United States Senate

WASHINGTON, DC 20510

May 24, 2012

The Honorable Daniel M. Ashe
Director
U.S. Fish & Wildlife Service
1849 C Street, NW
Washington, D.C. 20240

Re: Follow-up Request Concerning ESA Settlement Agreements

Dear Director Ashe:

We are disappointed by your March 23, 2012 letter that essentially rejects our request for documents related to the recent settlement agreements between the U.S. Fish & Wildlife Service (USFWS), WildEarth Guardians (WEG), and the Center for Biological Diversity (CBD). Under these agreements, USFWS has agreed to publish listing determinations for more than 750 species. These settlements, which resemble other "sue-and-settle" type arrangements entered recently by the current Administration, require an expensive undertaking that reshuffles federal priorities under the Endangered Species Act (ESA) without the involvement of Congress. On November 28, 2011, we asked the U.S. Department of Interior (DOI) to provide us with copies of communications between DOI/USFWS and the plaintiffs related to the litigation and settlement agreements.

Your agency initially responded, informally, that the documents were protected by "attorney-client privilege." We disagreed because an attorney-client relationship did not exist between your agency and the plaintiffs. In your March 23rd letter, which came almost four months after our initial request, you provided a small number of documents but you refused to provide any other documents on the basis that the district court's "local rules" prohibit disclosure of "any written or oral communication made in connection with or during any mediation session." This was a broad and, we believe, unproven assertion of protection. Your response makes no mention of key facts such as the dates "any mediation session" began or ended, or the scope of any such mediation sessions, and you did not provide an adequate legal rationale justifying your assertion.

As the Ranking Members of the Senate Committee on Environment and Public Works and the Subcommittee on Water and Wildlife, respectively, we have oversight responsibilities with regard to the issues pertaining to the above-referenced settlements. These are responsibilities that we take seriously. More significantly, we believe your agency has not yet fulfilled its obligation in this instance to be accountable to Congress and the American people with respect to its litigation settlement activities.

For these reasons, we renew our request for your attention to this matter. Within 30 days of the date of this letter, please provide our offices with copies of any and all records requested in our November 28th letter that have not otherwise already been provided. As we stated previously, we are prepared to safeguard these documents to the extent necessary. If your agency continues to claim some form of protection with respect to any responsive document, we ask that you provide a list of any such documents. For each document, the list should identify the author's name and organization; the recipient's name and organization; the date of the document; and a brief description of the document. This will enable us to more fully evaluate any claim you would make that a document is protected from disclosure to us.

Furthermore, in your response, please answer the following questions:

a. Has your agency sought permission from the relevant district court to provide the documents that are responsive to our request and, if not, why? Please provide a copy of the court order(s) establishing mediation in the litigation.

b. Has your agency sought consent from the other litigants to provide the documents that are responsive to our request and, if not, why? If you have sought such consent, what response were you given by the other litigants?

c. When, if at all, did the government bring our document request to the attention of the district court judge or the Compliance Judge? If not, why?

d. Why did your agency conclude that no exceptions, such as those listed in Local Rule 84.9(c), would allow disclosures to members of Congress?

e. When did any such "mediation session" begin and conclude, and how many responsive documents in your agency's possession were dated either before mediation began or after mediation concluded?

f. To the extent your agency is asserting some form of privilege, what precise privilege are you asserting and were any of the responsive documents marked as privileged?

g. Your letter provided a small set of documents. What distinguishes the documents you disclosed from those you did not disclose, in terms of your agency's view as to their protection under the local rules?

h. Your letter attached a January 2012 email from a U.S. government attorney regarding your agency's agreement setting a litigation settlement payment of $167,602 for WEG and $128,158 for CBD. Please provide the legal grounds for these payments and the methodology used to establish the payment amounts.

Your agency's willingness to freely settle lawsuits of this kind, which have cost taxpayers millions of dollars, is of great concern. A recent GAO report[1] confirmed that USFWS paid at least $1.5 million in 26 cases from fiscal years 2004 through 2010, but due to discrepancies in how your agency tracks the information, GAO found that "the data may not be complete over the identified timeframe" and that "USFWS officials were not sure that they had provided the complete universe of cases." Looking at Treasury Department records, GAO found that 254 of 525 attorney fee and cost payments made between March 2001 and September 2010 were "made as a result of Endangered Species Act litigation." GAO found that the Interior Department, alone, made 238 attorney fee and cost payments in that timeframe as part of ESA lawsuits totaling more than $21 million. Furthermore, this practice appears to be accelerating under the current Administration as GAO found that the number of Interior Department attorney fee and cost payments increased by 76% from 2008 to 2010 (from 21 to 37 payments). GAO found that one payment in 2010 accounted for more than $5.6 million of the $7.3 million in total payments.

Clearly, these are matters that merit significant congressional oversight. Our nation simply cannot afford to spend money in an ad hoc and unaccountable manner. In our view, federal agencies have a clear duty to vigorously defend, to the highest level, lawsuits that seek to compel action by any agency that is not authorized by Congress. In fact, we are concerned that, by entering into litigation settlements for which there is no dedicated funding to meet the settlement obligations, your agency risks running afoul of the Anti-Deficiency Act. Settlements like this create a situation where federal listing determinations must be made at significant cost to the U.S. Treasury, and as a result, other federal programs must either be reduced or additional funds provided by Congress. These are serious matters that merit a comprehensive review.

We look forward to your response.

Sincerely,

James M. Inhofe
Ranking Member
Committee on Environment & Public Works

Jeff Sessions
Ranking Member
Subcommittee on Water & Wildlife

[1] GAO, *Limited Data Available on USDA and Interior Attorney Fee Claims and Payments*, GAO-12-417R (April 12, 2012).