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JUL 06 2011
BY:

June 29, 2011

Director Jon Jarvis
National Park Service
1849 C Street, NW
Washington, DC 20240

RE: Appeal of Data Quality Act Complaint – Big Cypress National Preserve Addition Wilderness Eligibility Assessment – April 2010

Dear Director Jarvis:

On December 29, 2010, Public Employees for Environmental Responsibility (PEER) submitted an Information Quality Complaint (complaint) pursuant to the Data Quality Act of 2000, the Office of Management and Budget *Guidelines for Ensuring and Maximizing the Quality, Utility, and Integrity of Information disseminated by Federal Agencies*, Director's Order #11B: Ensuring Quality of Information Disseminated by the National Park Service, and the U.S. Department of Interior Information Quality Guidelines [ATTACHMENT I]. In this complaint, PEER respectfully requested that the National Park Service (NPS) rescind the Big Cypress National Preserve Addition Wilderness Eligibility Assessment – April 2010 or reissue it in draft form subject to rigorous peer review in order to allow public involvement, as stipulated in NPS Management Policy 6.2.1.3.

Our complaint detailed several reasons why this wilderness eligibility assessment (WEA) violated law, official policy and the standards of the Data Quality Act. Despite the requirement in your Director's order #11B that such complaints be evaluated within 60 days of receipt, we did not receive a reply until mid-June 2011. That reply came in the form of a letter from Southeastern Regional Director David Vela dated June 9, 2011 [ATTACHMENT II].

Rather than dispelling our objections, this June 9, 2011 response only confirmed our allegations. Nonetheless, Mr. Vela concluded that "we see no reason to rescind the 2010 WEA, remove it from publication, or undertake a new WEA." For the reasons detailed below, we appeal this response as inadequate, inaccurate and incomplete and reiterate our demand for the relief outlined in our original complaint.

Before going into the substantive basis of our complaint, let me note procedural matters that were not disputed by Mr. Vela and that, therefore, we assume are not at issue:

1. The challenged document is covered by the Data Quality Act and was distributed by NPS;
2. The nature of this information is clearly "influential" within the meaning of the Department of Interior (DOI) Information Quality Guidelines. With respect to "influential" information, NPS is held to a higher, more rigorous standard of utilizing the best available science and supporting studies conducted in accordance with sound and objective scientific practices, including peer-reviewed studies where available; and
3. PEER is an "affected person" within the meaning of applicable guidelines with sufficient interest to pursue this complaint.

If for some reason, any of the above premises remain under question, we would respectfully request that we be provided an opportunity to respond to whatever questions arise on these issues.

Appeal Background

In 2006 the National Park Service (NPS) reviewed the Big Cypress Addition to determine the areas that were eligible as wilderness. The NPS published the eligibility determination in the Draft General Management Plan and Environmental Impact Statement (GMP/EIS) in July 2009 (Appendix B). The NPS determined that 111,000 acres of the Addition were eligible. The eligible acres (and the interim protections afforded them by the NPS Management Policies) created limitations for off-road vehicle (ORV) routes. Based upon the clear evidence of e-mails that PEER possesses, Mr. Pedro Ramos, park superintendent and other NPS officials sought means to evade the limitations. Thus, a new wilderness eligibility assessment (2010 WEA) was conducted that found only 70,000 acres were eligible. This new determination was not released until it appeared in the Final GMP of November 2010. The 2010 WEA is the subject of our complaint.

Issues on Appeal

In our original complaint we made several arguments detailing that the 2010 WEA violated the Data Quality Act because it was unreliable, inaccurate and contrary to law, regulation and agency policy. Specifically, we presented the following detailed arguments:

1. The Challenged Information Is Not Transparent

NPS Information Quality Guidelines (as codified in Director's Order #11B) require that covered information "be made transparent, to the maximum extent practicable, through accurate documentation, use of internal and external review procedures, consultation with experts and users, and verification of the quality of the information disseminated to the public."

a) **No documentation**. The challenged information is a 12-page reanalysis unaccompanied by any documentation. The reanalysis itself consists of a series of unsupported declarations without citing authority or data.

b) **No Public Involvement**. NPS did not "involve the public in the wilderness eligibility process" through notification of its intentions to conduct the assessment as required by NPS Management Policies at 6.2.1.3.

c) **No *Federal Register* Notice**. NPS did not make this reanalysis known, also as required by NPS Management Policies at 6.2.1.3.

2. The Challenged Information Is Not Based on Accepted Practices

NPS Management Policies declare that the agency "will seek to achieve consistency in wilderness…practices on both an agency and an interagency basis." The 2010 WEA violated this guidance by:

a) Misapplying Roadless Standard. The 2010 WEA eliminated eligible lands that are roadless because there were traces of former dirt routes or imprints left by the passage of ORVs. These routes are not passable by motor vehicles designed primarily for highway use, and thus the lands meet the regulatory definition of "roadless."

b) Misapplying Key Wilderness Criteria. In reversing the 2006 WEA, the 2010 WEA mangled the following Wilderness Act criteria for eligibility:

"where earth and its community of life are untrammeled by man."
"where man himself is a visitor who does not remain."
"undeveloped…retaining their primeval character and influence, without permanent improvements or human habitation."
"generally appears to be primarily affected by the forces of nature."

c) Using Unreliable Methodology Not Understandable to the Public. The reanalysis bases its conclusion on the assertion, for the first time in the history of NPS wilderness review, that "noticeability" is only determined from the viewpoint, not of the user or visitor, but of the manager, asserting without rational support that park managers are far more able to detect evidence of past human work, largely undetectable to the "common visitor."

3. The Challenged Document Is Contradictory

The challenged reanalysis eliminated many eligible acres because the lands did not afford "outstanding opportunities for solitude or a primitive or unconfined form of recreation…." Yet, as a testament to their inaccessibility, these lands are accessible by a scant handful of hikers, hunters or birdwatchers who must hike by hours on foot to reach tracts that are miles from any road. Ironically, the purpose of the 2010 WEA was to justify reclassifying these inaccessible, wild sloughs and swamps as open for ORV traffic.

4. The Challenged Document Is Not In Compliance With NPS Policies or the Wilderness Act

In particular, we noted that in preparing the 2010 WEA:

a) Public Improperly Shut Out
The challenged reassessment does not conform to the requirement in NPS Management Policies that the NPS "will involve the public in the wilderness eligibility assessment process through notification of its intentions to conduct the assessment [through] the issuance of news releases to local and regional news media...."

b) Restoration of Disturbances Not Considered
NPS Management Policies at 6.2.1.3 provide that "in addition to the primary eligibility criteria, the following considerations should be taken into account in determining eligibility: ...if at the time of the assessment...their wilderness character could be maintained or restored through appropriate management actions." All four federal wilderness agencies have used their talents to restore an area's wild character. When using existing human disturbance as a basis for disqualification, the reanalysis did not mention restoration, apparently presuming that restoration was neither needed nor wanted.

c) Challenged Reanalysis Circumvents Intent of the Wilderness Act
The April 2010 WEA applied statutory and policy standards so rigidly that it defies everything we know about wilderness review from law, regulations and congressional oversight. As we detailed, this gross circumvention is without precedent in the history of NPS wilderness review.

Finally, we noted that while the challenged reanalysis is part of a final National Environmental Policy Act (NEPA) document, as the appendix to the GMP/EIS, as noted above, the public was given no chance to review and comment on it as it appeared for the first time in the final EIS. As a consequence, the public could not use the NEPA process for raising concerns about this reanalysis, as its existence was unknown and revealed only in the Final EIS.

This action short-circuited both the NEPA process and the integrity of NPS land management decision-making. The gaming of the system by NPS officials to reach a predetermined result means that existing mechanisms under NEPA for raising concerns are not applicable.

In his response, Director Vela did not claim the NEPA exception to Data Quality Act coverage. Moreover, he confirmed the basic scenario of events we laid out in our complaint. Consequently, it would be improper at this point to seize upon a NEPA process pretext as a basis for not deciding the merits of this appeal.

Agency Replies and PEER Rebuttals

In his four-and-a-half page reply to our complaint, Director Vela made four arguments:

I. *The 2010 WEA Was Part of the 2006 WEA.*

Mr. Vela reveals that "the 2010 WEA was a revision of the 2006 WEA, not a separate undertaking." Thus, the public notice and participation in preparation for the 2006 WEA should be credited to the 2010 WEA.

Rebuttal:
This contention strains credulity for a number of reasons listed below, but it also fails to address the substance of our challenges:

A. The 2010 WEA, by Mr. Vela's own admission, was not even contemplated until NPS Director Jarvis rejected Mr. Vela's request to waive Management Policies that barred land uses which precluded wilderness eligibility from lands so eligible. As Mr. Vela writes:

> "After the waiver approach was denied, we then reassessed the methodology and results of the 2006 WEA to see if the lands determined eligible truly met the wilderness criteria." (Emphasis added)

Tellingly, the 2006 WEA was settled enough in Mr. Vela's own mind that he requested a waiver of national agency policy. Only when that route was foreclosed did he decide to pursue the disingenuous circumvention that is the subject of this complaint.

B. The public was not aware that a new reanalysis had been commissioned in 2010, even if it was an extension of an earlier effort. There was no public notice or announcement made by NPS in 2010 that a wilderness reassessment using different standards was afoot. Indeed, Mr. Vela was counting on the public to be on notice from announcements four years earlier. Thus, for all practical purposes the 2010 WEA was done in secret, without public notice or structured public input.

C. Despite the claim that the 2010 WEA "used a stricter interpretation of the available factual information" (a claim belied by Mr. Vela's later claim of access to "new aerial imagery"), the 2010 WEA was not based on credible data. PEER obtained documents, under the Freedom of Information Act (FOIA), that contained no substantive data to support the loss of the 40,000 acres, a 36% downward revision of eligible acres. Instead, ample evidence showed that the reduction in acres was meant to remove an impediment to future ORV routes as provided for in the NPS preferred alternative in the GMP/EIS.

D. As noted above, the 2010 WEA radically revised the 2006 analysis Mr. Vela claimed it was part of. The 2006 process involved an extensive public record and publicly held workshops. If the conclusions of that highly public process were going to be reversed, fundamental fairness dictates that the public be consulted before the fact, not merely after the fact as was done in this instance.

II. Public Comments on Draft GMP Were the Basis for the 2010 Reassessment

Mr. Vela cites public comments as the reason to revisit the wilderness assessment: "As a result of these and other comments, we concluded that the 2006 WEA should be revisited with a closer examination of the criteria used to determine eligibility." This contention, however, conflicts with the record and, as explained, does not provide a justification for the action.

Rebuttal:

A. Mr. Vela admitted that the WEA was revisited only after and because Director Jarvis declined a Management Policy waiver that would allow mechanized recreation on wilderness eligible lands. This reasoning is also buttressed by e-mails and other documents PEER has obtained under FOIA showing that the 2010 wilderness reassessment was a Plan B hastily seized upon by Superintendent Ramos in early 2010 only after Plan A, the Management Policy waiver, failed. This hurriedly executed reassessment was motivated by a desire to find a mechanism to justify a predetermined decision. It was not motivated by dispassionate analysis of public comments.

B. The comments cited by Mr. Vela, including comments from the State of Florida, merely opposed wilderness designation in the Addition but provided no data that illustrated that any of 111,000 acres that the NPS found eligible were actually ineligible.

C. A January 5, 2010 NPS Briefing Statement which PEER obtained under FOIA states: "In general, the majority of public comments received focused on either end of the wilderness/motorized access spectrum." Since public comments were divided on the wilderness issue, Mr. Vela does not explain why he chose the anti-wilderness side and ignored the pro-wilderness side. The numerous voices of those who seek less vehicular access in roadless areas, including ours, are as valid the voices on on the other side.

D. Mr. Vela also decided to ignore negative comments from sister federal agencies and state agencies concerning opening up Addition lands to ORV traffic. The U.S. Fish and Wildlife Service and Florida Fish and Wildlife Conservation Commission both sent critical letters, as did the U.S. Environmental Protection Agency. In its January 4, 2011 letter, EPA expressed concern about ORVs "fragmenting the landscape into a disorganized and destructive web of trails and roads." EPA also predicted increased air, soil and water pollution. Mr. Vela does not explain why these reasoned comments from agencies with subject matter expertise were ignored in favor of generalized calls for more public access.

E. As noted earlier, the challenged 2010 WEA is an "influential" document within DQA guidelines. With respect to "influential" information, NPS is held to a higher, more rigorous standard of utilizing the best available science and supporting studies conducted in accordance with sound and objective scientific practices, including peer-reviewed studies where available. By any measure, NPS failed this standard in that the supporting facts were never published, let alone

peer-reviewed. In fact, Mr. Vela's letter is the first public explication, however cryptic, of the rationale for the 2010 WEA.

F. Mr. Vela refers to a "second NPS workshop in February 2010 that started with the same information used in the 2006 WEA...." This workshop was not advertised to the public. Moreover, from the FOIA documents, PEER learned that the "workshop" consisted of a conference call among a handful of NPS staff which produced no written record of its proceedings. The messages setting up the meeting make it clear that the purpose

III. Revised Eligibility Criteria Were Credible and Understandable

Mr. Vela claims that the methodology of the 2010 WEA were understandable and credible as they focused on two criteria: "1) the width of non-wilderness corridors surrounding roads, trails, and canals, and 2) the extent of disturbance that would be substantially noticeable." This latter factor of "noticeability" was to be seen though the eyes of "a land manager" rather than a "general visitor."

Rebuttal:

A. By Mr. Vela's own admission, this 2010 reassessment used different criteria for determining wilderness eligibility than those previously used in the history of the National Park Service. Yet these new standards were not published for comment, were not subjected to peer review and were not field tested before they were applied. Similarly, it is not clear whether all future NPS wilderness assessment will use these new standards or whether they will never be used again. Moreover, these new standards are nowhere codified or even reduced to writing, other than Mr. Vela's letter to PEER. The sudden use of new criteria to achieve a predetermined result, as in this case, is the precise opposite of what the Data Quality Act is intended to achieve in terms of ensuring excellent quality, completeness and utility of information that is to be used in agency decision-making.

B. The responsible NPS officials seem to have confused what is "eligible as wilderness" (a fact-based, data-driven judgment), with what "should be proposed or designated as wilderness" (a management and political decision). Thus, apparently Mr. Vela based his conclusion of what was eligible as wilderness on what he thought should be proposed as wilderness. These are two very distinct categories.

C. The justification for widening the road corridors from .01 miles to .25 miles from each road, trail or canal is never explained. By a stroke of the pen, Mr. Vela widened corridors of wilderness ineligibility by a factor of 25. Assuming these hyper-wide corridors extend to both sides of a trail, the non-wilderness corridor becomes a humongous unprecedented half-mile surrounding a footpath. Such a departure in practice should be justified by more than the slim paragraph in Mr. Vela's June 9th letter. Applying this policy would disqualify many national park lands already designated as wilderness. For example, several parks contain

designated wilderness in the "presence of" Interstate Highways, such as Mojave National Preserve and Joshua Tree National Park, California. Again, it is unclear whether this new road corridor criterion has been adopted by NPS or was simply used for situational expediency by Mr. Vela. What is clear, however, is that this new wide corridor policy in Addition lands has two effects: fragmenting the wilderness eligible areas and accommodating ORV traffic which veers off and erodes trails into yawning ruts.

D. The June 9th letter also states that eligibility should have been based upon the land's appearance in 1988–1993, not "21 years later." Lands on which man's works were noticeable decades ago may now be wilderness eligible, for example, Shenandoah National Park in Virginia. The notion (that Mr. Vela cites as "evidence") that eligibility must be determined only on the date that Congress created the Addition and "not 21 years later" is absurd. While PEER, and many others, wished that NPS had done the wilderness review by 1993 as required by law, the standards of eligibility are not based on reversion to eligibility on the date of the Addition's creation. Instead, NPS must determine the facts on the ground on the date that the eligibility is determined, albeit a much-delayed one.

E. The use of a new standard of through the eyes of a land manager is justified by Mr. Vela with this single sentence:

> "Given that the Wilderness Act does not specify from whose point of view noticeability is measured, we felt that the viewpoint from the land manager should take precedence, because to the general visitor an area may seem like wilderness, but the manager is more aware of the history and evidence of disturbance."

There are so many things palpably wrong with this jaw-dropping rationale that it is difficult to know where to begin. First, the 2006 WEA was conducted by land mangers, not park visitors polled at random. Why do the land mangers in 2010 under Mr. Vela's supervision have such a radically different view of what is wilderness eligible than the 2006 land managers who had yet to come under his command? Does this suggest that land managers can disagree and if so, which land manager's viewpoint takes precedence—one with greater seniority or one with greater expertise? Why should a new land manager's viewpoint take precedence over that of a long-time visitor who had a greater appreciation for the history and contours of an area? Given that the manager viewpoint is supposed to be based in facts and practice, cannot those factors be reduced to writing rather than utilized as land manger intuition? The questions could go on, but the point is that Mr. Vela's invocation of a land manager's inherently superior viewpoint cannot be sustained, falls well below the standards of the Data Quality Act and, in this instance, appears to be a lame attempt to pull rank to rationalize an outrageous action that cannot be justified.

F. Mr. Vela's comments fail to provide any substantive data upon which to disqualify otherwise eligible lands. Instead, they inject standards of eligibility that are not found in NPS policies. Thus, the 2010 WEA is contrary to the clear legislative intent of the Wilderness Act, as cited in our complaint, that In the absence of good and substantial reasons to the contrary, wilderness areas within national parks should embrace all wild land. There is no lawful policy basis for massive exclusions of qualified lands on which no development is planned.

IV. 2010 WEA "Contains More Forethought and Detail" Than 2006 WEA

Mr. Vela argues that "[t]he 2010 WEA not only contains the forethought and detail of the 2006 effort, the 13 page 2010 WEA is much more thorough in documenting the reasons for which each area of the Addition was determined eligible or ineligible compared to the 5 page 2006 WEA." He also points to "new aerial imagery" which informed the 2010 WEA.

Rebuttal:

A. The 2006 WEA was accompanied by a detailed public record, including meeting and workshop notes, that is absent from the 2010 successor.

B. Thirteen pages is a very slim basis on which to justify rendering nearly 40,000 acres wilderness ineligible. The 2010 WEA lists conclusions but provides no detailed rationale or evidence supporting those conclusions.

C. In no record that we have been able to find are the results of the aerial imagery to which Mr. Vela alludes. To the extent the aerial survey was a factor in the decision, it should be publicly displayed and open for comment.

D. Even assuming for sake of argument that the 2010 WEA was more thorough, that does not mean that it passes muster of the Data Quality Act, especially the stricter standards for such an "influential" document.

V. Unanswered Challenges

It should be noted that several of our challenges did not receive coherent replies in Mr. Vela's letter of June 9th. These challenges to which there was no response should be considered tacitly admitted. Among those unanswered challenges are:

- NPS never presented the documentation behind the 2010 WEA. All we have is the 13-page WEA itself;
- NPS misapplied the roadless standard and several key Wilderness Act criteria;
- The NPS case for discounting the possibility of solitude and primitive recreation on the formerly wilderness eligible lands is contradictory;
- In formulating the 2010 WEA, NPS violated agency policies and circumvented the intent of the Wilderness Act; and
- NPS should have reinitiated NEPA review once it chose a significantly different alternative than the one previously presented to the public.

Conclusion:
PEER believes that the record is overwhelming that Mr. Vela and his subordinates improperly manipulated a wilderness assessment in order to provide more routes for ORVs.

For the reasons stated above, NPS should grant our requested relief:

1. Retract or rescind the Big Cypress National Preserve Addition Wilderness Eligibility Assessment – April 2010 from official publication and cease further distribution.
2. Issue a public statement, posted on official websites, that the Big Cypress National Preserve Addition Wilderness Eligibility Assessment – April 2010 has been withdrawn from publication and further official consideration due to violations of the Data Quality Act.
3. Undertake a new, externally peer-reviewed wilderness eligibility assessment for BICY Addition Lands or publish a *Federal Register* notice that the 2009 assessment (Appendix B) will remain in effect.

Finally, this appeal touches on matters beyond the future of the Big Cypress National Preserve. This appeal tests whether there remains integrity within NPS decision-making. Should this transparently fraudulent and inferior document be allowed to stand we will know that a truly dark era has dawned in the history of the National Park Service—a time when even-handed application of law and policy and thorough scrutiny of facts have become helplessly subordinate to political dictates.

If you have questions about any aspect of our appeal, please call me at 202-265-PEER. We look forward to your expeditious consideration of this appeal.

Cordially,

Jeff Ruch
Executive Director

Cc. Mr. David Vela, Regional Director, Southeast Regional Office