

DOC HASTINGS, WA
CHAIRMAN
DON YOUNG, AK
LOUIE GOHMERT, TX
ROB BISHOP, UT
DOUG LAMBORN, CO
ROBERT J. WITTMAN, VA
PAUL C. BROUN, GA
JOHN FLEMING, LA
TOM McCLINTOCK, CA
GLENN THOMPSON, PA
CYNTHIA LUMMIS, WY
DAN BENISHEK, MI
JEFF DUNCAN, SC
SCOTT R. TIPTON, CO
PAUL A. GOSAR, AZ
RAUL R. LABRADOR, ID
STEVE SOUTHERLAND II, FL
BILL FLORES, TX
JON RUNYAN, NJ
MARKWAYNE MULLIN, OK
STEVE DAINES, MT
KEVIN CRAMER, ND
DOUG LAMALFA, CA
JASON SMITH, MO
VANCE McALLISTER, LA
BRADLEY BYRNE, AL

TODD YOUNG
CHIEF OF STAFF

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

March 7, 2014

PETER A. DeFAZIO, OR
RANKING DEMOCRATIC MEMBER
ENI F.H. FALCOMAVAEGA, AS
FRANK PALLONE, JR., NJ
GRACE F. NAPOLITANO, CA
RUSH HOLT, NJ
RAUL M. GRIJALVA, AZ
MADELEINE Z. BORDALLO, GU
JIM COSTA, CA
GREGORIO KILILI CAMACHO SABLAN, CNMI
NIKI TSONGAS, MA
PEDRO R. PIERLUISI, PR
COLLEEN W. HANABUSA, HI
TONY CÁRDENAS, CA
STEVEN HORSFORD, NV
JARED HUFFMAN, CA
RAUL RUIZ, CA
CAROL SHEA-PORTER, NH
ALAN LOWENTHAL, CA
JOE GARCIA, FL
MATTHEW CARTWRIGHT, PA
KATHERINE CLARK, MA

PENNY DODGE
DEMOCRATIC STAFF DIRECTOR

Ken Berg
Manager
U.S. Fish & Wildlife Service
Washington Fish and Wildlife Office
510 Desmond Dr. SE, Suite 102
Lacey, WA 98503

Dear Mr. Berg:

On December 20, 2013, the U.S. Fish & Wildlife Service (“FWS”) published a revision to the final rule that listed the White Bluffs bladderpod, *Physaria Douglasii* subspecies *Tuplashensis*, as a threatened species under the Endangered Species Act (“ESA”) and designated over 2,000 acres as critical habitat. The White Bluffs bladderpod was one of the many species included in the 2011 closed-door settlement between the FWS and the Center for Biological Diversity (“CBD”), which arbitrarily established a deadline of 2013 for the FWS to decide whether to list the White Bluffs bladderpod as a protected species. Based on the Service’s handling of the bladderpod listing, it appears that this deadline, rather than quality data and science, drove the listing and critical habitat decision.

First, the FWS’ basis for classifying the White Bluffs bladderpod as a separate subspecies raises serious questions. The FWS initially published the proposed rule for listing the White Bluffs bladderpod on May 15, 2012.¹ The proposed rule cited the CBD’s petition, stating the White Bluffs bladderpod’s “[taxonomic] status as a valid species is uncontroversial.”² In conjunction with the proposed rule, the FWS sought five peer reviewers to examine the relevant science.³ Four of the peer reviewers replied, and two of them, Peter Dunwiddie and Kathryn Beck, had co-authored a report entitled “Evidence for Recognition of *Physaria Tuplashensis* (Brassicaceae),”⁴ which identified the White Bluffs bladderpod as a unique species. Although

¹ 77 Fed. Reg. 28704 (May 15, 2012).

² 77 Fed. Reg. 28704 at 28715 (May 15, 2012).

³ See <http://www.fws.gov/pacific/informationquality/2012.03.Buckwheat.Bladderpod.html>.

⁴ Caplow F., P.W. Dunwiddie, D. N. Reynolds, K. Beck, and T. Kaye. Evidence for Recognition of *Physaria Tuplashensis* (Brassicaceae) (2006).

this report was apparently never published nor subjected to peer review, the FWS relied on it as a primary justification for classifying the White Bluffs bladderpod as a unique subspecies.⁵

Second, the FWS' questionable and inadequate process for notifying affected local landowners and citizens of the listing proposal has been disconcerting. On April 23, 2013, the FWS finalized the rule granting threatened status for the White Bluffs bladderpod and designating 2,861 acres of both federal and private land as critical habitat. Despite the ESA's requirement that "actual notice of the proposed regulation" be given to "each county, or equivalent jurisdiction in which the species is believed to occur,"⁶ the FWS only published the rule in a non-local newspaper⁷ and the Federal Register. Therefore, residents of Franklin County challenged the rule for lack of notice and threatened to file an "intent to sue" notice. It was only after these concerns were raised that the FWS suspended the final rule for six months and reopened it for comments in May 2013.

Third, the FWS' peer review of DNA data contradicting the listing raises questions. During the reopened comment period, the Franklin County Commissioners submitted a DNA report by Dr. Cort Anderson, an experienced biologist and University of Idaho professor, that demonstrated, based on several DNA samples, that the White Bluffs bladderpod was not a unique subspecies. In response, the FWS solicited five individuals to peer review the DNA report on September 9 and allotted a 10-day timeframe for a response. One of the peer reviewers, Stephen O'Kane, co-authored a 2002 study that designated the White Bluffs bladderpod as a unique subspecies and was used as justification for the taxonomic status by the FWS in its listing decision.⁸ In the brief time they were given to review Dr. Anderson's report, the peer reviewers dismissed it as inconclusive citing a lack of rapidly evolving molecular markers and the limited sample size. The FWS summarized the peer reviewers' comments as "conclud[ing] the analysis was insufficient to warrant a change to the current taxonomic status."⁹ It is particularly concerning that while the five reviewers suggested that further research could resolve the White Bluffs bladderpod's taxonomy, FWS opted to conduct no other DNA study, and instead finalize the listing determination.

Though the final rule decreased the critical habitat designation to 2,033 acres of federal land, significant questions of scientific integrity still exist. In particular, the FWS seems to have selected peer reviewers with pre-existing views on the taxonomic status of the White Bluffs bladderpod as a unique species, rather than impartial reviewers who would independently evaluate such a designation. Furthermore, the use of an apparently unpublished and non-peer

⁵ See 77 Fed. Reg. 28704 at 28715 (May 15, 2012) and 78 FR 23983 at 23987 (Apr. 23, 2013).

⁶ 16 U.S.C. § 1533(b)(5)(A)(ii).

⁷ The FWS published the Final Rule in the Spokesman Review – a newspaper based out of Spokane, WA and not circulated in Franklin County.

⁸ See 78 Fed. Reg. 23983 at 23987 (Apr. 23, 2013).

⁹ Fish and Wildlife Service, White Bluffs Bladderpod DNA Report Peer Review Documents, pg. 75 (Dec. 19, 2013); available at: http://www.fws.gov/wafwo/species/Hanford_Plants/Bladderpod%20DNA%20Peer%20Review%20Documents.pdf

reviewed study raises questions about whether the FWS used the best available scientific and commercial data as the law requires, or whether the FWS merely used convenient science to help justify the listing determination in order to meet the arbitrary litigation-driven deadline.

The FWS's scientific integrity policy requires that scientific and scholarly information be "of the highest quality," "the result of as rigorous scientific and scholarly processes as can be achieved," and "trustworthy."¹⁰ The FWS is also expected to follow the Office of Management and Budget's "Final Information Quality Bulletin for Peer Review"¹¹ to ensure the scientific integrity and information quality of the peer review process. That bulletin provides that "[peer] reviewers should be selected to represent a diversity of scientific perspectives relevant to the subject"¹² and that "reviewers with competing views on the science may lead to a sharper, more focused peer review."¹³ Furthermore, the government-wide information quality guidelines require that information – including peer review – disseminated by federal agencies be objective.¹⁴ Objectivity requires that peer reviewers be selected primarily on the basis of necessary technical expertise, be expected to disclose to agencies prior technical/policy positions they may have taken, and be expected to disclose their sources of personal and institutional funding.¹⁵ It is important for Congress and the public to have confidence that the FWS adhered to these directives and principles in the peer review processes for the White Bluffs bladderpod.

The Committee on Natural Resources ("Committee") has broad jurisdiction over the ESA and its implementation. To resolve the unanswered questions, and to ensure scientific integrity was upheld in the decisions to list the White Bluffs bladderpod and the designation of more than 2,000 acres as critical habitat, it is requested that complete and unredacted copies of the following information and documents be provided to the Committee no later than close of business March 21, 2014:

1. The FWS relied on a 2006 unpublished report entitled "Evidence for Recognition of *Physaria Tuplashensis* (Brassicaceae)" in its listing decision. Please provide the requested documents and respond to the following questions regarding this report:
 - a. A copy of the report, and any additional versions in the possession of the FWS;
 - b. An explanation as to how the FWS obtained this report;
 - c. An explanation as to whether the report was ever subjected to peer review, either before submission or by FWS, and if so what the results were;

¹⁰ Fish and Wildlife Service, General Administration, 212 FW 7, at 7.2.

¹¹ Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for Heads of Departments and Agencies, "Final Information Quality Bulletin for Peer Review" ("Quality Bulletin"), available at:

<http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>

¹² Quality Bulletin at page 17.

¹³ *Id.*

¹⁴ 67 Fed. Reg. 8452 at 8459 (Feb. 22, 2002).

¹⁵ 67 Fed. Reg. 8452 at 8459-8460 (Feb. 22, 2002).

- d. An explanation as to whether the FWS is aware of any publication information for this report and, if so, where such information is found;
- e. Any communications between the FWS and the authors of this report concerning the White Bluffs bladderpod.

2. The FWS sought five peer reviewers to review the May 2012 proposed rule for the listing of the White Bluffs bladderpod. Please provide the requested documents or responses to the following questions regarding that peer review process:

- a. An explanation as to how the FWS identified and selected the five peer reviewers;
- b. A list of all potential peer reviewers considered, including those not solicited, detailing their names, titles, current positions, and the reasoning for their consideration or, if applicable, for not being solicited;
- c. Copies of any and all disclosures made by the peer reviewers including, but not limited to, any prior technical or policy positions they may have taken, and any disclosures pertaining to personal or institutional funding;
- d. A summary of the total compensation FWS has provided to each of the peer reviewers, including, but not limited to, their review of the White Bluffs bladderpod issue, any other ESA species listing, and any grants or funding the peer reviewers may have received from the FWS;
- e. Copies of the written charge to the peer reviewers, and any information, or other documents that were provided to the peer reviewers to help guide the completion of the peer review;
- f. Any communications between the FWS and the peer reviewers concerning the White Bluffs bladderpod, including any communications before the publication of the proposed rule on May 15, 2012; and
- g. An explanation as to who the fifth person solicited as a peer reviewer was and why that person did not participate in the peer review.

3. The FWS solicited five peer reviewers to review the July 2013 DNA report by Dr. Cort Anderson submitted by the Franklin County Commissioners during the final comment period. Please provide the requested documents or responses to the following questions regarding the peer review process:

- a. An explanation detailing the peer reviewers including their names, titles, current positions, the reasoning for their consideration, and whether any other peer reviewers were considered;
- b. Copies of any drafts, edits, or comments to the solicitation letter sent to the peer reviewers and the written charge to the peer reviewers, and any communications related thereto;
- c. Copies of any and all disclosures made by the peer reviewers including, but not limited to, any prior technical or policy positions they may have taken, and any disclosures pertaining to personal or institutional funding;
- d. A summary of the total compensation FWS has provided to each of the peer reviewers, including, but not limited to, their review of the White Bluffs bladderpod issue, any other ESA species listing, and any grants or funding the peer reviewers may have received from the FWS;

- e. Any communications between the FWS and the peer reviewers concerning the White Bluffs bladderpod, including any communications before the solicitation of the peer review for the DNA report on September 9, 2013; and
 - f. An explanation as to why the peer reviewers were only allowed 10 days to review the DNA report.
4. An explanation of the decision to publish the Final Rule in the Spokesman Review newspaper, contrary to the statutory requirements of the ESA, rather than a local newspaper in Franklin County and any documents or communications relating thereto.
 5. An explanation of the locational information relied upon or utilized by the FWS relating the designation of critical habitat in Franklin County, Washington, for both the proposed and final rule, including a summary of when such information was developed and how it was obtained by the FWS.
 6. Copies of all communications, including electronic communications, between the FWS and the CBD concerning either the White Bluffs bladderpod or the Umtanum Buckwheat.

An attachment to this letter provides instructions on how to respond to the Committee's request. Please contact Andrew Vecera or Byron Brown in the Office of Oversight and Investigations at 202-225-2761 with any questions regarding this request or to make arrangements for the production.

Sincerely,



Doc Hastings
Chairman

CC: Dan Ashe, FWS Director

Responding to Committee Document Requests

A. Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, recorded notes, letters, notices, confirmations, receipts, checks, envelopes, presentations, pamphlets, brochures, interoffice and intra office communications, electronic mails (e-mails), notations of any type of conversation, telephone call, voice mail, phone mail, meeting or other communication, diaries, analyses, summaries, messages, correspondence, circulars, opinions, work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and electronic, mechanical, and electric records or representations of any kind, and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, discussions, releases, personal delivery, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this document request. The singular includes the plural. The masculine includes the feminine.
4. As used herein, “referring” or “relating” means and includes “constituting,” “pertaining,” “evidencing,” “reflecting,” “describing,” or “having anything to do with,” and in each instance, directly or indirectly. These terms mean, without limitation, any reference or relationship which either (a) provides information with respect to the subject of the inquiry, or (b) might lead to individuals who, or documents which, might possess or contain information with respect to the subject of the inquiry.

B. Instructions

1. In complying with this document request, you are required to produce all responsive documents, materials, or items that are in your possession, custody, or control, whether held by you or your past or present agents, employers, employees, representatives, subsidiaries, affiliates, divisions, partnerships, and departments acting on your behalf. You are also required to produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. No records, documents, data or information called for by this request shall be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization, or individual denoted in this document request has been, or is also known by any other name than that herein denoted, the document request shall be read also to include them under that alternative identification.
3. Each document produced shall be produced in a form that renders that document capable of being printed or copied.
4. Documents produced in response to this document request shall be produced together with copies of file labels, dividers, envelopes, or identifying markers with which they were associated when this document request was served. Documents produced to this document request shall also identify to which paragraph from the document request such documents are responsive. Moreover, please include with your response, an index identifying each record and label (preferably by bates stamping) the documents. The Committee prefers, if possible, to receive all documents in electronic format.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses documents that are non-identical or identical copies of the same document.
6. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer back-up tape), state the form in which it is available and provide sufficient detail to allow the information to be copied to a readable format. If the information requested is stored in a computer, indicate whether you have an existing program that will print the records in a readable form.
7. If compliance with the document request cannot be made in full, compliance shall be made to the extent possible and shall include a written explanation of why full compliance is not possible.
8. In the event that a document is withheld, in whole or in part, based on a claim of privilege, provide the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter of the document; (d) the date, author, and any recipients; and (e) the relationship of the author and recipients to each other. Claims of privileges are considered under Committee on Natural Resources Rule 4(h) and, similar to all common-law privileges, are recognized only at the discretion of the Committee.
9. If any document responsive to this document request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.
10. If a date or other descriptive detail set forth in this document request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

11. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon location or discovery subsequent thereto.

12. Production materials should be delivered to:

Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington D.C. 20515