, is committed to reducing internal bureaucratic review processes that inhibit our ability to communicate with all of our stakeholders in a timely manner. Both myself and the entire Indian Affairs senior leadership team are actively working to address the challenges highlighted in the Oregon Delegation's letter.

With regard to school staff communicating with congressional offices, we are working to insure our school staff understand the appropriate internal procedures to respond to inquiries from Congress. This is done to make sure that we can provide fulsome, accurate information to Congress, while at the same time making sure that children under our care do not inadvertently have personal, private information disclosed.

With regard to school improvement, we recently provided the entire Oregon Delegation with a copy of Chemawa's School Improvement Plan which specifically outlines the strategies currently being undertaken by school leadership to ensure students receive a quality education. As additional evidence of our commitment to addressing the challenges faced by Chemawa, in the month of March alone Ms. Tara Sweeney, Assistant Secretary for Indian Affairs, Mr. Mark Cruz, Deputy Assistant Secretary for Policy and Economic Development for Indian Affairs and Mr. Tony Dearman, Director of the Bureau of Indian Education, have made onsite visits to Chemawa, meeting with school leaders, students, and staff. Additionally in March, Mr. John Tahsuda, Principal Deputy Assistant Secretary for Indian Affairs, met with Senator Merkley, Congressman Schrader and Congresswoman Bonamici, and your staff at Chemawa pursuant to your request.

The Department remains committed to increasing the ability of the BIE to improve its services to Indian students, including those attending Chemawa, and I look forward to working with you to ensure that the important mission of the BIE is successfully achieved.

Question 20. I am concerned about the recent reassignment of significant numbers of BIA staff and positions from Washington, DC to New Mexico. Will you confirm how many federal positions within the BIA have been reassigned from the Washington, DC area to other regions within the last two years?

How does this compare to other agencies within the Department?

Response: The Office of Trust Services (OTS) relocation plan is part of the Bureau of Indian Affairs (BIA) commitment to streamline processes and delivery of services in pursuit of efficiency, while maintaining a focus on cost-savings efforts and fulfilling the BIA mission. This plan is in line with the President's Reorganization Executive Order 13781 (EO) and the Director of Management and Budget Memorandum dated April 12, 2017, but is not associated with the Departmental reorganization. By redirecting staff and funding to its field offices where the technical knowledge and experience is located relative to tribal and individual trust assets, OTS' work can best be supported and its mission achieved.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Cantwell

Question 1: Impact of Arctic Drilling on Endangered Polar Bears

I am very concerned that in the apparent rush to jam through Arctic drilling while President Trump is still in office, the Department has ignored its legal obligations to conduct a meaningful analysis of the impacts polar bears will suffer due to industrial development in the pristine Arctic Refuge.

Mr. Bernhardt, do you believe the Endangered Species Act (ESA), the Alaska National Interest Land Conservation Act (ANILCA), and National Wildlife Refuge System Administration Act (Refuge Act) apply to the National Arctic Wildlife Refuge?

Mr. Bernhardt, since polar bears are listed as a threatened species under the ESA, ANILCA and the Refuge Act both require the Secretary to manage the Arctic Refuge primarily to conserve habitat, does the Department of Interior have a legal obligation to provide for conservation of polar bear species within the Refuge?

Mr. Bernhardt, a memo written by Dr. Patrick Lemons, Chief of Marine Mammals Management at the U.S. Fish and Wildlife Service office in Anchorage Alaska details numerous areas where the Interior Department does not have enough information about polar bears to determine whether or not Arctic Refuge drilling will harm or kill polar bears or destroy designated critical habitat. Can you confirm that the analysis conducted by these Department scientists were incorporated into the Draft EIS?

Mr. Bernhardt, will you commit to sharing with the Committee all relevant correspondence that can document the use of this scientific information, how it was incorporated into the Department's deliberations, and any directive Interior Department agencies received from the Secretary or Deputy Secretary of the Interior?

Mr. Bernhardt, last month, the BLM said that they will forgo new seismic studies in Arctic Refuge this winter due to questions raised about the impacts of testing on local polar bear populations. I understand that the firm that was supposed to do the seismic testing, SAExploration, also believed their activities would likely harm arctic refuge polar bears, because they petitioned the U.S. Fish and Wildlife Service for a takings permit. Are you aware that seismic drilling was likely to kill polar bears, primarily through heavy machinery crushing mother bears and their cubs in undetected dens? Is the Department of Interior, at any level, considering authorizing the lethal taking of polar bears during any phase of Arctic Refuge Drilling?

Mr. Bernhardt, the Interior Department seems to be in such a rush to start drilling they are overriding the concerns of their career scientists. You are ignoring the promises made by Senate boosters of arctic drilling that it would be conducted under strict environmental reviews.

You are increasing the likelihood that the Department will not properly follow appropriate environmental laws and just end up tying up this effort in the courts. DOI is even going so far as declaring they will proceed with leasing this year, even without seismic testing, despite the fact that this lack of data will lower lease sales and force successful bidders to conduct their own exploration work before drilling, further delaying oil production in the Refuge. Have you personally directed in any way how the lease sale NEPA process has proceeded, including the schedule, public review, and comment period for the Draft EIS?

Mr. Bernhardt, are you okay with proceeding with Arctic Refuge drilling even if it could seriously harm endangered polar bear populations in the area that are already in alarming decline and facing the perils of melting ice they depend on for their food and life cycle?

Response: I disagree with the factual premises of your question, and I will not approve any leasing program which the Department's environmental analysis determines is inconsistent with the significant legal protections that exist for the polar bear. As I indicated in my response to you on this matter at my confirmation hearing, I will bring to our meeting the information we discussed. In general, however, the Department and the Bureau of Land Management are complying with the requirements of the authorizing legislation, the Tax Cuts and Jobs Act of 2017, the National Environmental Policy Act, and other relevant statutes, as we move toward conducting lease sales and providing for responsible development of these important resources.

The Bureau of Land Management has been successfully managing polar bear impacts over the course of the last four decades in implementing the oil and gas leasing program for the nearby National Petroleum Reserve in Alaska, and is applying that experience to the ANWR Coastal Plain in coordination with biologists from the Fish and Wildlife Service and U.S. Geological Survey. The analysis in the Draft Coastal Plain Leasing EIS incorporates the substantial body of known and relevant scientific literature on the polar bear, including literature published by Department biologists and Dr. Lemons.

Question 2: Climate Science

On November 23, 2018, thirteen federal agencies, including the Department of Interior, with input from hundreds of government and non-governmental experts, jointly issued the Congressionally- mandated quadrennial National Climate Report.

Mr. Bernhardt, do you agree or disagree with the finding from the National Climate Report that *"Climate change is transforming where and how we live and presents growing challenges to human health and quality of life, the economy, and the natural systems that support us."*

Mr. Bernhardt, do you agree or disagree with the finding from the National Climate Report that *"There are no credible alternative human or natural explanations supported by the observational evidence."*

Mr. Bernhardt, do you agree or disagree with the finding from the National Climate Report that *"Future impacts and risks from climate change are directly tied to decisions made in the present."*

Mr. Bernhardt, as the Energy and Natural Resources Committee grapples with how to best undertake our responsibility to respond to this pending crisis, how do you think the Interior Department can help us craft these urgently needed policies?

Mr. Bernhardt, as someone very familiar with the fossil fuel industry, how soon do you think we need to wean ourselves from fossil fuels before we really start getting hit with the effects of climate change and the extreme weather it brings?

Response: As I indicated at my hearing in response to a similar question, I recognize that the climate is changing, man is contributing to that change, and the science indicates there is uncertainty in projecting future climate conditions. The Department of the Interior's role is to follow the law in carrying out our responsibilities using the best science. Congress has not directed us to regulate carbon emissions. The laws governing Interior - such as the Federal Land Policy and Management Act - require us to manage our onshore federal resources on the basis of multiple use and sustained yield, which includes energy development. We are carrying out that statutory mission and will do so until Congress directs us differently.

Question 3: Interior Department's Climate Policy

Mr. Bernhardt, you signed Secretarial Order 3360, which deleted the Department's 2012 climate policy. What is the current climate policy of the Interior that has taken the place of Secretarial Order 3360?

Mr. Bernhardt, do you agree or disagree with the requirement in Order 3360 that the Department should "use the best available science to increase understanding of climate change impacts [and] inform decision-making?"

Mr. Bernhardt, do you agree or disagree with the requirement in Order 3360 that the Department should "integrate climate change adaptation strategies into its policies, planning, programs and operations?"

Mr. Bernhardt, with the deletion of the Department's 2012 climate policy, what ensures can you provide that the Department is using the best available science to coordinate appropriate responses to climate change impacts we are increasingly seeing on the public lands that the Interior Department is responsible for?

Mr. Bernhardt, did your personal views on climate change and the role of human activity in causing it influence your decision to delete the Department's 2012 climate policy?

Response: Secretary's Order 3360, which I signed on December 22, 2017, rescinded several policies and documents that were based on authorities revoked by the President, as a result of Executive Order 13783, and the Secretary, through Secretary's Order 3349. I agree that the climate is changing and that man has an effect, and that the Department's role is to follow the law in carrying out our responsibilities using the best science. We do evaluate the climate impacts of proposed actions. The USGS scientists have told me there is no "best" climate model, that each has its strengths and weaknesses. My personal views have played no role in the rescission of the 2012 policy.

Question 4: USGS Resource Assessment & Scientist Resignations

I would like to better understand why two top scientists from the U.S. Geological Survey, Dr. Murray Hitzman and Dr. Larry Meinert resigned a little over a year ago. In his resignation letter, Dr. Hitzman said he was protesting USGS providing the final results of the energy assessment for the National Petroleum Reserve to Secretary Zinke several days in advance of the information's public release.

Mr. Bernhardt, did Secretary Zinke request to see the final results of that assessment before its public release?

Mr. Bernhardt, did you also request to see those results before they were released?

I understand that the USGS scientific integrity policy states that these assessments are not disclosed to anyone prior to release because they can move financial markets, resulting in unfair advantages or the perception of an unfair advantage.

Mr. Bernhardt, do you believe that the Secretary is not covered by the scientific integrity policy when it says these reports should not be shared ahead of time?

Response: The Scientific Integrity Office for the Office of the Secretary did not view the review of data to be inconsistent with the scientific integrity policy. In fact, the Department's scientific integrity officer and a career scientist that I have subsequently appointed to serve as science advisor to the Acting Secretary and Deputy Secretary, said:

> I do not believe that current or proposed practices for the notification of DOI leadership constitutes a loss of scientific integrity. I do not see the issue outlined as one of scientific integrity. In fact, at no time was USGS asked to change or alter any of the findings for the assessment.

The Director of the U.S. Geological Survey acts under the authority of the Secretary of the Interior, who is ultimately responsible for the management and oversight of the Department and its bureaus. The Department's leadership thus has the authority to review data, draft reports, or other publications, and a responsibility to be knowledgeable about Interior information that will be released to the public. As a general rule, I take the longstanding position of the Office of the

Solicitor. It is my view then and now that employee policies included in Departmental manuals do not restrict the Secretary of the Interior. The Secretary of the Interior can change a departmental manual whenever he wants because he possesses the authority to do so.. Moreover, in regard to this particular matter, I have been informed that the USGS had also determined that it needed to change its policy before any issue arose on this particular assessment.

Question 5: BLM Assessment of Oil and Drilling Operations

A GAO report released on March 11 found that BLM was inadequately staffed to assess oil and gas drilling operation on federal lands during the analyzed period of 2012 to 2016.

Mr. Bernhardt, are you aware this GAO report, do you agree with its findings, and if you do you think these inspection shortfalls resulted in any avoidable environmental degradation on public lands?

Mr. Bernhardt, do you believe the inspection shortfalls found by GAO investigators still exist? If so, what are you plans to address this situation? What level of funding would be needed to fully found these staffing needs and how does that level compare to the President's FY 2020 Budget Request?

Response: I am aware of the GAO report, and that the report concluded that the BLM did not conduct periodic internal control reviews of its field offices in accordance with current guidance at the time. The BLM is revising its policy regarding internal control reviews of the inspection and enforcement program that will ensure the BLM conducts adequate internal control reviews. Since FY 2016, the BLM has completed 100 percent of its high-priority drilling inspections and improved how they are tracked. In FY 2019, the inspection and enforcement program is funded at $48.4 million. The President's FY 2020 Budget requests $48.9 million for the program.

Question 6: Recusals From Former Lobbying Clients
Numerous public interest groups have raised concerns about your role in crafting policy changes that may have benefited or may be benefitting former clients while you served as counsel at Brownstein Hyatt Farber Schreck LLP.

Mr. Bernhardt, can you provide a list of those all your former clients and is this list identical to the entities or organizations on the note card you reportedly carry with you listed your former clients?

Mr. Bernhardt, if you are confirmed, do you plan to continue to recuse yourself from participating in particular matters affecting any of these former clients for your entire tenure as Secretary of Interior?

Response: Information regarding former clients is contained in the Statement for Completion by Presidential Nominees that I completed and submitted for this nomination and my previous

nomination to be Deputy Secretary of the Department of the Interior. In addition, my 278, which was also submitted to the committee contains a list of former clients. However, for the Department of the Interior, my participation in certain particular matters involving specific parties is limited by my existing recusals, so it is the most relevant document to address your question. I have included my recusal along with some supplemental information from the Office of Government Ethics that may be helpful to your query. As I stated at my hearing, I am fully committed to following all ethics laws, regulations, and the ethics pledge. I will also continue to consult with the career ethics experts within the Department of the Interior, and seeking the guidance of career ethics experts. In addition, I am committed to not participating in any particular matter on which I lobbied or in the specific issue area in which that particular matter falls, as determined by the ethics pledge.

Attachment to Response

to Sen. Cantwell

Question 6

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

AUG 15 2017

To: Secretary
Acting Solicitor
Acting Assistant Secretaries
Acting Bureau Directors
Associate Deputy Secretary
Chief of Staff
Deputy Chief of Staff
Designated Agency Ethics Official (DAEO)

From: Deputy Secretary

Subject: Ethics Recusal

The purpose of this letter is to inform you that in accordance with my ethics agreement (attached) of May 1, 2017, as required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(l), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former employer or client of mine is a party or represents a party for a period of one year after I last provided service to that employer or client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

As a Trump Administration political appointee, I have signed the Ethics Pledge (Exec. Order No. 13770) and I understand that I will be bound by the requirements and restrictions therein in addition to the commitments that I have made in this and any other ethics agreement. Accordingly, I will not participate personally and substantially, for two years after appointment, in any particular matter involving specific parties in which a former employer or client of mine is or represents a party, if I served that employer or client during the two years prior to my appointment,

unless first authorized to participate, pursuant to Section 3 of Exec. Order No. 13770. Moreover, this two-year prohibition forbids my participation in any meeting or other communication with these entities unless (1) there are five or more different stakeholders present and (2) no particular matters involving specific parties are discussed.

I am aware that I am prohibited by 30 U.S.C. § 1211(f) from holding a financial interest in any surface or underground coal mining operation. Additionally, I am aware that my position is subject to the prohibitions against holding any financial interest in federal lands or resources administered or controlled by the Department of the Interior extended to me by supplemental regulation 5 C.F.R. § 3501.103.

In addition to a copy of my ethics agreement, I have attached a list of my current recusals under the Ethics Pledge and 5 C.F.R. § 2635.502. This list will be updated as necessary. Additionally, to facilitate the implementation of best ethics practices, I have included a document entitled "Guidance for Recusal Analysis" to assist in screening matters before the Department to determine whether they are subject to my recusal requirements.

Particular matters involving specific parties, in which an entity included in my list of current recusals is a party or represents a party, are not to be referred to me and are to be resolved without my participation. Such matters include, but are not limited to, litigation, permits, grants, licenses, and agreements. Anyone having a question about my recusal agreement should bring the matter to the attention of Assistant Deputy Secretary Willens for a determination. In order to help ensure that I do not inadvertently participate in matters from which I should be recused, he will seek the assistance of an agency ethics official as appropriate. Matters from which I am recused will be appropriately delegated for handling. If you have any questions, please be reminded that ethics advice must come from the DAEO or designee acting on the DAEO's behalf, as only a designated ethics official can make ethics determinations on which Department employees may authoritatively rely for safe harbor.

In consultation with an agency ethics official, I will revise and update this memorandum whenever that is warranted by changed circumstances. In the event of any changes to this screening arrangement, I will provide you a copy of the revised screening arrangement memorandum.

Attachments

May 1, 2017

Melinda Loftin
Designated Agency Ethics Official
and Director, Ethics Office
U.S. Department of the Interior
1849 C Street, NW, MS 7346
Washington, DC 20240

Dear Ms. Loftin:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Deputy Secretary of the Department of the Interior.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will withdraw from the partnership of Brownstein Hyatt Farber and Schreck, LLP, and all related entities. Pursuant to the 2012 Equityholders Agreement of Brownstein Hyatt Farber and Schreck, LLP, and BHFS-E PC, I will receive a *pro rata* partnership distribution based on the value of my partnership interests for services performed in 2017 through the date of my withdrawal. This payment will be based solely on the firm's earnings through the date of my withdrawal from the partnership. I currently have a capital account with the firm. If the firm will not refund the account before I enter into Federal service, I will forfeit the account. For a period of one year after my withdrawal, I also will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

My term with the Virginia Board of Game and Inland Fisheries has expired and I have resigned from my position with the Center for Environmental Science Accuracy and Reliability. For a period of one year after termination of my position with each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in

which I know that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

I will divest my interest in the T. Rowe Price Virginia Tax-Free Bond Fund, within 90 days of my confirmation. Until I have completed this divestiture, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of any holding of the T. Rowe Price Virginia Tax-Free Bond Fund that is invested in the Virginia municipal bonds sector, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), or obligations of the United States.

I understand that I may be eligible to request a Certificate of Divestiture for qualifying assets and that a Certificate of Divestiture is effective only if obtained prior to divestiture. Regardless of whether I receive a Certificate of Divestiture, I will ensure that all divestitures discussed in this agreement occur within the agreed upon timeframes and that all proceeds are invested in non-conflicting assets.

If I am confirmed as Deputy Secretary of the Department of the Interior, I am aware that I am prohibited by 30 U.S.C. § 1211(f) from holding a financial interest in any surface or underground coal mining operation. Additionally, I am aware that my position is subject to the prohibitions against holding any financial interest in federal lands or resources administered or controlled by the Department of the Interior extended to me by supplemental regulation 5 C.F.R. § 3501.103.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order no. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I will meet in person with you during the first week of my service in the position of Deputy Secretary in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

David L. Bernhardt

David Bernhardt

List of Recusals[1]

1. Ethics Pledge Recusals

Until August 3, 2019, absent a waiver under Section 3 of Executive Order No. 13770, I am recused from particular matters involving specific parties in which any of the following entities either is a party or represents a party to the matter. Such matters include, but are not limited to, litigation, permits, grants, licenses, applications, and agreements. For the purposes of the Ethics Pledge, this also prohibits my participation in any meeting or other communication with these entities unless (1) there are five or more different stakeholders present and (2) no particular matters involving specific parties are discussed.

Active Network LLC

BHFS-E PC

Brownstein Hyatt Farber and Schreck, LLP

Cadiz, Inc.

Center for Environmental Science Accuracy and Reliability (CESAR)

Cobalt International Energy

Eni Petroleum, North America

Halliburton Energy Services, LLC

Hudbay

Independent Petroleum Association of America (IPAA)

Klees, Don (individual)

National Ocean Industry Association (NOIA)

Noble Energy Company LLC

NRG Energy Inc.

Rosemont Copper Company

[1] Note that the scopes of the recusal requirements for the Ethics Pledge and 5 C.F.R. § 2635.502 are not the same. Accordingly, the lists of recusals for the Ethics Pledge and 5 C.F.R. § 2635.502 are not identical.

August 15, 2017

Sempra Energy

Statoil Gulf Services LLC

Statoil Wind LLC

Targa Resources Company LLC

Taylor Energy Company LLC

UBE PC

U.S. Oil and Gas Association

2. 5 C.F.R. § 2635.502 Recusals

Until the date indicated for the specific entity, unless first authorized to participate by the DAEO under 5 C.F.R. § 2635.502(d), I am recused from particular matters involving specific parties in which any of the following entities either is a party or represents a party to the matter. For the purposes of 5 C.F.R. § 2635.502, such matters include, but are not limited to, litigation, permits, grants, licenses, applications, and agreements.

Active Network LLC	8-1-18
BHFS-E PC	8-1-18
Brownstein Hyatt Farber and Schreck, LLP	8-1-18
Cadiz, Inc.	5-1-18
Center for Environmental Science Accuracy and Reliability (CESAR)	3-24-18
Cobalt International Energy	8-1-18
Eni Petroleum, North America	8-1-18
Forest County Potawatomi *Community*	3-1-18
Garrison Diversion Irrigation District	8-1-18
Halliburton Energy Services, LLC	7-29-18
Hudbay	8-1-18

Klees, Don (individual)	8-1-18
National Ocean Industry Association (NOIA)	7-29-18
Noble Energy Company LLC	12-1-17
NRG Energy Inc.	8-1-18
Rosemont Copper Company	8-1-18
Santa Ynez River Water Conservation District, Improvement District No. 1	11-1-17
Sempra Energy	4-1-18
Statoil Gulf Services LLC	8-1-18
Statoil Wind LLC	8-1-18
Targa Resources Company LLC	8-1-18
Taylor Energy Company LLC	7-29-18
UBE PC	8-1-18
U.S. Oil and Gas Association	7-29-18
Westlands Water District	8-1-18

Guidance for Recusal Analysis

In his ethics agreement, the Deputy Secretary agreed that, for one year after his withdrawal from his firm, he would not participate personally and substantially in any particular matter involving specific parties in which he knows his former firm is or represents a party, unless authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). He also agreed not to participate personally and substantially in any particular matter involving specific parties in which he knows a former client of his is or represents a party for a period of one year after he last provided service to that client, unless he is first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d)." In addition, per the Ethics Pledge, the Deputy Secretary agreed that he will not for a period of two years from the date of his appointment participate in any particular matter involving specific parties in which a former employer or client of his is or represents a party, if he served that former employer or client during the two years prior to his appointment, absent a waiver under Section 3 of Executive Order No. 13770. This includes recusal from any meeting or other communication with such a former employer or client unless (1) there are five or more different stakeholders present and (2) no particular matters involving specific parties are discussed

To assist the Deputy Secretary in complying with his ethics agreement and the Ethics Pledge, sufficient information needs to be secured before the Deputy Secretary participates in a matter to determine whether the matter meets the criteria described above.

To determine whether the Deputy Secretary may participate in a given matter, we must first determine whether that "matter" is a broad policy directed to the interests of a large and diverse group of persons or one of the two types of "particular matters" -- a "particular matter of general applicability" or a "particular matter involving specific parties."

In the context of the ethics rules, the unmodified term "matter" refers to virtually all Government work. It includes the consideration of broad policy options that are directed to the interests of a large and diverse group of persons. For instance, health and safety regulations applicable to all employers or a legislative proposal for tax reform. It also includes more narrowly defined "particular matters."

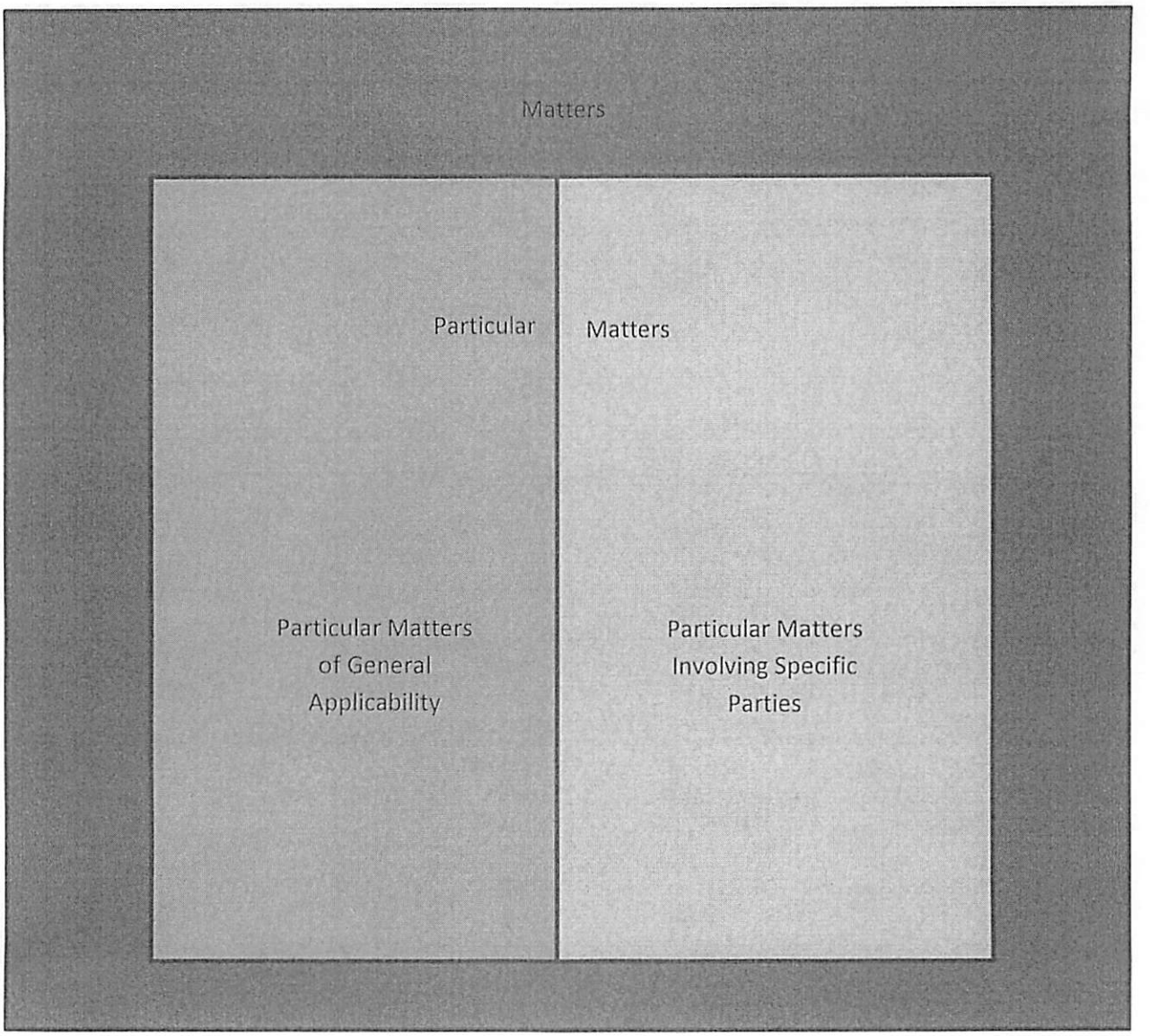
The term "particular matter" means any matter that involves deliberation, decision, or action that is focused on the interests of (1) specific persons or (2) a discrete and identifiable class of persons. These two types of particular matters are defined separately as "particular matters involving specific parties" and "particular matters of general applicability." (See attached diagram.)

A "particular matter involving specific parties" typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties." Examples include contracts, grants, licenses, investigations, litigation, and partnership agreements. This is the narrowest type of matter.

A "particular matter of general applicability" does not involve specific parties but at least focuses on the interests of a discrete and identifiable class, such as a particular industry or profession. Examples include rulemaking, legislation, or policy-making of general applicability that affect a particular industry or profession. For instance, a regulation prescribing safety standards for operators of oil rigs in the Gulf of Mexico or a regulation applicable to all those who have grazing permits on DOI public lands. On the other hand, a land use plan covering a large geographic area and affecting a number of industries (*e.g.*, agriculture; grazing; mining; timber; recreation; wind, solar, and/or geothermal power generation; etc.) would not constitute a "particular matter of general applicability" but, rather, would still fall within the broader definition of "matter," as it constitutes a broad policy directed to the interests of a large and diverse group of persons.

To assist the Deputy Secretary in complying with his ethics recusal requirements, one must gather sufficient information regarding a matter before the Department to determine whether the matter constitutes a particular matter involving specific parties, a particular matter of general applicability, or falls into the category of broad policy options that are directed to the interests of a large and diverse group of persons. In the event that a determination is made that the matter before the Department constitutes the narrowest type of matter, a particular matter involving specific parties, one must then reference the Deputy Secretary's List of Recusals to determine whether he is recused from participating in that matter.

Attachment


Matters
Particular Matters
Particular Matters of General Applicability
Particular Matters Involving Specific Parties

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

October 4, 2006

DO-06-029

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"

Perhaps no subject has generated as many questions from ethics officials over the years as the difference between the phrases "particular matter involving specific parties" and "particular matter." These phrases are used in the various criminal conflict of interest statutes to describe the kinds of Government actions to which certain restrictions apply. Moreover, because these phrases are terms of art with established meanings, the Office of Government Ethics (OGE) has found it useful to include these same terms in various ethics rules. A third term, "matter," also has taken on importance in recent years because certain criminal post-employment restrictions now use that term without the modifiers "particular" or "involving specific parties."

It is crucial that ethics officials understand the differences among these three phrases. OGE's experience has been that confusion and disputes can arise when these terms are used in imprecise ways in ethics agreements, conflict of interest waivers, and oral or written ethics advice. Therefore, we are issuing this memorandum to provide guidance in a single document about the meaning of these terms and the distinctions among them.

Because the three phrases are distinguished mainly in terms of their relative breadth, the discussion below will proceed from the narrowest phrase to the broadest.

Particular Matter Involving Specific Parties

The narrowest of these terms is "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but the meaning remains the same, focusing primarily on the presence of specific parties.

1. Where the Phrase Appears

This language is used in many places in the conflict of interest laws and OGE regulations. In the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used to describe the kinds of Government matters to which the life-time and two-year representational bans apply. 18 U.S.C. § 207(a)(1), (a)(2). Occasionally, ethics officials have raised questions because section 207 includes a definition of the term "particular matter," section 207(i)(3), but not "particular matter involving specific parties"; however, it is important to remember that each time "particular matter" is used in section 207(a), it is modified by the additional "specific party" language.[1]

In addition to section 207(a), similar language is used in 18 U.S.C. §§ 205(c) and 203(c). These provisions describe the limited restrictions on representational activities applicable to special Government employees (SGEs) during their periods of Government service.[2]

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[1] For a full discussion of the post-employment restrictions, see OGE DAEOgram DO-04-023, at https://www.oge.gov/Web/oge.nsf/Resources/DO-04-023:+Summary+of+18+U.S.C.+§+207.

[2] These restrictions on SGEs are discussed in more detail in OGE DAEOgram DO-00-003, at https://www.oge.gov/Web/oge.nsf/Resources/DO-00-003:+Summary+of+Ethical+Requirements+Applicable+to+Special+Government+Employees.

As explained below, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); see OGE Informal Advisory Letter 00 x 12. Moreover, OGE has issued certain regulatory exemptions, under section 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Likewise, the distinction between particular matters involving specific parties and broader types of particular matters (i.e., those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under section 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g).

Finally, OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain SGEs. 5 C.F.R. § 2635.807(a)(2)(i)(4).

2. What the Phrase Means

When this language is used, it reflects "a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate." Bayless Manning, Federal Conflict of Interest Law 204 (1964). Therefore, OGE has emphasized that the term "typically involves a specific

proceeding affecting the legal rights of the parties, or an isolatable transaction or related se t of transactions between identified parties." 5 C.F.R. § 2640.102(1). [3] Examples of particular matters involving specific parties include contracts, grants, licenses, product approval applications, investigations, and litigation. It is important to remember that the phrase does not cover particular matters of general applicability, such as rulemaking, legislation, or policy-making of general applicability.[4]

Ethics officials sometimes must deci de when a particular matter first involves a specific party. Many Government matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve

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[3] This definition, found in OGE's regulations implementing 18 U.S.C. § 208, differs slightly from the definition found in the regulations implementing a now-superseded version of 18 U.S.C. § 207, although this is more a point of clarification than substance. Specifically, the old section 207 regulations referred to "identifiable" parties, 5 C.F.R. § 2637.201(c)(1), whereas the more recent section 208 rule refers to "identified" parties. As explained in the preamble to OGE's proposed new section 207 rule: "The use of 'identified,' rather than 'identifiable,' is intended to distinguish more clearly between particular matters involving specific parties and mere 'particular matters,' which are described elsewhere as including matters of general applicability that focus 'on the interests of a discrete and identifiable class of persons' but do not involve specific parties. [citations omitted] The use of the term 'identified,' however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as where an agent represents an unnamed principal." 68 Feder al Register 7844, 7853-54 (February 18, 2003).

[4] Usually, rulemaking and legislation are not covered, unless they focus narrowly on identified parties. See OGE Informal Advisory Opinions 96 x 7 ("rare" example of rulemaking that involved specific parties); 83 x 7 (private relief legislation may involve specific parties).

specific parties. The Government sometimes identifies a specific party even at a preliminary or informal stage in the development of a matter. E.g., OGE Informal Advisory Letters 99 x 23; 99 x 21; 90 x 3.

In matters involving contracts, grants and other agreements between the Government and outside parties, the general rule is that specific parties are first identified when the Government first receives an expression of interest from a prospective contractor, grantee or other party. As OGE explained recently in Informal Advisory Letter 05 x 6, the Government sometimes may receive expressions of interest from prospective bidders or applicants in advance of a published solicitation or request for proposals. In some cases, such matters may involve specific parties even before the Government receives an expression of interest, if there are sufficient indications that the Government actually has identified a party. See OGE Informal Advisory Letter 96 x 21.

Particular Matter

Despite the similarity of the phrases "particular matter" and "particular matter involving specific parties," it is necessary to distinguish them. That is because "particular matter" covers a broader range of Government activities than "particular matter involving specific parties." Failure to appreciate this distinction can lead to inadvertent violations of law. For example, the financial conflict of interest statute, 18 U.S.C. § 208, generally refers to particular matters, without the specific party limitation. If an employee is advised incorrectly that section 208 applies only to particular matters that focus on a specific person or company, such as an enforcement action or a contract, then the employee may conclude it is permissible to participate in other particular matters, even t hough the la w prohibits such participation.

1. Where the Phrase Appears

In addition to 18 U.S.C. § 208, several other statutes and regulations use the term "particular matter." [5] The representational restrictions applicable to current employees (other than SGEs), under 18 U.S.C. §§ 203 and 205, apply to particular matters.[6] As mentioned above, section 207 also contains a definition of "particular matter." [7] However, where the phrase is used in the post-employment prohibitions in

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[5] The relevant language in 18 U.S.C. § 208(a) is "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (emphasis added).

[6] The prohibition in 18 U.S.C. § 205(a)(2) actually uses the phrase "covered matter," but that term is in turn defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter," 18 U.S.C. § 205(h)(emphasis added).

[7] The definition in 18 U.S.C. § 207(i)(3) provides: "the term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." This language differs slightly from other references to "particular matter" in sections 203, 205 and 208, in part because the list of matters is not followed by the residual phrase "or other particular matter." However, OGE does not believe that the absence of such a general catch-all phrase means that the list of enumerated matters exhausts the meaning of "particular matter" under section 207(i)(3). The list is preceded by the word "includes," which is generally a term of enlargement rather than limitation and indicates that matters other than those enumerated are covered. See Norman J. Singer, 2A Sutherland on Statutory Construction 231-232 (2000).

section 207(a)(1) and (a)(2), it is modified by the "specific parties" limitation.[8]

The phrase "particular matter" is used pervasively in OGE's regulations. Of course, the term appears throughout 5 C.F.R. part 2640, the primary OGE rule interpreting and implementing 18 U.S.C. § 208. Similarly, it is used in 5 C.F.R. § 2635.402, which is the provision in the Standards of Conduct that generally deals with section 208. The phrase also is used throughout subpart F of the Standards of Conduct, which contains the rules governing recusal from particular matters affecting the financial interest of a person with whom an employee is seeking non-Federal employment. 5 C.F.R. §§ 2635.601-2635.606. Moreover, the phrase appears in the "catch-all" provision of OGE's impartiality rule, 5 C.F.R. § 2635.502(a)(2). See also 5 C.F.R. 2635.501(a).[9] Various other regulations refer to "particular matter" for miscellaneous purposes. E.g., 5 C.F.R. § 2635.805(a)(restriction on expert witness activities of SGEs); 5 C.F.R. § 2634.802(a)(1)(written rec usals pursuant to ethics agreements).

2. What the Phrase Means

Although different conflict of interest statutes use slightly different wording, such as different lists of examples of particular matters, the same standards apply for determining what is a particular matter under each of the relevant statutes

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[8] At one time, the post-employment "cooling-off" restriction for senior employees in 18 U.S.C. § 207(c) applied to particular matters, but the language was amended (and broadened) in 1989 when Congress removed the adjective "particular" that had modified "matter." See 17 Op. O.L.C. 37, 41-42 (1993).

[9] Generally, section 2635.502 focuses on particular matters involving specific parties, as noted above. However, section 2635.502(a)(2) provides a mechanism for employees to determine whether they should recuse from other "particular matters" that are not described elsewhere in the rule. In appropriate cases, therefore, an agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee's impartiality reasonably may be questioned under the circumstances.

and regulations. See 18 Op. O.L.C. 212, 217-20 (1994). Particular matter means any matter that involves "deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1)(emphasis added). It is clear, then, that particular matter may include matters that do not involve parties and is not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000).

Essentially, the term covers two categories of matters: (1) those that involve specific part ies (described more fully above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as "particular matter of general applicability." 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Examples provided in OGE rules include a regulation applicable only to meat packing companies or a regulation prescribing safety standards for trucks on interstate highways. 5 C.F.R. §§ 2640.103(a)(1)(example 3); 2635.402(b)(3)(example 2). Other examples may be found in various opinions of OGE and the Office of Legal Counsel, Department of Justice. E.g., OGE Informal Advisory Letter 00 x 4 (recommendations concerning specific limits on commercial use of a particular facility); 18 Op. O.L.C. at 220 (determinations or legislation focused on the compensation and work conditions of the class of Assistant United States Attorneys).

Certain OGE rules recognize that particular matters of general applicability sometimes may raise fewer conflict of interest concerns than particular matters involving specific

parties.[10] Therefore, while both categories are included in the term "particular matter," it is often necessary to distinguish between these two kinds of particular matters. Of course, in many instances, the relevant prohibitions apply equally to both kinds of particular matters. This is the case, for example, in any application of 18 U.S.C. § 208 where there is no applicable exemption or waiver that distinguishes the two.

It is important to emphasize that the term "particular matter" is not so broad as to include every matter involving Government action. Particular matter does not cover the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2640.103(a)(1). For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform. 5 C.F.R. § 2640.103(a)(1)(example 4), (example 8). See also OGE Informal Advisory Letter 05 x 1 (report of panel on tax reform addressing broad range of tax policy issues). Although such actions are too broadly focused to be particular matters, they still are deemed "matters" for purposes of the restrictions described below that use that term.

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[10] As noted above, OGE's imparti ality rule generally focuses on particular matters involving specific parties. See OGE Informal Advisory Letter 93 x 25 (rulemaking "would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a)"). Furthermore, as also discussed above, several of the regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2) treat particular matters of general applicability differently than those involving specific parties. The preamble to the original proposed regulatory exemptions in 5 C.F.R. part 2640 explains: "The regulation generally contains more expansive exemptions for participation in 'matters of general applicability not involving specific parties' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters." 60 Federal Register 47207, 47210 (September 11, 1995). Of course, Congress itself has limited certain conflict of interest restrictions to the core area of particular matters that involve specific parties. E.g., 18 U.S.C. § 207(a)(1), (a)(2).

A question that sometimes arises is when a matter first becomes a "particular matter." Some matters begin as broad policy deliberations and actions pertaining to diverse interests, but, later, more focused actions may follow. Usually, a particular matter arises when the deliberations turn to specific actions that focus on a certain person or a discrete and identifiable class of persons. For example, although a legislative plan for broad health care reform would not be a particular matter, a particular matter would arise if an agency later issued implementing regulations focused narrowly on the prices that pharmaceutical companies could charge for prescription drugs. 5 C.F.R. § 2640.102(a)(1)(example 8). Similarly, the formulation and implementation of the United States response to the military invasion of an ally would not be a particular matter, but a particular matter would arise once discussions turned to whether to close a particular oil pumping station or pipeline operated by a company in the area where hostilities are taking place. 5 C.F.R. § 2640.102(a)(1)(example 7).

Matter

The broadest of the three terms is "matter." However, this term is used less frequently than the other two in the various ethics statutes and regulations to describe the kinds of Government actions to which restrictions apply.

1. Where the Phrase Appears

The most important use of this term is in the one-year post-employment restrictions applicable to "senior employees" and "very senior employees." 18 U.S.C. § 207(c), (d). In this context, "matter" is used to describe the kind of Government actions that former senior and very senior employees are prohibited from influencing through contacts with employees of their former agencies (as well as contacts with Executive Schedule officials at other agencies, in the case of very senior employees). The unmodified term "matter" did not appear in these provisions until 1989, when section 207(c) was amended to replace "particular matter" with "matter" and section 207(d) was first enacted. Pub. L. No. 101-194, § 101(a), November 30, 1989. OGE also occasionally uses the term "matter" in ethics regulations, for example, in the description of teaching,

speaking and writing that relates to an employee's official duties. 5 C.F.R. § 2635.807(a)(2)(E)(1).

2. What the Phrase Means

It is clear that "matter" is broader than "particular matter." See 17 Op. O.L.C. at 41-42. Indeed, the term is virtually all-encompassing with respect to the work of the Government.[11] Unlike "particular matter," the term "matter" covers even the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. Of course, the term also includes any particular matter or particular matter involving specific parties.

Nevertheless, it is still necessary to understand the context in which the term "matter" is used, as the context itself will provide some limits. In 18 U.S.C. § 207(c) and (d), the post-employment restrictions apply only to matters "on which [the former employee] seeks official action." Therefore, the only matters covered will be those in which the former employee is seeking to induce a current employee to make a decision or otherwise act in an official capacity.

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[11] A now-repealed statute, 18 U.S.C. § 281 (the predecessor of 18 U.S.C. § 203), used the phrase "any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter" (emphasis added). One commentator noted that the term "matter" in section 281 was "so open-ended" that it raised questions as to what limits there might be on the scope. Manning, at 50-51. Manning postulated that some limits might be inferred from the character of the matters listed before the phrase "or other matter." Id. at 51. Whatever the force of this reasoning with respect to former section 281, the same could not be said with respect to 18 U.S.C. § 207(c) or (d), as neither of these current provisions contains an exemplary list of covered matters.

LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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LA-17-03: Guidance on E.O. 13770

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to

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What is Covered in LA-17-03? (Past Guidance)

- Elaboration on Guidance in LA-17-02
  - Extent to which past guidance is applicable to EO 13770
  - Extent to which past guidance is NOT applicable or NOT relevant to EO 13770

3

What is Covered in LA-17-03? (New Guidance)

- LA-17-03 also addresses recusal obligations for recent lobbyists (pledge paragraph 7)
- Post-government employment restrictions
  - 5-year restriction under pledge paragraph 1
  - Administration-length restriction under pledge paragraph 3
  - Citations to – but not interpretations of – the Lobbying Disclosure Act (LDA)

4

What is Not Covered in LA-17-03?

- Section 3 of the new Executive Order concerning pledge waivers
- Paragraph 4 concerning post-government restrictions and the Foreign Agents Registration Act of 1938
- Paragraph 8 concerning employment decisions
- The continued applicability of EO 13490

5

Language Common to E.O. 13770 and E.O. 13490

6

LA-17-02: Executive Order 13770

"With respect to Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding Executive Order 13490 to the extent that such guidance addresses language common to both orders."

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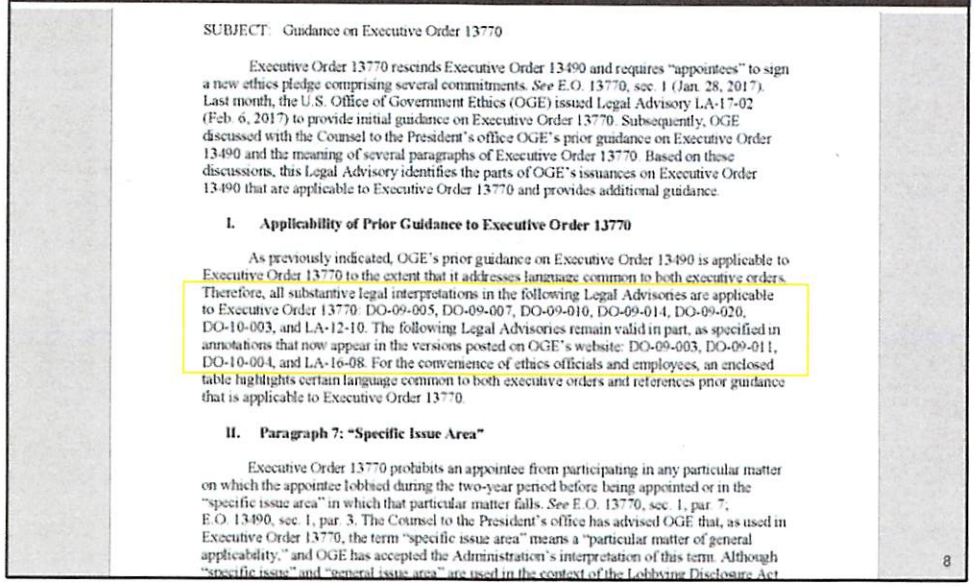
LA-17-03: Guidance on E.O. 13770



SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act

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Example:

DO-09-010: Who Must Sign the Ethics Pledge?

Note: All substantive legal interpretations in this advisory are applicable to Executive Order 13770, sec. 1. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 16, 2009
DO-09-010

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Who Must Sign the Ethics Pledge?

The Office of Government Ethics (OGE) has received numerous questions concerning

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Example:

DO-09-011: Revolving Door Ban—All Appointees Entering Gov't

NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E.O. 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec. 1, par. 6. All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec. 3. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that

10

Example:

DO-10-004: FAQs on Post-Employment under the Ethics Pledge

Note: Please see the attached addendum for the applicability of substantive legal interpretations in this advisory to Executive Order 13770. *See also* LA-17-02 and LA-17-03.

United States

Addendum (March 20, 2017)
DO-10-004: Post-Employment Under the Ethics Pledge: FAQs

The following substantive legal interpretations in this advisory are **applicable** to Executive Order 13770:

- Part A: Post-employment cooling-off period. *See* E.O. 13770, sec. 1, par. 2
  - Q2. Which appointees are subject to the restriction
  - Q3. How the restriction affects very senior employees
  - Q4. Which officials may not be contacted under this restriction
  - Q5. Applicability of exceptions under 18 U.S.C. § 207(c) to the restriction
- Part B: Post-employment lobbying ban. *See* E.O. 13770, sec. 1, par. 3
  - Q1. Relationship of the lobbying ban to other restrictions
  - Q2. Whether the lobbying ban applies to appointees who are not senior employees
  - Q5. Duration of the lobbying ban
  - Q11. Whether exceptions to the restriction exist

The following substantive legal interpretations in this advisory are **applicable in part** to Executive Order 13770, to the extent that they address the core questions listed below. However, because the post-employment ban in Executive Order 13490 restricts "lobbying," while the corresponding ban in Executive Order 13770 restricts "lobbying activities," the substantive legal interpretations of

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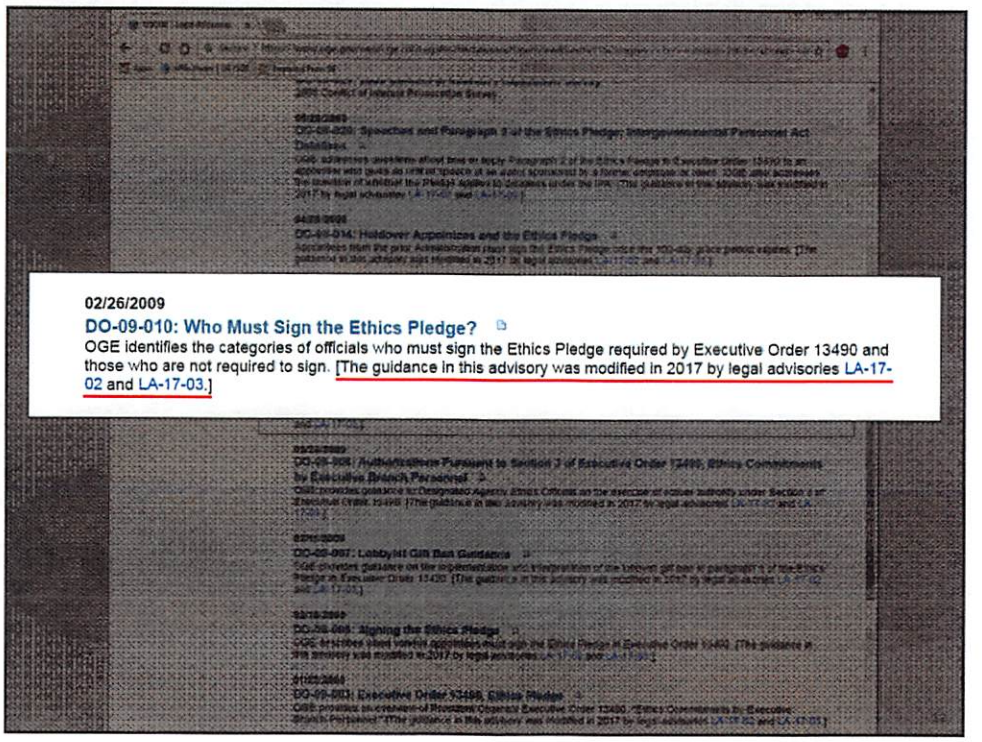
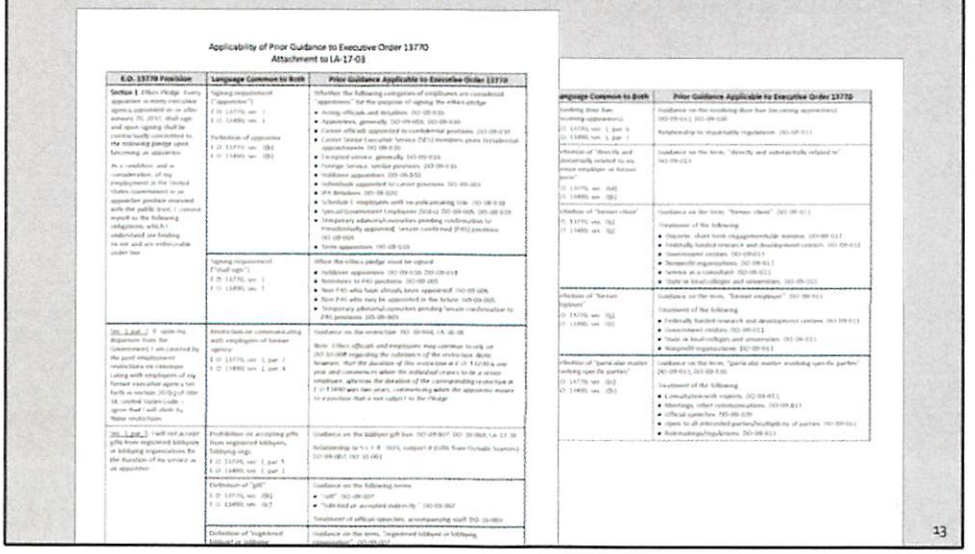


02/26/2009

DO-09-010: Who Must Sign the Ethics Pledge?

OGE identifies the categories of officials who must sign the Ethics Pledge required by Executive Order 13490 and those who are not required to sign. [The guidance in this advisory was modified in 2017 by legal advisories LA-17-02 and LA-17-03.]

Attachment to LA-17-03



Applicability of Prior Guidance to Executive Order 13770
Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1 When I Pledge. Every appointee in every executive agency appointed on or after January 20, 2017, shall sign and upon signing shall be contractually committed to the following pledge upon becoming an appointee: In consideration, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:	Signing requirement ("appointee") E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee E.O. 13770, sec. 3(b) E.O. 13490, sec. 3(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge • Acting officials and detailees (DO-09-010) • Appointees, generally (DO-09-003, DO-09-010) • Career officials appointed to confidential positions (DO-09-010) • Career Senior Executive Service (SES) members given Presidential appointments (DO-09-010) • Excepted service, generally (DO-09-010) • Foreign service, similar positions (DO-09-010) • Holdover appointees (DO-09-002) • Individuals appointed to career positions (DO-09-003) • IPA detailees (DO-09-009) • Schedule C employees with no policymaking role (DO-09-010) • Special Government Employees (SGEs) (DO-09-005, DO-09-010) • Temporary placements/transfers pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions (DO-09-004) • Term appointees (DO-09-010)
	Signing requirement ("mail-ups") E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed • Holdover appointees (DO-09-010, DO-09-013) • Nominees to PAS positions (DO-09-005) • Non-PAS who have already been appointed (DO-09-005) • Non-PAS who may be appointed in the future (DO-09-005) • Temporary placements/transfers pending Senate confirmation to PAS positions (DO-09-004)
Sec. 1 par. 2 "I agree that I will abide by the following restrictions: I will not, for a period of 2 years from the date of my appointment, participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts."	Restrictions on communicating with employees of former agency E.O. 13770, sec. 1, par. 2 E.O. 13490, sec. 1, par. 4	Guidance on the restriction (DO-09-004, LA-16-08) Note: Ethics officials and employees may continue to rely on DO-93-008 regarding the substance of the restriction. Note, however, that the duration of this restriction is 2 (E.O. 13770) vs. one year and commences when the individual ceases to be a senior employee, whereas the duration of the corresponding restriction is 1 (E.O. 13490) was two years, commencing when the appointee ceases to a position that is not subject to the Pledge
Sec. 1 par. 3 "I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee."	Prohibition on accepting gifts from registered lobbyists, lobbying orgs E.O. 13770, sec. 1, par. 3 E.O. 13490, sec. 1, par. 1	Guidance on the lobbyist gift ban (DO-09-007, DO-16-06)(LA-17-16) Relationship to 5 C.F.R. 2635, subpart B (Gifts from Outside Sources) (DO-09-007, DO-10-001)
	Definition of "gift" E.O. 13770, sec. 3(c) E.O. 13490, sec. 3(c)	Guidance on the following terms • "Gift" (DO-09-007) • "Solicited or accepted indirectly" (DO-09-007) Treatment of official speeches, accompanying staff (DO-16-06)
	Definition of "registered lobbyist or lobbying organization"	Guidance on the terms, "registered lobbyist or lobbying organization" (DO-09-007)

Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Rule 1 par. 1 "I will not, for a period of 2 years from the date of my appointment, participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts."	Guidance on the revolving door ban (DO-09-011, DO-09-013) Relationship to impartiality regulations (DO-09-011)
Definition of "directly and substantially related to my former employer or former clients" E.O. 13770, sec. 3(d) E.O. 13490, sec. 3(b)	Guidance on the term, "directly and substantially related to" (DO-09-011)
Definition of "former client" E.O. 13770, sec. 3(a) E.O. 13490, sec. 3(a)	Guidance on the term, "former client" (DO-09-011) Treatment of the following: • Deposits, short-term engagements/de minimis (DO-09-011) • Federally funded research and development centers (DO-09-011) • Government entities (DO-09-011) • Non-profit organizations (DO-09-011) • Service as a consultant (DO-09-011) • State or local colleges and universities (DO-09-011)
Definition of "former employer" E.O. 13770, sec. 3(a) E.O. 13490, sec. 3(a)	Guidance on the term, "former employer" (DO-09-011) Treatment of the following: • Federally funded research and development centers (DO-09-011) • Government entities (DO-09-011) • State or local colleges and universities (DO-09-011) • Non-profit organizations (DO-09-011)
Definition of "particular matter involving specific parties" E.O. 13770, sec. 3(e) E.O. 13490, sec. 3(c)	Guidance on the term, "particular matter involving specific parties" (DO-09-011, DO-09-013) Treatment of the following: • Consultations with experts (DO-09-011) • Meetings, other communications (DO-09-011) • Official speeches (DO-09-019) • Open to all interested parties/feasibility of parties (DO-09-011) • Rulemakings/regulations (DO-09-011)

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Language Common to Both

E.O. 13370, sec. 1, par. 6

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

E.O. 13490, sec. 1, par. 2

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

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Language Common to Both

E.O. 13370, sec. 2(b)

"Appointee" means every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

E.O. 13490, sec. 2(b)

"Appointee" shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

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Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:	Signing requirement ("appointee"): E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee: E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign"): E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005

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Paragraph 7:
Particular Matter & Specific Issue Area

17

Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . .
I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

18

Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7: Specific Issue Area

"Specific issue area" is not defined in LDA or Executive Orders 13490 or 13770

EO 13490

- Also contained a two-year prohibition on individuals seeking or accepting employment with executive agencies they lobbied

EO 13770

- No employment ban for former lobbyists

21

Paragraph 7: PMGA

As used in Executive Order 13770, the term "specific issue area" means a "**particular matter of general applicability**"

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter
Matter	→	No Recusal to that Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Ethics Pledge: Restrictions for Incoming Appointees

Paragraph 6 *Not limited to registered lobbyists*	I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
Paragraph 7 *Limited to registered lobbyists*	If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraphs 1 and 3:
Post-Employment Lobbying Activity Restrictions

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Ethics Pledge: Post-Employment Restrictions

Paragraph 1	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.
Paragraph 2	If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with appointees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.
Paragraph 3	I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.
Paragraph 4	I will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require me to register under the Foreign Agents Registration Act of 1938, as amended.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

29

Paragraph 1

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

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Paragraph 3

I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Restricted Activity

- Engage in a "lobbying activity" as defined by the Lobbying Disclosure Act (LDA)

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Engage in a Lobbying Activity

You engage in a "**lobbying activity**" if you:

- Make a lobbying contact
  - Written or oral communications
  - With covered executive or legislative branch officials
  - On behalf of a client
  - For financial or other compensation
  - 19 exceptions

OR

- Engage in behind-the-scenes efforts in support of such lobbying contact

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 1: "With respect to" that agency

A lobbying activity occurs "with respect to" that agency if the activity involves :

- A communication to a covered executive branch official at that agency *(component designations may be available)*

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official at that agency

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Paragraph 3: "With respect to" certain officials

A lobbying activity occurs "with respect to" certain officials if the activity involves :

- A communication to a covered executive branch official or non-career SES

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official or non-career SES

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency = Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 3: Examples

Write to various exec branch officials seek support for his client's research

Assist his client in preparing for a meeting with one of the officials

Assist his client in understanding grant application process and guidelines that agency established for research projects

Request the status of an action affecting his client.

I agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraph 1: Examples

Write to a covered executive branch official at NIH to seek support for his client's research

Assist his client in preparing for a meeting with the FDA official

Contact covered legislative branch official to discuss pending legislation that could affect NIH research projects

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

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LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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Question 7: Land and Water Conservation

For more than 50 years, the Land and Water Conservation Fund has been one of the most powerful tools we have available to preserve and ensure access to America's most iconic landscapes. It is a tool that has created or expanded thousands of treasured hunting, fishing and hiking opportunities and it has protected our cultural heritage. That's why the Land and Water Conservation Fund is supported by hundreds of organizations from around the country representing sportsmen, conservationists, veterans and outdoor enthusiasts from all backgrounds. In fact, according to a recent Western States Survey, more than 80 percent of people supported reauthorizing the LWCF.

Mr. Bernhardt, do you think Congress should directly and fully fund the Land and Water Conservation Fund at its authorized level so it is not subject to future appropriations?

Mr. Bernhardt, if Congress appropriated the fully authorized $900 for the Land and Water Conservation Fund for fiscal year 2020, how would the Department of the Interior use those funds?

Mr. Bernhardt, how would funding at the full level compare to what the LWCF would accomplish under the President's FY 2020 budget request?

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. I would be happy to engage in discussions with the Committee on different and creative ways to implement the LWCF.

Question 8: Offshore Drilling

Last year, your predecessor Secretary Zinke directed the Bureau of Ocean Energy Management to develop the National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024. The program would attempt to allow oil and gas drilling in over 90 percent of U.S. coastal waters, including off the Washington state coastline. This is unprecedented and along with many of my colleagues, I have heard from communities and businesses throughout my state and they are extraordinarily concerned about the impacts offshore drilling with have on local economies. In fact, local legislators, governors, businesses, and others affected by these decisions told Secretary Zinke and the Department of Interior that they do not want to expand offshore drilling activities on coasts—especially in the Pacific.

Mr. Bernhardt, do you support opening any or all waters off the coat of Washington state to offshore drilling and gas exploration, development of production?

Mr. Bernhardt, do you value public comment on proposed Department of the Interior activities? How do you plan to weigh and incorporate public comments on the National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024?

Mr. Bernhardt, if there is Congressional opposition, opposition from a state's Governor and the State is under a federal offshore drilling moratorium until 2022, will you commit to removing that state from the National Outer Continental Shelf Oil and Gas Leasing Program for 2019-2024?

Response: In formulating an Outer Continental Shelf leasing program, the Outer Continental Shelf Lands Act (OCSLA) requires the Secretary of the Interior, through the Bureau of Ocean Energy Management, to set a schedule of proposed lease sales that indicates the size, timing, and location of leasing activity that "best meets national energy needs." The OCSLA also specifically requires the Secretary to invite and consider comments from the Governors of any affected state. Comments from the public, governors, Members of Congress, tribes, and stakeholders are an integral part of Program development. The governing statute provides multiple opportunities for participation though public meetings, scoping meetings, and open houses. In addition, if confirmed, I will be happy to meet with governors, Members, and other interested parties affected by the development of offshore energy whether it be in the form of fossil fuels or renewable energy.

Question 9: North Cascades Grizzly Bear Recovery

Last year, former Secretary Zinke visited Washington state and on Friday March 22, 2018, former Secretary Zinke publicly stated his support for Grizzly Bear Restoration in North Cascades National Park and the surrounding ecosystem. A quote from former Secretary Zinke in a U.S. Department of the Interior press release stated:

"Restoring the grizzly bear to the North Cascades ecosystem is the American conservation ethic come to life,"* said Secretary Zinke. *"We are managing the land and the wildlife according to the best science and best practices. The loss of the grizzly bear in the North Cascades would disturb the ecosystem and rob the region of an icon. We are moving forward with plans to restore the bear to the North Cascades, continuing our commitment to conservation and living up to our responsibility as the premier stewards of our public land."

According to a poll conducted by Tulchin Research, found that 81% of those who were pulled agree that "the State of Washington should make every effort to help grizzly nears recover and prevent their disappearance."

The Federal Government has invested over $1 million dollars over four years in North Cascades Grizzly Recovery and the work is not complete.

Congressional Report language in the 2019 Consolidated Appropriations Act stated:

The Conferees direct the Service to work with ranchers, conservation groups, local governments, and other local partners to reduce conflicts between grizzly bears and livestock. These efforts should draw upon lessons learned with the Wolf Livestock Loss Demonstration Program to improve conservation outcomes while limiting effects to agricultural producers. Not less than 30 days after the date of enactment of this Act, and for a duration of not less than 90 days, the Service and the National Park Service are directed to re-open the public comment period regarding the draft environmental impact statement with proposed alternatives for the restoration of grizzly bears to the North Cascades Ecosystem. Any member of the public in attendance at any of the associated public forums and wishing to voice their opinion must be afforded the opportunity to do so.

Mr. Bernhardt, can you describe at what stage is the current North Cascades Grizzly Bear Environmental Impact Statement (EIS)?

Response: The National Park Service and Fish and Wildlife Service held a public comment period on the draft EIS with proposed alternatives for the restoration of grizzly bears to the North Cascades Ecosystem in early 2017 and received over 126,000 comments. In accordance with the Congressional Report language, the two bureaus are preparing to reopen the comment period to allow additional opportunity for public input.

Mr. Bernhardt, when will the Department re-open the public comment period on the North Cascades Grizzly Bear EIS? Will the Department host additional public meetings? When and where will these public meetings occur?

Response: In accordance with the Congressional Report language, the National Park Service and Fish and Wildlife Service are preparing to reopen the comment period to allow additional opportunity for public input. I expect the notice to be published in the coming weeks, and for public meetings to be held shortly thereafter.

Mr. Bernhardt, following the additional public comment period, will the Department finalize the North Cascades Grizzly Bear EIS? What is the timeline for finalizing the EIS?

Response: Following the additional public comment period, the next steps for the National Park Service and Fish and Wildlife Service include review of comments received; preparation of a final EIS (which will include written responses to public comments); issuance of the final EIS; and issuance of a final Record of Decision. The timeline for that process will depend on the number of public comments received and the scope of those comments.

Mr. Bernhardt, do you support your predecessor's statement on the need to restore the grizzly bear in the North Cascades ecosystem?

Response: I believe that we all benefit from the conservation of the grizzly bear. In addition, any effort to introduce bears must fully address the impacts to people and communities from such efforts, including public safety.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Question 10: Goat Mountain Mining Project

On December 3, 2018, the Bureau of Land Management released the Finding of No Significant Impact (FONSI) and Decision Record (DR) on the Goat Mountain Hard Rock Prospecting Permit Applications. This decision awards a mining company, Ascot USA, two hard rock prospecting permits within the Gifford Pinchot National Forest, about 12 miles northeast of Mount St. Helens and adjacent to and extending from the boundary of the Mount St. Helens National Volcanic Monument.

The Green River valley is a very popular recreation destination for hunting, fishing, backcountry horse riding, hiking, and camping due to its scenic beauty, healthy fish and wildlife populations, and proximity to the Monument. In addition, the Green River has been found by the Forest Service to be eligible for designation as a Wild and Scenic River and has been designated by the state of Washington as a Wild Steelhead Gene Bank. The Green River is also an important human resource, as it flows into the Cowlitz River, which supplies municipal drinking water for hundreds of people that live in downstream communities.

The Forest Service purchased the land on which the Goat Mountain Project is proposed in 1986 with funding from the Land and Water Conservation Fund. As such, mineral development can only be authorized by the Secretary of the Interior, when advised by the Secretary of Agriculture, that "such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture to protect such purposes." 5 U.S.C App. 1, 402. Before purchasing this land, the Forest Service sent a letter to Washington's Congressional delegation stating that the Forest Service's acquisition of the property would be to "aid in the preservation of the integrity of the Green River prior to its entering the National Volcanic Monument, and will also aid in the preservation of the scenic beauty of this area which is to become an important Monument portal."

I believe hard rock mining does not meet the intention of conserving the land for recreation purposes. The uses are inconsistent and commercial extraction of non-renewable natural resources seems completely at odds with the core principle of the Land and Water Conservation Fund.

Mr. Bernhardt, do you believe hard rock mining, including exploratory drilling, should occur on lands purchased through the Land and Water Conservation Fund?

Response: As you note, Congress specifically addressed the conditions where it is appropriate to consider such activities by adding the condition you referenced. If that is the case, it would seem the agency's decision would depend on whether or not "such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture to protect such purposes."

Question 11: Bureau of Indian Affairs Reorganization

At the 2019 Tribal Nation's Policy Summit winter session of the National Congress of American Indians, you stated the Bureau of Indian Affairs will remain intact and "will remain intact as we move forward with any plans to improve the Department of the Interior."

Mr. Bernhardt, can you confirm the Department of the Interior's reorganization plan does not include any changes to the Bureau of Indian Affairs programs?

Mr. Bernhardt, can you confirm the Department of the Interior's reorganization plan, or any other plan, does not include moving the location of the Bureau of Indian Affairs?

Response: As a result of tribal consultations carried out by the Department, the Bureau of Indian Affairs, the Bureau of Indian Education, and the Office of the Special Trustee for American Indians will not realign their regional structures to align with the other bureaus.

Question 12: Impact of Shutdown on National Parks

Local businesses and communities were harmed as a result of the 2018-2019 government shutdown. One example is the closure of Hurricane Ridge Winter Sports at the top of Hurricane Ridge in Olympic National Park because the road up to the ridge was closed because no National Park Service (NPS) personnel were available to plow snow. Likewise, at Olympic and Rainier National Parks, there were clear impacts to local communities and businesses from partial closure of the parks, with closed campgrounds and restrooms and other impacts leading to huge reductions in visits.

Mr. Bernhardt, what is the total amount of fee dollars obligated during the recent government shutdown and how many parks elected to use fee dollars? Please provide details on what specific activities were performed using fee revenues and in which parks? Can you please provide the list of parks and amount of fee dollars used and projects performed?

Mr. Bernhardt, can you detail the analysis regarding the likely impacts (contractors, partners, etc) of using fee dollars during the shutdown?

Mr. Bernhardt, how many NPS staff were paid using fee revenues during the lapse in appropriations?

Mr. Bernhardt, how much revenue was lost during the shutdown because no entrance or other forms of recreation fees were being collected?

Mr. Bernhardt, what was the total cost of repair to parks as a result of visitation to parks during the shutdown?

Mr. Bernhardt, given your decision to replenish the lost fee dollars with the passage of the FY19 appropriations bills, what specific accounts had to be decreased in your operating budget in FY19?

Mr. Bernhardt, it's been reported that you have directed that all planned fee projects be halted until you approve the use of the fee dollars? What is your rationale for that?

Response: During the lapse in appropriations, the NPS, using retained fees collected under the Federal Lands Recreation Enhancement Act (FLREA) and in accordance with law, was able to address issues with restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and basic visitor services. Excepted staff that worked on specified allowable activities under FLREA were paid. Approximately 100 national parks were approved for the use of FLREA funds during this time.

While many of the smaller sites around the country remained closed, use of these funds allowed the American public to safely visit many of our national parks while providing these treasures additional protection and allowing NPS to meet its dual mandate. Importantly, the use of FLREA funds allowed continued visitor access to some park units, contributing to the economies of the respective gateway communities. It also meant that those employees who were providing these services were assured that they would receive a timely paycheck, an assurance that was comforting to some.

Congress, in the Fiscal Year 2019 Further Additional Continuing Appropriations Act (Public Law 116-5) that extended appropriations through February 15, 2019, explicitly made such funds cover the prior period during the lapse. Pursuant to this direction, the NPS was able to move obligations incurred during the appropriations lapse from the FLREA fee account to the account for which the charges were originally planned, including the NPS operating account, where most of these obligations would have been charged. The actions taken under these provisions, which were confirmed by the Office of Management and Budget, allowed NPS to fully restore FLREA balances to pre-lapse levels.

The Department is currently evaluating impacts to natural resources and infrastructure that occurred during the period of this lapse of appropriations from available funding. The Department is also collecting information related to the amount of revenue obligated during this period, and anticipates that additional information will be available early in the third quarter of operations. FLREA projects have been reviewed to ensure consistency with the law, and are continuing to be implemented across the country.

I hope that we will not be faced with another lapse of appropriations. However, I believe that this action provides critical direction for similar situations in the future. First, our national parks should not be made the public face of another lapse in funding, and we will be prepared to use these fees, as available, immediately for appropriate staffing, basic services, and other bureau needs in accordance with the authorities provided by law. In addition, we have modified our

contingency plans for the NPS and for the other relevant bureaus to ensure that in the event of a future lapse, we are prepared to use these fees for these allowable purposes.

Question 13: National Register of Historic Places

The Department of the Interior is proposing new regulations for the National Register of Historic Places that establishes weighted objections to listings by allowing the percent of land ownership to be a determining factor in objections.

Mr. Bernhardt, can you explain under what Congressional authority are you able to create a rule change that effectively changes the American voting structure?

Response: The proposed rule does not change the American voting structure. The proposed regulations you reference are intended to implement amendments to the National Historic Preservation Act included in the National Park Service Centennial Act of 2016 and to ensure that, if the owners of a majority of the land area in a proposed historic district object to listing, the proposed district will not be listed over their objection. Importantly, the 60-day comment period on these proposed regulations is open and will close on April 30, 2019, after which the NPS will carefully consider the comments received on this proposal.

Question 14: Disposable Plastic Water Bottle Recycling and Reduction

In August of 2017, the Department of the Interior overturned the prior Administration's "Disposable Plastic Water Bottle Recycling and Reduction" program, which was effectively a ban on the sale of plastic water bottles inside units of our National Park System. I absolutely support efforts to preserve customer choice, but plastic pollution remains one of the great environmental challenges of our time.

Mr. Bernhardt, as you prepare to more formally assume leadership of the Department of the Interior, I ask that you make time to focus on this issue of plastic pollution. Consistent with that request, I have a couple questions:

Following the decision in August of 2017 to overturn the prior Administration's ban on plastic water bottle sales inside units of the National Park System, has the Department undertaken any work on alternative approaches to mitigating or preventing plastic pollution on our federal lands and in our federal waters?

If not, can you please commit to providing me and the committee with a plan to do so within four months of being confirmed by the Senate?

Response: The NPS continues to promote recycling and reduce plastic waste while still providing as many safe, healthy hydration options as possible to visitors. Many parks have worked with partners to provide free potable water in bottle filling stations located at visitor

centers and near trailheads. At other parks, concessioners have implemented disposable water bottle reduction programs in consultation with park management and many parks conduct an annual clean-up, typically in partnership with the local community, and have information available in visitor centers on the importance of reducing waste. Several coastal parks also participate in research and monitoring projects related to marine debris and microplastics.

For FY 2018, the NPS reported that its solid waste management efforts are improving, as measured by the waste reduction rate, which measures parks' success in diverting waste from landfills. The rate for FY 2018 was 41.97%, compared to 31% for FY 2017. I will continue to support the effort to increase the diversion of waste from landfills.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Sanders

Climate Change

Question 1: The Department of the Interior's (DOI) mission, as stated on DOI's website, is to "conserve and manage [our] Nation's natural resources and cultural heritage." The vast majority of scientists tell us that climate change poses a number of serious risks to our nation's precious natural resources and cultural heritage, and that burning fossil fuels is the primary driver of climate change. Therefore, extracting and burning fossil fuels directly threatens our nation's natural resources and cultural heritage.

In the hearing to consider your nomination for DOI Deputy Secretary, you stated the following regarding your views on climate change:

"We are going to look at the science, whatever it is, but policy decisions are made. This president ran, he won on a particular policy perspective. The perspective is not going to change to the extent that we have the discretion under the law to follow it...we're absolutely going to follow the policy perspective of the president."

a. Do you agree that climate change is the greatest threat to our nation's natural resources and cultural heritage? If not, why not? If so, why did you not mention the threat of climate change at all in your testimony?

Response: As I indicated at that hearing, I recognize the climate is changing and that man is contributing to that change and the science, including in the fourth assessment, indicates that there is a lot of uncertainty in projecting future climate conditions.

b. Please outline your plan, including a timeline, for addressing climate change by ending any DOI activities, such as the extraction of fossil fuels from our nation's public lands that contribute to climate change.

Response: As I indicated at my hearing, I recognize that the climate is changing, man is contributing to that change, and the science indicates there is uncertainty in projecting future climate conditions. The Department of the Interior's role is to follow the law in carrying out our responsibilities using the best science. The laws governing Interior - such as the Federal Land Policy and Management Act - require us to manage our onshore federal resources on the basis of multiple use and sustained yield, which includes energy development. We are carrying out that statutory mission and will do so until Congress directs us differently. While I agree that the impacts of a changing climate need to be understood and addressed, the Department's role is to follow the law in carrying out our responsibilities. The laws that govern our resources management actions on public lands and offshore areas generally require us to manage these areas for maximum sustained yield of multiple uses, including energy development.

Question 2: On March 28, 2017, the president issued an Executive Order, *Promoting Energy Independence and Economic Growth*, which included several provisions that would cause DOI to increase the extraction of fossil fuels, thereby violating its mission to conserve and manage our nation's natural resources and cultural heritage as well as contributing to climate change. Those provisions include:

a. Lifting any and all moratoria on federal land coal leasing activities related to Secretary's Order 2228.

b. Reviewing and suspending, revising, or rescinding the rules entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," "General Provisions and Non-Federal Oil and Gas Rights," and "Management of Non Federal Oil and Gas Rights," all of which limit fossil fuel extraction on public lands.

If confirmed, will you carry out the DOI's mission to protect our nation's natural resources and cultural heritage, or will you instead carry out the policy laid out in the aforementioned Executive Order? Are there any other policies of the President you intend to carry out that would violate DOI's mission protect our nation's natural resources and cultural heritage?

Response: I do not agree with the assertion that there is an inconsistency between the Executive Order and the Department's mission as set out in law. As I indicated in response to the previous question, while I agree that the impacts of a changing climate need to be understood and addressed, the Department's role is to follow the law in carrying out our responsibilities. The laws that govern our resources management actions on the public lands and offshore areas generally require us to manage these areas for maximum sustained yield of multiple uses, including energy development.

Question 3: In a March 20, 2019 CBS interview, EPA Administrator Andrew Wheeler stated that "most of the threats from climate change are 50 to 75 years out." However, the vast majority of the world's scientists tell us that climate change is already causing rising sea levels, increasing hunger and illness, extinction of species, and more frequent and intense extreme weather all around the world.

Do you agree with the vast majority of scientists, or do you agree with Administrator Wheeler's statement that "most of the threats from climate change are 50 to 75 years out"?

Response: I am unfamiliar with Administrator Wheeler's comments or the context in which he made them. My views are reflected above in the previous response

Question 4: Do you accept the following findings from the Fourth National Climate Assessment on climate change-related impacts happening now?

a. Declines in surface water quality due to intensifying droughts, increasing heavy downpours, and reduced snowpack.

b. Increased air quality and health risks from wildfire and ground-level ozone pollution due to changes in temperature and precipitation.

c. Increased damage to America's trillion-dollar coastal property market and infrastructure due to increased frequency of high-tide flooding events driven by sea level rise.

d. Decreasing productivity of certain fisheries and damage to the marine ecosystems on which many of our coastal communities rely for livelihoods and recreation due to rising water temperatures, ocean acidification, retreating arctic sea ice, coastal erosion, and heavier precipitation.

Response: As I indicated at that hearing, I recognize the climate is changing and that man is contributing to that change and the science, including in the fourth assessment, indicates that there is a lot of uncertainty in projecting future climate conditions.

Public Lands

Question 5: In the hearing to consider Ryan Zinke's nomination for DOI Secretary, he told me that he was "absolutely against the sale or transfer of public land." In response to my questions for the record for the hearing to consider your nomination for DOI Deputy Secretary, you stated that you shared then-Secretary Zinke's "opposition to the sale or wide scale transfer of federal lands." And, in a March 6, 2019 speech to the North American Wildlife and Natural Resources Conference, you stated that the Trump administration opposes "large scale transfer [of public lands]."

After he was confirmed, then-Secretary Zinke conducted the largest rollback of federal land protection in our nation's history by proposing to slash the boundaries of the Bears Ears and Grand Staircase-Escalante National Monuments by more than two million acres. He also proposed to open the majority of U.S. coastal waters to oil and gas drilling in the largest offshore lease sale in American history and ordered the largest ever lease sale of the National Petroleum Reserve.

a. Do you believe it is appropriate for cabinet nominees, such as yourself, to lie to United States Senators during their constitutionally-mandated confirmation process?

Response: I do not agree with the premise of your question that Secretary Zinke lied. I believe it is unwise for any public official, whether elected or otherwise, to be untruthful.

b. Given that the Trump administration opposes the large scale sale or transfer of public lands, please outline your plan, including a timeline, for reversing the decisions to shrink the boundaries of the Bears Ears and Grand Staircase-Escalante National Monuments, open up U.S. coastal waters and land to increased oil and gas drilling, and conduct the largest ever lease sale of the National Petroleum Reserve.

Response: To be clear, the President's proclamations issued under the Antiquities Act did not sell or transfer any lands out of federal ownership. Rather, as you may be aware, the Department, as it did before the issuance of the proclamations, continues to manage the public lands that were included within the original boundaries of Bears Ears and Grand Staircase-Escalante National Monument. Similarly, the authorizations of conventional or renewable energy development do not include the sale or transfer of any lands out of federal ownership.

Oil and Gas Leases

Question 6: In January 2018, DOI issued an internal Instruction Memorandum on oil and gas leasing rules that would make the National Environmental Policy Act review processes optional for potential oil and gas leases, eliminate the requirement for oil and gas lease site visits by DOI officials, and shrink the lease sale parcel protest period from 30 days to 10 days.

In response to my questions for the record for the hearing to consider your nomination for DOI Deputy Secretary, you stated that you would "advance Secretary Zinke's conservation agenda in a manner that is rooted in and supported by input from a wide array of stakeholders, particularly those state and local communities most directly affected by the decisions the Department makes." Furthermore, in your testimony, you stated that you would "actively seek input and listen to varied views and perspectives to help ensure the conclusions [you] draw are well informed."

Given that the January 2018 Instruction Memorandum on oil and gas leasing rules would severely limit input from state and local communities most impacted by DOI's decisions on oil and gas leases, please describe your plan, including a timeline, for withdrawing the Memorandum and replacing it with guidelines that are "rooted in and supported by input from a wide array of stakeholders, particularly those state and local communities most directly affected by the decisions the Department makes."

Response: The Department values meaningful public participation and an efficient environmental review process in the implementation of its onshore oil and gas program. The BLM observed a trend regarding protests over the past several years in which the percentage of parcels protested from the original sale notice had increased dramatically. This 10 day period is in addition to multiple opportunities for public participation and engagement through the BLM planning process under FLPMA and NEPA processes.

Question 7: In my questions for the record for the hearing to consider your nomination for DOI Deputy Interior Secretary, I asked you if you could commit to the highest environmental protections for the Atlantic Region, Pacific Region, and Alaska Region, including the Beaufort, Chukchi, and North Aleutian Basin Planning Areas, identical with those provided by the Obama Administration, in your execution of President Trump's April 28, 2017 Executive Order to open our outer continental shelf to oil and gas drilling. You responded by stating that you were unaware of the details regarding the ongoing review of the Five Year Offshore Leasing Program.

Given that you have now had ample time to familiarize yourself with this plan, will you commit to the highest environmental protections for the Atlantic Region, Pacific Region, and Alaska Region, including the Beaufort, Chukchi, and North Aleutian Basin Planning Areas, identical with those provided by the Obama Administration? If so, please provide a plan, including a timeline, for withdrawing the 2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program and instead working to end all drilling in the Outer Continental Shelf. If not, why not?

Response: The Department's offshore energy development and safety activities are an important component of the Administration's policy of ensuring long term energy and economic security. The Administration's America First Offshore Energy Strategy calls for boosting domestic energy production to stimulate the Nation's economy and to ensure national security, while providing for responsible stewardship of the environment. The process of review and development of draft documents and proposals is currently ongoing. BOEM's management of the Nation's OCS oil and gas, marine minerals, and renewable energy resources will continue to be informed through environmental assessments, studies, and partnerships conducted under its Environmental Programs. These efforts are vital to ensuring that the impacts of OCS activities on the environment are understood and effective protective measures are put in place.

Question 8: In September 2018, DOI proposed eliminating safety rules for offshore oil and gas drilling that were adopted following the Deepwater Horizon accident, which killed 11 people and spilled 134 million gallons of oil into the Gulf of Mexico. This spilled oil decimated local economies and ecosystems. DOI now says that less rigid inspection and equipment requirements would have "negligible" safety and environmental risks.

a. Do you believe worker deaths are a negligible safety risk?

Response: No, I do not.

b. Do you consider 134 million gallons of spilled oil to be a "negligible" environmental risk? If not, please outline your plan, including a timeline, for withdrawing DOI's proposal to modify these safety rules.

Response: No, I do not. The Department's efforts, through the Bureau of Safety and Environmental Enforcement, to review the 2016 Well Control Rule for consistency with the

policy set forth in Executive Order 13795, are aimed at improving the rule by codifying longstanding internal policies; revising provisions from which requests for alternate procedures or equipment were routinely granted; adding explanatory text to clarify existing regulations; and revising or removing provisions that provided no additional safety benefit, but increased regulatory complexity. These efforts are informed by career subject matter experts as well as independent organizations. In the wake of, and in response to, the Deepwater Horizon tragedy, 14 different organizations issued 26 separate reports. These reports contained a total of 424 recommendations to BSEE. BSEE considered the recommendations of these 14 organizations as inputs from outside, independent experts. The effect of this input is reflected in the draft revised Well Control Rule in that no proposed revision conflicts with or ignores any of the 424 recommendations made by those organizations.

BSEE also solicited input from a variety of stakeholders to identify potential revisions to the regulations promulgated through the draft revised Well Control Rule that would clarify unclear provisions of the original rule or reduce regulatory burdens without impacting safety and environmental protection.

Question 9: On January 22, 2019 I joined 13 of my Senate colleagues in sending you a letter requesting information on the Bureau of Ocean Energy Management's (BOEM) decision to continue work on the National Outer Continental Shelf Oil and Gas Leasing Program during the partial government shutdown. DOI's response, sent by BOEM Acting Director Walter Cruickshank, ignored several important aspects of our letter, so I will repeat those questions here.

In the Explanatory Statement accompanying the Consolidated Appropriations Act of 2018, Congress provided $171,000,000 for BOEM in Fiscal Year 2018, and included full funding for the five-year offshore leasing program through regular appropriations. At the time of our letter, what specific accounts, subaccounts, and programs were DOI and BOEM relying on to fund the continuation of the oil and gas activities referenced in our letter? Were these funds being used for other activities under the BOEM December 2018 contingency plan following the start of the government shutdown, and if so, what were those activities? Were these funds being used for other activities under the normal operations of the government prior to the shutdown on December 22, 2018, and if so, what were those activities?

a. Were BOEM's essential functions of emergency response and support for Bureau of Safety and Environmental Enforcement permitting operations short-staffed during the ongoing shutdown? If so, could the carryover funds used to support the 40 on-call employees working on the National OCS program have otherwise been used to support these shorthanded essential functions?

Response: To support activities and employees identified as "exempt" under the January 2019 contingency plan, BOEM utilized the direct appropriations and offsetting collections funds provided by the Consolidated Appropriations Act, 2018, to the Ocean Energy Management

account, specifically the Conventional Energy, Environmental Programs, and Executive Direction budget activities. BOEM had a limited amount of these funds left over from FY 2018 (such funding is termed "carryover") that was therefore available to fund FY 2019 mission functions in a manner consistent with appropriations language. Because this carryover was appropriated in FY 2018 and not expired (direct appropriations are available for two years and offsetting collections are available until expended), it was not subject to the FY 2019 lapse in appropriations.

Carryover funds were not used for activities identified in the Contingency Plan published December 27, 2018. That version of the plan stated that none of the employees performing excepted functions were funded ("Number of exempt employees whose compensation is financed by a resource other than annual appropriations (carryover): None"). BOEM refers to guidance from the Office of Personnel Management on the determination and definition of excepted (vice exempt) functions and how employees performing those functions are paid during a lapse in appropriations. Prior to the shutdown on December 22, 2018, carryover funds had been used to support ongoing mission work similar to the work undertaken during the shutdown.

b. Was the scope of activities related to the Environmental Compliance Monitoring program, which include monitoring for compliance with the Clean Air Act and Clean Water Act, at all curtailed during the shutdown, and if so, to what extent? Please include any reductions in personnel, inspections or other relevant activities.

Response: There was no potential of short-staffing. BOEM's contingency plan provides for over 60 BOEM employees to be on call to respond to BSEE requests for support in emergency situations.

Land and Water Conservation Fund

Question 10: On February 15, 2019, you tweeted the following:

"There's a lot to agree on in the #public lands package from the senate. The Trump administration fully supports reauthorizing #LWCF and we included it in our budget last year."

President Trump's FY2020 budget request would slash the Land and Water Conservation Fund's (LWCF) budget by 95 percent. A 95 percent budget reduction is not consistent with support for the LWCF. If confirmed, will you commit to submitting a FY2021 budget request for full funding for the LWCF of $900 million?

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. LWCF has only been fully funded by Congress twice since its enactment in 1965. Whatever funding level Congress chooses for this program, the Department under my leadership will faithfully execute the goals of LWCF.

Questions from Senator Sanders

Question 11: If, like in FY19, Congress chooses to ignore the President's budget request and appropriate the LWCF budget at a higher level than the President's budget request in future fiscal years, will you commit to ensuring that all grant funds are awarded and delivered to their recipients in an expeditious manner?

Response: I commit to implementing the LWCF in accordance with laws passed by Congress.

Arctic National Wildlife Refuge

Question 12: Public Employees for Environmental Responsibility recently released a number of DOI documents which show that federal scientists believe there are significant gaps in scientific information related to fossil fuel extraction on the coastal plain of the Arctic National Wildlife Refuge (ANWR), and that numerous additional scientific studies related to vegetation, caribou, polar bears, birds, water, subsistence, cultural resources, fish, and public health are necessary before moving forward with fossil fuel extraction-related activities in ANWR. DOI attempted to hide these documents from the public, failed to clearly identify them in the draft Environmental Impact Statement (EIS) to implement an oil and gas leasing program within ANWR, and refused to release them in response to relevant Freedom of Information Act requests.

a. If confirmed, will you commit to publicly releasing any pertinent documents from federal scientists regarding this draft EIS? If so, please provide a timeline for releasing these documents.

b. Will you commit to ensuring that the draft EIS is revised and re-released to include all areas for which federal scientists believe more scientific research is necessary? If so, please provide a timeline for revising and re-releasing the draft EIS.

Response to a and b: DOI routinely releases scientific papers that have bearing on the Department's programs to the public, and this case is no different. The referenced documents were considered in the development of the leasing program and Draft EIS. The Department and the Bureau of Land Management are complying with the requirements of the authorizing legislation, the Tax Cuts and Jobs Act of 2017, the National Environmental Policy Act, and other relevant statutes, as we move toward conducting lease sales and providing for responsible development of these important resources. The agencies involved determined that data from the suggested studies were unnecessary to assure that the Draft EIS contained a robust environmental analysis of potential impacts of leasing for each of the referenced resources.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Stabenow

Question 1: It seems that I should remind you of the critical role the Interior Department plays in preserving the health of the Great Lakes, which hold 21% of the world's surface freshwater, provide drinking water to more than 30 million people, and support a $6 trillion economy.

The U.S. Fish and Wildlife Service, and the U.S. Geological Survey provide key research on water-quality and fish stocks, and conduct essential work to prevent the spread of invasive species like Asian carp that would decimate the Great Lakes.

But either this Administration has forgotten about this vital work, or considers it unimportant, because it has proposed a 14 percent budget cut to the USGS and a 16 percent cut to the US Fish and Wildlife Service for fiscal year 2020 – including a 28 percent cut to their efforts to combat Asian carp – which as I explained during your confirmation hearing for Deputy Secretary, are an eminent threat to the Great Lakes.

Given your and this administration's efforts to suppress science and exploit natural resources for mineral extraction and fossil fuel production, how can we trust you to protect the Great Lakes, especially when it's not even a priority for this President?

Response: I do not agree with the premise of your question. I support scientific integrity and have great respect for the work that Department scientists carry out. The Department is one of our country's principal stewards for the Great Lakes and we recognize the connection between the health of the Great Lakes Watershed and human health and the economy. The Department's budget request includes over $66 million for ecosystem work in the Great Lakes, and $107 million for invasive species work. This funding will support a number of federal and non-federal partnerships focused on critical restoration activities, including projects for aquatic invasive species management, including Asian Carp and habitat protection and restoration. Upon your request, if confirmed I would like to work with you on addressing the Asian Carp situation.

Question 2: During your confirmation hearing for Deputy Secretary, you promised me you would be "honest" to science – that you would look at it, evaluate it, and honor it. You said you were certain that scientists at the Interior Department were not under attack. However, under your leadership, the DOI has gone through great lengths to suppress science and limit public access to information – all, I might add, in the interest of fossil fuel projects that benefit companies you once represented as a private attorney. You signed Secretarial Order 3360 that abolished directions to use the best available science to increase understanding of climate change. On your watch, the DOI disbanded its Advisory Committee on Climate Change and Natural Resource Science; and proposed a rule restricting public access to information through the FOIA process – a proposal so alarming that even my Republican colleagues have called foul play. The DOI has deleted its top-level climate change web page, and has implemented a new screening process requiring scientific grants over $50,000 to be reviewed by political appointees.

Scientists at the Interior Department and 12 other federal agencies recently reaffirmed the real threat of climate change in the Fourth National Climate Assessment. Isle Royale National Park in Northern Michigan is already experiencing significant impacts from climate change. However, as I understand, the Interior Department has removed all mention of climate from its latest draft resource management plan for the park. President Trump said he doesn't believe federal scientists, and this administration has clearly proven it has different priorities. The President's budget for fiscal year 2020 once again promotes fossil fuels at the expense of clean energy and conservation; and during the Trump Shutdown, you recalled workers to make sure oil and gas permitting continued – even while safety and environmental review personnel and national park employees remained furloughed.

I would like to know what has changed, then, since we last spoke. Either you have forgotten the commitments you made to me and this Committee, or thought we wouldn't notice your office's blatant attacks on science. Can you square with me how all of these activities demonstrate your commitment to be fair to science, and not this administration's desire to promote fossil fuels over all else?

Response: I do not agree with the premise of your questions. Science plays a critical role in our decision making process as does the law. Within the Department of the Interior over the last two years, the number of formal complaints of breach of scientific integrity have decreased. In addition, to further our application of well-grounded science, I have appointed a career scientist to serve as the Science Advisor to the Acting Secretary/Deputy Secretary, and if I am confirmed, he will continue to serve in the Immediate Office of the Secretary. There is no question that scientific integrity should underpin agency actions. As I have stated, my view is that an agency's decisions should be predicated on the best information, including an evaluation of science and application of the law. I believe when scientific data is evaluated on its merits and used as a basis to make legal and policy decisions that are honest to the science, conflicts will be reduced and those decisions will be reliable and legally sound. I believe when the Department picks and chooses between data, it is obligated to articulate a reason why it has done so, and it must be able to connect its conclusions to the facts it finds in a rational manner.

This is why I issued Secretary Order 3369 last September promoting open science. This Order is intended to ensure that the Department of the Interior bases its decisions on the best available science and provides the American people with enough information to thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions.

Question 3: When Mr. Zinke testified before this Committee during his confirmation hearing, he gave us his "full commitment" to support the Land and Water Conservation Fund. He recognized it as an "important program" and pledged to work with Congress to make it permanent. But to the disappointment of many of my colleagues, he fell short of his commitments and instead defended a FY2019 Interior budget that proposed a 95 percent cut to the program.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

This year, both parties in Congress came together to permanently authorize the Land and Water Conservation Fund as part of the John D. Dingell Jr. Conservation, Management, and Recreation Act. The Senate overwhelmingly passed this far-reaching lands bill by a vote of 92 to 8, and the House passed it by 363 to 62. So it seems both sides agree that America's most important conservation and recreation program merits permanent authority.

LWCF has leveraged over $329 million to protect special places across Michigan. In fact, one of the largest LWCF investments in the country is our very own Sleeping Bear Dunes National Lakeshore, where LWCF has invested over $96 million to protect the park's 65-mile shoreline and 400-foot dunes for generations more of hikers, kayakers, wildlife watchers, and fishermen.

Mr. Bernhardt, weeks after signing a bill that permanently authorizes the LWCF, President Trump sent Congress a budget proposal that guts its funding in fiscal year 2020. I don't understand how you can be a champion for the LWCF and lead a department that has effectively called for eliminating it. Please explain.

Response: I support the Land and Water Conservation Fund, and applaud Congress for permanently reauthorizing this fund as part of the John D. Dingell Jr. Conservation, Management and Recreation Act, which became law just three weeks ago. LWCF has only been fully funded by Congress twice since its enactment in 1965. Whatever funding level Congress chooses for this program, the Department under my leadership will faithfully execute the goals of LWCF.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Cassidy

Question 1: Knowing much of the current focus in the Gulf for energy development is in deep water exploration and production, folks in my state are concerned about how we "revive" energy development activity specifically in shallow water and on the Outer Continental Shelf. Royalty rates for new leases on the Outer Continental Shelf (OCS) were lowered from 18.75 to 12.5 percent but according to the Bureau of Safety and Environmental Enforcement, shallow water bids decreased by 25 percent compared to August 2018.

What are your thoughts on additional measures that can be taken to stimulate further oil and gas exploration and production activity on the OCS?

Response: The prudent development of our abundant offshore energy resources is an important component of our economic prosperity. There are a number of factors that contribute to positive market conditions for development of these resources including the economy, energy prices, and the regulatory environment. As market conditions fluctuate, the Department has the statutory authority to adjust royalty rates for future offshore lease sales in accordance with federal law. The law also requires the Secretary to conduct lease sales on the OCS that ensure fair market value to the taxpayer. Within this legal framework, I will ensure that the Department continues to examine ways to improve our programs.

Question 2: It is my understanding that the U.S. Coast Guard and the Bureau of Ocean Energy Management (BOEM) have not been able to reach a satisfactory agreement to avoid siting offshore energy project leases in recognized maritime navigation lanes, including port access routes. Improper siting can result in collisions between vessels and derricks.

As we continue to expand our offshore energy footprint and seek to ensure the safety of mariners and energy project workers, will you direct BOEM to conclude a siting agreement for offshore leases with the U.S. Coast Guard as soon as possible?

Response: Yes, I will work to ensure an appropriate agreement is in place.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Martin Heinrich

Question 1: My office has been in regular contact with staff from your office and the Bureau of Reclamation involved in implementing the Aamodt Indian Water Rights Settlement. Specifically, the parties have been negotiating a path forward to resolve the forecasted cost-overrun associated with the construction of the Pojoaque Basin Regional Water System.

Can you confirm that the Bureau of Reclamation will allow for and move forward with limited construction of the System once the parties agree to a project design, cost, and cost allocation that addresses the forecasted System cost overrun, pending congressional authorization of an agreed upon ceiling raise?

Response: The Department has been working diligently with the parties to reach agreement, we are making progress and hope to reach an agreement soon. We are committed to working with you on next steps once that agreement is reached.

Question 2: The Compensatory Mitigation Instruction Memorandum issued by the Bureau of Land Management seems to contradict itself. The IM states "FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation as a condition of obtaining authorization for the use of the public lands." In the next paragraph, the IM states "Even if FLPMA authorizes the use of compensatory mitigation, it does not require project proponents to implement compensatory mitigation."

Which one is it? Does BLM have the authority or not to require compensatory mitigation?

Response: FLPMA does not provide the BLM with the authority to require compensatory mitigation as a condition of authorization for the use of public lands or to require that project proponents implement compensatory mitigation. Because of this, the IM referenced in your question clarifies that the BLM will consider compensatory mitigation only as a component of compliance with mitigation programs authorized under a state's policy or statute, federal law other than FLPMA, or when voluntarily offered by a project proponent.

Question 3: In 2018, the Mexican Wolf Recovery Program reported 21 wolf deaths, which is an alarmingly high number given last year's total population estimate for New Mexico and Arizona combined was only 114 Mexican wolves.

What is the Fish and Wildlife Service's plan to address and curb this high mortality rate of endangered Mexican wolves, especially with the data revealing more than half of these wolf mortalities were illegal kills?

Response: The Fish and Wildlife Service recorded 21 Mexican wolf mortalities in 2018, the highest documented number of mortalities to occur in a single year. In 2018 compared to prior

years, more Mexican wolves were radio-collared providing improved mortality detection, which is the likeliest explanation for the increase in documented mortalities. The Mexican wolf population continues to expand in terms of both area occupied and number of wolves. In addition to promoting Mexican wolf conservation through education and outreach programs, the FWS continues to investigate and help prosecute illegal Mexican wolf killings.

Question 4: I am glad to learn that the Department of the Interior is talking with the pueblos about conducting a pueblo-led study of tribal cultural heritage in the Greater Chaco Area. Such a study could demonstrate how beneficial it is for all the stakeholders in the development process to have tribal leaders involved from the very beginning.

However, I am concerned that the initial proposed study area is entirely within the buffer area where the pueblos (and the New Mexico Congressional Delegation) believe no development at all should take place.

Would you be willing to work with pueblo leadership to identify a more appropriate area for this first tribal cultural resource study outside the immediate buffer area around the park?

Response: As I indicated to you at the hearing, I would be more than happy to visit the site and meet with you and your constituents about potential development matters there at your request.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Hirono

Question 1: Recently in response to questions regarding the new grant review process being implemented over at DOI Mr. Scott Cameron commented that DOI was in the midst of finalizing the streamlining process.

When will the entire process be finalized and what will the new grant review process entail, including the established timeline for each grant review?

Response: The Department just published a proposed rule in the Federal Register, the Financial Assistance Interior Regulation, which addresses longstanding ethics issues identified by the Inspector General in the Department's past administration of grants. In addition, the Department is currently in the process of implementing a new grants management platform called GrantSolutions, which is an HHS product. This platform will allow standardization of business processes across the Department along with providing all of the grants information in a single repository. This will provide increased transparency, and greater efficiency in processing, accountability, and management. The complete transition to such a program will likely take years.

Question 2: In July of last year the Department of the Interior, under your leadership, and NOAA Fisheries proposed a set of sweeping regulatory changes to the Endangered Species Act that would drastically undermine this law and make it harder for imperiled species to recover.

What is the status of these proposed regulatory changes?

Response: The proposed revisions to regulations that implement portions of the ESA are in interagency review.

Question 3: One focus of the Endangered Species Act regulatory proposals released last summer by DOI and NOAA was the scope of impacts that could be considered when listing a species or when evaluating actions that could affect listed species and their designated critical habitats.

In particular, there are at least two proposed changes to the regulations that seem to minimize or eliminate consideration of the effects of climate change on species survival. In the proposed changes to Section 4 regulations, the definition of foreseeable future – which is used to determine whether to list a species as threatened – would be limited to "only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future *are probable.*"

In the proposed changes to Section 7 regulations, a planned activity by a federal agency would be exempt from consultation with the Services if that activity has "effects that are

***manifested through global processes*" if those effects "(i) cannot be reliably predicted or measured at the scale of the species' current range, or (ii) would result in very small or insignificant impact on the species or critical habitat, or (iii) are such that the risk of harm to a listed species or critical habitat is remote."**

These two components of the proposed regulations seem to allow the Services to circumvent consideration of climate change when enforcing the ESA, despite the widespread scientific consensus on the significant impacts of climate change on species and habitats. The ESA relies on use of the best available science, and its mandate is to prevent extinction, so is it not incumbent upon DOI to understand and incorporate information on climate change into its enforcement of this law?

Response: As I indicated at that hearing, I recognize the climate is changing and that man is contributing to that change and the science, including in the fourth assessment, indicates that there is a lot of uncertainty in projecting future climate conditions. An objective of this proposed revision to portions of the ESA implementing regulations is to clarify the meaning of certain ambiguous terms that are in the ESA itself but not defined in the Act. For example, the law allows us to list species as threatened when they are likely to become endangered in the foreseeable future, but it does not explain what "foreseeable future" means. We aim to provide the public and our federal agencies with a shared terminology that will increase regulatory certainty.

Question 4: The Department of the Interior is currently rewriting the regulations that protect threatened and endangered species. As part of those changes, you are proposing removing the current, comprehensive protections species receive when they are listed as threatened and instead only granting protections under a species-specific rule. At the same time, your Department has recommended slashing the funding appropriated to the Fish and Wildlife Service for their listing program.

How do you reconcile requiring the agency to do more work to make sure species receive the necessary protections and providing them with less money to do that work?

Response: The U.S. Fish and Wildlife Service's (USFWS) focus on the recovery of species has resulted in twelve species being delisted and downlisted, and nine species proposed for delisting and downlisting in this Administration. Our FY 2020 budget request includes $95 million dedicated to the recovery of species listed under the ESA. By recovering species and returning them to state and tribal management, we further our commitment to being a good neighbor by working with states and private landowners on conservation activities, and we are able to focus our limited resources on those species of greatest conservation need. With proposed FY 2020 Recovery funding, the USFWS anticipates proposing or finalizing 36 delisting or downlisting rules.

The request also includes $26.4 million for conservation and restoration activities that can help keep at-risk species off the threatened and endangered species lists and under the management of

our state and tribal partners. The USFWS is committed to strengthening delivery of conservation under the ESA by making it easier to work with the agency on proactive conservation efforts for species. By investing in reducing threats to species and their habitats before they become critically imperiled, future conservation efforts are likely to be less costly, more flexible, and more likely to result in successful conservation over time.

Question 5: On Tuesday the 26th the NYT reported that you personally intervened in the biological opinions for chlorpyrifos and two other pesticides and that four years of work by career scientists that was ready for review by the public was shelved subsequent to your intervention. The story included the newly released analysis by FWS career staff, which included the finding that almost 1400 endangered species are being put on the path to extinction by chlorpyrifos.

Is it true that under the Endangered Species Act a biological opinion must be based on the best available science at the time?

In the 18 months that you have been Deputy Secretary, how many biological opinions have you personally intervened in? How many times has the Department purposefully withheld or delayed the sharing of scientific information with the public? Is it also true that the Endangered Species Consultation Handbook does not contemplate Secretary level review of any biological opinion but instead that they are to be reviewed by the director of the USFWS?

Response: I serve as Deputy Secretary in an operating environment where there is no Senate confirmed Solicitor, Assistant Secretary for Fish and Wildlife and Parks, or a Director of the U.S. Fish and Wildlife Service. As a result, over the course of the last nineteen months I have found myself engaged in many activities that I would greatly prefer others were spending their time and focus on.

However, my lawful ability to be engaged in a vast array of activities within the Department of the Interior flows from the reality that I act with all of the Authority of the Secretary of the Interior. I serve as his or her alter ego. Theoretically, I can exercise all of the authority of the Secretary of the Interior.

I disagree with the factual premise of your question. Science related to the biological opinions for the pesticide related consultations have not been "shelved", but are undergoing further review and improvement.

Biological Opinions must be consistent with the law and science. They must comport with FWS' regulations. I am aware of no case in which the Department has purposely withheld or improperly delayed the sharing of scientific information with the public, where disclosure was appropriate during my tenure. I issued Secretary's Order 3369 last September promoting open science. This Order is intended to ensure that the Department of the Interior bases its decisions on the best available science and provides the American people with enough information to

thoughtfully and substantively evaluate the data, methodology, and analysis used by the Department to inform its decisions.

Under section 7(a)(2) of the ESA, each federal agency involved in the consultation is required to use the best scientific and commercial data available. The ESA assigns authority for implementing the Department's role in Section 7 to the Secretary, but that authority is also delegated to the Assistant Secretary of Fish Wildlife and Parks, and then to the Director of the Fish and Wildlife Service and further delegated by the Fish and Wildlife Service Manual to career senior executives or their subordinate managers. The Consultation Handbook reflects the Service's internal delegations, and decision authority for the pesticide biological opinions follow those delegations.

Question 6: I understand you have been realigning DOI regions to create 12 unified regions.

a. NPS has seven regions. Do you intend to hire 5 new regional directors or what is your plan?

Response: The unified boundaries went into effect in August 2018, pursuant to a Congressional reprogramming. As a result, the National Park Service consists of a headquarters office, twelve regions, and multiple parks and support units. In some cases a NPS Regional Director may oversee more than one region, or the NPS may choose to make other organizational changes over time.

b. How is this realignment impacting career staff and morale?

Response: The realignment enables all bureaus, except for the Bureau of Indian Affairs, the Bureau of Indian Education, and the Office of the Special Trustee for American Indians, who are not participating at this time, to operate on a common geographic framework. This structure should have a positive impact on employees as it improves communication and increases interaction among staff across bureaus, while also setting the stage for improving delivery of shared services. Inter-bureau teams were formed to provide input on all aspects of reorganization, and many participants found the interactions so useful that they have independently continued their regular meetings.

c. What is the opportunity cost and what impact does this realignment have on the bureau's budget?

Response: Establishing unified regions is designed to improve service delivery to the American public. The Department will leverage the unified regional structure to improve coordination and streamline business operations using shared services and best practices across the Department, focusing primarily on human resources, information technology, and acquisition services. Work is underway in 2019 to plan implementation, conduct analysis, and identify areas for

collaboration. The FY 2020 budget request for NPS includes $5.7 million to support the reorganization.

d. Will staff be asked to relocate?

Response: Currently there are no announced plans to relocate staff as part of implementing the Unified Regions.

Can you report on what precisely you are doing with the funds that were appropriated in FY19?

Response: The Department has been working with each of the relevant bureaus to finalize their 2019 implementation strategies since the funds became available in February 2019, and taking a careful and methodical approach in order to spend this money wisely. The 2019 funding will help implement changes needed within the bureaus to align their field operations to the new unified regional structure. Funds will be used to finalize proposals to relocate some staff out West. This 2019 funding will also be used to identify the best strategies for implementing smarter ways of doing business through shared services at the regional, bureau, and national levels.

The FY20 DOI Budget in Brief gives little detail as to how the proposed $28 million would be used. Please expand on how those funds would be used and justify how that number was arrived at.

Response: In FY 2020, the Department will continue implementing the reorganization effort, including standing up the unified regions, relocating a small number of headquarters staff and functions as appropriate, and improving operations through the use of technology, shared services and consistent best practices. We are working now to redesignate the bureau's prior regional assignments to the new boundaries. We expect to complete revisions to the Departmental Manual to reflect the unified regions this Spring.

We have received the first of three third party reviews of the Department's acquisition, information technology, and human capital services, which will help us identify the best business decisions and inform an implementation strategy that will improve the quality and efficiency of "back office" functions, allowing us to shift resources to public-facing work.

What agencies do you intend to move to the West?

Response: We propose to move some functions in the Bureau of Land Management closer to field operations. The USGS also proposes to move some leadership functions and staff to Colorado, phased over time.

Do you still intend to have Interior Regional Directors? What is your plan for having any centralized command?

Response: The current budget proposal contemplated Interior Regional Directors.

Please report on the progress to date in the four focus areas. What exactly do you mean by "collaborative conservation"? What is your plan for recreation and permitting?

Response: The six focus areas are the 3 mission areas (Recreation, Collaborative Conservation, and Permitting), along with three administrative areas with potential shared services in information technology, acquisition, and human resources. Regional teams of experts in each mission area have been working together for many months to plan and accomplish priority activities.

- Collaborative conservation involves leveraging the bureaus' individual efforts to plan and implement programs and activities in the areas of species and habitat conservation, such as creating wildlife corridors and invasive species management.

- Enhanced recreation has been a Departmental priority since the beginning of the reorganization effort. We recently launched an online portal that helps people find recreation opportunities on Department-managed lands from one web page. The plan is to continue to increase opportunities for recreation and afford the American people greater access to their public lands.

- Permitting is a mission area where the bureaus have already made great strides in improving customer service to our many permittees. Improvements include expedited, but still legally compliant timelines and more clear and concise documents. We are planning additional improvements as the bureaus continue to work together through the unified region structure to improve cooperation and communication at the local and regional levels. The local bureau leaders are most familiar with the issues and the landscape or context for those issues and the unified region structure ensures better informed decisions by focusing decision-making on the same geography and stakeholders.

Question 7: During your last nomination hearing I also asked how you will balance fossil fuel interests with the health of our economy and environment. You responded by saying "...my view is that policy decisions should be predicated on the evaluation of science and application of the law. If confirmed, I will make decisions with an open mind, actively seeking input and listening to varied views and perspectives."

From whom are you seeking input? Is it from your own internal experts and career scientists or is it from outside sources?

Response: I have a deep appreciation for the dedicated career public servants and the work that they do at the Department. In my personal statement submitted for my confirmation hearing, I indicated that I seek out varied views, even when we disagree. During my tenure as Deputy Secretary, I have had more meetings with environmental, conservation, and sporting groups than

any other type of external group. However, the vast majority of my information comes from internal experts, comments submitted by the public in regulatory proceedings, and other federal agency sources.

Question 8: In September 2018, the Bureau of Land Management made final its methane rule, which significantly altered the previous rule by eliminating its most significant requirements to reduce extensive waste of natural gas on federal lands. The 2016 rule was finalized after years of collecting data and stakeholder input as well as broad public support. This 2016 rule not only would have protected public health and reduced potent greenhouse gas emissions, it would have recouped millions of taxpayer dollars.

The Trump Administration's rule allows operators to waste a significant amount of taxpayer-owned methane every year during production. Adding to the waste, operators pay royalties on a fraction of wasted methane, costing taxpayers even more money. The BLM estimates that the new rule will cost taxpayers up to $80 million in lost royalty revenue and decrease natural gas production on federal lands by 250 billion cubic feet (bcf) over 10 years.

Why has the Department repealed this rule and put in place a rule that jeopardizes public health and costs taxpayers?

Response: I disagree with your premise that the 2010 rule "jeopardizes public health and costs taxpayers." The Department has provided a lengthy explanation to describe its action in the preamble to the rule which is available to you. Essentially, the explanation is that the rule was revised to reduce unnecessary compliance burdens; to be consistent with the Bureau of Land Management's existing statutory authorities; and to re-establish long-standing requirements that had been replaced. The final rule became effective on November 27, 2018. It is my personal view that the 2016 rule was an unlawful assertion of authority that Congress had not provided the Department, and if Congress wants to provide such authority it could do so at any time.

Question 9: In a recent speech at the North American Wildlife and Natural Resources Conference, you reportedly stated that the Trump administration "generally" opposes "large-scale transfer [of public lands]," but later added that "not everything is required to stay in federal hands."

If confirmed as Secretary, will you commit to not selling federal lands?

Response: My views on the disposal of public lands have not changed since I was confirmed to be Deputy Secretary of the Department of the Interior in 2017. As I noted at that time, I oppose the sale or wide scale transfer of federal lands. I will, however, faithfully execute the laws that Congress has put in place, including for example the provisions of the Federal Land Policy and Management Act. In addition the recent lands package contained a provision allowing certain Alaska Native Veterans of Vietnam to make land selections in Alaska.

Question 10: In September 2017, you were the lead on a Secretarial order restricting environmental reviews under the National Environmental Policy Act (NEPA). The order reduces the time allowed for staff to conduct environmental assessments, while also limiting the scope of the studies by setting and enforcing arbitrary page limits of 150 pages, or 300 pages for an assessment considered "complex."

Do you agree that many decisions that DOI makes are complex, involve many stakeholders and require thorough scientific reviews? If so, why is the agency taking steps to limit studies and require arbitrary page and time limits?

Response: The primary goal of the order referenced in your question is to streamline the Department's environmental reviews while continuing to meet or exceed the National Environmental Policy Act requirements for informed decision making and public participation in environmental impact statements and environmental assessments. The Department's own NEPA regulations at 43 C.F.R. 46.240 direct the bureaus to set time limits. The framework is intended to encourage bureau and Departmental leadership to carefully scrutinize internal processes, when warranted. The order does not set arbitrary limits. Instead, it establishes a process to secure a waiver for any EIS that will exceed either the time completion goal or page goal. I have approved many timeline and page limit waivers upon request.

Question 11: In response to a request from your former client the Independent Petroleum Association of America, DOI reversed longstanding, bipartisan interpretations of the MBTA in order to end all enforcement of incidental takes, and removing any liability by oil and gas companies under the law. Since that time, you have received opposition from a large bipartisan group of former DOI officials and Flyaway Councils representing most state wildlife agencies in the country, and the Justice Department has questioned the changes. Despite all of this, the M-Opinion stands as the Department's current interpretation of the law.

Does the Department have scientific data to back-up this opinion that stands at odds with so many others who have longstanding experience on the issue?

Response: Solicitor opinions are based on the law. On December 22, 2017, after reviewing the text, history, and purpose of the MBTA, the Solicitor issued M-37050, which takes into account the positions of various Federal Courts of Appeals.

M-Opinions are issued by the Solicitor and they are some of the most important and serious work undertaken by the Office of the Solicitor. This important legal guidance is to be based on the law, not outside influence. The work to develop an opinion is a thoughtful and studious exercise.

I did not personally review the research or the prior case law before M-37050 was issued. However, I reviewed a draft and possibly drafts of this legal opinion, that would become the legal guidance for the entire Department.

I certainly informed the drafters that I thought they had done a good job analyzing an important legal question.

It is my personal opinion that the direction and need for the Office of the Solicitor to issue an M-Opinion on the Migratory Bird Treaty Act and its application was the direct result of an M-opinion issued on January 10, 2017, which was suspended very early in the Trump Administration. It is my view that the opinion should not have been issued as the Solicitor was walking out the door, a Solicitor who would not be burdened by the responsibility of implementation and defense of that position, particularly in light of contrary case law in multiple Federal Courts of Appeals. Obviously, a broad and diverse set of interests care about the scope of lawful authority of the Migratory Bird Treaty Act and its overall application. Many have views on it, and Congress can impose any liability standard it would like to affirmatively impose.

I have neither a personal or professional relationship with the IPAA or its employees.

Question 12: Has the National Park Service conducted a damage assessment and report on the total costs to park system (e.g. damage to visitor centers, buildings, restrooms, equipment, roads, forests, trails, signs, petroglyphs, entry fee lost, etc.) due to the recent federal government shutdown? If so, can you provide the report to the committee and if not, can you provide to the Committee a complete accounting?

Response: The Department is currently evaluating impacts to natural resources and infrastructure that occurred during the period of this lapse of appropriations from available funding. The Department is also collecting information related to the amount of revenue obligated during this period, and anticipates that additional information will be available early in the third quarter of operations and will share this information with the Committee.

Question 13: Between 2011 and 2017, park visitation increased by 19%, but staffing has been reduced by 11%. How does the Department justify the decrease in staffing levels with record level visitation in our parks?

Response: There are many things that occurred during the prior administration that I find need careful review. This is certainly one of them. I do think we are too constrained on the front lines. The staffing levels proposed in the FY 2020 budget are an estimate of what could be funded and are not a specific target. Department-wide studies are underway looking at ways to manage back-office functions like human resources, information technology, and procurement more efficiently including developing and adopting consistent best practices across bureaus and offices to potentially reduce the overall personnel needs in these areas, thereby freeing up resources and staff who interact with the public. Additionally, numerous park employees have suggested to me that we reassess the policy of not hiring and paying for permanent employees with park fees perhaps that is something we need to consider.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Question from Senator Hyde-Smith

Question: On July 17, 2014, the Department of the Interior U.S. Fish and Wildlife Service Leadership Team issued a memorandum to Regional Refuge Chiefs regarding agricultural practices for wildlife management on national wildlife refuges. Specifically, the memorandum stated that neonicotinoid pesticides could not be a part of a farmer's integrated pest management plan. In addition, it directed refuge chiefs to phase out the use of genetically modified (GMO) crops unless it was determined their use is essential to accomplishing refuge purposes. On August 2, 2018, your office issued a memorandum withdrawing the neonicotinoid and GMO prohibition. I applaud your agency for that decision. Please provide an update and timeline as to when farmers will be allowed to incorporate GMOs and neonicotinoid pesticides into their integrated pest management plans when engaged in agricultural production on wildlife refuges.

Response: The August 2, 2018, memorandum reversed the decision to ban the use of genetically modified crops and neonicotinoid pesticides on National Wildlife Refuges. Refuges are now determining the use of those crops and pesticides on a case-by-case basis, in compliance with all relevant laws, rules, and regulations. Interested farmers are now requesting the use of genetically modified crops and neonicotinoid pesticides with the appropriate refuge manager. The USFWS is currently developing programmatic NEPA compliance on the use of genetically modified crops in the Southeast and anticipates completion in early 2020. In addition to NEPA compliance approximately 30 National Wildlife Refuges in the Southeast are initiating determinations for the use of genetically modified crops. The USFWS believes that genetically modified crops and neonicotinoids, consistent with these determinations, could be used on National Wildlife Refuges in crop year 2020.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator King

Question 1: As the leader of a Department that has been fraught with ethical violations in the past, it is imperative that the head of the Department to act with the upmost ethical standards beyond just what is required by law.

Beyond the letter of the law, how do you plan to enforce a culture of ethical standards at the Department of Interior?

Response: As I stated at my hearing, I believe that public trust is a public responsibility and that maintaining an ethical culture is critical. Enforcing a culture of ethical standards begins at the top. On a personal level, I have fully complied with my ethics agreement, the ethics laws, and my ethics pledge. I will continue to do so in the future.

In addition, because I believe the Department needs to move to a culture of ethical compliance throughout its offices and bureaus, I have begun to implement significant changes to the program. For years, the Department's Ethics program has been subject to a great deal of criticism, and oversight, and a lack of funding. To address this, we have hired highly qualified and experienced career leaders to lead this office. Since the beginning of this administration, we have hired a total of 42 career, professional ethics advisors, including: a new Designated Agency Ethics Official; an Alternate Designated Agency Ethics Official; a Financial Disclosure Supervisor; an Ethics Education and Training Supervisor with the Departmental Ethics Office; and new Deputy Ethics Counselors at the National Park Service, BLM, and other bureaus and offices. We have elevated the Designated Agency Ethics Official to directly reporting to the Solicitor--the third-ranking person in the Department. And, by the end of Fiscal Year 2019, we will have doubled the number of career ethics officials that the previous administration hired in its entire eight years.

With these efforts, we are starting to make tremendous strides in creating a better and more robust ethics program at the Department, but we have much ahead of us. I look forward to working with you, if confirmed, as we continue these efforts.

Question 2: As I mentioned during the hearing, the entire Maine state federal delegation, Maine's legislature and Maine's Governor are all opposed to any activities relating to the development or extraction of fossil fuel off the coast of New England.

Please explain in detail how the Bureau of Ocean Energy Management is legally obligated to take the comments, opinions and laws of a coastal state and the coastal state's elected representatives and officials into account when making decisions on all geological and geophysical surveying permits.

Response: Geological and geophysical surveying activities are conducted for a wide array of activities on the OCS aside from locating subsurface oil and gas resources. For instance, G&G activities are used to: map the seafloor for OCS wind turbine placement, identify OCS sand

resources for coastal restoration and beach replenishment, and identify subsea hazards. Aside from our permitting process, under the Coastal Zone Management Act, a state can review those OCS permits identified in its Coastal Zone Management Program for federal consistency. If a state wants to review a permit that is not identified, it follows NOAA's procedures to ask permission to review and add the permit to its Program. The state must concur with or object to the lessee's consistency certification within a designated time period. If the state does not meet the deadline, CZMA provisions render the permit consistent. If the state concurs, BOEM can approve the permit, and the lessee can begin activities.

If the state objects, the bureau is prohibited from approving the permit, and the applicant can appeal the state's decision to the Department of Commerce, or the applicant can amend the proposed activities and associated permit application and resubmit it to BOEM for approval and to the state for federal consistency review. There are also public commenting opportunities during the development of the associated National Environmental Policy Act analyses.

Question 3: If the Department of Interior was directed to permit oil and gas leasing on the Outer Continental Shelf, could these leases be permitted to go through and be acted on over the wishes of any state governor, state legislature, congressional delegation or state law relevant to the permitted activities?

Response: Under the OCS Lands Act, the states have several specific roles in the decision-making process for OCS leasing and development. First, in deciding whether to include an area in the leasing program, the laws goals and policies of affected states, as identified by the Governor, is one of eight factors the Secretary must consider. Governors are afforded specific review and comment opportunities under the Act. For individual lease sales, the Secretary shall accept recommendations of the Governor if he determines that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.

As for development of existing leases, any activity must be consistent with the enforceable policies of an affected state's coastal management program, pursuant to the Coastal Zone Management Act. In addition to review of OCS permitting for geological and geophysical surveying as described in my previous response, under the Coastal Zone Management Act, states can review OCS exploration and development and production plans for Federal consistency. If a state objects to the plans, BOEM is prohibited from approving it. In this instance, the lessee can appeal the state's decision to the Department of Commerce or the lessee can amend the proposed activities associated permit and resubmit it to BOEM for approval and to the state for Federal consistency review.

Question 4: In a House Appropriations Subcommittee on the Interior hearing in April 2018, Former Secretary of Interior Ryan Zinke said that "in the state of Maine, most of the areas, A) you don't have the resources off of the coast, B) you don't have infrastructure in place and, C) most of the districts along the coast and communities are not in favor of oil and gas."

a. Given these factors as reported from the Interior Department, can you report that the New England coastline will not be suitable for drilling or geological and geophysical surveying?

Response: Right now, the Department continues to analyze and assess information gathered during the comment period following the publication of the Draft Proposed Program. The three factors you mention are among those taken into account during the National OCS Program development. It is the Department's obligation to consider any and all laws, comments and views of affected states and communities. Of the eight factors outlined in the Outer Continental Shelf Lands Act, which include the views of each affected state, the Secretary may not ignore the other factors and base his decision on one factor. However, it is reasonable to assume that the three factors you reference would weigh heavily on any analyses.

I do recognize that there are certain areas where these activities are appropriate and there are areas where they are not. As I reaffirmed to you at my confirmation hearing, the views of states and Congressional delegations will be a major factor in the balancing analysis I will take, should I be confirmed, in making these decisions. I will further commit to you that any leasing or permitting decision I make will be grounded squarely within the law, consistent with the Department's mission, informed by public engagement and supported by science.

Geological and geophysical survey permitting is a separate process with stringent requirements and mitigation measures that ensure safe and appropriate geological and geophysical activities in specific areas of the Outer Continental Shelf.

b. Are these three factors determining factors in where fossil fuel development leasing and permitting will be done?

Response: Under Section 18 of the OCS Lands Act, the Secretary must consider eight factors when determining the size, timing, and location of potential oil and gas lease sales:

- Geographical, Geological, and Ecological Characteristics
- Equitable Sharing of Developmental Benefits and Environmental Risks
- Location with Respect to Regional and National Energy Markets and Needs
- Other Uses of the Sea and Seabed
- Laws, Goals, and Policies of Affected States Identified by Governors
- Interest of Potential Oil and Gas Producers
- Environmental Sensitivity and Marine Productivity
- Environmental and Predictive Information

The Secretary has the discretion to assign the weight he deems appropriate to these eight factors when considering the timing and location of the areas to be included in the National OCS Program.

Nomination of David Bernhardt
Senate Energy and Natural Resources Committee
March 28, 2019

Questions from Senator Cortez Masto

Question 1: It was recently reported that during the 35-day government shutdown earlier this year, BLM under your supervision, approved 267 drilling permits and 16 leases applied for by oil and gas companies – two of your former lobbying clients were among the companies that received approval for their applications. This is during a time that you recalled some, but not all, furloughed workers who regularly review these applications. It is also my understanding that such supporting staff that contribute to these application reviews, such as those that review details concerning environmental and cultural resources, remained furloughed during this time period.

On February 15, you were quoted in the Carlsbad Current-Argus that work on oil and gas development continued "...because the fees were still coming in...There's also safety. We need to keep things safe. We need to keep things going. I'm very comfortable with what we did during the lapse. We could do more next time."

Why was this safety ethic not applied to your decision to keep the National Parks opened, which we now know led to acts of vandalism, destruction of precious resources like we've seen in Joshua Tree National Park, the safety of countless visitors travelling through the parks without park rangers available to act in case of emergencies, or the safety of visitors?

Response: I do not agree with the premise of your question. A safety ethic was applied to decisions involving the National Park Service. For the National Park Service, the length of the lapse in appropriations brought significant challenges. As a result, I instructed that the National Park Service's contingency plan be modified to ensure people were safe, park resources were protected, and at least some employees would be guaranteed to receive a paycheck on a set date. I also directed that fees collected by the NPS under the Federal Lands Recreation Enhancement Act (FLREA) be used to address resource protection and visitor safety concerns, including issues with restrooms and sanitation, trash collection, road maintenance, campground operations, law enforcement and emergency operations, and basic visitor services. Use of these funds allowed the American public to safely visit many of our national parks while providing these treasures additional protection and allowing NPS to meet its dual mandate of resource protection and visitor enjoyment.

With respect to comparisons between the BLM and the NPS, the two agencies operate on different funding regimes and have different options for dealing with a general lapse in appropriations. I would be happy to visit about this matter in detail with you in the future if you want to do so.

Question 2: Since you became Deputy Secretary of the Interior in August 2017, the Bureau of Land Management has offered more than 17 million acres of public land for oil and gas leasing. This is clearly in line with this Administration's priority of making oil and gas development the dominant use of our public lands, no matter the negative impact it might have on any other value public lands yield to the American people, like recreation or renewable energy development.

Nation-wide, only 15 percent of the acreage offered for lease at competitive sale under your watch has been purchased. That number is even lower in Nevada where, since August 2017, industry has purchased just 9 percent of the acreage offered for lease and, of that, 83 percent was purchased for the minimum bid of $2 per acre.

Besides reflecting low demand, this apparent practice of indiscriminately opening lands for leasing allows speculators to purchase leases noncompetitively for incredibly small sums of money while preventing management for other, perhaps better uses.

What is the intention behind this Administration continuing to push to broadly open federal public lands when it appears to be decoupled from industry demand?

A. Should you be confirmed, can you please identify the concrete steps you will take to ensure that oil and gas leasing takes place only on lands that:

(1) Have real potential for mineral development; and

(2) are not better managed for other uses like wildlife, recreation, or wilderness?

B. Can you identify the concrete steps you will take to prevent land speculators from obtaining oil and gas leases on public lands?

Response: This year we saw some lease sales where the bids exceeded $81,000 per acre. The overall collections of revenue has markedly increased on our watch. As you know, the BLM is required by law to offer eligible lands that are available for lease by competitive auction on a quarterly basis. As part of the competitive leasing process, the BLM accepts informal expressions of interest and noncompetitive presale offers from the public that identify potential federal minerals for leasing.

Regarding which lands may be made available for development, the Federal Onshore Oil and Gas Leasing Reform Act of 1987 abolished criteria requiring that lands offered be within "Known Geologic Structures" and instead relies on the free market to establish value. The BLM is also required by law to hold quarterly lease sales wherever eligible lands are available for leasing and for which leasing is in the public interest. In this regard, the BLM relies on current land-use planning documents to ensure a balance between environmental protection and opportunities for responsible resource development.

As Secretary I will ensure that all of our onshore leasing activities are carried out diligently and in compliance with appropriate laws and BLM leasing development requirements.

Question 3: Last year, the Trump Administration issued new guidance pertaining to land parcel reviews for oil and gas leasing, as part of their "Energy Dominance" agenda to open more public lands for potential leasing. Prior to the Administration's new guidance, the

public was assured a 30-day comment period before parcels were included on a lease sale list and 30-days to file a protest.

Under the new guidance, comment periods are optional and the protest period is 10-days. Do you view the public input process as an impediment to leasing?

A. By reducing the public's ability to have a say in the process, what public benefit does this new guidance serve?

B. Would you commit to a meaningful public participation and environmental review process for all oil and gas leasing activities, including by restoring the previous process, as well as any other measures necessary to fully engage the public, tribes, local governments, state wildlife agencies, and affected landowners?

Response: The Department values meaningful public participation and an efficient environmental review process in the implementation of its onshore oil and gas program. The BLM observed a trend regarding protests over the past several years in which the percentage of parcels protested from the original sale notice had increased dramatically. This 10 day period is in addition to multiple opportunities for public participation and engagement through the BLM planning process under FLPMA and NEPA processes.

Question 4: I have been hearing concerns from sportsmen and women, the conservation community, tribal communities, local state legislators, and many others about the potential loss of bighorn sheep habitat and a loss of public recreational and conservation access that would result from the proposed military expansion within the Desert National Wildlife Range. The proposed expansion could cumulatively lead would lead to a loss of over 1 million acres of land directly managed or co-managed by the U.S. Fish and Wildlife Service, much of which is habitat currently managed for the benefit of emblematic Nevadan desert species, like bighorn sheep. While I certainly acknowledge the need for facilities that ensure military readiness, I am concerned about how the existing 4,531 square miles of federal land already under the military's control is supposedly no longer sufficient, and I am concerned about the potential effects such a land withdrawal would have on wildlife habitat.

To what extent have you been involved in these discussions, and, understanding this is ultimately a decision to be made by Congress, what is the position of the Department of the Interior on the military's request to take over administrative control of one of the largest expanses of protected wildlife habitat in the lower 48 states?

A. Are you concerned about such a large amount of land being re-purposed from under your purview?

Response: I am advised that the current legislative withdrawal for Nellis Air Force Range, which was overlaid upon the original Desert National Wildlife Refuge, is set to expire in 2021,

that efforts are underway to prepare for renewal of that withdrawal, and that some of the alternatives evaluated include expansion of the withdrawal. This effort is led by the Department of the Air Force, and includes coordination with the Bureau of Land Management and the Fish and Wildlife Service. I understand that this matter will ultimately be resolved by the Congress, and Congress would need to consider the potential benefits and detriments to the public in rendering a decision.

Question 5: Ethics laws require officials to avoid even the appearance of a conflict of interest or partiality. Given that 20 of your former clients have actively lobbied Interior since the beginning of 2017, how are you able to adequately meet this standard as Secretary?

Response: I have fully complied with my ethics agreement, the ethics laws, and my ethics pledge and I will do so in the future. I have actively sought and consulted with the Department's designated ethics officials for advice on particular matters involving clients and I have implemented a robust screening process to ensure that I do not meet with my former firm or former clients to participate in particular matters involving specific parties that I have committed to recuse myself from. My senior staff is well versed in matters at the Department and they either manage such matters without any consultation with me, or re-route issues to different offices within the Department of the Interior, as appropriate.

Question 6: I understand that you are barred from closed meetings with your former lobbying clients. But that doesn't stop former clients like the Petroleum Association from lobbying Interior—instead, they are presumably meeting with your subordinates. Have you ever had a conversation before or after they met with a Petroleum Association representative? How do you ensure you are not influencing your subordinates actions with your former clients?

Response: My subordinates are here to work on behalf of the American people. They have no interest in benefitting my former clients, nor do I.

Recusals are designed to ensure that the recused individual does not participate in a particular matter involving specific parties where one of the parties was either a represented client or an employer. They do not restrict the entity who had the relationship from petitioning other employees of the United States Government. In the Immediate Office of the Secretary, my entire team is very sensitive of the need for me to not participate in any particular matter involving specific parties in which my former firm or a former client is either a party or represents a party.

I have made clear we are here to work for the American people, no one else. Indeed, once a subordinate is involved with a particular matter in which a former client is a party or my former firm represents a party there is no communication between us on that particular matter involving specific parties. As a result, I do not provide any communication to them before or after meetings, and I would likely not ever be aware of the reality that such a meeting was occurring absent public disclosure.

In addition, in the unlikely event a matter is raised directly to me, I would explain that I am recused and that they need to ensure they are going through the appropriate person on my staff on such particular matters involving specific parties and, if necessary, the Department's Ethics Office, to determine how best to handle a matter.

Question 7: A recent New York Times report suggests you effectively continued lobbying on behalf of one of your former clients, Westlands, after you became Deputy Interior Secretary. You participated in agency actions that advanced the same goals that you pursued as a lobbyist, potentially in violation of your ethics pledge. You lobbied for years to limit the application of a specific Endangered Species Act protections that limit water diversion to your former lobbying client, and then you joined government and effectively continued those efforts. Did it occur to you that advancing the same goals at Interior that you used to promote as a lobbyist would create the appearance that you are using your official authority to benefit your former client?

A. Will you commit to asking for written ethics advice on any matters related to your former lobbying clients and lobbying activities, and to instructing your subordinates to do the same before the purposed action takes place?

B. What other mechanisms do you intend to put in place to ensure subordinates track and avoid potential ethics violations, especially if they enter government with a long list of former lobbying clients who conduct business in front of the agency?

C. Will you commit to recusing from matters involving your former lobbying clients for the entirety of your tenure at Interior?

Response: I have not "effectively continued lobbying" on behalf of any former client at any time. I have fully complied with my ethics agreement, the ethics laws, and my ethics pledge and I will do so in the future. I have actively sought and consulted with the Department's designated ethics officials for advice on particular matters involving former clients and I have implemented a robust screening process to ensure that I do not meet with my former firm or former clients to participate in particular matters involving specific parties that I have committed to recuse myself from.

I have committed to securing written advice before taking any action involving former lobbying clients, and instructing my subordinates to do the same.

When the referenced New York Times article was published, I requested that the Departmental Ethics Office examine prior ethics advice and counsel I had received involving the issues raised in the article. The DEO carefully and extensively reviewed the matter and provided a memorandum explaining that "broad matters" are outside the scope of paragraph 7 of the Ethics Pledge. Furthermore, when responding to a letter from Senator Warren and Senator Blumenthal on this same issue and article, the Department's Designated Agency Ethics Official concluded that my actions have complied with all applicable ethics laws, rules and other obligations,

including the requirements of President Trump's Ethics Pledge. A copy of that correspondence is included for your convenience.

Attachment to Response

to Sen. Cortez Masto

Question 7

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

March 25, 2019

The Honorable Elizabeth Warren
United States Senate
317 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Richard Blumenthal
United States Senate
706 Hart Senate Office Bldg.
Washington, DC 20510

Dear Senator Warren and Senator Blumenthal:

Thank you for your letter of February 26, 2019 regarding your expressed concerns of the actions of the Acting Secretary of the Department of the Interior (Department or DOI). Your letter references an article published by the *New York Times* on February 12, 2019 discussing the Acting Secretary's legal practice prior to joining the Department as Deputy Secretary in August 2017. Specifically, you asked about the Acting Secretary's involvement with the Central Valley Project (CVP) in California and whether his actions, "violated his ethics pledge and federal conflict of interest regulations by participating in decisions that directly affect a former client." As discussed below, we have found the Acting Secretary's actions have complied with all applicable ethics laws, rules and other obligations, including the requirements of President Trump's Executive Order 13770 entitled, "Ethics Commitments by Executive Branch Appointees" (Jan. 28, 2017) (Ethics Pledge).

As an initial matter, I would like to take this opportunity to inform you and your colleagues of recent developments and improvements with the DOI ethics program that will enhance our ability to prevent conflicts of interest at all levels of the Department. Since our arrival at the Department in April 2018, Deputy Director Heather Gottry and I have overhauled an ethics office that was previously characterized by both DOI employees and numerous Inspector General reports as passive and ineffectual. With the strong support of the Acting Secretary, we have spearheaded a long-overdue build-out of the Departmental Ethics Office (DEO) as well as the ethics programs of the various Bureaus and Offices throughout the Department.

Our top priority as non-partisan, career ethics officials, is to prevent conflicts of interest at the DOI and ensure that DOI employees are aware of and comply with all applicable ethics laws and standards. We understand the importance of our program in helping the American people have trust and confidence in the lawful and proper administration of the Department.

Please know that my office takes all credible allegations of potential ethics violations by any DOI employee very seriously and allegations against senior officials are an extremely high priority. Consequently, when the *New York Times* published its article, I immediately sought to understand the facts and carefully analyzed the applicable legal authorities. We note that the Acting Secretary also immediately requested that my office look into this matter and to examine the prior ethics advice and counsel he had received.

Of critical importance, we note that the Acting Secretary does not have any financial conflicts of interest related to either his former client, Westlands Water District, or the CVP generally. As reflected in his Ethics Agreement, dated May 1, 2017, and his Ethics Recusal memorandum, dated August 15, 2017, the Acting Secretary was required under 5 C.F.R. § 2635.502 to recuse for one year (until August 3, 2018) from participating personally and substantially in any "particular matters involving specific parties" in which Westlands Water District was a party or represented a party. Because Westlands Water District is an agency or entity of a state or local government it is excluded from the requirements of paragraph 6 of the Ethics Pledge. Additionally, consistent with U.S. Office of Government Ethics (OGE) guidance, it was determined that the law the Acting Secretary had lobbied on for Westlands Water District, Public Law 114-322, should not be categorized as a "particular matter" because the law addressed a broad range of issues and topics. Therefore, because he did not lobby on a "particular matter" for Westlands Water District, he was not required to recuse himself under paragraph 7 of the Ethics Pledge either from "particular matters" or "specific issue areas" related to Public Law 114-322. Accordingly, the Acting Secretary's recusal related to Westlands Water District ended on August 3, 2018, and was limited in scope to "particular matters involving specific parties" under 5 C.F.R. § 2635.502.

I have enclosed the transmittal e-mail from me to the Acting Secretary with a detailed memorandum attached wherein the DEO consolidates and memorializes prior ethics advice and guidance on certain issues involving the CVP. Of particular importance for a legal analysis of the scope of the Acting Secretary's recusals related to Westlands Water District, the memorandum analyzed and categorized certain issues involving the CVP and related State Water Project as "matters," "particular matters of general applicability," and "particular matters involving specific parties." As I state in the transmittal e-mail, these legal categorizations are critical in determining whether an official complies with the various ethics rules. As reflected in the memorandum, we determined that both the Notice of Intent to Prepare a Draft EIS and the development of a 2019 Biological Assessment are appropriately categorized as "matters," not "particular matters." Our determinations are supported by Federal law and OGE opinions and though the matters involved may sound like "particular matters" or "specific issue areas," they are legally broad matters outside the scope of 5 C.F.R. § 2635.502. As noted above, the Acting Secretary's lobbying on behalf of Westlands Water District on Public Law 114-322 was not categorized as a "particular matter" and did not require an additional recusal under paragraph 7 of the Ethics Pledge. Therefore, the Acting Secretary was not required under either 5 C.F.R. § 2635.502 or the Ethics Pledge to recuse from participation in either the Notice of Intent to Prepare a Draft EIS or the development of a 2019 Biological Assessment. Attached, for your convenience, please find the legal reference materials addressed in the memorandum – I believe our interpretation and application of the relevant legal authorities is both reasonable and prudent.

I have advised the Acting Secretary, at his request, that he and his staff should continue to consult with the DEO prior to participating in any matter that is potentially within the scope of his Ethics Agreement, Ethics Recusal memorandum, the Ethics Pledge, or any other ethics law or regulation. Additionally, to eliminate any potential for miscommunication, I have instructed my staff that all ethics guidance to the Acting Secretary be in writing prior to his participation in a decision or action that reasonably appears to come within the purview of his legal ethics obligations.

In closing, and to be responsive to your final requests, the DEO has not issued any authorizations or ethics waivers to the Acting Secretary or other Interior officials on the topics you raised, nor have we referred any matters to the IG on these topics. It is worth noting that the Acting Secretary meets with me and my senior staff frequently and that I have a standing meeting with him once a week to discuss any significant ethics issues at the DOI. Pursuant to the Acting Secretary's direction, my senior staff also meets with his scheduling staff and other top officials twice a week, at a minimum, to ensure we are aware of who the Acting Secretary is meeting with and the issues he will be discussing. These efforts, supported by the Acting Secretary and his staff, are designed to ensure his compliance with applicable ethics rules and protect the integrity of the Department's programs and operations. My experience has been that the Acting Secretary is very diligent about his ethics obligations and he has made ethics compliance and the creation of an ethical culture a top priority at the Department.

If you have any other questions or concerns, please do not hesitate to contact me.

Sincerely,

S. de la Vega

Scott A. de la Vega
Director, Departmental Ethics Office and
Designated Agency Ethics Official

Enclosure

BISON CONNECT

de la Vega, Scott <scott.delavega@sol.doi.gov>

Legal Categorization of CVP/SWP Issues

1 message

de la Vega, Scott <scott.delavega@sol.doi.gov> Tue, Feb 19, 2019 at 8:03 PM
To: David Bernhardt <dwbernhardt@ios.doi.gov>
Cc: Daniel Jorjani <daniel.jorjani@sol.doi.gov>, Heather Gottry <heather.gottry@sol.doi.gov>, "McDonnell, Edward" <edward.mcdonnell@sol.doi.gov>
Bcc: Scott de la Vega <scott.delavega@sol.doi.gov>

Acting Secretary Bernhardt:

Recently, you requested that my office examine prior ethics advice and counsel you had received from the Departmental Ethics Office (DEO) in regards to issues, decisions, and/or actions pending at the DOI involving the Central Valley Project (CVP) and the State Water Project (SWP) in California. You have also asked for my recommendations on any additional best practices to implement to fully ensure that you are in compliance with your Ethics Agreement, Executive Order 13770 (the "Ethics Pledge"), and all other ethics laws and regulations.

Attached, please find a detailed memorandum wherein the DEO reviews and explains the prior guidance you have received from this office and, of utmost importance, categorizes CVP and SWP issues as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties." These legal categorizations are critical in determining whether an official complies with the various ethics rules. Reports that conflate these categories are sometimes confusing, however, the legal analysis and conclusion that Public Law 114-322 is not a "particular matter" and that both the Notice of Intent to Prepare a Draft EIS and the development of a 2019 Biological Assessment are "matters," not "particular matters" are supported by Federal law and Office of Government Ethics opinions. Consequently, these broad matters are outside the scope of paragraph 7 of the Ethics Pledge despite colloquially sounding like a "specific issue area."

Going forward, you and your staff should continue to consult with my office in advance of your participation in any matter that is potentially within the scope of your Ethics Agreement, the Ethics Pledge, or any other ethics laws or regulations. In addition, to eliminate any potential for miscommunication, misunderstanding or error, I have instructed my staff that all guidance to you be in writing before you decide to participate in a decision or action that reasonably appears to come within the purview of your legal ethics obligations. The implementation of these two recommendations will facilitate addressing any future question raised by your participation in a "matter," "particular matter of general applicability," or a "particular matter involving specific parties."

Finally, I am attaching reference materials that highlight many of the concepts discussed in the memorandum. Please let me know if you have any questions or would like to discuss any of these issues further and thank you for your conscientious approach to ethics compliance.

Scott A. de la Vega

Director, Departmental Ethics Office

& Designated Agency Ethics Official

Office of the Solicitor

U.S. Department of the Interior | MIB 5309

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6 attachments

Legal Categorization Memo CVP 2.19.19.pdf
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United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MEMORANDUM

TO: Scott A. de la Vega, Director, Departmental Ethics Office & Designated Agency Ethics Official

FROM: Heather C. Gottry, Deputy Director for Program Management and Compliance, Departmental Ethics Office & Alternate Designated Agency Ethics Official

Edward McDonnell, Deputy Director for Ethics Law and Policy, Departmental Ethics Office

DATE: February 19, 2019

RE: Ethics Guidance on How to Categorize Issues, Decisions, and/or Actions Pending at DOI and Involving the Central Valley Project and State Water Project as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

This memorandum consolidates and memorializes prior ethics advice and guidance provided by the Department Ethics Office (DEO) about whether issues, decisions, and/or actions pending at the U.S. Department of the Interior (DOI) involving the Central Valley Project (CVP), and coordination of operations with the State Water Project (SWP) should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" pursuant to the definitions of those terms in ethics regulations and guidance from the Office of Government Ethics (OGE). 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"* (Oct. 4, 2006) (OGE DO-06-029). As a general matter, while it is clear that there are many broad policy determinations impacting the entire CVP and/or SWP that would not constitute either "particular matters of general applicability" or "particular matters involving specific parties," case-by-case factual analysis and ethics review will be required in most circumstances in order to determine whether an issue, decision, or action involving the CVP and/or SWP and pending before the DOI should be categorized as a "matter," "particular matter of general applicability," or "particular matter involving specific parties". This categorization will in turn govern whether certain DOI employees may participate in the issue, decision, or action involving the CVP and/or SWP and pending before the DOI, or whether they are required to disqualify themselves or recuse from participation pursuant to 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the requirements of paragraphs 6 and 7 of Executive Order 13770

entitled, "Ethics Commitments by Executive Branch Appointees" (Jan. 28, 2017) (Ethics Pledge).

This memorandum first provides background information on the CVP and the SWP. Second, the memorandum provides a summary of the applicable and governing legal definitions of "matters," "particular matters of general applicability", or "particular matters involving specific parties" found in the ethics regulations and other OGE guidance. Third, this memorandum applies these definitions to the deliberations and discussions that resulted in the publication of a *Notice of Intent to Prepare a Draft Environmental Impact Statement, Revisions to the Coordinated Long-Term Operation (LTO) of the CVP and the SWP, and Related Facilities* (*Draft EIS NOI*) in the Federal Register on December 29, 2017, or the DOI process that resulted in the *Reinitiation of Consultation on the Coordinated LTO of the CVP and SWP, Final Biological Assessment* (*2019 BA*), dated January 2019, in order to determine whether they should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" as defined in the ethics regulations. Finally, this memorandum provides general guidance on how the DEO categorizes issues, decisions, and/or actions involving the CVP and/or SWP pending before the DOI as "matters," "particular matters of general applicability," or "particular matters involving specific parties."

I. Background of the CVP and SWP

As set forth in *2019 BA*, Congress authorized the U.S. Bureau of Reclamation (Reclamation)[1] to develop the CVP for the public good of delivering water and generating power, while providing flood protection to downstream communities and protecting water quality for water users within the system.[2] *2019 BA* at 1.1.1., 1-3. In its authorization to Reclamation, Congress envisioned that the CVP would be composed of a large, complex project integrated across multiple watersheds that Reclamation would operate to ensure the most beneficial use of water released into the system. *Id.*

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[1] Reclamation's mission is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public. *2019 BA* at 1-1. Reclamation is the largest wholesale water supplier in the United States, and the nation's second largest producer of hydroelectric power. *Id.* Its facilities also provide substantial flood control, recreation, and fish and wildlife benefits. *Id.* In California, Reclamation operates the CVP in coordination with the State of California Department of Water Resources' (DWR) operation of the SWP. *Id.* The mission of the DWR is to manage the water resources of the State of California, in cooperation with other agencies, to benefit the state's people and to protect, restore, and enhance the natural and human environment. *Id.*

[2] The Rivers and Harbors Act of 1935 authorized Reclamation to take over the CVP from the State of California and its initial features were authorized for construction. In 1992, Public Law 102-575 included Title 34, the Central Valley Project Improvement Act (CVPIA) that refined water management for the CVP. *2019 BA* at 1.1.1, 1-4. The CVPIA added fish and wildlife mitigation, protection, and restoration as a project purpose with the same priority as water supply, and also added fish and wildlife enhancement as a project purpose with the same priority as power generation. *Id.* In addition, the CVPIA prescribed a number of actions to improve conditions for anadromous fish and provided for other fish and wildlife benefits. The Secretary of the Interior assigned the primary responsibility for carrying out the many provisions of CVPIA to Reclamation and the U.S. Fish and Wildlife Service (USFWS).

Currently, Reclamation operates the CVP consistent with the CVP's federally authorized purposes, which include: river regulation; improvement of navigation; flood control; water supply for irrigation and municipal and industrial uses; fish and wildlife mitigation, protection, and restoration; power generation; and fish and wildlife enhancement. *Id.* at 1.1.1, 1-4. The CVP consists of 20 dams and reservoirs that together can store nearly 12 million acre-feet (MAF) of water. *Id.* at 1-1. Reclamation holds over 270 contracts and agreements for water supplies that depend upon CVP operations. *Id.* Through operation of the CVP, Reclamation delivers water in 29 of California's 58 counties. *Id.* The CVP serves farms; homes, and industry in California's Central Valley as well as the major urban centers in the San Francisco Bay Area; it is also the primary source of water for much of California's wetlands. In addition to delivering water for farms, homes, factories, and the environment, the CVP produces electric power and provides flood protection, navigation, recreation, and water quality benefits. While the CVP's facilities are spread out over hundreds of miles, the CVP is financially and operationally integrated by the DOI as a single large water project.

The SWP is a water storage and delivery system of reservoirs, aqueducts, powerplants, and pumping plants operated by the State of California.[3] *2019 BA* at 1-1. Its main purpose is to store and distribute water to 29 urban and agricultural water suppliers in Northern California, the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California. Of the contracted water supply, 70 percent goes to urban users and 30 percent goes to agricultural users.

In 1986, Congress directed the Secretary of the Interior to execute the Coordinated Operations Agreement (COA) between the CVP and SWP. *2019 BA* at 1.1.1, 1-4. The COA between the U.S. Government and the State of California was signed by DWR and Reclamation in 1986. The COA defined CVP and SWP facilities and their water supplies, coordinated operational procedures between the DOI and the State of California, identified formulas for sharing joint responsibility between the DOI and the State of California for meeting Delta standards (such as those in D-1485), identified how unstored flow is shared between the CVP and SWP, and established a framework for exchange of water and services between the projects between the CVP and SWP. *Id.* In 1999, the California State Water Resources Control Board issued D-1641, obligating the CVP and SWP to the 1995 Bay-Delta Water Quality Control Plan. Revised in 2000, D-1641 provided standards for fish and wildlife protection, municipal and industrial water quality, agricultural water quality, and Suisun Marsh salinity. *Id.*

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[3] The Burns-Porter Act, approved by the California voters in November 1960 (Water Code [Wat. Code] §§ 12930–12944), authorized issuance of bonds for construction of the SWP. DWR's authority to construct state water facilities or projects is derived from the Central Valley Project Act (CVPA) (Wat. Code § 11100 et seq.), the Burns-Porter Act (California Water Resources Development Bond Act) (Wat. Code §§ 12930–12944), the State Contract Act (Pub. Contract Code § 10100 et seq.), the Davis-Dolwig Act (Wat. Code §§ 11900–11925), and special acts of the State Legislature. *2019 BA* at 1.1.1, 1-4. In 1978, the SWRCB issued Water Rights Decision 1485 (D-1485). D-1485 required spring outflow and set salinity standards in the Delta while setting standards for the diversion of flows into the Delta during winter and spring. *Id.*

The complex and varied activities of DOI with respect to the CVP and SWP are governed by a variety of laws, including the Water Infrastructure Improvements for the Nation Act (WIIN Act) (Pub. L. 114–322, 130 Stat. 1628). Section 4001 of the WIIN Act directs the Secretary of the Interior and the Secretary of Commerce to provide the maximum quantity of water supplies practicable to CVP contractors and SWP contractors by approving, in accordance with federal and applicable state laws, operations or temporary projects to provide additional water supplies as quickly as possible, based on available information. Consistent with authorizations and directions provided by Congress, the DOI routinely analyzes and takes action on a wide variety of both macro and micro operational and programmatic issues, decisions, and/or actions involving the operation of the CVP and coordination with the SWP.

II. Applicable Legal Definitions of "Matters," "Particular Matters of General Applicability," and "Particular Matters Involving Specific Parties"

For purposes of analyzing under ethics laws, regulations, and rules whether and to what extent a DOI employee is required to recuse from participating in a policy, operational and/or programmatic issue, decision, and/or action involving the operation of the CVP and coordination with the SWP depends on whether it is categorized as a matter, particular matter of general applicability, or particular matter involving specific parties. These are terms of art with established meanings defined in ethics laws and regulations as well as guidance from the OGE. 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"* (Oct. 4, 2006).

A. Definition of "Matter"

In the context of the ethics statutes and regulations, the unmodified term "matter" can refer to virtually all Government work from the broadest to the most narrow issue, decision, and/or action. OGE DO-06-029 at 10-11. The broad definition of "matter" also includes any "particular matter", including "particular matters of general applicability" or "particular matters involving specific parties." *Id* at 11. However, if an issue, decision, and/or action pending at the DOI can be categorized as a "particular matter of general applicability" or a "particular matter involving specific parties" then there are specific recusal and disqualification requirements that will apply to a DOI employee's participation in the issue, decision, and/or action in question. Such recusal and disqualification requirements may arise if a DOI employee has a financial interest that could be directly and predictably effected by the issue, decision, and/or action, if the DOI employee has a "covered relationship" (such as former employer, former client, spousal employer, *etc.*) with one of the parties involved in the issue, decision, and/or action, or if the DOI employee lobbied on the same particular matter prior to employment with the DOI. These recusal and disqualification requirements will generally not apply if the issue, decision, and/or action is not categorized as either a "particular matter of general applicability" or a "particular matter involving specific parties."

While the term "matter" is not affirmatively defined in the ethics regulations, for purposes of determining whether the specific recusal and disqualification requirements which apply to "particular matters of general applicability" or "particular matters involving specific

parties" are applicable to an issue, decision, and/or action pending at the DOI, a working definition can be derived from examples in the ethics regulations of the types of issues, decisions, and/or actions that OGE does not consider to be "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3)(Ex. 1)(regulations changing the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants); 5 C.F.R. § 2641.201(h)(2)(Ex. 3)(formulation of policies for a nationwide grant program for science education programs targeting elementary school children is not a particular matter).

Therefore, we apply the generally accepted definition that the consideration of broad policy options that are directed to the interests of a large and diverse group of persons, such as health and safety regulations applicable to all employers or a legislative proposal for tax reform would not qualify as either "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3). Hereinafter, for purposes of the analysis and discussion in this memorandum, the term "matter" is used to describe the consideration of broad policy options that are directed to the interests of a large and diverse group of persons.

Therefore, if an issue, decision, and/or action pending at the DOI is (1) broad and (2) directed to the interests of a large and diverse group of persons, then the recusal and disqualification requirements found in ethics laws, regulations, and rules for "particular matters of general applicability" and "particular matters involving specific parties" would not apply, and a DOI employee will generally be able to fully participate in the issue, decision, and/or action.[4]

B. Definition of "Particular Matter"

The term "particular matter" means any matter that involves "deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons." 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.103(a)(1).[5] The term "particular matter", however, "does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2635.402(b)(3). Based on this definition it is clear that "particular matters" may include matters that do not involve specific parties and are not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000) (Van Ee).[6]

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[4] The term "matter" is found in the one-year post-employment restrictions in 18 U.S.C. § 207(c) and (d) for "senior employees" and "very senior employees." Therefore, those restrictions will be applicable even to issues, decisions, and/or actions at the DOI that are (1) broad and (2) directed to the interests of a large and diverse group of persons. 5 C.F.R. § 2635.402(b)(3).

[5] Please note that for purposes of the Ethics Pledge, the term "particular matter" has the same meaning as set forth in 18 U.S.C. § 208, and 5 C.F.R. § 2635.402(b)(3). Ethics Pledge, Sec. 2(r).

[6] In Van Ee, the D.C. Circuit construed 18 U.S.C. § 205(a)(2), which bars executive branch employees and others from "act[ing] as agent or attorney" for others "before any department, agency, [or] court" in connection with certain "covered matters" in which "the United States is a party or has a direct and substantial interest." The D.C. Circuit concluded that 18 U.S.C. § 205(a)(2) does not prohibit the communications which the plaintiff in the case, a career employee, proposed to make:

The term "particular matter" generally covers two categories of matters: "(1) those that involve specific parties, and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession." OGE DO-06-029 at 8. These two types of particular matters are generally referred to as "particular matters involving specific parties" and "particular matters of general applicability," and the definitions of each type of "particular matter" is discussed further below starting with the broader category of "particular matter of general applicability."

1. Definition of "Particular Matter of General Applicability"

A "particular matter of general applicability" is broader than a "particular matter involving specific parties." 5 C.F.R. § 2641.20(h)(2). A "particular matter of general applicability" does not involve specific parties, but is a matter that focuses on the interests of a discrete and identifiable class, such as a particular industry or profession. *See* OGE DO-06-029 at 8. Examples of "particular matters of general applicability" includes rulemaking, legislation, or policy-making, as long as it is narrowly focused on a discrete and identifiable class such as a particular industry or profession. For instance, a "particular matter of general applicability" at the DOI might include a regulation prescribing safety standards for operators of oil rigs in the Gulf of Mexico or a regulation applicable to all those who have grazing permits on DOI public lands. On the other hand, a land use plan covering a large geographic area and affecting a number of industries (*e.g.*, agriculture, grazing, mining, timber, recreation, wind, solar, and/or geothermal power generation, *etc.*) would not generally constitute a "particular matter of general applicability" but, rather, would still fall within the broader definition of "matter," as it constitutes a broad policy directed to the interests of a large and diverse group of persons.

2. Definition of "Particular Matter Involving Specific Parties"

The narrowest type of matter under the ethics laws, regulations, and rules is a "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but OGE has advised that the meaning remains the same, focusing primarily on the presence of specific parties.[7] OGE

> We hold that § 205 is inapplicable to Van Ee's uncompensated communications on behalf of public interest groups in response to requests by an agency at which he is not employed for public comment on proposed environmental impact statements related to land-use plans; these proceedings lack the particularity required by the statute, will not result in a direct material benefit to the public interest groups, and do not create a real conflict of interest or entail an abuse of position by Van Ee.

Van Ee, 202 F.3d at 298-99. In reaching this conclusion, the D.C. Circuit analyzed the components required in order for an agency issue, action, and/or decision to be categorized as a "particular matter." This analysis is not limited to 18 U.S.C. § 205, but rather it provides guidance on how to categorize agency issues, actions, and/or decisions for other ethics statutes and regulations, including, but not limited to 18 U.S.C. § 203, 18 U.S.C. § 207, 18 U.S.C. § 208, and 5 C.F.R. § 2635.502.

[7] For example, in the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used. 18 U.S.C. § 207(a)(1), (a)(2). Similar language is used in 18 U.S.C. §§ 205(c) and 203(c), which describe the limited restrictions on representational activities applicable to

DO-06-029 at 10-11. As set forth in 5 C.F.R. § 2641.201(h)(1), a particular matter involving specific parties "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case." Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties. 5 C.F.R. § 2641.201(h)(2). The regulations further advise that "[i]nternational agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests." *Id.; see also* OGE DO-06-029 at 2-5.

Additionally, in its preamble to the final rule implementing 5 C.F.R. part 2641, the OGE stated that "OGE does not necessarily equate 'Government program' with 'particular matter involving specific parties.' For one thing, some Government programs are not even, in and of themselves, particular matters involving specific parties. For example, a Government program to understand the causes of a particular disease is not, in and of itself, a particular matter involving specific parties, even though the program may involve several grants, contracts or cooperative agreements all designed to support or implement different aspects of the overall program. *See, e.g., OGE Informal Advisory Letter* 80 x 9; 5 C.F.R. § 2637.201(c)(1) (Ex. 4)." *Post-Employment Conflict of Interest Restrictions Action: Final Rule*, 73 Fed. Reg. 36168, 36177 (June 25, 2008).

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special Government employees. In contrast, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); *see OGE Informal Advisory Letter 00 x 12*. OGE has also issued certain regulatory exemptions, under 18 U.S.C. § 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Additionally, the distinction between "particular matters involving specific parties" and broader types of particular matters (*i.e.*, those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g). OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain special Government employees. 5 C.F.R. § 2635.807(a)(2)(i)(4). The Ethics Pledge states that for purposes of paragraphs 6 and 7 the term "particular matter involving specific parties" will be defined as set forth in 5 C.F.R. § 2641.201(h) "except that it shall also include any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." Ethics Pledge, Sec. 2(s).

III. Analysis of Whether the *Draft EIS NOI* or *2019 BA* Should Be Categorized as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

A. The *Draft EIS NOI* is a "Matter"

On December 29, 2017, Reclamation published the *Draft EIS NOI*[8] which set forth Reclamation's intent to prepare a programmatic environmental impact statement for analyzing potential modifications to the continued LTO of the CVP, for its authorized purposes, in a coordinated manner with the SWP, for its authorized purposes. *Draft EIS NOI*, 82 Fed. Reg. 61789 (Dec. 29, 2017). Reclamation proposed to evaluate alternatives that maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species. *Id.* Reclamation sought suggestions and information on the alternatives and topics to be addressed and any other important issues related to the proposed action. *Id.*

After review, the DEO has determined that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* do not constitute a "particular matter" (either a "particular matter involving specific parties" or a "particular matter of general applicability") and, therefore, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and

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[8] Under the National Environmental Policy Act (NEPA), codified at 42 C.F.R. §4321 *et seq.*, a Federal agency must prepare an environmental impact statement (EIS) if it is proposing a major federal action significantly affecting the quality of the human environment. In this case, Reclamation and DWR propose to continue the long-term operation of the CVP and SWP to maximize water supply delivery and optimize power generation consistent with applicable laws, contractual obligations, and agreement; and to increase operational flexibility by focusing on non-operational measures to avoid significant adverse effects. Reclamation and DWR propose to store, divert, and convey water in accordance with existing water contracts and agreements, including water service and repayment contracts, settlement contracts, exchange contracts, and refuge deliveries, consistent with water rights and applicable laws and regulations. The proposed action includes habitat restoration that would not otherwise occur and provides specific commitments for habitat restoration.

The EIS process begins with publication of a Notice of Intent (NOI), stating the agency's intent to prepare an EIS for a particular proposal. The NOI is published in the Federal Register, and provides some basic information on the proposed action in preparation for the scoping process. The NOI provides a brief description of the proposed action and possible alternatives. It also describes the agency's proposed scoping process, including any meetings and how the public can get involved. The NOI will also contain an agency point of contact who can answer questions about the proposed action and the NEPA process. The scoping process is the best time to identify issues, determine points of contact, establish project schedules, and provide recommendations to the agency. The overall goal is to define the scope of issues to be addressed in depth in the analyses that will be included in the EIS.

interpretations of Environmental Impact Statements and is supported by the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in Van Ee.

As discussed in Van Ee, whether an administrative proceeding is a "particular matter" is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Van Ee, 202 F.3d at 309. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties is the proceeding considered a particular matter. *Id.* In Van Ee, the D.C. Circuit examined whether the public comment phase on a proposed EIS related to land use plans was a "particular matter," and determined that because the focus of the decision to be made by the agency following the public comment phase on the proposed EIS was not on the interests of particular groups or individuals, the public comment phase of a proposed EIS on a land use plan did not constitute a "particular matter." *Id.*

In this instance, Section VIII of the *Draft EIS NOI* identifies the following purposes: (1) to advise other agencies, CVP and SWP water users and power customers, affected tribes, and the public of Reclamation's intention to gather information to support the preparation of an EIS; (2) to obtain suggestions and information from other agencies, interested parties, and the public on the scope of alternatives and issues to be addressed in the EIS; and (3) to identify important issues raised by the public related to the development and implementation of the proposed action. *Draft EIS NOI*, 82 Fed. Reg. at 61791. Similar to the facts underlying the D.C. Circuit's decision in Van Ee, the deliberations and discussions leading up to the publication of the *Draft EIS NOI* and the potential impact of the EIS itself was not focused on the interests of a discrete and identifiable class of persons and, accordingly, it should not be categorized as a "particular matter" but rather as a "matter" as defined above.

In Van Ee, the D.C. Circuit noted the types of proposed actions generally set forth in EISs are focused on diverse sets of interests, such as how to reconcile or balance recreational, conservation, and commercial interests in a land use plan covering considerable territory. Van Ee, 202 F.3d at 309. Similarly, Section II of the *Draft EIS NOI*, notes that Reclamation intends to analyze potential modifications to the LTO of the CVP, in a coordinated manner with the SWP, to achieve the following goals:

- Maximize water supply delivery, consistent with applicable law, contracts and agreements, considering new and/or modified storage and export facilities.
- Review and consider modifications to regulatory requirements, including existing Reasonable and Prudent Alternative actions identified in the Biological Opinions issued by the USFWS and NMFS in 2008 and 2009, respectively.
- Evaluate stressors on fish other than CVP and SWP operations, beneficial non-flow measures to decrease stressors, and habitat restoration and other beneficial measures for improving targeted fish populations.
- Evaluate potential changes in laws, regulations and infrastructure that may benefit power marketability.

Draft EIS NOI, 82 Fed. Reg. at 61790. Additionally, Section III of the *Draft EIS NOI* states: "[t]he purpose of the action considered in this EIS is to continue the operation of

the CVP in a coordinated manner with the SWP, for its authorized purposes, in a manner that enables Reclamation and California Department of Water Resources to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species." *Id.*

Sections II and III of the *Draft EIS NOI* establish that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, focused on the broad policy option of remedying reduced availability of water for delivery south of the Delta by continuing operation of the CVP in a coordinated manner with the SWP in a manner that enables Reclamation and DWR to maximize water deliveries and optimize marketable power generation, consistent with applicable laws, contractual obligations, and agreements, while augmenting operational flexibility by addressing the status of listed species.

These discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, they are not appropriately categorized as "particular matters" as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) ("particular matters involving specific parties"), or 5 C.F.R. § 2641.201(h)(2) ("particular matters of general applicability"). Rather, they were focused on the broad policy of restoring, at least in part, water supply, in consideration of all of the authorized purposes of the CVP as discussed in greater detail above. Accordingly, the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, are appropriately categorized as "matters" and do not trigger the specific recusal and disqualification requirements that are applicable when an issue, decision, and/or action pending at the DOI is a "particular matter of general applicability" or a "particular matter involving specific parties." Consistent with this, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

B. The *2019 BA* is a "Matter"

On August 2, 2016, Reclamation and DWR[9] requested reinitiation of Section 7 consultation under the Endangered Species Act of 1973 (ESA), codified at 16 U.S.C. § 1531 *et*

[9] While 5 C.F.R. § 2641.201(h)(1) includes "application" as an example of a "particular matter involving specific parties," in this case, DWR should not be considered an applicant as the word is traditionally defined. While DWR was listed as an applicant for the reinitiation of Section 7 consultation in 2016, they are not included as an author of the *2019 BA*, Indeed, based on available information, DWR is not applying for a specific permit or license to carry out an activity through the consultation process. Instead, DWR, along with BOR, requested reinitiation of formal consultation under Section 7 of the ESA on the continued operation of the CVP and the SWP, both of which are massive water projects serving multiple purposes throughout a large portion of the State of California. Further, under the consultation process set forth in Section 7 of the ESA, only federal agencies can request consultation from the USFWS and the NMFS to review the impacts proposed significant federal action. 16 U.S.C. § 1536. Accordingly,

seq., with the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) on the Coordinated LTO of the CVP and SWP.[10] *2019 BA* at 1-1. The USFWS accepted the reinitiation request on August 3, 2016, and the NMFS accepted the reinitiation request on August 17, 2016. *Id.* The *2019 BA* supports Reclamation's consultation under Section 7 of the ESA, and documents the potential effects of the proposed actions[11] to provide

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identification of DWR as part of the "application" for the reinitiation request does not act to convert the *2019 BA* into a "particular matter involving specific parties."

[10] As codified in 16 U.S.C. § 1531, the purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. It is administered by the USFWS and the NMFS. The USFWS has primary responsibility for terrestrial and freshwater organisms, while the responsibilities of NMFS are mainly marine wildlife such as whales and anadromous fish, such as salmon. Under the ESA, species may be listed as either endangered or threatened. "Endangered" means a species is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). "Threatened" means a species is likely to become endangered within the foreseeable future. 16 U.S.C. § 1532(20). All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened. For the purposes of the ESA, Congress defined species to include subspecies, varieties, and, for vertebrates, distinct population segments.

The ESA directs all Federal agencies to work to conserve endangered and threatened species and to use their authorities to further the purposes of the ESA. Section 7 of the ESA, called "Interagency Cooperation," is the mechanism by which Federal agencies ensure the actions they take, including those they fund or authorize, do not jeopardize the existence of any listed species or adversely modify or destroy critical habitats. 16 U.S.C. § 1536. Under Section 7, Federal agencies must consult with the USFWS (and/or NMFS as appropriate) when any action the agency carries out, funds, or authorizes (such as through a permit) *may affect* a listed endangered or threatened species. This process often begins as informal consultation. *Id.* A Federal agency, in the early stages of project planning, approaches the USFWS (and/or NMFS as appropriate) and requests informal consultation. Discussions between the agencies may include what types of listed species may occur in the proposed action area, and what effect the proposed action may have on those species. If it appears that the agency's action may affect a listed species, that agency may then prepare a biological assessment to assist in its determination of the project's effect on a species. 16 U.S.C. § 1536(c).

When a Federal agency determines, through a biological assessment or other review, that its action is *likely to adversely affect* a listed species, the agency submits to the USFWS (and/or NMFS as appropriate) a request for formal consultation. During formal consultation, the USFWS (and/or NMFS as appropriate) and the agency share information about the proposed project and the species likely to be affected. Formal consultation may last up to 90 days, after which the USFWS (and/or NMFS as appropriate) will prepare a biological opinion on whether the proposed activity will *jeopardize* the continued existence of a listed species. The USFWS (and/or NMFS as appropriate) has 45 days after completion of formal consultation to write the opinion. Please note that these timeframes may be extended upon agreement between the action agency and the services the USFWS (and/or NMFS as appropriate).

[11] The proposed action analyzed in the *2019 BA* centers on a Core Water Operation that provides for Reclamation and DWR to operate the CVP and SWP for water supply and to meet the requirements of State Water Resources Control Board (SWRCB) Water Right Decision 1641 (D-1641), along with other project purposes. *2019 BA* at 1-2. The Core Water Operation consists of operational actions that do not require subsequent concurrence or extensive coordination to define annual operation. *Id.* The proposed action also includes conservation measures designed to minimize or reduce the effects of the action on listed species. *Id.* In addition, the *2019 BA* and resulting consultation evaluates actions that will require

operational flexibility for the CVP and SWP, large-scale government programs that divert, store, and convey water throughout California for various purposes, on federally listed endangered and threatened species that have the potential to occur in the action area and critical habitat for these species. *Id.* It also fulfills consultation requirements for the Magnuson-Stevens Fishery Conservation and Management Act of 1976 for Essential Fish Habitat. *Id.*

As set forth in the *2019 BA*, several factors resulted in Reclamation requesting reinitiation of consultation under the ESA, including the apparent decline in the status of several listed species, new information related to recent multiple years of drought, and the evaluation of best available science. https://www.usbr.gov/mp/bdo/lto.html. The coordinated long-term operations of the CVP and SWP are currently subject to 2008 and 2009 biological opinions issued pursuant to Section 7 of the ESA. *2019 BA* at 1.1.2, 1-4-5. Each of these biological opinions included Reasonable and Prudent Alternatives to avoid the likelihood of jeopardizing the continued existence of listed species, or the destruction or adverse modification of critical habitat that were the subject of consultation. *Id.* In the *2019 BA*, Reclamation proposes to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements, and to augment operational flexibility by addressing the status of listed species. https://www.usbr.gov/mp/bdo/lto.html.

After review, the DEO has determined that the *2019 BA* should not be categorized as either a "particular matter involving specific parties" or a "particular matter of general applicability," but rather as a "matter" as defined for purposes of this memorandum. Therefore, DOI employees would not be required to recuse from participation in the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and interpretations of Biological Assessments (BAs) and Biological Opinions issued pursuant to the requirements of the ESA, and is supported by the decision of the D.C. Circuit in Van Ee.

Generally, a BA is a compilation of the information prepared by or under the direction of a Federal agency as part of its Section 7 consultation concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. 16 U.S.C. § 1536(c). A BA evaluates the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determines whether any such species or habitat are likely to be adversely affected by the proposed actions and is used in determining whether formal consultation or a conference is necessary. *Id.*

The *2019 BA* analyzes and includes as an environmental baseline, the past and present impacts of all federal, state, and private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of certain state or private actions that are contemporaneous with the consultation in process, including the past and present

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further development and may change during repeated implementation as more information becomes available (*i.e.*, "adaptive management"). Adaptively managed actions will require additional coordination prior to implementation through program-specific teams established by Reclamation and DWR with input and participation from partner agencies and stakeholders. *Id.*

impacts of CVP and SWP operations under 2008 and 2009 biological opinions. *2019 BA* at 3-1-21. The BA also analyzes the effects of multiple physical, hydrological, and biological alterations that have negatively affected the species and habitat considered in the consultation with the USFWS and NMFS, including past, present, and ongoing effects of the existence of the CVP structures, as well as disconnected floodplains and drained tidal wetlands, levees, gold and gravel mining, gravel, timber production, marijuana cultivation, large woody debris, alterations to address effects, fish passage, spawning and rearing habitat augmentation, tidal marsh restoration, *etc. Id.* The *2019 BA* also sets forth a series of proposed actions that – if implemented – will work to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements, and to augment operational flexibility while minimizing impact to listed species. *2019 BA* at 4-1-62; 5-1-498; 6-1-4.

Additionally, applying the D.C. Circuit's decision in Van Ee, BAs generally may not even constitute "particular matters," let alone "particular matters involving specific parties." As noted by the D.C. Circuit in Van Ee: "...whether an administrative proceeding is a 'particular matter' . . . is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties [is it a particular matter]." Van Ee, 202 F.3d at 309. As discussed above, the *2019 BA* is not focused on a probable particularized impact on discrete and identifiable parties. Instead, the *2019 BA* evaluates the potential effects of the action on a number of listed and proposed species and designated and proposed critical habitats, and determines whether any such species or habitat are likely to be adversely affected by the proposed actions and is used in determining whether formal consultation or a conference is necessary. *Id.* Moreover, the numerous proposed actions that the *2019 BA* discusses will work together to provide additional operational flexibility for the continued operation of the CVP and SWP, both of which, as described above in greater detail, are federal and state government projects that are enormous in geographical extent and impact on the people, wildlife, and environment of California. As a result, the proposed actions under review in the *2019 BA* take into account and have the potential to impact a wide and diverse sets of interests, and the *2019 BA* analyzes how to reconcile or balance recreational, conservation, and commercial interests in the operation of the CVP and SWP.

Accordingly, even though some of the issues, decisions, and actions undertaken by the DOI with respect to the preparation, development, drafting, discussion, and submission of the *2019 BA* may have a discernible impact on the interests of certain identifiable parties, the overall impact and focus of the proposed actions and decisions to be made are of a much broader nature, including the avoidance of jeopardizing the continued existence of a listed species and the destruction or adverse modification of designated critical habitat in connection with the continued operation of the CVP and the SWP. Consistent with this, the DOI's work on the *2019 BA* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, it is not appropriately categorized as a "particular matter" as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) ("particular matters involving specific parties"), or 5

C.F.R. § 2641.201(h)(2) ("particular matters of general applicability"). The *2019 BA* considered a wide range of diverse issues related to and the interests of the environmental, agricultural, industrial, municipal, business, academic, and recreational sectors. As result, the DOI's work on the *2019 BA* involved multifaceted discussions among representatives of those numerous sections and industries in a process that more closely resembles legislative policymaking than contracting, litigation, or negotiations. The issues, decisions, and actions undertaken by the DOI with respect to the preparation, development, drafting, discussion, and submission of the *2019 BA* are therefore appropriately characterized as a "matter" as defined for purposes of this memorandum, and DOI employees would not be required to recuse from participation in the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

IV. Guidance On Assessing Whether Issues, Decisions, and/or Actions Involving the CVP and/or SWP Are "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

As set forth in greater detail above, the DEO has determined that both the *Draft EIS NOI* and the *2019 BA* are appropriately categorized as "matters" as defined in this memorandum. It is important to note that as work on the *Draft EIS NOI* and the *2019 BA* continues, it is possible that certain aspects of each, such as the implementation of certain underlying actions, interpretation of specific requirements, or the application of decisions on one sector, could develop into "particular matters of general applicability" or "particular matters involving specific parties." This, in turn, can implicate the recusal or disqualification requirements of 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

Accordingly, DOI employees should not assume that the conclusions of this memorandum are applicable to every EIS or BA, or to the entire lifecycle of either the *Draft EIS NOI* or the *2019 BA* at the DOI. Further, while the CVP and SWP projects taken as a whole at DOI are "matters" as defined in this memorandum, DOI employees should not conclude that each issue, decision, and/or action that impacts the CVP or SWP are also "matters." Instead, the DEO recommends that DOI employees assess whether the issues, decisions, and/or actions that they undertake with respect to the CVP and the SWP are best categorized as:

- broad policy options that are directed to the interests of a large and diverse group of persons;
- an issue, decision, and/or action focused on the interests of a discrete and identifiable class, such as a particular industry or profession; or
- a specific proceeding affecting the legal rights of certain parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

In order to assist DOI employees in categorizing their work on CVP and SWP issues, decisions, and/or actions pending before the DOI, the DEO has prepared the chart below as a general reference guide. It sets forth the three general categories under the ethics laws and regulations and includes examples of certain issues, decisions, and/or actions involving the CVP

and SWP that could potentially be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties."

CATEGORIES	EXAMPLES
"Matters" as defined in this memorandum • Broad policy options that are directed to the interests of a large and diverse group of persons	• *Draft EIS NOI* [as described above] • *2019 BA* [as described above] • Issue, decision, and/or action that impacts all industries and sectors involved with the CVP and/or SWP • CVP-wide operational and programmatic policy decisions
"Particular Matters of General Applicability" • Issue, decision, and/or action focused on the interests of a discrete and identifiable class, such as a particular industry or profession	• Issue impacting only the agricultural industry involved with the CVP and/or SWP • Decision limited only to hydroelectric power generators • Action focused only on municipal water issues • Anything that impacts an entire sector and/or industry or a subset of sectors and/or industries involved with and impacted by the CVP and/or SWP
"Particular Matters Involving Specific Parties" • Specific proceeding affecting the legal rights of certain parties or an isolatable transaction or related set of transactions between identified parties	• CVP Water Contracts • Litigation • Settlement Agreements • Permit for a specific party or parties • Specific request from individual(s) or entity(ies)

In every case, the categorization of issues, decisions, and/or actions will depend on the specific facts involved, and the DEO is available to provide specific guidance and assistance in making such determinations.

V. Conclusion

This memorandum reflects the current analysis and guidance of the DEO on how the types of issues, decisions, and/or actions involving the CVP and the DOI's coordination of operations with the SWP, should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" pursuant to the definitions of those terms in ethics regulations and guidance from the OGE. As discussed in greater detail above, the DEO has determined that both the *Draft EIS NOI* and the *2019 BA* are "matters" as defined in this memorandum and, as such, DOI employees would not be required to recuse from participation in either the *Draft EIS NOI* or the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

While there are other similar broad policy determinations impacting the entire CVP and/or SWP that would not constitute either "particular matters of general applicability" or "particular matters involving specific parties," the DEO notes that case-by-case factual analysis and ethics review will be required in many, if not most, circumstances in order to determine the appropriate categorization of issues, decisions, and/or actions undertaken at the DOI with respect to the CVP and the SWP. The DEO is available to provide further ethics guidance on this and other issues upon request.

UNITED STATES OFFICE OF
GOVERNMENT ETHICS

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act (LDA), the term "specific issue area" is not used in that context. *See* E.O. 13770, sec. 2; *see also*

2 U.S.C. §§ 1602, 1603(b)(5), 1604(b)(2). Although the term "specific issue area" appeared in Executive Order 13490, it was not defined in any guidance issued during the eight years in which that executive order remained in effect.

OGE has issued guidance distinguishing two types of particular matters: "particular matters involving specific parties" and "particular matters of general applicability." *See* 5 C.F.R. § 2640.102(l)-(m); *see also* OGE Inf. Adv. Op. 06 x 9 (2006). The latter is broader than the former. *Id.* This difference in breadth is relevant in determining the scope of the recusal, as illustrated in the following example:

> An appointee was a registered lobbyist during the two-year period before she entered government. In that capacity, she lobbied her agency against a proposed regulation focused on a specific industry. Her lobbying was limited to a specific section of the regulation affecting her client. Her recusal obligation as an appointee is not limited to the section of the regulation on which she lobbied, nor is it limited to the application of the regulation to her former client. Instead, she must recuse for two years from development and implementation of the entire regulation, subsequent interpretation of the regulation, and application of the regulation in individual cases.

III. Paragraphs 1 and 3: Post-Government Employment Lobbying Restrictions

The ethics pledge under Executive Order 13770 establishes two post-Government employment lobbying restrictions. The restriction in paragraph 1 of the ethics pledge prohibits a former appointee, for five years after terminating employment with an executive agency, from engaging in lobbying activities "with respect to" that agency. *See* E.O. 13770, sec. 1, par. 1. The restriction in paragraph 3 of the ethics pledge establishes the same restriction "with respect to" any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. *See id.*; E.O. 13770 sec. 1, par. 3; sec. 2(c).

Executive Order 13770 relies partly on the definition of "lobbying activities" in the Lobbying Disclosure Act (LDA). *See* E.O. 13770, sec. 2(n). The LDA defines that term to include both "lobbying contacts" and behind-the-scenes efforts in support of such contacts. 2 U.S.C. § 1602(7). The LDA's definition of "lobbying contacts" is limited to certain types of communications and excludes 19 types of communications. 2 U.S.C. § 1602(8). Executive Order 13770 specifically excludes additional types of communications. *See* E.O. 13770, sec. 2(n).

For purposes of paragraph 1, lobbying activities are deemed to be carried out "with respect to" an agency only to the extent that they involve the following:

> (a) Any oral or written communication to a covered executive branch official of that agency; or

(b) Efforts that are intended, at the time of performance, to support a covered lobbying contact to a covered executive branch official of that agency.

For purposes of paragraph 3, the prohibition on lobbying activities "with respect to" a covered executive branch official or non-career Senior Executive Service appointee extends to non-career Senior Executive Service appointees. Therefore, lobbying activities in paragraph 3 involve the following:

(a) Any oral or written communication to a covered executive branch official or non-career Senior Executive Service appointee; or

(b) Efforts that are intended, at the time of performance, to support a covered lobbying contact to a covered executive branch official or non-career Senior Executive Service appointee of that agency.

For the convenience of ethics officials and employees, an enclosed table compares the post-Government employment lobbying restrictions in paragraphs 1 and 3.

Attachments

Applicability of Prior Guidance to Executive Order 13770
Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:	Signing requirement ("appointee"): E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee: E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign"): E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005
Sec. 1, par. 2: If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.	Restriction on communicating with employees of former agency: E.O. 13770, sec. 1, par. 2 E.O. 13490, sec. 1, par. 4	Guidance on the restriction: DO-10-004, LA-16-08 *Note: Ethics officials and employees may continue to rely on DO-10-004 regarding the substance of the restriction. Note, however, that the duration of this restriction in E.O. 13770 is one year and commences when the individual ceases to be a senior employee, whereas the duration of the corresponding restriction in E.O.13490 was two years, commencing when the appointee moves to a position that is not subject to the Pledge.*
Sec. 1, par. 5: I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.	Prohibition on accepting gifts from registered lobbyists, lobbying orgs: E.O. 13770, sec. 1, par. 5 E.O. 13490, sec. 1, par. 1	Guidance on the lobbyist gift ban: DO-09-007, DO-10-003, LA-12-10 Relationship to 5 C.F.R. 2635, subpart B (Gifts from Outside Sources): DO-09-007, DO-10-003
	Definition of "gift": E.O. 13770, sec. 2(k) E.O. 13490, sec. 2(c)	Guidance on the following terms: • "Gift": DO-09-007 • "Solicited or accepted indirectly:" DO-09-007 Treatment of official speeches, accompanying staff: DO-10-003
	Definition of "registered lobbyist or lobbying organization": E.O. 13770, sec. 2(w) E.O. 13490, sec. 2(e)	Guidance on the term, "registered lobbyist or lobbying organization": DO-09-007 Treatment of the following: • 501(c)(3) organizations: DO-09-007, LA-12-10 • Clients of lobbyists/lobbying firms: DO-09-007 • Institutions of higher education: LA-12-10 • Media organizations: DO-09-007, LA-12-10

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Sec. 1, par. 6: I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.	Revolving door ban (incoming appointees): E.O. 13770, sec. 1, par. 6 E.O. 13490, sec. 1, par. 2	Guidance on the revolving door ban (incoming appointees): DO-09-011, DO-09-020 Relationship to impartiality regulations: DO-09-011
	Definition of "directly and substantially related to my former employer or former clients": E.O. 13770, sec. 2(d) E.O. 13490, sec. 2(k)	Guidance on the term, "directly and substantially related to": DO-09-011
	Definition of "former client": E.O. 13770, sec. 2(i) E.O. 13490, sec. 2(j)	Guidance on the term, "former client": DO-09-011 Treatment of the following: • Discrete, short-term engagements/*de minimis*: DO-09-011 • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • Nonprofit organizations: DO-09-011 • Service as a consultant: DO-09-011 • State or local colleges and universities: DO-09-011
	Definition of "former employer": E.O. 13770, sec. 2(j) E.O. 13490, sec. 2(i)	Guidance on the term, "former employer": DO-09-011 Treatment of the following: • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • State or local colleges and universities: DO-09-011 • Nonprofit organizations: DO-09-011
	Definition of "particular matter involving specific parties": E.O. 13770, sec. 2(s) E.O. 13490, sec. 2(h)	Guidance on the term, "particular matter involving specific parties": DO-09-011, DO-09-020 Treatment of the following: • Consultation with experts: DO-09-011 • Meetings, other communications: DO-09-011 • Official speeches: DO-09-020 • Open to all interested parties/multiplicity of parties: DO-09-011 • Rulemakings/regulations: DO-09-011

Paragraphs 1 and 3 in Executive Order 13770
Attachment to LA-17-03

	Paragraph 1	Paragraph 3
Basic Prohibition	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency. E.O. 13770, sec. 1, par. 1.	In addition to abiding by the limitations of paragraphs 1 and 2, I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. E.O. 13770, sec. 1, par. 3.
Length of Restriction	5 years. E.O. 13770, sec. 1, par. 1.	Remainder of the Administration. E.O. 13770, sec. 1, par. 3
Commencement of Restriction	Termination of employment as an appointee. E.O. 13770, sec. 1, par. 1.	Termination of government service. E.O. 13770, sec. 1, par. 3
Restricted Activity	Lobbying activities, as defined in the Lobbying Disclosure Act, but excluding certain types of communications. E.O. 13770, sec. 2(n). The term "lobbying activities" includes "lobbying contacts" and behind-the-scenes efforts in support of such contacts. 2 U.S.C. § 1602(7). • "Lobbying contacts" are limited to written or oral communications with covered officials that are made on behalf of a client. 2 U.S.C. § 1602(8)(A). o The term "lobbying activities" as defined in E.O. 13770 does not include communications and appearances with regard to: a judicial proceeding; a criminal or civil law enforcement inquiry, investigation, or proceeding; or any agency process for rulemaking, adjudication, or licensing, as defined in and governed by the Administrative Procedure Act, as amended, 5 U.S.C. 551 et seq. o The definition of "lobbying contact" includes 19 exceptions listed at 2 U.S.C. § 1602(8)(B). 2 U.S.C. § 1602(8)(B)(i)-(xix) ▪ For example, the definition excludes "a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official." 2 U.S.C. § 1602(8)(B)(v). • The term "client" means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. 2 U.S.C. § 1602(2). • An activity is considered a "lobbying activity" whether or not a former appointee is required to register as a lobbyist. Therefore, there is no minimum requirement to engage in lobbying activities before the restrictions apply (*i.e.*, no 20% service threshold). *See* E.O. 13770, sec. 2(n).	
With Whom Appointees are Restricted From Engaging in Lobbying Activities	Covered executive branch officials <u>at the former appointee's former agency</u>. E.O. 13770, sec. 1, par. 1 ("with respect to that agency"). • A communication to or appearance solely before a covered legislative branch official is not a lobbying activity "with respect to" the former appointee's former agency. *Id.* • With respect to those appointees to whom component designations are applicable, "agency" means the separate and distinct component agencies designated in accordance with 18 U.S.C. § 207(h). E.O. 13770, sec. 2(e).	Covered executive branch officials <u>throughout the executive branch</u>. E.O. 13770, sec. 1, par. 3. Non-career senior executive service appointees <u>throughout the executive branch</u>. E.O. 13770, sec. 1, par. 3.
	Covered executive branch officials are: • The President; • The Vice President; • Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President; • Any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order; • Any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37; and • Any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5. See E.O. 13770, sec. 2(c); 2 U.S.C. § 1602(3).	

LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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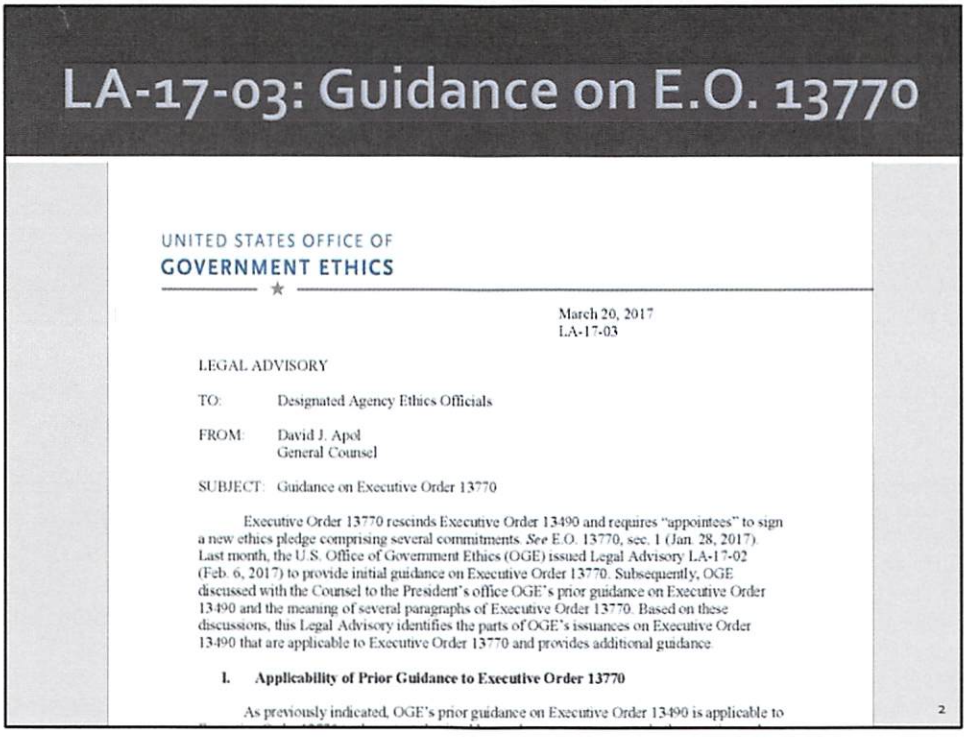
LA-17-03: Guidance on E.O. 13770



UNITED STATES OFFICE OF
GOVERNMENT ETHICS

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to

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What is Covered in LA-17-03? (Past Guidance)

- Elaboration on Guidance in LA-17-02
  - Extent to which past guidance is applicable to EO 13770
  - Extent to which past guidance is NOT applicable or NOT relevant to EO 13770

3

What is Covered in LA-17-03? (New Guidance)

- LA-17-03 also addresses recusal obligations for recent lobbyists (pledge paragraph 7)
- Post-government employment restrictions
  - 5-year restriction under pledge paragraph 1
  - Administration-length restriction under pledge paragraph 3
  - Citations to – but not interpretations of – the Lobbying Disclosure Act (LDA)

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What is Not Covered in LA-17-03?

- Section 3 of the new Executive Order concerning pledge waivers
- Paragraph 4 concerning post-government restrictions and the Foreign Agents Registration Act of 1938
- Paragraph 8 concerning employment decisions
- The continued applicability of EO 13490

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Language Common to E.O. 13770 and E.O. 13490

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LA-17-02: Executive Order 13770

"With respect to Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding Executive Order 13490 to the extent that such guidance addresses language common to both orders."

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LA-17-03: Guidance on E.O. 13770

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act

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Example:

DO-09-010: Who Must Sign the Ethics Pledge?

Note: All substantive legal interpretations in this advisory are applicable to Executive Order 13770, sec. 1. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 16, 2009
DO-09-010

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Who Must Sign the Ethics Pledge?

The Office of Government Ethics (OGE) has received numerous questions concerning

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Example:

DO-09-011: Revolving Door Ban—All Appointees Entering Gov't

NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E.O. 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec. 1, par. 6. All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec. 3. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that

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Example:

DO-10-004: FAQs on Post-Employment under the Ethics Pledge

Note: Please see the attached addendum for the applicability of substantive legal interpretations in this advisory to Executive Order 13770. *See also* LA-17-02 and LA-17-03.

Addendum (March 20, 2017)
DO-10-004: Post-Employment Under the Ethics Pledge: FAQs

The following substantive legal interpretations in this advisory are **applicable** to Executive Order 13770:

- Part A: Post-employment cooling-off period. *See* E.O. 13770, sec. 1, par. 2.
  - Q2. Which appointees are subject to the restriction
  - Q3. How the restriction affects very senior employees
  - Q4. Which officials may not be contacted under this restriction
  - Q5. Applicability of exceptions under 18 U.S.C. § 207(c) to the restriction
- Part B: Post-employment lobbying ban. *See* E.O. 13770, sec. 1, par. 3.
  - Q1. Relationship of the lobbying ban to other restrictions
  - Q2. Whether the lobbying ban applies to appointees who are not senior employees
  - Q5. Duration of the lobbying ban
  - Q11. Whether exceptions to the restriction exist

The following substantive legal interpretations in this advisory are **applicable in part** to Executive Order 13770, to the extent that they address the core questions listed below. However, because the post-employment ban in Executive Order 13490 restricts "lobbying," while the corresponding ban in Executive Order 13770 restricts "lobbying activities," the substantive legal interpretations of

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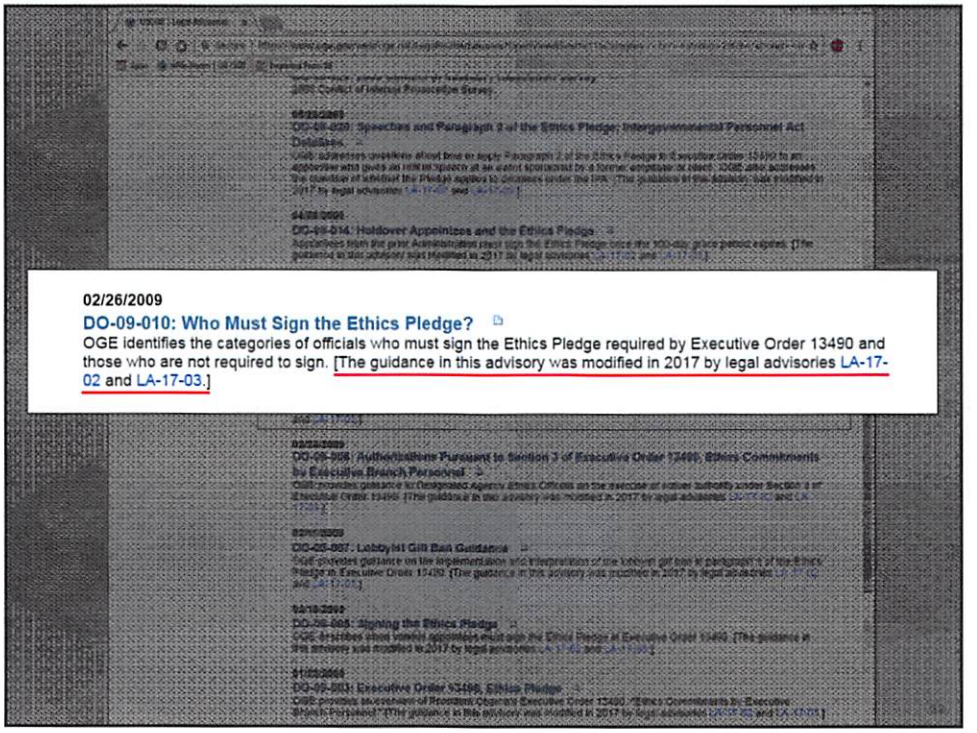
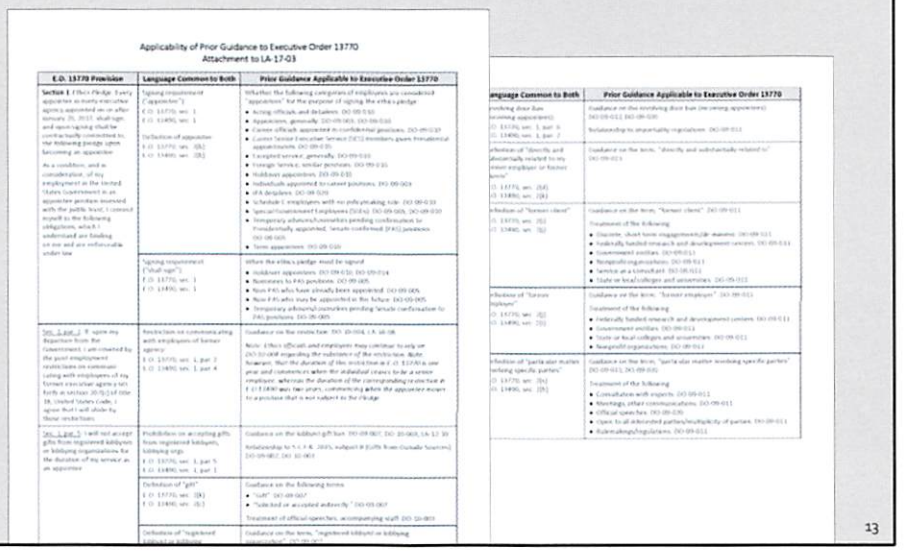


Attachment to LA-17-03



Applicability of Prior Guidance to Executive Order 13770
Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1 ("Ethics Pledge"). Every appointee in every executive agency appointed on or after January 20, 2017, shall sign and upon signing shall be contractually committed to the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:	Signing requirement ("appointee"): E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee: E.O. 13770, sec. 1(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees. DO-09-010. • Appointees, generally. DO-09-003, DO-09-010. • Career officials appointed in confidential positions. DO-09-010. • Career Senior Executive Service (SES) members given Presidential appointments. DO-09-010. • Excepted service, generally. DO-09-010. • Foreign service, similar positions. DO-09-010. • Holdover appointees. DO-09-010. • Individuals appointed to career positions. DO-09-003. • IPA designees. DO-09-010. • Schedule C employees with no policy-making role. DO-09-010. • Special Government Employees (SGEs). DO-09-003, DO-09-010. • Temporary advisors/committees pending confirmation by Presidentially appointed, Senate-confirmed (PAS) positions. DO-09-005. • Term appointees. DO-09-010.
	Signing requirement ("shall sign"): E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees. DO-09-010, DO-09-014. • Nominees to PAS positions. DO-09-005. • Non-PAS who have already been appointed. DO-09-005. • Non-PAS who may be appointed in the future. DO-09-005. • Temporary advisors/committees pending Senate confirmation to PAS positions. DO-09-005.
Sec. 1, par. 2. If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.	Restriction on communicating with employees of former agency: E.O. 13770, sec. 1, par. 2 E.O. 13490, sec. 1, par. 4	Guidance on the revolving door. DO-09-004, LA-16-08. Note: Ethics officials and employees may continue to rely on DO-09-004 regarding the application of the restriction. Note, however, that the duration of this restriction is E.O. 13770 is one year and consistent with the substantial cases to be a senior employee, whereas the duration of the corresponding restriction in E.O. 13490 was two years, commencing when the appointee ceases to participate that is not subject to the Pledge.
Sec. 1, par. 3. I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.	Prohibition on accepting gifts from registered lobbyists, lobbying orgs. E.O. 13770, sec. 1, par. 3 E.O. 13490, sec. 1, par. 1	Guidance on the lobbyist gift ban. DO-09-007, DO-10-003, LA-12-10. Relationship to 5 C.F.R. 2635, subpart B (Gifts from Outside Sources). DO-09-007, DO-10-003.
	Definition of "gift": E.O. 13770, sec. 1(b) E.O. 13490, sec. 2(c)	Guidance on the following terms: • "Gift." DO-09-007. • "Solicited or accepted indirectly." DO-09-007. Treatment of official speeches, accompanying staff. DO-10-003.
	Definition of "registered lobbyist or lobbying organization":	Guidance on the terms, "registered lobbyist or lobbying organization." DO-09-007.

Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Revolving door ban (receiving appointee): E.O. 13770, sec. 1, par. 4 E.O. 13490, sec. 1, par. 2	Guidance on the revolving door ban (receiving appointee): DO-09-011, DO-09-016. Relationship to impartiality regulation. DO-09-011.
Definition of "directly and substantially related to my former employer or former clients": E.O. 13770, sec. 2(a) E.O. 13490, sec. 2(a)	Guidance on the term, "directly and substantially related to": DO-09-011.
Definition of "former client": E.O. 13770, sec. 2(c) E.O. 13490, sec. 2(c)	Guidance on the term, "former client." DO-09-011. Treatment of the following: • Discrete, short-term engagements/de minimis. DO-09-011. • Federally funded research and development centers. DO-09-011. • Government entities. DO-09-011. • Nonprofit organizations. DO-09-011. • Service as a consultant. DO-09-011. • State or local colleges and universities. DO-09-011.
Definition of "former employer": E.O. 13770, sec. 2(c) E.O. 13490, sec. 2(c)	Guidance on the term, "former employer." DO-09-011. Treatment of the following: • Federally funded research and development centers. DO-09-011. • Government entities. DO-09-011. • State or local colleges and universities. DO-09-011. • Nonprofit organizations. DO-09-011.
Definition of "particular matter involving specific parties": E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Guidance on the term, "particular matter involving specific parties": DO-09-011, DO-09-016. Treatment of the following: • Consultation with experts. DO-09-011. • Meetings, other communications. DO-09-011. • Official speeches. DO-09-016. • Open to all interested parties/multiplicity of parties. DO-09-011. • Rulemakings/regulations. DO-09-011.

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Language Common to Both

E.O. 13370, sec. 1, par. 6

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

E.O. 13490, sec. 1, par. 2

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

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Language Common to Both

E.O. 13370, sec. 2(b)

"Appointee" means every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

E.O. 13490, sec. 2(b)

"Appointee" shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

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Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:	Signing requirement ("appointee"): E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee: E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign"): E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005

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Paragraph 7:
Particular Matter & Specific Issue Area

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . .
I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7: Specific Issue Area

"Specific issue area" is not defined in LDA or Executive Orders 13490 or 13770

EO 13490

- Also contained a two-year prohibition on individuals seeking or accepting employment with executive agencies they lobbied

EO 13770

- No employment ban for former lobbyists

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Paragraph 7: PMGA

As used in Executive Order 13770, the term "specific issue area" means a "**particular matter of general applicability**"

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter
Matter	→	No Recusal to that Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Ethics Pledge: Restrictions for Incoming Appointees

Paragraph 6 ***Not limited to registered lobbyists***	I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
Paragraph 7 ***Limited to registered lobbyists***	If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraphs 1 and 3:
Post-Employment Lobbying Activity Restrictions

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Ethics Pledge: Post-Employment Restrictions

Paragraph 1	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.
Paragraph 2	If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with appointees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.
Paragraph 3	I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.
Paragraph 4	I will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require me to register under the Foreign Agents Registration Act of 1938, as amended.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

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Paragraph 1

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

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Paragraph 3

I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Restricted Activity

- Engage in a "lobbying activity" as defined by the Lobbying Disclosure Act (LDA)

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Engage in a Lobbying Activity

You engage in a "**lobbying activity**" if you:

- Make a lobbying contact
  - Written or oral communications
  - With covered executive or legislative branch officials
  - On behalf of a client
  - For financial or other compensation
  - 19 exceptions

OR

- Engage in behind-the-scenes efforts in support of such lobbying contact

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 1: "With respect to" that agency

A lobbying activity occurs "with respect to" that agency if the activity involves :

- A communication to a covered executive branch official at that agency *(component designations may be available)*

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official at that agency

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Paragraph 3: "With respect to" certain officials

A lobbying activity occurs "with respect to" certain officials if the activity involves :

- A communication to a covered executive branch official or non-career SES

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official or non-career SES

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency = Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 3: Examples

- Write to various exec branch officials seek support for his client's research
- Assist his client in preparing for a meeting with one of the officials
- Assist his client in understanding grant application process and guidelines that agency established for research projects
- Request the status of an action affecting his client.

I agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraph 1: Examples

Write to a covered executive branch official at NIH to seek support for his client's research

Assist his client in preparing for a meeting with the FDA official

Contact covered legislative branch official to discuss pending legislation that could affect NIH research projects

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

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LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E.O. 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec. 1, par. 6. All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec. 3. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that includes several commitments. 74 Fed. Reg. 4673 (January 26, 2009). OGE Memorandum DO-09-003 explains the definition of appointee, describes the commitments included in the Pledge, and provides a Pledge Form to be used for appointees.[1] The purpose of the present memorandum is to advise ethics officials on how to implement paragraph 2 of the Pledge, "Revolving Door Ban--All Appointees Entering Government."

Paragraph 2 of the Pledge requires an appointee to commit that he or she will not, for a period of two years following appointment, participate in any particular matter involving specific parties that is directly and substantially related to his or her former employer or former clients, including regulations and contracts. Exec. Order No. 13490 sec. 1(2). To help agencies implement this requirement, OGE is providing the following explanation of the phrases that comprise paragraph 2 of the Pledge and of how paragraph 2 interacts with existing impartiality regulations.

Understanding the Meaning of the Terms that Comprise Paragraph 2 of the Pledge

"Particular matter involving specific parties"

In order to determine whether an appointee's activities concern any particular matters involving specific parties, ethics officials must follow the definition of that phrase found in section 2(h) of the Executive Order. That definition incorporates the longstanding interpretation of particular matter involving specific parties reflected in 5 C.F.R. § 2641.201(h). However, it also expands the scope of the term to include any meeting or other communication with a former employer or former client relating to the performance of the appointee's official duties, unless

[1] https://www.oge.gov/Web/oge.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge.

the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. The purpose of this expansion of the traditional definition is to address concerns that former employers and clients may appear to have privileged access, which they may exploit to influence an appointee out of the public view.[2]

The expanded party matter definition has a two-part exception for communications with an appointee's former employer or client, if the communication is: (1) about a particular matter of general applicability and (2) is made at a meeting or other event at which participation is open to all interested parties. Although the exception refers to particular matters of general applicability, it also is intended to cover communications and meetings regarding policies that do not constitute particular matters. An appointee may participate in communications and meetings with a former employer or client about these particular or non-particular matters if the meeting or event is "open to all interested parties." Exec. Order No. 13490 sec. 2(h). Because meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings, common sense demands that reasonable limits be placed on what it means to be "open to all interested parties." Such meetings do not have to be open to every comer, but should include a multiplicity of parties. For example, if an agency is holding a meeting with five or more stakeholders regarding a given policy or piece of legislation, an appointee could attend such a meeting even if one of the stakeholders is a former employer or former client; such circumstances do not raise the concerns about special access at which the Executive Order is directed. Additionally, the Pledge is not intended to preclude an appointee from participating in rulemaking under section 553 of the Administrative Procedure Act simply because a former employer or client may have submitted written comments in response to a public notice of proposed rulemaking.[3] In any event, agency ethics officials will have to exercise judgment in determining whether a specific forum qualifies as a meeting or other event that is "open to all interested parties," and OGE is prepared to assist with this analysis.

"Particular matter involving specific parties...including regulations"

Because regulations often are cited as examples of particular matters that do not involve specific parties, OGE wants to emphasize that the phrase is not intended to suggest that all rulemakings are covered. Rather, the phrase is intended to serve as a reminder that regulations sometimes may be particular matters involving specific parties, although in rare circumstances. As OGE has observed in connection with 18 U.S.C. § 207, certain rulemakings may be so focused on the rights of specifically identified parties as to be considered a particular matter

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2 Note, however, that the expanded definition of party matter is not intended to interfere with the ability of appointees to consult with experts at educational institutions and "think tanks" on general policy matters, at least where those entities do not have a financial interest, as opposed to an academic or ideological interest. See Office of Legal Counsel Memorandum, "Financial Interests of Nonprofit Organizations," January 11, 2006 (distinguishing between financial interests and advocacy interests of nonprofits), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0064.pdf; cf. 5 C.F.R. § 2635.502(b)(1)(v)(Note)(OGE impartiality rule does not require recusal because of employee's political, religious or moral views).

3 For other reasons discussed below, however, rulemaking sometimes may constitute a particular matter involving specific parties, albeit rarely

involving specific parties.[4] Such rulemakings likewise are covered by paragraph 2.

"Directly and substantially related to"

The phrase "directly and substantially related to," as defined in section 2(k) of the Executive Order, means only that the former employer or client is a party or represents a party to the matter. Ethics officials should be familiar with this concept from 5 C.F.R. § 2635.502(a).

"Former employer or former client"

In order to determine who qualifies as an appointee's former employer or former client, ethics officials must follow the definitions of each phrase found in section 2(i) and 2(j), respectively, of the Executive Order. In effect, the Executive Order splits the treatment of former employer found in the impartiality regulations into two discrete categories, "former employer" and "former client," and removes contractor from the definition of either term. *See* 5 C.F.R. §§ 2635.502(b)(1)(iv), 2635.503(b)(2).

Former Employer

For purposes of the Pledge, a former employer is any person for whom the appointee has, within the two years prior to the date of his or her appointment, served as an employee, officer, director, trustee, or general partner, unless that person is an agency or entity of the Federal Government, a state or local government, the District of Columbia, a Native American tribe, or any United States territory or possession. Exec. Order No. 13490, sec. 2(i). While the terms employee, officer, director, trustee, or general partner generally follow existing ethics laws and guidance, OGE has received questions about the scope of the exclusion for government entities from the definition of former employer, specifically with regard to public colleges and universities. The exclusion for state or local government entities does extend to a state or local college or university.[5]

OGE also has received several questions about whether the definition of former employer includes nonprofit organizations. Consistent with the interpretation of similar terms in other ethics rules and statutes, the definition of former employer in the Executive Order covers

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[4] *See, e.g.*,. 73 Fed. Reg. 36168, 36176 (June 25, 2008); *see also* OGE Informal Advisory Letter 96 x 7, n.1.

[5] *See* OGE Informal Advisory Opinion 93 x 29 n.1 where OGE held that for purposes of applying the supplementation of salary restrictions in 18 U.S.C. § 209, the exception for payments from the treasury of any state, county, or municipality included a state university. OGE cautions, however, that the exclusion for state and local entities may not extend to all entities affiliated with a state or local college or university. OGE notes that some colleges and universities may create mixed public/private entities in partnership with commercial enterprises. Such entities should not automatically be considered as falling within the exclusion, but rather should be examined on a case-by-case basis to determine whether they should be viewed as instrumentalities of state or local government for the purposes of the Executive Order.

nonprofit organizations.[6] Moreover, it includes nonprofit organizations in which an appointee served without compensation, provided of course that the appointee actually served as an employee, officer, director, trustee, or general partner of the organization. Thus, for example, the recusal obligations of Pledge paragraph 2 would apply to an appointee who had served without pay on the board of directors or trustees of a charity, provided that the position involved the fiduciary duties normally associated with directors and trustees under state nonprofit organization law. This does not include, however, purely honorific positions, such as "honorary trustee" of a nonprofit organization. It also does not include unpaid positions as a member of an advisory board or committee of a nonprofit organization, unless the position involved fiduciary duties of the kind exercised by officers, directors or trustees, or involved sufficient supervision by the organization to create a common law employee-employer relationship (which is not typical, in OGE's experience).

Former Client

For purposes of the Pledge, a former client means any person for whom the appointee served personally as an agent, attorney, or consultant within two years prior to date of appointment. Exec. Order No. 13490 sec. 2(j). A former client does not include a client of the appointee's former employer to whom the appointee did not personally provide services. Therefore, although an appointee's former law firm provided legal services to a corporation, the corporation is not a former client of the appointee for purposes of the Pledge if the appointee did not personally render legal services to the corporation. Moreover, based on discussions with the White House Counsel's office, OGE has determined that the definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer. Thus, for example, an appointee who had provided legal services to the Department of Energy would not be prohibited from participating personally in particular matters in which the Department is a party.

In addition, the term former client includes nonprofit organizations. However, a former client relationship is not created by service to a nonprofit organization in which an appointee participated solely as an unpaid advisory committee or advisory board member with no fiduciary duties. Although a former client includes any person whom the appointee served as a "consultant," OGE has not construed the term consultant, as used in analogous provisions of the Ethics in Government Act and the Standards of Ethical Conduct, to include unpaid, non-fiduciary advisory committee members of a nonprofit organization. *See* 5 U.S.C. app. § 102(a)(6)(A)(disclosure of consultant positions); 5 C.F.R. § 2635.502(b)(1)(iv)(covered relationship as former consultant). Likewise, former client does not include a nonprofit organization in which an appointee served solely in an honorific capacity.

[6] For similar reasons, Federally-funded research and development centers (FFRDCs), whether nonprofit or for profit, are intended to be included in the definitions of former employer and former client for purposes of paragraph 2 of the Pledge.

The definition of former client specifically excludes "instances where the service provided was limited to a speech or similar appearance." Exec. Order No. 13490, sec. 2(j). In addition to excluding all activities that consist merely of speaking engagements, this provision is intended to exclude other kinds of discrete, short-term engagements, including certain de minimis consulting activities. Essentially, the Pledge is not intended to require a two-year recusal based on activities so insubstantial that they are not likely to engender the kind of lingering affinity and mixed loyalties at which the Executive Order is directed. The exclusion for speaking and similar engagements was added to emphasize that the provision focuses on services that involved a significant working relationship with a former client. Therefore, the exclusion is not limited to speeches and speech-like activities (such as serving on a seminar panel or discussion forum), but includes other activities that similarly involve a brief, one-time service with little or no ongoing attachment or obligation. In order to determine whether any services were de minimis, ethics officials will need to consider the totality of the circumstances, including the following factors:

- the amount of time devoted;
- the presence or absence of an ongoing contractual relationship or agreement;
- the nature of the services (e.g., whether they involved any representational services or other fiduciary duties); and
- the nature of compensation (e.g., one-time fee versus a retainer fee).

For example, the recusal obligation of Pledge paragraph 2 would not apply to an appointee who had provided consulting services on a technical or scientific issue, for three hours on a single day, pursuant to an informal oral agreement, with no representational or fiduciary relationship.[7] On the other hand, an appointee who had an ongoing contractual relationship to provide similar services as needed over the course of several months would be covered. In closer cases, OGE believes ethics officials should err on the side of coverage, with the understanding that waivers, under section 3 of the Order, remain an option in appropriate cases.

The Relationship of Paragraph 2 of the Pledge to the Existing Impartiality Regulations

Paragraph 2 of the Pledge is not merely an extension of the existing impartiality requirements of subpart E of the Standards of Ethical Conduct, although in some circumstances the restrictions of the Pledge and the existing impartiality restrictions could align. The effect of any overlap is that all of the relevant restrictions apply to the appointee and should be acknowledged in the appointee's ethics agreement and considered when granting a waiver or authorization under either set of restrictions.

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[7] Note that appointees still will have a covered relationship for one year after they provided any consulting services, under the OGE impartiality rule, 5 C.F.R. § 2635.502(b)(1)(iv). Therefore, the OGE rule may require an appointee to recuse from certain matters (or obtain an authorization, as appropriate), even if the Pledge does not extend the recusal for an additional year. Indeed, the presence of the OGE rule as a "fall-back" was a factor in the decision to exclude certain de minimis consulting services from the Pledge in the first place.

Paragraph 2 of the Pledge and Impartiality Regulations Differ and Overlap

An appointee's commitments under paragraph 2 of the Pledge both overlap and diverge from the existing impartiality regulations in important ways depending upon the facts of each appointee's circumstances. The following highlights some of the key areas in which paragraph 2 of the Pledge and the existing impartiality restrictions differ. In addition, OGE has developed a chart as a quick reference tool to identify the key differences among the existing impartiality regulations and paragraph 2 of the Pledge. *See* **Attachment 1.**

Paragraph 2 of the Pledge is at once more expansive and more limited than the existing impartiality restrictions found at 5 C.F.R. §§ 2635.502, 2635.503. For example, an appointee is subject to impartiality restrictions based on his covered relationships with a much broader array of persons[8] than to the restrictions of paragraph 2, which are limited to the appointee's former employer and former clients. Thus, for instance, if the appointee has served as a contractor, but not in any of the roles described in the definitions of former employer or former client in the Executive Order, then the appointee may have recusal obligations under 5 C.F.R. §§ 2635.502 and 2635.503, but not under Pledge paragraph 2. Conversely, Pledge paragraph 2 is more expansive than the definition of covered relationship in section 2635.502 because the Pledge provision looks back two years to define a former employer or former client and it imposes a two-year recusal obligation after appointment, both of which are considerably broader than the one-year focus of section 2635.502(b)(1)(iv). Pledge paragraph 2 also is more expansive in that the recusal obligation may apply to certain communications and meetings that do not constitute particular matters involving specific parties as that phrase is used in sections 2635.502 and 2635.503.[9]

On the subject of recusal periods alone, ethics officials will need to be especially attentive to the possible variations, as it may be possible for as many as three periods to overlap. For example, an appointee could have: a one-year recusal, under 5 C.F.R. § 2635.502, from the date she last served a former employer; a two-year recusal, under section 2635.503, from the date she received an extraordinary payment from that same former employer; and a two-year recusal with respect to that former employer, under Pledge paragraph 2, from the date of her appointment.

Specific Recusals under Paragraph 2 of the Pledge are Not Required to be Memorialized in an Appointee's Ethics Agreement.

Executive Order 13490 does not require recusals under paragraph 2 of the Pledge to be addressed specifically in an appointee's ethics agreement, unlike recusals under paragraph 3 of

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[8] See definition of "covered relationship" at 5 C.F.R. § 2635.502(b)(1).

[9] *Compare* Exec. Order No. 13490, sec. 2(h)(definition broader than post-employment regulation); *with* 5 C.F.R. § 2635.502(b)(3)(defining particular matter involving specific parties solely by reference to post-employment regulations).

the Pledge. *See* Exec. Order No. 13490 sec. 4(a).[10] However, if an appointee will have a written ethics agreement addressing other commitments, OGE requires that the following language be inserted in that written ethics agreement in order to ensure that the appointee is aware of her commitments and restrictions under both her ethics agreement and the Pledge.

> Finally, I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.

Written ethics agreements will continue to address section 2635.502 and 2635.503 issues separately using the model provisions from OGE's "Guide to Drafting Ethics Agreements for PAS Nominees." Thus, regardless of paragraph 2 of the Pledge, the one-year "covered relationship" under the OGE impartiality rule remains in effect and may require an appointee to recuse from certain matters, even if the Pledge does not extend the recusal for an additional year. *See* 5 C.F.R. § 2635.502(b)(1)(iv).

The Pledge and Impartiality Regulations Waiver Provisions

Designated Agency Ethics Officials have been designated to exercise the waiver authority for the Ethics Pledge, under section 3 of Executive Order 13490, in addition to their existing role in the issuance of impartiality waivers and authorizations. DAEOgram DO-09-008; 5 C.F.R. §§ 2635.502(d), 2635.503(c). Generally, it is expected that waivers of the various requirements of the Pledge will be granted sparingly. *See* OGE DAEOgram DO-09-008. Although paragraph 2 clearly adds new limits on the revolving door, those limits are not intended to bar the use of qualified appointees who have relevant private sector experience in their fields of expertise. Therefore, at least where the lobbyist restrictions of paragraph 3 of the Pledge are not implicated, OGE expects that DAEOs will exercise the waiver authority for paragraph 2 in a manner that reasonably meets the needs of their agencies. In this regard, DAEOs already have significant experience in determining whether authorizations under 5 C.F.R. § 2635.502(d) are justified, and DAEOs should use similar good judgment in decisions about whether to waive paragraph 2 of the Pledge. Of course, any such waiver decisions still must be made in consultation with the Counsel to the President. Exec. Order No. 13490, sec. 3. Additional details on the standards for issuing a waiver of provisions of Pledge paragraph 2, as well as on issues related to the interaction of the waiver provisions of the impartiality regulations and relevant paragraphs of the Pledge, are reserved for future guidance.

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[10] An ethics agreement is defined as "any oral or written promise by a reporting individual to undertake specific actions in order to alleviate an actual or apparent conflict of interest," such as recusal from participation in a particular matter, divestiture of a financial interest, resignation from a position, or procurement of a waiver. 5 C.F.R. § 2634.802.

ATTACHMENT 1

OGE developed the following table as a quick reference tool to highlight the main differences between paragraph 2 of the Pledge and existing impartiality regulations. It is not intended to be a substitute for thorough analysis, but we hope you find it useful.

		5 C.F.R. § 2635.502	5 C.F.R. § 2635.503	Paragraph 2 of the Pledge
Relationship:	Former Employer	Any person which the employee served, within the last year, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Two years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner; contractor and consultant omitted from list (although consultant added below under former client); is not a former employer if governmental entity
	Former Client	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.502(b)(1)(iv)	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.503(b)(2)	Two years prior to date of appointment served as an agent, attorney, or consultant. Is not former client if: • Only provided speech/similar appearance (including de minimis consulting) • Only provided contracting services other than as agent, attorney, or consultant • Served governmental entity
	Business and Personal/ Covered Relation-ship	In addition to former employers/ clients discussed above, includes various current business and personal relationships, as listed in 5 C.F.R. § 2635.502(b)(1)	No equivalent concept	No equivalent concept
Prohibition:	May not participate in particular matter involving specific parties if:	Reasonable person with knowledge of facts would question impartiality	Extraordinary payment from former employer	Includes communication by former employer or former client unless matter of general applicability or non-particular matter and open to all interested parties
Length of recusal:		1 year from the end of service	2 years from date of receipt of payment	2 years from date of appointment

05 x 1

Letter to a Designated Agency Ethics Official
dated February 10, 2005

This is in response to your letter of February 9, 2005, in which you inquire whether the deliberations of the President's Advisory Panel on Federal Tax Reform would constitute particular matters for purposes of 18 U.S.C. § 208. The first meeting of the Panel is scheduled for February 16, and the need for a prompt resolution of the question is apparent. Your letter follows up on earlier telephone conversations in which my Office advised that the proposed work of the Panel, as described to us, did not constitute a particular matter or particular matters within the meaning of the conflict of interest statute. We continue to be of the same view.

Pursuant to Executive Order 13369 (January 7, 2005), the Panel is charged with producing a single report that will address a range of "revenue neutral policy options" for legislative reform of the Federal tax system. The contemplated scope of the report is quite broad, as indicated by the three guiding principles in the Executive order: the options should "(a) simplify Federal tax laws to reduce the costs and administrative burdens of compliance with such laws; (b) share burdens and benefits of the Federal tax structure in an appropriately progressive manner while recognizing the importance of homeownership and charity in American society; and (c) promote long-run economic growth and job creation, and better encourage work effort, saving, and investment, so as to strengthen the competitiveness of the United States in the global marketplace." Executive Order, § 3. The Executive order only prescribes that "at least one option submitted by the Advisory Panel should use the Federal income tax as the base for its recommended reforms." *Id.* Consistent with this broad mandate, your letter indicates that Panel deliberations are expected "to focus on a wide range of tax matters--including both matters that have the potential to affect all taxpayers (*e.g.*, the alternative minimum tax and the compliance burdens for large, small and individual taxpayers) as well as matters that specifically and uniquely affect taxpayers comprised of

industry sectors (*e.g.*, depletion allowance for the oil and gas industries)."

As you know, section 208(a) prohibits employees from participating personally and substantially in any "particular matter" in which they have a personal or imputed financial interest. Under the interpretive regulations issued by the Office of Government Ethics, "[t]he term 'particular matter' includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1). The phrase generally is understood to include matters of general applicability that are narrowly focused on the interests of a discrete industry, such as the meat packing industry or the trucking industry. *E.g.*, 5 C.F.R. § 2640.103(a)(1) (example 3); 5 C.F.R. § 2635.402(b)(3) (example 2). However, the term does not extend to the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." § 2640.103(a)(1).

The work of the Panel, as described above, fits comfortably within the latter exclusion for consideration of broad policy options directed to the interests of a large and diverse group of persons. Indeed, the Panel's report is expected to address issues affecting every taxpayer in the United States. In this regard, the matter is analogous to example 8 following section 2640.103(a)(1), in which the consideration of a legislative proposal for broad health care reform is held not to be a particular matter because it is intended to affect every person in the United States. However, your letter refers to the preamble discussion of this example in the final rule and indicates that it suggests that the larger legislative proposal may be broken down into different constituent parts that might be viewed as separate particular matters in their own right. 61 *Fed. Reg.* 66830, 66832 (December 18, 1996). You note that some of the many tax policy options to be considered by the Panel will focus more narrowly on discrete industries and question whether the language in the preamble means that the consideration of these options should be treated as separate particular matters, apart from the overall report.

It was not OGE's intention that example 8 and the preamble should be read as requiring that broad legislative proposals of this type be fractionated into separate provisions or issues for purposes of identifying particular matters. Such an approach would prove little, since the consideration of most matters of

broad public policy can be carved up into successively finer and more focused parts: after all, much of policymaking inevitably involves the consideration of how different aspects of an overall proposal will affect different constituencies in a pluralistic democracy. Nor do we think it would be workable to employ a variation of what one court has criticized as an "elastic approach" to identifying particular matters, which is contingent on the part of the overall matter in which the particular individual happened to be involved. *Van Ee v. EPA*, 202 F.3d 296, 309 (D.C. Cir. 2000).[1] It would not be logical to conclude that an employee could participate in considering the overall legislative proposal but not its constituent parts.

In any event, the text of example 8 does not state that work on the broad health care proposal must be divided up into separate particular matters. It simply indicates that "consideration *and implementation, through regulations,* of a section of the health care bill" that limits prices for prescription drugs would be a particular matter that is focused on the pharmaceutical industry. § 2640.103(a)(1) (example 8) (emphasis added); *see also* 60 *Fed. Reg.* 47208, 47210 (September 11, 1995) (preamble to proposed rule) (broad policy matters may *later* become particular matters when implemented in a way that distinctly affects specific persons or groups of persons). At most, the preamble language indicates only that there may be *other* conceivable situations where a narrowly focused provision in a larger legislative proposal should not be viewed as merely an integral part of the broader policy deliberations. Although OGE has not had occasion to render any opinions on such situations, an example might be (depending on the facts) a private relief bill that becomes attached to a larger legislative vehicle focused on an unrelated subject.

Apart from example 8, the OGE regulations contain another example that appears to be almost indistinguishable from the work of the Panel. Example 5 following section 2640.103(a)(1) states that "deliberations on the general merits of an omnibus bill such as the Tax Reform Act of 1986 are not sufficiently

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[1] *Van Ee* involved the use of the same phrase, "particular matter," in a related conflict of interest statute, 18 U.S.C. § 205. In interpreting the same regulatory definition of particular matter discussed above, the Court in that case criticized the Government for focusing on "aspects of the [Government matter] that might ultimately affect specific groups or individuals, rather than upon the overall focus of the proceeding itself." 202 F.3d at 309.

focused on the interests of specific persons, or a discrete and identifiable group of persons to constitute participation in a particular matter." As my Office explained in our earlier telephone conversations, the Tax Reform Act of 1986 itself contained numerous provisions, which, if considered alone, might have constituted separate particular matters, such as specific tax provisions for the oil, gas and pharmaceutical industries. *See* Pub. L. 99-514, October 22, 1986. However, the inclusion of such topics simply as components of a much more global tax reform proposal meant that the Tax Reform Act, like the comprehensive tax reform deliberations of the new Panel, must be viewed as too broadly focused to be considered a particular matter.

If you have any further questions about this matter, feel free to contact my Office.

Sincerely,

Marilyn L. Glynn
Acting Director

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

October 4, 2006

DO-06-029

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"

Perhaps no subject has generated as many questions from ethics officials over the years as the difference between the phrases "particular matter involving specific parties" and "particular matter." These phrases are used in the various criminal conflict of interest statutes to describe the kinds of Government actions to which certain restrictions apply. Moreover, because these phrases are terms of art with established meanings, the Office of Government Ethics (OGE) has found it useful to include these same terms in various ethics rules. A third term, "matter," also has taken on importance in recent years because certain criminal post-employment restrictions now use that term without the modifiers "particular" or "involving specific parties."

It is crucial that ethics officials understand the differences among these three phrases. OGE's experience has been that confusion and disputes can arise when these terms are used in imprecise ways in ethics agreements, conflict of interest waivers, and oral or written ethics advice. Therefore, we are issuing this memorandum to provide guidance in a single document about the meaning of these terms and the distinctions among them.

Because the three phrases are distinguished mainly in terms of their relative breadth, the discussion below will proceed from the narrowest phrase to the broadest.

Particular Matter Involving Specific Parties

The narrowest of these terms is "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but the meaning remains the same, focusing primarily on the presence of specific parties.

1. Where the Phrase Appears

This language is used in many places in the conflict of interest laws and OGE regulations. In the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used to describe the kinds of Government matters to which the life-time and two-year representational bans apply. 18 U.S.C. § 207(a)(1), (a)(2). Occasionally, ethics officials have raised questions because section 207 includes a definition of the term "particular matter," section 207(i)(3), but not "particular matter involving specific parties"; however, it is important to remember that each time "particular matter" is used in section 207(a), it is modified by the additional "specific party" language.[1]

In addition to section 207(a), similar language is used in 18 U.S.C. §§ 205(c) and 203(c). These provisions describe the limited restrictions on representational activities applicable to special Government employees (SGEs) during their periods of Government service.[2]

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[1] For a full discussion of the post-employment restrictions, see OGE DAEOgram DO-04-023, at https://www.oge.gov/Web/oge.nsf/Resources/DO-04-023:+Summary+of+18+U.S.C.+§+207.

[2] These restrictions on SGEs are discussed in more detail in OGE DAEOgram DO-00-003, at https://www.oge.gov/Web/oge.nsf/Resources/DO-00-003:+Summary+of+Ethical+Requirements+Applicable+to+Special+Government+Employees.

As explained below, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); see OGE Informal Advisory Letter 00 x 12. Moreover, OGE has issued certain regulatory exemptions, under section 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Likewise, the distinction between particular matters involving specific parties and broader types of particular matters (i.e., those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under section 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g).

Finally, OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain SGEs. 5 C.F.R. § 2635.807(a)(2)(i)(4).

2. What the Phrase Means

When this language is used, it reflects "a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate." Bayless Manning, Federal Conflict of Interest Law 204 (1964). Therefore, OGE has emphasized that the term "typically involves a specific

proceeding affecting the legal rights of the parties, or an isolatable transaction or related se t of transactions between identified parties." 5 C.F.R. § 2640.102(1). [3] Examples of particular matters involving specific parties include contracts, grants, licenses, product approval applications, investigations, and litigation. It is important to remember that the phrase does not cover particular matters of general applicability, such as rulemaking, legislation, or policy-making of general applicability.[4]

Ethics officials sometimes must deci de when a particular matter first involves a specific party. Many Government matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve

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[3] This definition, found in OGE's regulations implementing 18 U.S.C. § 208, differs slightly from the definition found in the regulations implementing a now-superseded version of 18 U.S.C. § 207, although this is more a point of clarification than substance. Specifically, the old section 207 regulations referred to "identifiable" parties, 5 C.F.R. § 2637.201(c)(1), whereas the more recent section 208 rule refers to "identified" parties. As explained in the preamble to OGE's proposed new section 207 rule: "The use of 'identified,' rather than 'identifiable,' is intended to distinguish more clearly between particular matters involving specific parties and mere 'particular matters,' which are described elsewhere as including matters of general applicability that focus 'on the interests of a discrete and identifiable class of persons' but do not involve specific parties. [citations omitted] The use of the term 'identified,' however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as where an agent represents an unnamed principal." 68 Feder al Register 7844, 7853-54 (February 18, 2003).

[4] Usually, rulemaking and legislation are not covered, unless they focus narrowly on identified parties. See OGE Informal Advisory Opinions 96 x 7 ("rare" example of rulemaking that involved specific parties); 83 x 7 (private relief legislation may involve specific parties).

specific parties. The Government sometimes identifies a specific party even at a preliminary or informal stage in the development of a matter. E.g., OGE Informal Advisory Letters 99 x 23; 99 x 21; 90 x 3.

In matters involving contracts, grants and other agreements between the Government and outside parties, the general rule is that specific parties are first identified when the Government first receives an expression of interest from a prospective contractor, grantee or other party. As OGE explained recently in Informal Advisory Letter 05 x 6, the Government sometimes may receive expressions of interest from prospective bidders or applicants in advance of a published solicitation or request for proposals. In some cases, such matters may involve specific parties even before the Government receives an expression of interest, if there are sufficient indications that the Government actually has identified a party. See OGE Informal Advisory Letter 96 x 21.

Particular Matter

Despite the similarity of the phrases "particular matter" and "particular matter involving specific parties," it is necessary to distinguish them. That is because "particular matter" covers a broader range of Government activities than "particular matter involving specific parties." Failure to appreciate this distinction can lead to inadvertent violations of law. For example, the financial conflict of interest statute, 18 U.S.C. § 208, generally refers to particular matters, without the specific party limitation. If an employee is advised incorrectly that section 208 applies only to particular matters that focus on a specific person or company, such as an enforcement action or a contract, then the employee may conclude it is permissible to participate in other particular matters, even t hough the la w prohibits such participation.

1. Where the Phrase Appears

In addition to 18 U.S.C. § 208, several other statutes and regulations use the term "particular matter." [5] The representational restrictions applicable to current employees (other than SGEs), under 18 U.S.C. §§ 203 and 205, apply to particular matters.[6] As mentioned above, section 207 also contains a definition of "particular matter." [7] However, where the phrase is used in the post-employment prohibitions in

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[5] The relevant language in 18 U.S.C. § 208(a) is "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (emphasis added).

[6] The prohibition in 18 U.S.C. § 205(a)(2) actually uses the phrase "covered matter," but that term is in turn defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter," 18 U.S.C. § 205(h)(emphasis added).

[7] The definition in 18 U.S.C. § 207(i)(3) provides: "the term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." This language differs slightly from other references to "particular matter" in sections 203, 205 and 208, in part because the list of matters is not followed by the residual phrase "or other particular matter." However, OGE does not believe that the absence of such a general catch-all phrase means that the list of enumerated matters exhausts the meaning of "particular matter" under section 207(i)(3). The list is preceded by the word "includes," which is generally a term of enlargement rather than limitation and indicates that matters other than those enumerated are covered. See Norman J. Singer, 2A Sutherland on Statutory Construction 231-232 (2000).

section 207(a)(1) and (a)(2), it is modified by the "specific parties" limitation.[8]

The phrase "particular matter" is used pervasively in OGE's regulations. Of course, the term appears throughout 5 C.F.R. part 2640, the primary OGE rule interpreting and implementing 18 U.S.C. § 208. Similarly, it is used in 5 C.F.R. § 2635.402, which is the provision in the Standards of Conduct that generally deals with section 208. The phrase also is used throughout subpart F of the Standards of Conduct, which contains the rules governing recusal from particular matters affecting the financial interest of a person with whom an employee is seeking non-Federal employment. 5 C.F.R. §§ 2635.601-2635.606. Moreover, the phrase appears in the "catch-all" provision of OGE's impartiality rule, 5 C.F.R. § 2635.502(a)(2). See also 5 C.F.R. 2635.501(a).[9] Various other regulations refer to "particular matter" for miscellaneous purposes. E.g., 5 C.F.R. § 2635.805(a) (restriction on expert witness activities of SGEs); 5 C.F.R. § 2634.802(a)(1) (written rec usals pursuant to ethics agreements).

2. What the Phrase Means

Although different conflict of interest statutes use slightly different wording, such as different lists of examples of particular matters, the same standards apply for determining what is a particular matter under each of the relevant statutes

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[8] At one time, the post-employment "cooling-off" restriction for senior employees in 18 U.S.C. § 207(c) applied to particular matters, but the language was amended (and broadened) in 1989 when Congress removed the adjective "particular" that had modified "matter." See 17 Op. O.L.C. 37, 41-42 (1993).

[9] Generally, section 2635.502 focuses on particular matters involving specific parties, as noted above. However, section 2635.502(a)(2) provides a mechanism for employees to determine whether they should recuse from other "particular matters" that are not described elsewhere in the rule. In appropriate cases, therefore, an agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee's impartiality reasonably may be questioned under the circumstances.

and regulations. See 18 Op. O.L.C. 212, 217-20 (1994). Particular matter means any matter that involves "deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1)(emphasis added). It is clear, then, that particular matter may include matters that do not involve parties and is not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000).

Essentially, the term covers two categories of matters: (1) those that involve specific part ies (described more fully above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as "particular matter of general applicability." 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Examples provided in OGE rules include a regulation applicable only to meat packing companies or a regulation prescribing safety standards for trucks on interstate highways. 5 C.F.R. §§ 2640.103(a)(1)(example 3); 2635.402(b)(3)(example 2). Other examples may be found in various opinions of OGE and the Office of Legal Counsel, Department of Justice. E.g., OGE Informal Advisory Letter 00 x 4 (recommendations concerning specific limits on commercial use of a particular facility); 18 Op. O.L.C. at 220 (determinations or legislation focused on the compensation and work conditions of the class of Assistant United States Attorneys).

Certain OGE rules recognize that particular matters of general applicability sometimes may raise fewer conflict of interest concerns than particular matters involving specific

parties.[10] Therefore, while both categories are included in the term "particular matter," it is often necessary to distinguish between these two kinds of particular matters. Of course, in many instances, the relevant prohibitions apply equally to both kinds of particular matters. This is the case, for example, in any application of 18 U.S.C. § 208 where there is no applicable exemption or waiver that distinguishes the two.

It is important to emphasize that the term "particular matter" is not so broad as to include every matter involving Government action. Particular matter does not cover the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2640.103(a)(1). For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform. 5 C.F.R. § 2640.103(a)(1)(example 4), (example 8). See also OGE Informal Advisory Letter 05 x 1 (report of panel on tax reform addressing broad range of tax policy issues). Although such actions are too broadly focused to be particular matters, they still are deemed "matters" for purposes of the restrictions described below that use that term.

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[10] As noted above, OGE's imparti ality rule generally focuses on particular matters involving specific parties. See OGE Informal Advisory Letter 93 x 25 (rulemaking "would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a)"). Furthermore, as also discussed above, several of the regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2) treat particular matters of general applicability differently than those involving specific parties. The preamble to the original proposed regulatory exemptions in 5 C.F.R. part 2640 explains: "The regulation generally contains more expansive exemptions for participation in 'matters of general applicability not involving specific parties' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters." 60 Federal Register 47207, 47210 (September 11, 1995). Of course, Congress itself has limited certain conflict of interest restrictions to the core area of particular matters that involve specific parties. E.g., 18 U.S.C. § 207(a)(1), (a)(2).

A question that sometimes arises is when a matter first becomes a "particular matter." Some matters begin as broad policy deliberations and actions pertaining to diverse interests, but, later, more focused actions may follow. Usually, a particular matter arises when the deliberations turn to specific actions that focus on a certain person or a discrete and identifiable class of persons. For example, although a legislative plan for broad health care reform would not be a particular matter, a particular matter would arise if an agency later issued implementing regulations focused narrowly on the prices that pharmaceutical companies could charge for prescription drugs. 5 C.F.R. § 2640.102(a)(1)(example 8). Similarly, the formulation and implementation of the United States response to the military invasion of an ally would not be a particular matter, but a particular matter would arise once discussions turned to whether to close a particular oil pumping station or pipeline operated by a company in the area where hostilities are taking place. 5 C.F.R. § 2640.102(a)(1)(example 7).

Matter

The broadest of the three terms is "matter." However, this term is used less frequently than the other two in the various ethics statutes and regulations to describe the kinds of Government actions to which restrictions apply.

1. Where the Phrase Appears

The most important use of this term is in the one-year post-employment restrictions applicable to "senior employees" and "very senior employees." 18 U.S.C. § 207(c), (d). In this context, "matter" is used to describe the kind of Government actions that former senior and very senior employees are prohibited from influencing through contacts with employees of their former agencies (as well as contacts with Executive Schedule officials at other agencies, in the case of very senior employees). The unmodified term "matter" did not appear in these provisions until 1989, when section 207(c) was amended to replace "particular matter" with "matter" and section 207(d) was first enacted. Pub. L. No. 101-194, § 101(a), November 30, 1989. OGE also occasionally uses the term "matter" in ethics regulations, for example, in the description of teaching,

speaking and writing that relates to an employee's official duties. 5 C.F.R. § 2635.807(a)(2)(E)(1).

2. What the Phrase Means

It is clear that "matter" is broader than "particular matter." See 17 Op. O.L.C. at 41-42. Indeed, the term is virtually all-encompassing with respect to the work of the Government.[11] Unlike "particular matter," the term "matter" covers even the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. Of course, the term also includes any particular matter or particular matter involving specific parties.

Nevertheless, it is still necessary to understand the context in which the term "matter" is used, as the context itself will provide some limits. In 18 U.S.C. § 207(c) and (d), the post-employment restrictions apply only to matters "on which [the former employee] seeks official action." Therefore, the only matters covered will be those in which the former employee is seeking to induce a current employee to make a decision or otherwise act in an official capacity.

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[11] A now-repealed statute, 18 U.S.C. § 281 (the predecessor of 18 U.S.C. § 203), used the phrase "any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter" (emphasis added). One commentator noted that the term "matter" in section 281 was "so open-ended" that it raised questions as to what limits there might be on the scope. Manning, at 50-51. Manning postulated that some limits might be inferred from the character of the matters listed before the phrase "or other matter." Id. at 51. Whatever the force of this reasoning with respect to former section 281, the same could not be said with respect to 18 U.S.C. § 207(c) or (d), as neither of these current provisions contains an exemplary list of covered matters.

Question 8: On January 29, 2019, you signed an Order (Order No. 3345, Amdt. 24), of "Temporary Redelegation of Authority" to "ensure uninterrupted management and execution of duties of vacant non-career positions during a Presidential transition pending Senate-confirmation of new non-career officials." This is to ensure the duties of 8 vacant leadership-level political employees are carried out by other officials on an acting basis.

These positions include the directors for the National Park Service, the BLM, Fish and Wildlife Service, and others. We are in the third year of this administration, and the President has yet to announce nominees for some of these positions. Your Order implies Senate confirmation is "pending"; but for 6 of the 8 positions there is no nominee pending. Do you believe the "transition" is still underway?

A. Considering we are into the President's third-year, do you think this redelegation practice sidesteps the Constitution's "checks and balances" framework?

B. Would you commit to ending this practice of having so many officials in an acting capacity and request the President formally submit nominees to fill these positions?

Response to questions A and B: The Vacancies Reform Act (VRA) places conditions on how a position requiring confirmation can be filled in an "acting" capacity. Additionally, the law allows the head of an agency to delegate to departmental employees certain "non-exclusive" functions of roles contemplated to be filled by Senate confirmed individuals. Interior Order 3345 and the Department Reorganization Plan No. 3 of 1950 are fully compliant with the VRA. Nevertheless, we hope for speedy confirmation of all nominees.

Question 9: Regarding the ongoing reorganization effort within the Department, information pertaining to the creation of these 12 "unified regions", which problematically splits my home state of Nevada into two different regions, as well as any information about potentially moving the headquarters for the BLM to a western state, has been very vague and hard to come by – yet the President's budget requests $27.6 million to continue these efforts. Can you provide an update today on the status of this effort and will you commit to provide a briefing to this committee before any structural changes or announcements are made?

A. I previously asked this to Secretary Zinke, but did not receive an adequate response, so I will ask you the same - What studies or analyses have been done in order to determine if there are needs for this reorganization? Have any analyses been prepared on how the proposed changes will correct identified needs? If so, would you share those with us? The response I received from the Secretary was vague and seemed to indicate there were no such studies or other documentation to otherwise guide any of these decisions.

Response: On August 22, 2017 the Department's regions were realigned after Congress agreed to Secretary Zinke's reprogramming request. As a result, we are now in the phase of implementing the reality of that action. Simply put, the Department's bureaus evolved

independently over many decades, each with its own geographic regions. This structure, with 49 geographic regions, was complex and not optimal for efficient citizen service. In order to improve citizen service, delivery of shared services internally, facilitate improved inter-bureau coordination and communication, enhance cooperation in shared mission interests and activities, reduce the confusion that differing bureau boundaries cause the Department's partners and the American public, a new regional structure that established 12 Unified Regions went into effect in August, 2018. We are working now to align the bureau's structures to the new boundaries. We expect to complete revisions to the Departmental Manual to reflect the unified regions this spring.

As part of the analyses conducted, we commissioned external third party evaluations of information technology, acquisition processes, and human capital services. Some complex supporting processes and systems will take time to fully implement. For example, implementing changes to align the budget and financial structures and systems to the new regions will be phased in over an extended period. Feedback from the external reviews will help us make sound business decisions and will inform implementation strategies to help us improve administrative function and thereby free up resources for citizen-facing work.

We do propose to move certain functions west. We are developing business case analyses of proposed moves so that spending and relocation decisions are made wisely in order to best enable the bureau to most effectively accomplish its mission and responsibilities.

By streamlining and improving business practices, shared services, and operations, the Department and its individual bureaus will more effectively accomplish their missions. We are committed to thoroughly evaluating the impact of these changes - to measure success and identify any improvements that should be made. We are evaluating performance metrics that can help assess and improve the 3 mission areas (Recreation, Collaborative Conservation, and Permitting) and shared services (human resources, information technology, and acquisition services). By examining performance metric data early in the process, we will ensure that the implementation is nimble and flexible enough to allow us to make any necessary course corrections during the implementation phase.

Question 10: The review conducted by Interior on monuments created by the Antiquities Act over the past twenty years, and the subsequent Presidential decision to remove protections from large swaths of Bears Ears and Grand Staircase-Escalante National Monuments was largely determined behind closed doors. Following the controversial changes to the aforementioned monuments, it is unclear what further considerations to other monuments awaits. Is there active work being done in the Department to pursue changes to other monuments that were on the monument review list? Can you clarify what the next steps are for the remaining national monuments that have not been "pardoned" or altered?

A. Would you commit to rescinding the recommendations that former Secretary Zinke made to President Trump as part of his national monuments review?

Response: The review of national monuments conducted by former Secretary Zinke in accordance with the President's direction in Executive Order 13792 was informed by the Secretary's travel to eight monument sites in six states, more than 60 meetings held by the Secretary and his staff with hundreds of advocates for and opponents of monument designations, a review of more than 2.4 million public comments, and multiple tribal consultations. Public input in this review was robust. Secretary Zinke provided a report to the President. Ultimately, under the Antiquities Act, the President is solely authorized, in his discretion, to declare, by public proclamation, national monuments.

Follow-up: Would you commit to not writing or rewriting any monument management plans in any manner that is inconsistent with the intent of the original proclamations?

Response: I commit to implementing the President's proclamation in accordance with all appropriate laws and regulations.

Question 11: Please provide data on both how much and what percentage of the land that has been offered for onshore oil and gas lease sale while you have been Deputy Secretary is designated as low or no potential? What percentage of land currently available for oil and gas leasing on a noncompetitive basis has been designated as no or low potential? Please provide data on how many of BLM's Reasonably Foreseeable Development Scenarios (RFD's), which are used by BLM to inform land use planning and leasing decisions, are more than five years old? How many RFD's has BLM completed overall?

Response: The BLM advises me that since August of 2017, 2,626 parcels have received bids at competitive lease sales covering 2.74 million acres. During calendar year 2018, a total of 1,412 parcels received bids, covering nearly1.5 million acres at competitive lease sales.

The BLM generated $1.1 billion from 28 oil and gas lease sales in calendar year 2018, an amount nearly equal to the BLM's entire budget for FY 2018. It was the highest-grossing year on record, nearly tripling what had been the agency's highest year ever in 2008.

BLM does not have an official resource designation to track resource potential on a national level. Individual Resource Management Plans (RMPs) and field development Reasonable Foreseeable Development (RFD) scenarios identify areas, in that time frame, that are expected to have resource potential. However, given recent technological innovations, areas once thought to have low potential have been shown to have more promising energy resources. The U.S. Geological Survey maintains the National Oil and Gas Assessments, but many of these are outdated due to technical advancements allowing for development in new formations that were previously thought to be low potential. The BLM does not track whether nominated lands or lease parcels were designated to have low or no potential in a RFD scenario.

Noncompetitive leases are considered low potential, since they did not receive bids during competitive lease sales. Because these are estimates made at a particular time and are subject to change, whether a lease is designated high and low potential is not maintained in the leasing

databases. It is disclosed to the public during the individual lease sale in NEPA compliance documentation. These documents are posted on BLM's ePlanning website and in the public room 45 days prior to the start of the lease sale.

There are a total of 74 completed RFDs, primarily tied to RMPs. Of those, 36 are more than five years old, many in areas where drilling is not occurring.

Question 12: When were the federal bonding rates for individual leases, statewide bond minimums, and nationwide bond minimums last updated? If these rates were adjusted for inflation, what would they be today? Considering that bonds insure against serious degradation of public land, can you explain why the Interior Department has declined to keep bonding rates on pace with inflation, and at levels that are far lower than what many states require for drilling on state lands?

Response: The BLM advises that its regulations establish the following minimum bond amounts: $10,000 for an individual lease; $25,000 to cover all leases of a single operator in a state; and $150,000 to cover all leases of a single operator nationwide.

The bond amount for individual leases was set in 1960, while the statewide and nationwide bond amounts were set in 1951. The BLM conducts bond adequacy reviews of each oil and gas bond every five years and makes adjustments as needed. These reviews assess the level of potential risk and liability posed by an operator.

Question 13: How does the federal onshore oil and gas royalty rate compare to royalty rates in Colorado, Montana, New Mexico, North Dakota, Texas, Utah and Wyoming? When was the federal rate last updated? How much additional revenue would taxpayers receive if federal rates matched, or exceeded, these states' rates?

Response: The Mineral Leasing Act stipulates that the Federal royalty rate be no less than 12.5 percent. The state royalty rate in Colorado is 20.0 percent, Montana is 16.67 percent, New Mexico is 12.5 to 20.0 percent, North Dakota is 16.67 or 18.75 percent, Utah is 12.5 to 16.67 percent, Wyoming is 12.5 or 16.67 percent, and Texas is typically 20 to 25 percent. It is important to note that Federal oil and gas leases are subject to different regulations than state oil and gas leases. Also, in most of these states, obtaining a permit to drill takes significantly less time and costs less compared to the Federal permitting system.

The Government Accountability Office (GAO) concluded in the *Report to Congressional Committees 17-540, Oil, Gas, and Coal Raising Federal Royalty Rates Could Decrease Production on Federal Lands but Increase Federal Revenue, June 2017* that "Raising federal royalty rates—a percentage of the value of production paid to the federal government—for onshore oil, gas, and coal resources could decrease oil, gas, and coal production on federal lands but increase overall federal revenue, according to studies GAO reviewed and stakeholders

interviewed. However, the extent of these effects is uncertain and depends, according to stakeholders, on several other factors, such as market conditions and prices."