



Public Employees for Environmental Responsibility

2001 S Street, NW • Suite 570 • Washington, D.C. 20009 • 202-265-PEER (7337) • fax: 202-265-4192
e-mail: info@peer.org • website: www.peer.org

Before the U.S. Department of the Interior

U.S. Fish & Wildlife Service (USFWS)
WASHINGTON, D.C.

ANDREW ELLER, Jr. and
PUBLIC EMPLOYEES FOR
ENVIRONMENTAL
RESPONSIBILITY

Complainant,

v.

DEPARTMENT OF INTERIOR
Agency.

Dkt. No. _____

July 28, 2004

*Data Quality Act Appeal to FWS decision
of previously-submitted Data Quality Act
Challenge*

APPEAL OF
ANDREW ELLER and PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY (PEER)
PURSUANT TO THE DATA QUALITY ACT OF 2000

To: *Correspondence Control Unit
Attention: Information Quality Complaint Processing
U.S. Fish and Wildlife Service
1849 C Street, NW Mail Stop 3238-MIB
Washington, DC 20240*

Pursuant to Section (b), Data Quality Act of 2000 and Part IV (6) U.S. Fish and Wildlife
Service Information Quality Guidelines, Andrew Eller and Public Employees for



proposing 2006 as a tentative date to put documents before the public that reflect the current consensus of peer-reviewers and the panther recovery community.

We herein appeal the agency's refusal of redress under the Data Quality Act. We describe misunderstandings, inaccuracies, and inconsistencies in the USFWS response to our Challenge, address specific points raised under Statements of Error, and summarize our requests for redress.

II. Description of why appellants are affected persons under DQA guidelines.

Public Employees for Environmental Responsibility (PEER) is a non-profit organized in the District of Columbia to hold government agencies accountable for enforcing environmental laws, maintaining scientific integrity, and upholding professional ethics in the workplace. PEER has thousands of employee and citizen members nationwide, including employees both within FWS and in other public agencies whose work with the Florida panther is affected by the information that is the subject of this complaint. PEER also represents a number of public employees who contend that the FWS stance on the Florida panther is intellectually dishonest and is the result of political pressure. In addition, PEER members include citizens who have dedicated their careers to researching the Florida panther. USFWS's reliance on the information cited in this complaint negatively affects the ability of reputable scientific study to address issues concerning the Florida panther.

I, Andrew C. Eller, Jr., appellant, qualify as an affected person under the provisions of the USFWS DQA guidelines. From November 1998 through February 2003 I worked as a Fish and Wildlife Biologist in Naples, Florida, the Western Everglades and authored several biological opinions on developments that required Corps of Engineers dredge and fill permits. The biological opinions were written under provisions of section 7 of the Endangered Species Act for the endangered Florida panther. The information used and disseminated by the USFWS directly affected my ability to perform my job:

as bad science by the SRT due to unacknowledged exclusion of data, faulty assumptions, mis-citations, unwarranted extrapolation and inappropriate methods of analysis.

As claimed, there was no evidence to support PHEM rules that restricted panthers to a 90-meter radius of large forest patches. The field biologists who had been arguing for years that panthers are not forest obligates were right after all. Skeptics of the forest obligate view who had been bemused that anyone could hold such far-fetched opinions were astounded to learn that these ideas had guided regulatory assessments, and were outraged when the USFWS seemed unwilling to give up such convenient, if illogical, methodologies. Instead of welcoming the resolution of errors, Vero Beach supervisors stonewalled experts on their Panther Subteam, refusing to comment on peer-reviews, and pressured USFWS biologists to ignore sound panther science.

B. Failure to Incorporate Peer Reviews

Several USFWS actions prompted us to file the Challenge. Primary among these was the USFWS decision not to allow Subteam members to incorporate peer-review comments to the Draft Conservation Strategy, available since November 2002 and February 2003, that confirm serious errors in the science that guides USFWS panther recovery decisions. The agency also decided not to respond in any formal way to the Scientific Review Team (SRT) report, which confirmed the existence of those errors and identified new ones. The report eloquently expressed the indignation of scientists over serious breeches of the scientific method. In comments to the press, USFWS representatives mischaracterized the substance and significance of SRT findings, portraying errors as due to work becoming outdated by new information.

Our concern was that the USFWS decision not to incorporate peer-review comments into the Draft Conservation Strategy and to not discuss which, if any, SRT findings were accepted or rejected indicated that the USFWS had decided not to acknowledge errors in the science that had guided their recovery efforts or the implications of these errors.

The information used and disseminated by the USFWS is relevant to establishing the environmental baseline and to rational evaluation of the direct and indirect effects of the Federal action and the cumulative effects of all-non Federal actions.

Proper definition and characterization of panther habitat is key to assessing the rate of habitat loss versus the rate of habitat protection and the amount of land needed to secure the south Florida panther population. The amount of land needed to secure a panther population large enough to withstand environmental disturbances and disease, while providing the individuals needed to reestablish two additional populations within its historic range, is in turn determined by demographic parameters that relate to population viability such as kitten survival, sub-adult recruitment into the breeding population, male-to-female sex-ratios, fecundity, and adult mortality. These parameters can tell us whether the population is on a trajectory toward extinction or recovery. It is imperative that demographic parameters based on field data be used in population viability analyses to accurately portray the current status of the population so that management decisions regarding habitat protection and habitat management are efficient and effective. Without sufficient habitat all other aspects of the panther recovery program are moot.

III. Misrepresentations and inaccuracies in Agency response

Protecting the role of science in policy is a meaningless concept if the interpretation of science is itself determined by non-scientific policy concerns. We understand that scientific concerns may at times be outweighed by other concerns, but it is never acceptable to misrepresent science.

The USFWS response to our Challenge appears to reflect a lack of consensus about how to respond to contested issues of panther science. Some responses show confusion regarding specific details; errors acknowledged in one section are defended in another. In addition, the preparers are understandably reluctant to admit the degree to which USFWS has used bad science and ordered biologists to use bad science long after it was known to be critically flawed and not just outdated.

The subject of assessing the degree to which USFWS decisions were guided by bad science and of the possible need to revisit consultations is one USFWS should evaluate on its own, and do so with more candor than has been shown in the agency's response to our Challenge. The response, which is often contradictory, claims that: (1) the agency was using what it considered to be best available science at the time, (2) the agency understood the limitations of the science being used; and, (3) other sources of information were incorporated in decision-making.

USFWS have made a most unconvincing case that sources of information that differed significantly from Maehr and Cox (1995) were used, or that these sources had an affect on changing the outcomes of consultations. For example, it is our understanding that the FWC (1998) GIS map, mentioned but not described in the USFWS response as an alternate source of information, uses habitat rankings based on daytime telemetry, following Maehr's approach. It does not, therefore, constitute a qualitatively different source of information.

If USFWS understood that Dr. Maehr's research and resulting papers were flawed, the agency should have allowed the Subteam to examine panther habitat evaluation methods. When peer-reviewers confirmed errors in the Draft Conservation Strategy related to Maehr's work, USFWS should have welcomed their input and corrected the material in a timely manner. Since some USFWS biologists understood that Maehr's work was flawed, but administrators refuse to acknowledge these problems, biologists were pressured to ignore the problem. These are matters for USFWS to consider in assessing the amount of damage done to the panther recovery program, and in formulating plans to avoid similar conflicts between science and policy in the future.

Unfortunately, the USFWS response focuses on defending decisions in biological opinions. In narrowly focusing on a concern we did not raise, USFWS fails to address adequately our central request under the Data Quality Act: the request to correct known misinformation in material the agency uses or disseminates. To the degree that USFWS has addressed this request in their response, key agency actions are misrepresented. USFWS claims to have incorporated, to the extent practicable, habitat-related peer-review comments