

United States Senate

WASHINGTON, DC 20510

February 28, 2019

Mr. Scott de la Vega
Designated Agency Ethics Official
U.S. Department of the Interior Ethics Office (DEO)
1849 C Street NW – Mail Stop 5311
Washington, DC 20240

Dear Mr. de la Vega:

We write to express our significant concern about potential ethics violations committed by David Bernhardt, the Acting Secretary of the Department of the Interior (DOI). This request follows recent reports that Mr. Bernhardt is involved in Department decisions to roll back long-standing protections for endangered wildlife, which would directly benefit one of his former clients. This matter is particularly urgent because Mr. Bernhardt has been nominated by President Trump to serve as Secretary of the Interior and is currently awaiting a Senate confirmation hearing.¹

On July 24, 2017, the Senate confirmed Mr. Bernhardt to the position of Deputy Secretary of the Interior Department. The *Los Angeles Times* reported that day about how this position would give Mr. Bernhardt the opportunity to oversee Interior policies that directly affected his former clients, who paid his firm millions to lobby on their behalf.² The article specifically mentioned Mr. Bernhardt's work on behalf of the Westland Water District, the nation's largest irrigation district, which ranged from drafting letters and executive orders to personally arguing an appeals case on their behalf.³ Mr. Bernhardt was named as Acting Secretary of the Department in February 2019, following the resignation of Secretary Ryan Zinke.

Earlier this month, the *New York Times* published an article confirming that Mr. Bernhardt's significant involvement in Department proposals that revise Endangered Species Act rules that protect the delta smelt and the Chinook salmon.⁴ Just four months after starting as Deputy Secretary at the Interior Department in 2017, he began taking "a hands-on approach" in the rerouting of river water in the San Francisco Bay Delta, which endangers the habitat of these two species – that are listed as "threatened" and "endangered" respectively – to support the local agricultural industry.⁵

¹ U.S. Department of Energy, "Murkowski Welcomes Nomination of David Bernhardt to be Interior Secretary," press release, February 5, 2019, <https://www.energy.senate.gov/public/index.cfm/2019/2/murkowski-welcomes-nomination-of>.

² LA Times, "Senate confirms David Bernhardt, controversial Trump pick, for No. 2 post at Interior," Bettina Boxall, July 24, 2017, <https://www.latimes.com/local/lanow/la-me-bernhardt-vote-20170724-story.html>.

³ *Id.*

⁴ New York Times, "Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client," Coral Davenport, February 12, 2019, <https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html>.

⁵ *Id.*

Since that time, the DOI has announced the release of proposals to weaken federal protections in the Central Valley Project (which covers the San Francisco Bay Delta) on December 29, 2017⁶, and a subsequent report on how water diversion in the area will take place on February 4, 2019.⁷ These actions directly benefit Westlands Water District, which is the entity that is “most penalized under the current system.”⁸ Prior to his appointment at the Department in 2017, Mr. Bernhardt represented the Westlands Water District as a lobbyist, which paid his law firm \$320,000 to advocate for the water needs of California farmers.⁹ In that position, he pursued litigation to undermine the Endangered Species Act and challenged federal scientific findings on endangered species such as the delta smelt.¹⁰

On January 28, 2017, President Donald Trump signed an executive order that required “every appointee in every executive agency appointed on or after January 20, 2017” to sign and “be contractually committed to” an ethics pledge.¹¹ This pledge requires adherence to the following rule:

“If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.”¹²

In addition to the ethics pledge, federal ethics law also restricts federal employees’ involvement in matters in which they have a conflict of interest. Section 2635.502 of the Code of Federal Regulations states the following:

“Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter

⁶ U.S. Department of the Interior, Bureau of Reclamation, “Updates to the Coordinated Long-Term Operation of the CVP and SWP and Related Facilities,” <https://www.usbr.gov/mp/bdo/lto.html>.

⁷ *Id.*

⁸ New York Times, “Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client,” Coral Davenport, February 12, 2019, <https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html>.

⁹ Open Secret, “Brownstein, Hyatt et al.,”

<https://www.opensecrets.org/lobby/firmsum.php?id=D000000724&year=2018>

¹⁰ Washington Post, “Zinke’s #2 has so many potential conflicts of interest he has to carry a list of them all”, Juliet Eilperin, November 19, 2018, https://www.washingtonpost.com/national/health-science/the-man-behind-the-curtain-interiors-no-2-helps-drive-trumps-agenda/2018/11/18/6403eb4c-e9ff-11e8-b8dc-66cca409c180_story.html?utm_term=.55848585a90e.

¹¹ White House, Executive Order, “Ethics Commitments by Executive Branch Appointees,” January 28, 2017, <https://www.whitehouse.gov/presidential-actions/executive-order-ethics-commitments-executive-branch-appointees/>.

¹² *Id.*

unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.”

As an executive agency appointee, Mr. Bernhardt signed the pledge and was also subject to the federal ethic restrictions under 5 CFR 2635.502. Mr. Bernhardt would subsequently recuse himself from actions involving 26 former clients, including Westlands Water District, to abide by these rules.¹³

However, Mr. Bernhardt may have violated these rules when former Interior Secretary Ryan Zinke tasked him with drafting a new plan for managing federal and state water supplies. According to press reports, Mr. Bernhardt reportedly received a “verbal approval” by Interior ethics officials to conduct such actions because his recent lobbying efforts on behalf of Westlands Water District – though focused only on passing a specific provision targeting smelt and salmon — was viewed “technically” to be part of a broad water bill.¹⁴ Virginia Canter, the Chief Ethics Counsel for Citizens for Responsibility and Ethics in Washington, stated that this argument was a “real reach” and that if “he didn’t receive it in writing, it’s still an open question of whether he violated the pledge, and [it is] worthy of an investigation.”¹⁵

We are concerned by what appears to be clear evidence that Mr. Bernhardt, while acting to weaken Endangered Species Act rules, may have violated his ethics pledge and federal conflict of interest regulations by participating in decisions that directly affect a former client.

As the acting head of a major government agency, it is incumbent upon Mr. Bernhardt to be held to the highest standards of ethical conduct and to avoid any appearance of impropriety, including the perception that he has given his former client an unfair advantage and favorable treatment in the formulation of government policy. These concerns are heightened when they involve contentious matters on which he previously lobbied, received financial remuneration and that could result in a controversial outcome.

To address our questions about this matter, we ask that you provide the following information by March 12, 2019.

1. Did Department of Interior ethics officials make any ethics determinations regarding Acting Secretary Bernhardt’s participation in meetings regarding the Endangered Species Act, the Central Valley Project, and the San Francisco Bay Delta?
 - a. If so, please provide copies of any determinations, ethics guidance, or ethics advice regarding Acting Secretary Bernhardt’s participation in these meetings, or, if the determinations, guidance, or advice was communicated orally and not

¹³ Washington Post, “Zinke’s #2 has so many potential conflicts of interest he has to carry a list of them all”, Juliet Eilperin, November 19, 2018, https://www.washingtonpost.com/national/health-science/the-man-behind-the-curtain-interiors-no-2-helps-drive-trumps-agenda/2018/11/18/6403eb4c-e9ff-11e8-b8dc-66cca409c180_story.html?utm_term=.55848585a90e.


¹⁴ New York Times, “Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client,” Coral Davenport, February 12, 2019, <https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html>

¹⁵ *Id.*


otherwise documented, a detailed description of any determinations, guidance, or advice communicated to Acting Secretary Bernhardt or his staff.

- b. Please provide copies of all memoranda, notes or other materials maintained by the office so as to ensure that all relevant facts were appropriately collected and documented by the office.
2. Did you or other ethics officials at the Department of Interior provide Acting Secretary Bernhardt authorizations or ethics waivers regarding his participation in meetings with representatives with the Association of California Water Agencies or Interior officials on the topics of the Endangered Species Act, the Central Valley Project, and the San Francisco Bay?
 - a. If so, please provide copies of those authorizations or waivers. If not, please describe why the Department does not believe authorizations or waivers were necessary or warranted.
 3. Have you or other Department of Interior ethics officials made any referrals regarding Acting Secretary Bernhardt's participation in meetings in meetings with representatives with the Association of California Water Agencies or Interior officials on the topics of the Endangered Species Act, the Central Valley Project, and the San Francisco Bay for further investigation to the Department of Commerce's Inspector General?
 - a. If so, please provide a copy of those referrals.

Sincerely,



Elizabeth Warren
United States Senator



Richard Blumenthal
United States Senator