Attachment G

# REPORT OF INVESTIGATION

**Julie MacDonald,**
**Deputy Assistant Secretary,**
**Fish, Wildlife and Parks**

This report contained information that has been redacted pursuant to 5 U.S.C. §§ 552 (b)(2), (b)(5), (b)(6), and (b)(7)(C) of the Freedom of Information Act and 5 U.S.C. § 552a(k)(2) of the Privacy Act. Supporting documentation for this report may be requested by sending a written request to the OIG Freedom of Information Act Office.

# Results in Brief

The Office of Inspector General (OIG) initiated this investigation based on an anonymous complaint alleging that Julie MacDonald, Deputy Assistant Secretary (DAS), Fish, Wildlife and Parks, had been involved in unethical and illegal activities. Specifically, the complainant alleged that MacDonald had bullied, insulted, and harassed the professional staff of the U.S. Fish and Wildlife Service (FWS) to change documents and alter biological reporting regarding the Endangered Species Program. As our investigation progressed, we also developed information that MacDonald had disclosed nonpublic information to private sector sources.

Through interviewing various sources, including FWS employees and senior officials, and reviewing pertinent documents and e-mails, we confirmed that MacDonald has been heavily involved with editing, commenting on, and reshaping the Endangered Species Program's scientific reports from the field. MacDonald admitted that her degree is in civil engineering and that she has no formal educational background in natural sciences, such as biology.

While we discovered no illegal activity on her part, we did determine that MacDonald disclosed nonpublic information to private sector sources, including the California Farm Bureau Federation and the Pacific Legal Foundation. In fact, MacDonald admitted that she has released nonpublic information to public sources on several occasions during her tenure as Deputy Assistant Secretary for FWS.

The OIG Office of General Counsel's review of this investigation indicates that MacDonald's conduct violated the Code of Federal Regulations (C.F.R.) under 5 C.F.R. § 2635.703 Use of Nonpublic Information and 5 C.F.R. § 2635.101 Basic Obligation of Public Service, Appearance of Preferential Treatment.

This case is being referred to the Department of the Interior (DOI) for potential administrative action against MacDonald.

# Background

Julie MacDonald came to the Department of the Interior in July 2002. She served as senior advisor to the former Assistant Secretary until 2004, when she was promoted by then Secretary Gale Norton to Deputy Assistant Secretary for Fish, Wildlife and Parks. MacDonald is a civil engineer with a master's degree in management. She began her federal career as a hydraulic engineer with Interior's Bureau of Reclamation in 1979. In 1987, she commenced a career in public policy. She has been a staff consultant in the California Legislature and served as senior staff to a former California Senate minority leader. A former California Governor later appointed her as Associate Secretary of the State Health and Welfare Agency and then as Deputy Secretary for Legislative Affairs in the California Resources Agency. In the latter position, she was responsible for gaining bipartisan passage of new provisions in the California Endangered Species Act. DAS MacDonald has oversight of FWS operations including the examination of Endangered Species Act (ESA) reviews, and five-year Critical Habitat Designations (CHD) reviews.

Congress enacted the ESA in 1973. The purpose of the ESA is to conserve, or recover, the ecosystems upon which endangered and threatened species depend. Section 4 of the ESA directs the Secretary of the Interior to determine by regulation whether a given species should be listed as endangered or threatened, based upon the "best scientific and commercial data available...after conducting a review of the status of the species."

The Department is required by statute to conduct a review of every listed Endangered Species (ED) at least every five years. This is to determine whether, based on the best available science, each listed species should have its status either lowered from endangered to threatened, raised from threatened to endangered, delisted altogether, or remain unchanged.

The term critical habitat refers to a specific area within the geographical area occupied by the species, at the time it is listed. Critical habitat includes habitat areas that are both occupied and unoccupied by listed species that are essential to the conservation of the species. FWS must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat."

The legal review and clearance procedure for rule-making documents prepared under Section 4 of the ESA, which was modified in 2004, describes the path ED and CHD packages take to be published at the Federal Register.

Usually operating under a court ordered deadline, ED and CHD review timelines for completion vary from 12 to 18 months. After a draft report is completed, the Regional Office, including the Regional Solicitor's Office, review the field's findings; the Regional Solicitor's Office conducts a draft legal analysis of the report, which is sent to FWS headquarters; at headquarters, the Assistant Director for Endangered Species and the Department Solicitor's Office review the report for legal issues and other concerns. Changes and comments can be made to the draft, but then it is sent back to the Regional Office for a formal legal review by the Regional Solicitor's Office. The regional attorney assigned to the review can surname the document if he/she agrees that the report has legal sufficiency (can withstand a potential lawsuit); they can also disagree and not surname the final. Whether the draft is surnamed or not, it goes back to the Department's Solicitor's Office, the FWS Director, and the Assistant Secretary for Fish, Wildlife and Parks, including Deputy Assistant Secretary MacDonald. According to the policy of the Chief of Staff for the Department, Brian Waidmann, the document must be surnamed before leaving DOI, usually by Barry Roth, Deputy Associate Solicitor for Parks and Wildlife. Waidmann also reviews the package before it goes to the Federal Register for publishing.

When FWS suspects that a species is sliding toward extinction, it places a notice in the Federal Register describing the situation and the studies that led to this conclusion. Independent scientists and others, including the public, may comment on the proposed listing. If FWS determines, usually within one year, that the species does deserve listing, it places another notice in the Federal Register. Thirty days later, the listing becomes effective. Unlike other parts of the Endangered Species Act, the listing of a threatened or endangered species is based solely on science, not on economics or other factors.

# Details of Investigation

**Altering/Changing Scientific Documents**

On April 11, 2006, the OIG received an anonymous complaint from an employee of FWS alleging unethical and illegal activities by MacDonald. The complainant stated that MacDonald had persistently harassed, bullied, and insulted FWS employees to change documents and "ignore good science" related to the Endangered Species Program. After initiating a preliminary inquiry into these allegations, we opened an investigation.

On October 30, 2006, an article appeared in *The Washington Post* regarding DAS MacDonald and her consistent rejection of FWS staff scientist's recommendations to protect animals and plants under the ESA. Several issues were raised in the article which required further investigation.

When we interviewed the former Director of the FWS Endangered Species Program (ES), he stated that many of the scientific reports his office has issued have been edited extensively by MacDonald, who has no background in biology, and cited the Sage Grouse Risk Analysis as an example. He explained that many other officials in MacDonald's position have made changes to reports to reflect their political philosophy, but MacDonald took it a step further by involving herself at the field level. He explained that MacDonald regularly bypassed managers to speak directly with field staff, often intimidating and bullying them into producing documents that had the desired effect she and the former Assistant Secretary wanted.

The former ES Director discussed one instance in which MacDonald interfered in FWS critical habitat fieldwork. He said that in central California, FWS had been collecting data where *vernal pools* were located to designate them as a critical habitat. He said FWS was conducting the work under a court order with a required date of completion. He explained that several days before this date, FWS sent its report to MacDonald, who then determined that the economic cost of designating the area as a critical habitat was unacceptable. The former ES Director said MacDonald ordered him to revise the report to reflect her position.

***Agent's Note:*** *Vernal pools are miniature ecosystems: natural depressions covered by shallow water for variable periods from winter to spring, they are typically dry for most of summer and fall. A diverse array of plants and animals adapted to a waterlogged spring followed by a parched summer has evolved that thrive under these conditions. Many of these are native species endemic to vernal pools or related wetland habitat. Because of the extreme environment, there are relatively few introduced species that can compete with the natives. In addition to providing habitat for the resident species, vernal pools provide resting sites for migrating birds and foraging grounds for bald and golden eagles.*

The former ES Director said MacDonald reached this conclusion after she had accessed a California Department of Development Web site and researched business development figures from the counties involved with the critical habitat. He stated that she had misread the figures and based her decision on a mistake, although she later acknowledged that she interpreted the figures incorrectly.

The former ES Director said that overall, MacDonald did not want to accept petitions to list species as endangered, and she did not want to designate critical habitats. He said the overall effect

was to minimize the Endangered Species Act as much as possible or ensnare it in court litigation, which happened often.

We interviewed the Assistant Director for External Affairs, FWS, who stated that MacDonald would not accept the field's scientific findings and would apply science from alternative outside sources. She said MacDonald would use information from these sources as "the best science" and insist field employees revise their findings to fit what she wanted.

The Assistant Director for External Affairs described MacDonald as "an angry woman" who had been abusive to her and had become a liability to FWS. She stated that MacDonald had demoralized the FWS program with her interference in endangered species studies – often reaching "way down the line" to have reports reflect what she wanted.

When we interviewed the Chief of the Division of Consultation, FWS, he said that while he has not personally experienced or witnessed any inappropriate behavior by MacDonald, many of the field biologists had expressed concerns similar to the OIG complainant. The Chief said he believed that MacDonald's policy regarding endangered species was not to regulate them unless there was scientific proof showing otherwise. He said that unfortunately, in most cases, there is rarely definitive scientific proof, leaving uncertainties. The Chief of the Division of Consultation said MacDonald, when evaluating scientific reports, has leaned more toward the question of: "Does the science fit the policy?"

When we interviewed the Assistant Manager, California/Nevada Operations (CNO), FWS, he explained he has managed or was the lead biologist for the past eight years on numerous studies under the ESA and CHD. FWS would typically not establish CHD for a species until sued by environmental groups to do so. The process involved in CHD would follow the actual listing of an endangered species. [Ex. 5]

The CNO Assistant Manager explained how ESA issues get to court. The DOI and FWS are sued in federal court to review the status of an ED species (list/delist) or CHD. A deadline date is established for the review to be completed. The CNO Assistant Manager's staff would begin compiling scientific and biological data on the issue. Initial draft of the issue would be given to the Regional Solicitor's Office for legal review and sent back for revision. The final draft is reviewed for legal sufficiency by the Regional Solicitor's Office and sent to FWS headquarters in Washington, D.C., for further comments and revisions. The CNO Assistant Manager said many reviews are not surnamed by the regional attorneys because they are legally vulnerable due to administrative procedures ([Ex. 5]).

With respect to the California Tiger Salamander CHD and listing of the Distinct Population Segment (DPS), there was a push by DAS MacDonald to combine a large central area of California with two other smaller DPS for the salamander. According to CNO Assistant Manager, that proposal was eventually rejected by the court, as well as science, when it was determined that there were genetic differences in each population of the salamander that would prevent their combining the DPS.

The Endangered Species Coordinator, CNO, FWS, reiterated the California Tiger Salamander experience during her interview. She was the team coordinator on the FWS determination of threatened status for the Central California DPS of the California Tiger Salamander. The CNO ES Coordinator said DAS MacDonald was not happy that there were two DPSs in the north and south regions of California and wanted to consolidate these into a central California salamander population;

FWS employees disagreed with the consolidation. MacDonald had a number of objections in the final salamander rule to the CNO's findings. This was a controversial issue because consolidating the population segments from the north and south regions into the central population would diminish their status as 'endangered' to the central region's lesser designation of 'threatened.' The ES Coordinator commented that MacDonald was able to get what she wanted on the final salamander ruling; however, the court overruled the Department and kept the north and south DPSs as endangered, while adding the central region as threatened.

The CNO Assistant Manager stated that FWS Ecological Services does not factor in economic issues when reviewing endangered species for a listing. Economics does become an issue though in CHD. The economic issues would be something that senior management at DOI may take into consideration in their decisions in the process. The Secretary of the Interior can overrule FWS' research based on economic considerations as long as it does not lead to the extinction of the species. The CNO Assistant Manager added that FWS research has to be repeated over and over based on the challenges, lawsuits, and pendulum of politics. He also stated that there has been a lot of pressure on his department in CNO over the last three years, "but we have toed the line." He explained, "Everything needs to be consistent with the law and the science."

The CNO Assistant Manager stated that the CNO is at the center for continual lawsuits by the private sector and environmentalists and that the environmental groups particularly like the Ninth Circuit Court of Appeals for ESA issues. He commented that the Regional Solicitor's Office rarely surnames their legal reviews on ED/ CHD issues. The normal path for his office's work (aside from legal review) would be from himself to the CNO Manager, to FWS Deputy Director Marshall Jones, to FWS Director Dale Hall, and then the to the Special Assistant to the Assistant Secretary for Fish, Wildlife and Parks, the Deputy Assistant Secretary and the Assistant Secretary, Fish, Wildlife and Parks would weigh in with the Secretary's Chief of Staff. Deputy Associate Solicitor Barry Roth would surname the FWS packages before sending them to the Federal Register. The CNO Assistant Manager said if DOI management (Assistant Secretary, Chief of Staff) wants something accomplished policy wise, it does not matter whether the Regional Solicitor's Office surnamed the rulemaking package or not; the DOI's Deputy Associate Solicitor can, and frequently does, use his surname authority to move the rule to the Federal Register.

The CNO Assistant Manager commented that working with Julie MacDonald "has been one of the most challenging times in my entire career." He stated that MacDonald intimidated some FWS employees and added that it was very unusual for a person of her position to directly contact field biologists and challenge them on their work. He said MacDonald would relate to the various FWS personnel she contacted that she was calling on behalf of the former Assistant Secretary. The CNO Assistant Manager stated that the CNO Manager would verify that information by calling the former Assistant Secretary himself to ensure that he was the source of the inquiry and not MacDonald. The CNO Assistant Manager related there was a fair amount of "explicit" conversations with MacDonald that the former Assistant Secretary "wanted this and that done" and it caused a lot of stress on his staff.

We interviewed the Chief of the Endangered Species Division, CNO, FWS; he works for the CNO Assistant Manager. The CNO ESD Chief stated that Julie MacDonald "was in your face all the time, but never inappropriate." The CNO ESD Chief described MacDonald as "a pain in the butt."

The CNO ESD Chief stated that he was responsible for much of the research on the Delta Smelt fish as an ESA issue. There was a recovery plan established in 1990 for the Delta Smelt, and

there was also a plan for delisting the Smelt if the population index was exceeded three of the next five years. In 2003, the California Farm Bureau Federation (Farm Bureau) produced a report that the Delta Smelt was no longer threatened. The Farm Bureau report was not referenced, cited, or published with any scientific research. As a result, FWS asked the U.S. Geological Survey (USGS) to conduct a peer review. USGS completed the review and criticized the Farm Bureau's report. There is still an ongoing lawsuit against FWS for not delisting the Smelt based on the recovery plan and whether the population index is accurate. The CNO ESD Chief stated that MacDonald challenged the basic population index that FWS biologists have always used and claimed that the USGS peer review was "no good." In the current lawsuit by the Farm Bureau, there was an e-mail provided to the Farm Bureau that has caused controversy. ***Agent's Note:*** *The e-mail was ultimately determined to have been provided by MacDonald.* The presiding judge on the case demanded that FWS explain its position since the e-mail makes the FWS appear confused over its own stance on the Smelt's listing under the ESA. The CNO ESD Chief added that just because an endangered species' recovery plan is met, that does not mandate delisting. He said MacDonald was highly opinionated about what she believed was the right way to evaluate the controversy and she did not support FWS research or the peer review by USGS.

The CNO ESD Chief related a series of phone conversations and meetings with MacDonald, during which she kept pressuring him to make subtle changes to his report or research. Although, according to CNO ESD Chief, in some cases it was just changing words, he had to involve other CNO management so that his report did not begin to just mirror what MacDonald wanted him to say. The CNO ESD Chief opined that the degree of involvement by MacDonald was unprecedented for a DAS.

The CNO Manager FWS, was interviewed and said that most issues on the ESA are court driven. With respect to DAS MacDonald, the CNO Manager related that he has been around a long time with FWS and never took anything MacDonald said or wanted at face value. He would contact the former Assistant Secretary directly or fly to Washington, D.C., to verify MacDonald's requests and present his view on the ED and CHD reviews coming from the CNO.

The CNO Manager stated that his office's confrontations with MacDonald had become much better since Dale Hall had become FWS Director. Thompson opined that political appointees should make changes in policy but not interfere with biologists doing their jobs. There were times MacDonald was helpful in her critical reviews, but the CNO Manager viewed her as ineffective in her overall approach. In the Delta Smelt issue, the CNO Manager stated that he received an enormous amount of pressure from MacDonald. The presiding judge requested a memo for inclusion into the Smelt Administrative Record (a record is kept on all reviews) explaining the circumstances surrounding an e-mail by MacDonald to the CNO Manager and other CNO officials regarding a press release on the Smelt. MacDonald allegedly sent the e-mail to a friend in the Farm Bureau, who brought it to the attention of the judge and prompted the request. In the memo, the CNO Manager identifies MacDonald as being the source of much of the conflicting DOI internal debate over the Smelt. The CNO Manager said he believed that the Farm Bureau dropped its lawsuit on the five-year status review of the Smelt because the science did not support the claims for delisting.

The CNO Manager stated that there are 30 to 50 lawsuits on his desk in any week and that it comes with the territory, the politics, the agency, and the geographical area he supervises. He stated that MacDonald would often put a slant on the rules that would compromise FWS' position and success in court.

The CNO Manager was aware of DOI/FWS headquarters personnel who wanted to file a hostile work environment complaint against MacDonald. He said his employees at CNO were definitely stressed, pushed, and yelled at by MacDonald. The CNO Manager stated he would interject at any point when he felt MacDonald had clearly stepped out of her authority and was demeaning to his staff, even to the point of halting conference calls and not calling MacDonald when she had stepped over the line.

The CNO Manager concluded by saying that MacDonald was a prolific writer and made him and his staff do an incredible amount of work, which was often unproductive. He added he felt confident that he and his staff remained professional throughout their contacts with MacDonald despite not feeling MacDonald always shared that basic approach.

The OIG interviewed the Assistant Manager, Region 1 Portland, FWS, who said that she heads up the Endangered Species Review Section for Region 1. The Portland Assistant Manager informed us that the recently retired Region 1 Director was very frustrated in his contacts with MacDonald.

The Portland Assistant Manager commented that Julie MacDonald intimidated FWS personnel within Region 1. She instructed her staff to tell MacDonald that they would need to go through their supervisors when they were badgered with questions by MacDonald. She related that MacDonald would curse and yell at her, but she never felt intimidated or threatened by MacDonald because the Portland Assistant Manager was confident that her 20 years of government service and quality of work could withstand the verbal attacks; however, she sympathized with the less senior FWS employees who might not have felt as secure on the receiving end from a senior manager. She described MacDonald as lacking the basics in managerial style.

The Portland Assistant Manager stressed to her staff to be impartial in their work, be complete, and, above all, remain professional and dedicated to the overall mission of FWS. She commented that MacDonald was very critical and would find mistakes on things that were incomplete, which was a good thing, but her confrontational style tainted any positives related to her review. The Portland Assistant Manager also added that MacDonald would go around managers to get to the lowest level FWS employees. This was considered to be unprofessional and caused additional problems within the region since many of the biologists were not used to that type of direct contact from a senior manager in the Assistant Secretary's corridor.

The Portland Assistant Manager said that MacDonald was very frustrated over CHDs. On the designation of critical habitat for the Bull Trout, for example, there were specific exclusions for federal agencies and not federal lands, as MacDonald had wanted. The exclusion of federal lands meant more miles of critical habitat eliminated.

*Agent's Note: In a number of e-mails and comments on the Bull Trout CHD, MacDonald forced a reduction in critical habitat miles in the Klamath River basin from 296 to 42 miles.*

The Portland Assistant Manager stated Region 1 has produced numerous completed ESA reviews over the past three years and MacDonald has never overturned any of her staff's reviews; however, she said many Region 1 decisions on ESA reviews were revised as a matter of policy by MacDonald or another Fish, Wildlife and Parks senior manager's discretion. The Portland Assistant Manager stated MacDonald has never told her that she could not list or delist an endangered species.

The Assistant Manager commented that she has been with the government long enough to know there are a lot of political issues that affect agency decisions.

The Portland Assistant Manager stated that although MacDonald lacked a professional managerial style, she was unaware of any known incidents in which a Region 1 FWS employee felt threatened enough to file a hostile work environment complaint against MacDonald. The Assistant Manager commented that MacDonald would invoke the former Assistant Secretary's name on many occasions to obtain what she wanted from the field. She said that the former regional director ran a lot of interference, while MacDonald put a lot of pressure (using the former Assistant Secretary's name) on the Region.

In closing, the Portland Assistant Manager stated that there was a lack of oversight by DOI senior management to keep MacDonald in check and advise her of her role in the process. The Assistant Manager stated that after FWS Director Dale Hall was appointed in October 2005, he quickly realized that it was unprofessional for MacDonald not to follow a chain of command and it hindered the rulemaking process to have MacDonald involved at the field level.

We interviewed the Chief, Classification and Conservation, FWS, who stated that MacDonald often interjected herself into the scientific process. She cited MacDonald's involvement in an FWS study of Preble's Meadow Jumping Mouse as an example. The mouse was listed in 1998 as a threatened species under the ESA.

On February 2, 2005, FWS issued a finding on a petition to delist the Preble's mouse and proposed to remove the mouse from the federal list of threatened and endangered species. The delisting proposal was primarily based on the genetic research conducted by a zoologist formerly of the Denver Museum of Nature and Science. The zoologist's study claimed that the Preble's mouse was not a species unto itself and was part of a more common species of mouse. The Classification and Conservation Chief said that based on this information, MacDonald wanted to delist the species from the endangered list.

According to the Classification and Conservation Chief, in seeking to use the best science possible in making a final decision, FWS later commissioned a USGS biologist to do an independent genetic analysis of several meadow jumping mouse subspecies. The USGS study results, provided to FWS on January 25, 2006, raised significant questions about the conclusions drawn by zoologist in his study.

Given the apparent inconsistencies between these reports, said the Classification and Conservation Chief, the FWS contracted with Sustainable Ecosystems Institute (SEI) to organize an independent scientific review panel to analyze, assess, and weigh the reasons why the data, findings, and conclusions of the USGS biologist differ from those of the zoologist. The Chief said MacDonald wanted to hire an outside consultant other than SEI. On July 21, 2006, SEI delivered to FWS their report, which stated that based on the "best available science" it appears the Preble's mouse is a distinct species on at least some basis. A final determination by FWS on the status of the Preble's mouse is pending.

The Classification and Conservation Chief opined that MacDonald is more interested in political views than getting it "right." She said that in many instances, FWS establishes a ruling on a critical habitat in the Western United States, has it published in the Federal Register, and then has it

immediately challenged in court by business interests such as water and power companies, cattlemen's associations, commercial and residential housing developers, and farm bureaus. According to the Chief, FWS has been losing many of these challenges, and FWS budget resources are being wasted when a court finds fault with a ruling two or three times on the same habitat review. Further, the Classification and Conservation Chief claimed that several of the Regional Solicitor Offices will not surname, or sign off on, the rule making documents (ED/CHD reviews) or policy decisions because they believe they are not legally sufficient.

During the investigation, we found an example of the legal wrangling involved with a critical habitat ruling described in an article in the *San Francisco Chronicle* on May 17, 2003, regarding the Alameda Whipsnake. According to the article, the Alameda Whipsnake dispute started in 1999 when the Center for Biological Diversity, an environmental group based in Tucson, AZ, sued FWS for failing to designate critical habitat for the whipsnake. The environmental group prevailed in its suit and in 2000; FWS designated more than 400,000 acres of land as critical whipsnake habitat. Following that designation, a coalition including the Home Builders Association, the California Chamber of Commerce, and the California Alliance for Jobs sued FWS alleging it violated the ESA by not adequately defining the habitat area or considering its economic impact. The Pacific Legal Foundation (PLF) represented the coalition in this case and was successful in overturning the original protected habitat of the whipsnake.

The article quoted a spokesperson for FWS in Sacramento, CA, who stated that FWS spent a lot of money on a process that was lawsuit-driven to designate a habitat, after which it was lawsuit-driven to get it dismantled. According to the spokesperson, this illustrates the drain on the FWS budget having to contend with constant lawsuits from either business interests or environmental groups.

***Agent's Note:*** *According to their Web site, the PLF is a conservative law firm representing various business interests. It is a self-proclaimed national leader in the effort to reform the ESA and raise awareness of the Act's impact on people. They have successfully mounted a number of legal challenges to ED/CHD reviews throughout the Western United States on behalf of their clients such as the California Farm Bureau, Washington Farm Bureau, California State Grange, Arizona Cattle Growers' Association, and the California Cattlemen's Association.*

When the OIG questioned her regarding her involvement in the Delta Smelt case, MacDonald related that she has not had to testify in court, but she did have to file a clarifying memorandum, co-signed by CNO Manager, as to the circumstances surrounding her e-mail to CNO officials regarding a controversial press release by CNO on the Smelt.

According to DAS MacDonald, when she attended meetings at Western Regional Offices, it was not beyond the realm of possibility that she swore at field personnel when challenging them on their scientific/biological findings. She said she generally will match the tone of whoever is speaking to her. She recalled that early in her tenure with DOI, the quality of the ED/CHD reviews emanating from the field was bad. She added that the reviews have since improved.

## Regional and Department Solicitors' Comments on the Legal Review Process

We interviewed an attorney from the Department Solicitor's Office in the Main Interior Building (MIB). The attorney has worked on FWS legal issues regarding ED and CHD reviews.

During the past four to five years, he said, federal listings involving ED and CHD reviews have been accomplished under court ordered deadlines.

The attorney from the Solicitor's Office described the process of how a CHD review gets published in the Federal Register. He said if there is a legal dispute between the Regional and Department Solicitor's Offices, the final decision concerning the ED and CHD review packages is made by Deputy Associate Solicitor Roth or Solicitor David Bernhardt, if necessary. According to the attorney, Roth and Bernhardt both have the ability to elevate the surnamed review to the DOI's Chief of Staff despite legal insufficiencies cited by the FWS Regional Solicitor's Office.

We interviewed the Assistant Regional Solicitor, Solicitor's Office, FWS Region 1, Portland, OR, who described his work as involving either litigation, legal review, or rule making as it applies to the ESA.

The Portland Assistant Regional Solicitor stated he has conducted approximately 15 ED/CHD legal reviews and that the administrative record for these reviews generally consists of factual support, scientific data, public comment, and peer review. When asked why he does not generally surname on ED/CHD reviews, the Assistant Regional Solicitor commented he has not surnamed a document in six years due to the legal insufficiency of the documents. He states that he looks at the rule, the rationale within the rule, past judicial decisions, whether it is factually supported, and whether there are any hopes of public support.

The Portland Assistant Regional Solicitor related that he and FWS personnel are always under court ordered deadlines to meet review dates. Normally when he gets a review, there is already a deadline looming and he attempts to turn them around in 24 hours; however, it often takes a week when questions need to be asked of the field biologists.

The Assistant Regional Solicitor commented that often what is being proposed or sent to him for review is a legal stretch. Due to the heavy workload of the field biologists and the ever-present court deadlines, the regional reviews are not particularly good. The initial review package from the field on a CHD or an ED listing/delisting package may be delivered to him lacking elements the field biologists should have included. The Portland Assistant Regional Solicitor often spends time correcting these mistakes and then does the initial review.

The Portland Assistant Regional Solicitor described the review process for a CHD and ED package. He said the completed package would go to the Federal Register, usually the day before it is due, even though from his perspective the package was legally insufficient. The Assistant Regional Solicitor said the former Deputy Associate Solicitor used to rationalize that even though he surnamed a legally insufficient document, it kept the Secretary of the Interior from being held in contempt of court. The Portland Assistant Regional Solicitor commented that the former Counsel to Secretary Norton, believed the former Deputy Associate Solicitor was actually signing ESA issues as being legally sufficient.

The Portland Assistant Regional Solicitor recalled two teleconference calls on CHD for Bull Trout and the Sage Grouse that he had with DAS MacDonald and other Regional and headquarters FWS officials. MacDonald wanted a 90 percent reduction in acreage for the Bull Trout's critical habitat. The Assistant Regional Solicitor remembered distinctly that MacDonald was "quite hostile, raised her voice repeatedly, and cut people short as they were explaining." The Portland Assistant

Regional Solicitor sent the attorney in the Solicitor's Office at MIB an e-mail with the subject, "and the Red Queen was talking backwards," after the conference call. The Portland Assistant Regional Solicitor wrote, "Re: today's call. I'm still reeling from my little taste of it, but its [sic] Alice in Wonderland every day for you, isn't it?" The Assistant Regional Solicitor opined that MacDonald was disrespectful, rude, and unprofessional, and said, "never in over 20 years of government service" had he seen a political appointee behave like she did.

The Portland Assistant Regional Solicitor was assigned the legal review for the designation of Columbia and Klamath populations for the Bull Trout habitat. He cited three reasons for not sumaming the document and a fourth regarding the preamble disclaimer as being inappropriate and in need of deletion from the final rule on the Bull Trout.

Regarding the other conference call on Sage Grouse with MacDonald, the Portland Assistant Regional Solicitor said the interaction with MacDonald was even worse than on Bull Trout. On Sage Grouse, there was a deadline approaching and a major issue involving state regulations for protecting the species. He described the Policy for Evaluating Conservation Efforts (PECE), in which state conservation efforts are screened under defined criteria to validate conservation plans. The Assistant Regional Solicitor said the policy is very well-written, if FWS just followed it. For Sage Grouse, three FWS regions (Regions 1, 2, and 6) reviewed state plans and determined that conservation efforts did not meet the PECE policy. The Portland Assistant Regional Solicitor said once MacDonald was informed, she claimed that FWS came up with the wrong conclusions and instructed them to go back and do the review again. He termed this behavior by MacDonald as "the most brazen case of political meddling" he had seen. [Ex. 5]

In an e-mail to his supervisor, the Portland Assistant Regional Solicitor said that the former DOI Deputy Solicitor, who was in on the conference call, opined that, "...FWS has received inadequate supervision [relating to Sage Grouse and PECE policy] and that it's time for us to start 'meddling' in their work."

When asked about the preamble disclaimer language on their legal review memo (which the Portland Assistant Regional Solicitor believed was initiated by the former Assistant Secretary in 2001 or 2002), he opined that it is a waste of time and makes FWS look reluctant to carry out its duties, casting a negative light on the entire process. The Portland Assistant Regional Solicitor stated he worked with attorney at the MIB a few months ago to change the verbiage in the preamble and that the Assistant Solicitor for Fish & Wildlife, MIB, supposedly has referred it to Assistant Secretary for Fish, Wildlife and Parks David Verhey for further review.

The Assistant Regional Solicitor, Solicitor's Office, CNO, FWS, Sacramento, CA, stated that he has been doing FWS reviews for the past seven years and has done approximately 20 reviews since 2002. These reviews typically consist of listings, 90-day findings, 12-month findings, preliminary CHDs, and final CHDs.

The Assistant Regional Solicitor in Sacramento recalled the Alameda Whipsnake ruling that he had sumamed as being legally sufficient and from which he learned a lesson because the ruling was overturned in court. He commented that he has not sumamed a CHD since 2002. In his legal analysis of the California Tiger Salamander listing, which included the consolidation of the three DPSs that MacDonald wanted and obtained in the final ruling, the Assistant Regional Solicitor in Sacramento

concluded that it was legally insufficient. The final ruling proceeded to the Federal Register, was immediately challenged, and was overturned by a federal district court.

The Assistant Regional Solicitor in Sacramento said that ED and CHD reviews always have looming deadlines and they have to be surnamed by the Department Solicitor's Office before going to the Federal Register. He related that if there are legal concerns, the Assistant Secretary for Fish, Wildlife and Parks would become involved. There are monthly calls back and forth, and legal objections are discussed. The preamble disclaimer language added to the final rules is always debated and "the higher pay grades make the final decision." As to the legal analysis, the Assistant Regional Solicitor in Sacramento said, "MacDonald is not in my chain of command. We work for the Interior Secretary through the Solicitor. MacDonald found that out early in her career." The Assistant Regional Solicitor in Sacramento commented that he had never had a one-on-one discussion with MacDonald. He has raised objections to the rubber stamping of ESA packages at senior levels in the Department despite them being identified as legally insufficient at the regional level; he said, however, "Policy trumps science within the Assistant Secretary's corridor on many occasions."

The Assistant Solicitor for Fish and Wildlife, Solicitor's Office, DOI, Washington, D.C., said the bulk of their work is with the ED, CHD, and litigation issues with the ESA.

He described the typical process for legal analyses of ED and CHD reviews conducted at the regional office level. Sometimes, however, he said that in between the packages going from the Assistant Secretary's Office to the Chief of Staff's Office, they are reviewed by Deputy Associate Solicitor Barry Roth. The Assistant Solicitor for Fish and Wildlife said he provides legal advice (weaknesses in case, potential for legal suit, etc.) to Roth and usually it involves two points of consideration: one, whether to surname the document to avoid being held in contempt of court for failing to provide the Federal Register a rule by the court ordered deadline; and two, whether to surname the document as being defensible in court if challenged or surname the document noting the legal concerns raised by the Regional Solicitor's Office. The main concern is to publish the best decision possible within court deadline requirements.

According to the Assistant Solicitor for Fish and Wildlife , since the Bush Administration came into office in 2001, DOI senior management has conducted a balancing of risk factors involved with sending ED and CHD rules to the Federal Register with the knowledge that there are legal problems with the packages. Obviously, he said, the Assistant Secretary's Office policy agenda involves a certain amount of litigation risks and they are prepared to absorb expected losses.

The Assistant Solicitor for Fish and Wildlife said that in the past four years that Julie MacDonald has been with the Assistant Secretary's Office for Fish, Wildlife and Parks, over 75 percent of the legal reviews his office has received from the FWS western regional offices have not been surnamed.

The Assistant Solicitor for Fish and Wildlife was asked if he had felt any pressure on the ED and CHD issues from DAS MacDonald regarding the number of non-surnamed documents coming from the regions. He said he felt no pressure from MacDonald because she is not in his chain of command; rather, the pressure comes from the court deadlines his office has to meet.

The Assistant Solicitor for Fish and Wildlife related that Brian Waidmann, DOI Chief of Staff, wanted the Solicitor's Office opinion and surname on ED and CHD packages before they go to the Federal Register.

He commented on the preamble disclaimer language for critical habitat that the former Assistant Secretary had inserted into final CH rules. The Assistant Solicitor for Fish and Wildlife said that recently in a California federal court decision on Vernal Pools CH designation, the court said FWS' failure to consider the recovery benefits of a critical habitat designation was a key point in remanding the case.

[Ex. 5]

We interviewed Barry Roth, Deputy Associate Solicitor, Solicitor's Office, DOI, Washington, D.C., he stated that when ED and CHD review packages get to him, he is usually under a court ordered deadline to move them on to the Federal Register; this rarely leaves time to remedy legal problems with the packages. He acknowledged surnaming the packages before they go to the Federal Register to avoid contempt of court charges for missing court deadlines. Roth said meeting the deadlines is his main focus. He does due diligence in reviewing the legal analysis from the Regional Solicitor's Office, notes their legal concerns, and signs them. He understands that he is under no statutory requirement to surname; however, it is DOI Chief of Staff Brian Waidmann's policy that the package be surnamed before the final rule goes to the Federal Register.

Roth said the process for review, commenting, and surnaming has not worked well over the past few years. There has not been a lot of time to work out the legal problems associated with the packages before the court deadline arrives. Within the last year, Roth said the process has improved somewhat as the documents are being delivered with more than one day's notice.

Prior to Roth taking on the surnaming duty, the former Deputy Associate Solicitor, was in the position to last review the ED and CHD packages. Roth said the former Deputy Associate Solicitor more or less rubber stamped the packages with his signature due to the large amount of packages that arrived from the field because of time limits imposed by a court deadline. Roth said he has attempted to give the documents a more critical review before sending them to the Federal Register.

Roth stated that FWS had been instructed to use a boilerplate preamble disclaimer language favored by the former Assistant Secretary regarding critical habitat designations. It was seen as a legal obstacle by several of the Regional Solicitor's attorneys who review CHD packages, and it was recently struck down by a federal district court in California.

Roth related that the FWS work agenda is controlled by the litigation process regarding ED rule listings/delistings and CHDs. Roth used the term, "unfunded mandate on FWS" to describe how their work is affected by lawsuits. They do not have the budget to constantly conduct ED and CHD reviews under court deadlines, in addition to carrying out their normal duties.

Roth advised that he does not always agree with everything DAS MacDonald does; however, he did say she works hard and he has approached their business relationship as her "legal adviser." He normally talks to her on ED and CHD matters when subordinates, an attorney and the Assistant Solicitor for Fish and Wildlife, feel the need to elevate an issue. Roth said MacDonald customarily goes through FWS management with her comments and reservations on particular ED and CHD

matters. In matters where Roth and MacDonald have opposing views, he brings the issue to the attention of Solicitor David Bernhardt. Roth related that Bernhardt was focusing more on ESA issues than his predecessors.

Roth was asked if he had knowledge of MacDonald ever releasing deliberative process material outside of DOI, FWS, and the federal government, he recalled the Delta Smelt e-mail she released to the California Farm Bureau in 2004.

The OIG interviewed DOI Solicitor David Bernhardt concerning his role in the ED/CHD legal review process. Bernhardt echoed his subordinate Barry Roth's assertion that ED and CHD packages arrive at the Department usually under a court ordered deadline leaving little time for review before going to the Federal Register. The overriding concern is to avoid contempt of court for the Secretary of the Interior. Bernhardt said he has an obligation to give legal advice to the Secretary as to whether these ED/CHD packages are a bad risk or an assumable risk, given their legal sufficiency, and to provide the Secretary with options.

Recently, Bernhardt sent a memorandum to his office attorneys that included a section on the surnaming of documents. He reminded them that the placing of your surname on a document is an attestation that they have inquired into and analyzed the factual and legal matters presented in the document and are satisfied that the matter is in compliance with applicable law. Bernhardt advised them that it is appropriate to include with their surname comments that describe the scope of the review or articulate reservations to which their surname is subject, consistent with the duty of due diligence.

Bernhardt acknowledged that he has the final decision in differences between Roth and DAS MacDonald regarding legal concerns with ED/CHD packages. He views MacDonald as a legal client to whom he provides advice.

When we interviewed FWS Deputy Director Marshall Jones, he stated several Senior Executive Service employees within the FWS regional offices have contemplated filing hostile work environment complaints. He said none of these individuals, however, have gone forward with their complaints. Jones commented that it seemed like MacDonald had "political heat" on her to change the science behind the endangered species reviews.

According to Jones, MacDonald was the former Assistant Secretary's "attack dog" regarding ED issues. Jones stated that after the new appointment of Hall as FWS Director, MacDonald had moderated her interference. He said Hall had "drawn a line in the sand" with MacDonald and had stated that she has the right to change policy but not the science coming from the field.

Jones also speculated that MacDonald may have been sharing internal FWS ED documents with outside sources. He said he based this suspicion on the sources MacDonald used to challenge FWS field biologist findings. Jones explained that FWS is also being consistently sued in federal court by private sector entities for missing endangered species review deadlines. He cited the PLF as a legal group who regularly sues FWS for missing review dates.

Jones stated that while MacDonald has been correct on several occasions in her challenges of field research, he emphasized that her position is one of political policy – not scientific finding.

We interviewed Dale Hall, FWS Director, about the allegations against MacDonald. He stated, "A lot of that is true". He said that since October 2005, when he was sworn in, he has been involved in a "running battle" with MacDonald over the chain of command in FWS and her repeated attempts to circumvent it.

As an example of her interference, Hall cited MacDonald's involvement of a FWS study of the Southwest Willow Flycatcher, a small bird placed on the ED list in 1995 and whose habitat stretches from Arizona through New Mexico and into Southern California. He said the FWS Southwest Region was studying the Flycatcher in order to be in compliance with a September 30, 2003 opinion issued by the Federal District Court of New Mexico (*Center for Biological Diversity v. Norton*). Hall was the Regional Director for that office at the time. He said the biologists were identifying primary constituent elements, which are elements that endangered species need to live. One of these elements was the nesting range of the Flycatcher. Hall explained that birds have flying radiuses around their nests, and the field biologists determined that the Flycatcher's radius or range was 2.1 miles. He said MacDonald decided that 1.8 miles was more accurate, and she then argued with the field personnel about that issue.

Hall said he told the field staff to inform her of the science behind their findings, and if she still said to make the change, to go ahead and do so – but to document everything. He said that in the end, MacDonald had them change the range to 1.8 miles because she was concerned that the 2.1 radius figure would extend into California. Hall stated that MacDonald had a particular interest in all of the ED work in California, where her husband maintained the family ranch, and she had previously served in various California State Legislature positions ranging from staff consultant to a former Republican Senate Minority Leader, to Associate Secretary of Health and Welfare and Deputy Secretary for Legislative Affairs under a former California Governor.

Hall said he had a "face down" with MacDonald over an issue involving the Kootenai River sturgeon, a white sturgeon fish that resides in Montana and Idaho. Hall explained that the sturgeon needed certain levels of river flow in order to spawn, and the goal is to have reasonable river flows for spawning without affecting the operations of the dams[1] more than necessary.

Hall, a wildlife biologist, noted that flow levels are measured in ranges and are not tied into one specific number. He said the field established the range for the Kootenai sturgeon between 2.3 and 5.9 cubic feet per second. He said MacDonald wanted to be specific and asked the field to change the final figure to 5.9. Hall said he challenged MacDonald on her assertion and asked her to put it in writing but that she ultimately relented and they kept the 2.3 to 5.9 range.

Hall stated that MacDonald later circumvented the chain of command and went directly to the field biologists at the river to request documents and to remind them to "be sure" about the science. He noted that the dam operators would have benefited from using the 5.9 figure.

We interviewed the former Assistant Secretary for Fish, Wildlife and Parks, who related that he did not recall anyone in FWS complaining to him regarding the managerial style of MacDonald. A quote from the former Assistant Secretary in a *Time* magazine article from December 13, 2004, regarding MacDonald's critique of the Sage Grouse review stated, "She is highly qualified, an engineer, extremely competent, and reads every single paper cited" by federal biologists in their

[1] There are at least five dams along the river's route.

reviews. The former Assistant Secretary said he had complete confidence in MacDonald's abilities, first as his Special Assistant and then as Deputy Secretary. She frequently spoke for him in matters regarding ED and CHD with FWS. The former Assistant Secretary said he spoke on a regular basis with FWS Regional Directors regarding ED and CHD final packages and their associated problems. He stated he was personally involved in these issues as they were matters of importance to him.

The OIG interviewed another former Assistant Secretary for Fish, Wildlife and Parks, who subsequently assumed the position and who supervised MacDonald for approximately seven months before accepting a position in the private sector. The other former Assistant Secretary stated that there were several disagreements between FWS Director Hall and MacDonald over chain of command issues and MacDonald's penchant for communicating directly with field employees over scientific reporting. The other former Assistant Secretary said Hall and MacDonald differed over the role the Deputy Assistant Secretary should have in reviewing and editing the scientific reports coming from the field. He described himself as a "referee" between Hall and MacDonald in several meetings.

The other former Assistant Secretary commented that he had heard that several FWS regional directors and office managers were contemplating filing hostile work environment complaints against MacDonald. He said he had heard that MacDonald "got into the face" of FWS personnel and that she had a fundamental suspicion of FWS employees because of her belief that they were close with the environmental groups. He said he has a philosophical difference with MacDonald on how to treat employees, and he did not agree with her approach.

When we interviewed Julie MacDonald, she said she is responsible for reviewing, commenting, and at some times editing critical habitat designation reports and five-year endangered species reviews. MacDonald said she views her involvement in the Endangered Species Program as part of her duties, and she challenges the science produced by FWS field personnel and makes them accountable for the citations and rules they refer to in field reports. She admitted that she is not always right, as in the case of the vernal pools, but added, "The figures were a mistake and very embarrassing, but they didn't make a difference in the outcome of the review."

DAS MacDonald considered the Western Regional Solicitor's Offices to be outside their legal realm in their opinions and analysis regarding ESA and CHD issues." She accused the FWS of being lax in submitting ESA/CHD packages to DOI senior management before court ordered deadlines were imminent.

During her interview, DAS MacDonald was asked why she ignored or discounted the Regional Solicitor's legal opinion concerning ED/CHD packages. MacDonald replied it was a matter of policy, it was what worked best, and it was the result of the risk balancing that takes place between policy and legal insufficiency. MacDonald commented that the former Assistant Secretary was "very" involved regarding ED/CHD issues [Ex. 5].

MacDonald echoed Roth's comment regarding Waidmann wanting everything surnamed before leaving DOI and going to the Federal Register, describing it as his "informal and unwritten" policy. MacDonald agreed with Roth stating that in policy disputes with the DOI Solicitor's Office, she consults with Bernhardt for resolution.

**Misuse of Position**

As our investigation of MacDonald progressed, in addition to the initial allegations, we developed information that MacDonald had misused her position and disclosed nonpublic information to private sector sources.

On April 4, 2006, OIG investigators reviewed MacDonald's government e-mails, using the keyword "Pacific Legal Foundation" as a search item because of the number of times this private sector legal entity appears in newspaper and other media articles related to court decisions involving ED.

The e-mail search revealed that MacDonald had sent an FWS document titled, "Interim Guidance for the Designation of Critical Habitat Under the Endangered Species Act," with an attachment that consisted of 147 pages, to a PLF attorney. MacDonald sent this e-mail on February 4, 2004, following an exchange of e-mails she had with the PLF attorney on the subject of draft CHD policy.

In those e-mails, the PLF attorney requested information from MacDonald, stating, "Any information that you can share regarding the draft policy, and general guidance as to the process/timetable, would be greatly appreciated." MacDonald wrote back, "I will send you a copy of the draft but please do not share it with anyone else. It's still undergoing revision, although the fundamental legal/policy approach will not change. Does that work for you?" The PLF attorney acknowledged, "...yes, that would definitely work. You have my word that it won't go beyond me. Thanks [the PLF attorney's first name]."

Marshall Jones identified the e-mail to the PLF attorney containing the Interim Critical Habitat Guide as being nonpublic information and classified as internal DOI/FWS documents. Jones stated that these documents were for "FWS eyes only" and should not have been disseminated outside of DOI.

***Agent's Note:*** *According to Deputy Director Jones, the Interim Guidance for Critical Habitat Designation has never been publicly released or published for comment. Jones said it remains an FWS internal document and probably will remain so indefinitely. During his interview, Jones speculated that MacDonald may have been sharing internal FWS ED documents with outside sources; however, he had no evidence to substantiate his contention.*

The former Assistant Secretary stated that he did not give MacDonald permission to release the Interim Guidance for Critical Habitat Designation Policy to the attorney for the PLF. He added that he never knowingly gave MacDonald a blanket authorization to release nonpublic information. The former Assistant Secretary stated that he authorized MacDonald to share matters with whomever necessary in the course of consultations on issues.

The other former Assistant Secretary also said he never gave MacDonald permission to release nonpublic information. He admitted that the issue of MacDonald disclosing nonpublic information was a rumor within Fish, Wildlife and Parks; however, he said the subject was not officially brought to his attention in his official capacity as Assistant Secretary.

During our review, we found another e-mail, dated March 30, 2004, which MacDonald sent to a non-governmental address. This e-mail included an attachment titled, "Draft [Delta Smelt] 5-Year Review," which was an FWS review of a Northern California endangered species, the Delta Smelt.[2] During her interview, MacDonald identified the address as her private e-mail account. She said she often transmitted DOI/FWS documents to her home computer for use during off hours.

We found the Draft Delta Smelt five-year review was a highly controversial issue within FWS. In fact, the media heavily reported on MacDonald and her attempts to derail the status review on the Smelt because it did not support removing protections for the Smelt. FWS released its status review on the Delta Smelt on March 31, 2004. Originally, the review had recommended that the threatened listing be continued; however, on April 1, 2004, MacDonald sent an e-mail to FWS CNO Manager, the CNO Assistant Manager, and the Chief of ESD in the Sacramento office, stating that "...the facts represented by the Service [released status review] provide an oversimplified and misleading characterization of what is happening...I have asked the press release be stopped until we have an opportunity to more accurately characterize the finding and its basis".

***Agent's Note:*** *The FWS biologists from the Sacramento office who completed their review of the Delta Smelt five-year draft in March 2004, took the position that there was no justification for delisting the Smelt, while MacDonald opposed the field decision through her comments in the margins of the Smelt draft review dated March 30, 2004. As of this date, the Farm Bureau is no longer a part of the Smelt lawsuit against FWS.*

We discovered several other e-mails sent from MacDonald's government computer to internet subscriber addresses outside of the Department. The title of two such e-mails was the "Delta Smelt letter/report/press release". These e-mails contained MacDonald's critical comments regarding the FWS Sacramento office's release of a Delta Smelt review letter to the Congressional Affairs office in Washington, D.C..

We sent an Inspector General subpoena to AOL for subscriber information for the e-mail accounts to which MacDonald sent the documents. We identified the recipients as an attorney-advisor in the Solicitor's Office at MIB, the father of an individual MacDonald met online, and her child.

Two weeks after MacDonald sent the above-mentioned e-mails, the California Farm Bureau made a formal FOIA request for the e-mail and any responses to it (MacDonald had provided a copy of the e-mail to a Farm Bureau lobbyist and personal friend). An examination of the FOIA file revealed that the e-mail was designated exempt from public disclosure by DOI's FOIA office as "inter-agency or intra-agency memorandums or letters" on July 7, 2004.

A further review of MacDonald's government e-mails showed a large Environmental Protection Agency (EPA) file that was sent to a private AOL account. MacDonald had also sent the same document to another account ending in *chevrontexaco.com*.

Additional reviews of MacDonald's e-mails show that she regularly meets and communicates with officials and lobbyists working for the California Farm Bureau Federation and the Building Industry Association of Southern California. Both of these entities have launched lawsuits against

[2] An IG subpoena to MSN/Hotmail did not disclose relevant subscriber information other than the e-mail address was initiated in Los Angeles, CA, in 1999.

FWS to force it to review whether certain species should continue to be listed as endangered. Based on the analysis of several of these e-mails, MacDonald appears to have a close personal and business relationship with a Farm Bureau lobbyist.

Examples include an October 4, 2002 e-mail where the Farm Bureau lobbyist asked MacDonald for information on what FWS has done with the Office of Management and Budget guidelines attached to the e-mail. He also asked about the status of his request for a meeting between the former Assistant Secretary and two Farm Bureau representatives to discuss a court decision concerning FWS land-use restrictions.[3] The Farm Bureau lobbyist requested feedback from MacDonald on these subjects, and MacDonald provided answers in a subsequent e-mail on October 17, 2002.

We found another e-mail, dated September 30, 2003, from the Farm Bureau lobbyist to MacDonald, where he asked her, "with respect to the FY 04 appropriations/budget – any issue regarding the funding for the Fish and Wildlife Service to do the 5 year delta smelt review? where would the money come from?"

***Agent's Note:*** *MacDonald requested through a series of e-mails to subordinate employees, including the FWS Associate Director for Budget, Planning and Human Resources, to gather the above information for her, MacDonald then passed it onto the Farm Bureau lobbyist.*

In another example of MacDonald's close relationship with the California Farm Bureau Federation, she voluntarily provided the previously mentioned Delta Smelt e-mail to an attorney for the California Farm Bureau Federation, who immediately filed the e-mail with the U.S. District Court in Washington, D.C. The court had been reviewing the Delta Smelt case and Farm Bureau's attorney asked the judge to reopen it, citing disarray among the federal defendants as demonstrated by the MacDonald e-mail.

Affidavits filed with the court in the Delta Smelt case indicate that the attorney and the lobbyist testified in District of Columbia Federal District Court that MacDonald provided the objectionable e-mail to the lobbyist at the Farm Bureau attorney's request.

As documented through her government e-mails, DAS MacDonald has met with, lunched with, spoken to, allowed access to high level DOI officials, and provided nonpublic information on FWS internal deliberations to lobbyists like the California Farm Bureau Federation lobbyist and private sector entities such as the California Farm Bureau Federation and PLF over the past four years.

During her interview, MacDonald admitted to sending the Interim Critical Habitat Guide via her government e-mail account to a PLF attorney. She acknowledged that the document would not have been released under a Freedom of Information Act (FOIA) request; however, she said that did not mean she could not release it to a personal friend, the PLF attorney, as long as the attorney would not post the document on the PLF's Web site. Shortly thereafter, MacDonald changed her statement and said she may have received authorization to release the document to the PLF attorney from her supervisor, the former Assistant Secretary.

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[3] *Arizona Cattle Growers v. U.S. FWS*

According to MacDonald, an attorney in the Solicitor's Office works FWS legal issues for the Department, and in that capacity, she has sent numerous FWS documents to the attorney's home computer for review (when on leave/after hours).

MacDonald confirmed that she also sent the Delta Smelt document to an on-line game friend through his father's e-mail account. MacDonald said she is acquainted with the on-line friend through internet role-playing games. She said she engages in these games to relieve the stress created by her job; however, she said she has not played while at work. When asked why she would e-mail an internal DOI document to a private citizen, MacDonald replied, "I was irritated [with what was happening regarding the subject of the document] and tried to explain my irritation over the phone; however, I sent it to him to read for a better understanding."

***Agent's Note:*** *The on-line game friend is not professionally or personally affiliated with DOI or any of its entities. MacDonald continues to play games on the internet with the on-line friend; however, she has not sent any internal DOI information to him since her first interview last summer.*

MacDonald could offer no explanation as to why she sent her child an e-mail containing an internal DOI/FWS document other than she feels frustrated at times and likes to have third party reviews of these documents. MacDonald opined that she sent FWS documents to the on-line game friend and her child to have another set of eyes give an unfiltered opinion of them, negative comments included.

MacDonald admitted to sending "Watershed proposed draft rule by the EPA: proposal of a new framework for accomplishing the water quality planning and management provisions of the Clean Water Act" via government e-mail to a personal friend, whose e-mail address ended in *chevrontexaco.com*. She said she did not remember why she sent the document as an attachment to the friend but stated, "It probably wasn't releasable." When MacDonald was questioned about the second e-mail, containing a large EPA file, sent to another e-mail address ending in *chevrontexaco.com,* MacDonald could not recall whom this e-mail address belonged to.

MacDonald acknowledged having contact with the Farm Bureau and other lobbying entities, including a professional relationship with the California Farm Bureau Federation lobbyist. She stated that she also has a social relationship with the lobbyist. However, she denied giving preferential treatment to the Farm Bureau lobbyist or his clients. She stated, "I try to respond to everyone/public when asked for information. It's my duty as a public servant." MacDonald stated that the Farm Bureau lobbyist has no more access than any other person seeking information on FWS programs.

Title 5 of the Code of Federal Regulations (C.F.R.) § 2635.101 Basic Obligation of Public Service states:

> Employees shall act impartially and not give preferential treatment to any private organization or individual.
>
> Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

Title 5 of the Code of Federal Regulations (C.F.R.), Chapter XVI, Subpart G, Standards of Ethical Conduct for Employees of the Executive Branch § 2635.703 Use of Nonpublic Information states:

> (a) *Prohibition.* An employee shall not...allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.
>
> (b) *Definition of nonpublic information.* ... Is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:
>
> > (1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation;
> >
> > (2) Is designated as confidential by an agency; or
> >
> > (3) Has not been actually disseminated to the general public and is not authorized to be made available to the public on request.

An Associate General Counsel of the OIG's Office of General Counsel reviewed the details of our investigation and advised that the C.F.R. had been violated under 5 C.F.R. § 2635.101 Basic Obligation of Public Service because of the appearance of preferential treatment and 5 C.F.R. § 2635.703 Standards of Conduct, Use of Nonpublic Information.

# Subject(s)

Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife and Parks, Department of the Interior, Washington, D.C.

# Disposition

The results of this investigation will be forwarded to the Assistant Secretary for Fish, Wildlife and Parks for appropriate administrative action as warranted.[Ex.5]