



March 15, 2021

Duane Spencer, Associate State Director, Deciding Official
Bureau of Land Management
Wyoming State Office
5353 Yellowstone Road
Cheyenne, WY 82009
Sent via email to: dspencer@blm.gov and jduron@blm.gov

Re: Reply by Walter Loewen: Notice of Proposed Removal (NPR) of Feb, 19, 2021
your file number 1400-432 (WY933)

Dear Mr. Spencer,

As indicated previously, PEER represents Walter Loewen in the above-referenced personnel action.¹ We here submit his written Reply; we will supplement it with oral arguments on March 16th. Eight supporting exhibits are attached hereto - **Exh. 1 through Exh. 8**. We make frequent reference to the agency file submitted in support of his removal, in particular agency documents numbered **06 through 25**.

In a nutshell, the Proposed Removal of Mr. Loewen:

- a) is based on an unfair performance appraisal process created by the Trump Administration that was revoked by the Biden Administration before Mr. Loewen was proposed for removal;

¹ PEER is a nonprofit organization headquartered in Silver Spring, Maryland. PEER's mission includes educating the public and speaking out, as well as providing legal defense to those who speak out, about environmental ethics and compliance with environmental laws. PEER works nationwide with government scientists, land managers, environmental law enforcement agents, field specialists, and other resource professionals committed to responsible management of America's public resources, including BLM and other public lands.

- b) should not be decided by you, Duane Spencer, because you should recuse yourself due to your involvement in related facts that led to his removal;
- c) resulted from retaliation and bias against him by his supervisor;
- d) is based on improper performance management by his supervisor as demonstrated in her NPR; and
- e) is not a reasonable outcome because better alternatives exist to resolve this matter more fairly, as well as more beneficially to the Bureau.

The Proposed Removal would be contrary to Biden Administration policy:

The NPR relies on alleged failures to satisfy a Notice of Opportunity to Demonstrate Acceptable Performance (NODAP) issued by Ms. Jennifer Fleuret (NPR, p. 2). However, the NPR here was issued on **February 19, 2021**, so 28 days after President Biden’s Executive Order (EO) of **January 22, 2021**, 14003—*Protecting the Federal Workforce* (full text attached hereto as **Exh. 1**).² That directed the agencies to revoke the former Trump Administration processes that included the overly harsh 30-day NODAP approach that is the foundation of Mr. Loewen’s later-issued NPR.

The Biden EO rescinded former President Trump’s EO 13839 of May 25, 2018, *Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles*. (attached as **Exh. 2**). Mr. Trump’s EO 13839 instituted the 30-day NODAP approach (replacing the former Performance Improvement Plan approach). In Interior the implementation of EO 13839 was applied starting Oct. 1, 2018, in the Departmental Manual on performance 370 DM 430, at (www.doi.gov/sites/doi.gov/files/elips/documents/370_dm_430_transmittal.pdf), which states (emphasis added):

Incorporating requirements of Executive Order 13839 and Personnel Bulletin 18-06, specifically making clear that 1) procedures under 5 CFR 752 should be used in appropriate cases to address instances of unacceptable performance; and 2) opportunity periods to demonstrate acceptable performance will generally last no more than 30 days.

However, the pertinent provisions of the Biden EO provide (emphasis added):

Sec. 3. Revocation of Certain Presidential and (a) Executive Order 13836 of May 25, 2018 (Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector

² Note that all of the exhibits are identified as “LOEWEN EXHIBIT NO. #” on the lower right corner of each page.

Collective Bargaining), is hereby revoked. The Interagency Labor Relations Working Group is hereby disbanded and the Director of OPM shall withdraw all materials issued by this working group that are inconsistent with the policy set forth in section 1 of this order.

(b) Executive Order 13837 of May 25, 2018 (*Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*), is hereby revoked.

(c) Executive Order 13839 of May 25, 2018 (*Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles*), is hereby revoked.

(d) The Presidential Memorandum of October 11, 2019 (*Executive Orders 13836, 13837, and 13839*), is hereby revoked.

(e) The heads of agencies whose practices were covered by Executive Orders 13836, 13837, and 13839 (affected agencies) shall review and identify existing agency actions related to or arising from those orders. Such actions include:

(i) Actions related to the authorization of union time described in sections 4(b) and 5(b) of Executive Order 13837;

(ii) Actions related to the system for monitoring the use of union time described in section 5(c) of Executive Order 13837;

(iii) Guidance promulgated pursuant to section 7(d) of Executive Order 13837;

(iv) Actions taken pursuant to section 8 of Executive Order 13837;

(v) Revisions to discipline and unacceptable performance policies, including ones codified in bargaining agreements, issued pursuant to section 7(b) of Executive Order 13839; and

(vii) The final rule entitled "Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions," 85 Fed. Reg. 65940 (October 16, 2020).

(f) The heads of affected agencies shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, the actions identified in the review described in subsection (e) of this section, as appropriate and consistent with applicable law and the policy set forth in section 1 of this order.

The last section (f) refers to a mandate to agencies, including BLM, to "suspend, revise, or rescind the actions identified in the review described in subsection (e)." At issue here is this subsection (e) provision, in which the Trump EO had made: "(v) Revisions to discipline and unacceptable performance policies."

The harsh proposed removal of Walter Loewen here, based on a 30-day NODAP, resulted directly from the former Administration's now-revoked revisions to Interior's former "unacceptable performance policies". Section 3(e) orders agencies to identify agency actions related to EO 13839. Section 3(f) is a mandate to agencies, including BLM, to "suspend, revise, or rescind" such actions. The NODAP personnel policy, 370 DM 430, was issued explicitly to "incorporat[e] requirements of Executive Order 13839". Thus, it is an existing "agency action" based on the rescinded EO 13839. President Biden has

expressly ordered the BLM to suspend such actions. Maintaining this NPR based on an agency action that President Biden had ordered suspended before the date of the NPR is a violation of the President's directive. The NPR and NODAP should be rescinded by the Deciding Official on that basis; or, at the very least, the new Administration's policy should be given great weight when the Deciding Official considers the unreasonableness of the NODAP process that Ms. Fleuret applied here, as explained below.

Recusal argument:

This Proposed Removal involves a pattern of retaliation against Mr. Loewen for disclosing key environmental impact information about the massive (~5,000 well) and highly-controversial Converse County, Wyoming, BLM oil and gas leasing project. You, Duane Spencer, the Associate State Director (the **Deciding Official** here), were then the Deputy State Director of Minerals who helped to process the Converse Count project and ultimately approved it, per the BLM's July 31, 2020, Federal Register Notice (at: <https://www.govinfo.gov/content/pkg/FR-2020-07-31/pdf/2020-16563.pdf>; when acting as the State Director (emphasis added:

*Notice of Availability of a Proposed
Resource Management Plan
Amendment and Final Environmental
Impact Statement for the Converse
County Oil and Gas Project, Converse
County, Wyoming*

*AGENCY: Bureau of Land Management,
Interior.*

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), the Bureau of Land Management (BLM) has prepared a Proposed Resource Management Plan (RMP) Amendment and Final Environmental Impact Statement (EIS) that evaluates, analyzes, and discloses to the public direct, indirect, and cumulative environmental impacts of the project proposal and the amendment for the Casper RMP to allow relief from timing stipulations for non-eagle raptors within the Converse County Oil and Gas Project Area (CCPA) in Converse County, Wyoming

You not only approved that amended RMP that addressed the high raptor mortality topic, but you also signed off on issuing the final EIS that focused heavily on that topic. See:

https://eplanning.blm.gov/public_projects/66551/200129860/20023673/250029877/Converse_County_FEIS_Volume_I_and_II.pdf , at 5th page.

Mr. Loewen had, in November of 2019, disclosed internally to the SO leadership the SO field biologist's concerns over excessive mortality especially to raptors including the ferruginous hawk (*Buteo regalis*), a sensitive species, from that Converse County project. After making those internal disclosures about ferruginous hawk mortality, which many in the SO decisionmaking chain refused to acknowledge, Mr. Loewen was, with no appropriate justification, removed from his NEPA project duties altogether by Jennifer Fleuret (the Proposing Official) in retaliation for his disclosures. See **Exh. 3**, the declaration of SO Wildlife Biologist Christopher Keefe, dated March 11, 2021, hereinafter "**Keefe Declaration**", at par. 5; and **Exh. 8**, the declaration of former SO Physical Scientist Merry E. Gamper, dated March 15, 2021, hereinafter "**Gamper Declaration**", at par. 5.³

Ms. Fleuret then repeatedly assigned Mr. Loewen to "make work" and "busywork" tasks that were deliberately demeaning in view of his 16 years of experience as a NEPA specialist across several agencies, including six years at BLM with a strong past performance record and several awards. Ms. Fleuret went on to take several other steps to pressure him to leave his BLM job.

Mr. Spencer, you have knowledge of key facts underlying the retaliation against Mr. Loewen stemming from the Converse County project. You would be named as a witness to testify those facts in a subsequent appeal by Mr. Loewen if he is removed. Therefore, it is highly inappropriate to remain as the Deciding Official. It is fundamental to Merit System protections that a Deciding Official must not consider information external to the Agency Record, as well as the civil servant's response. The U.S. Court of Appeals for the Federal Circuit has held that constitutional Due Process requires that a Deciding Official be disconnected from the operative facts:

*It is constitutionally impermissible to allow a Deciding Official to receive additional material information that may undermine the objectivity required to protect the fairness of the process. Our system is premised on the procedural fairness at each stage of the removal proceedings.*⁴

³ Ms. Gamper is now a Senior Litigation Specialist in the Office of the Director in Grand Junction, CO. It is noteworthy that both Keefe and Gamper are current BLM employees.

⁴ *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999).

Here, you have additional prior information likely to undermine your objectivity about Mr. Loewen's defense that he was retaliated against by Ms. Fleuret directly because of his Converse County oil and gas project disclosures. For that reason you should recuse according to accepted Merit System rules. As an expert commentator said regarding Deciding Officials, the agency must ensure:

There is no conflict or apparent conflict of interest for the specific manager to decide the case. In other words, no relationship or history that could be proven to taint an outcome either favorable or unfavorable to the employee. If this is a concern, you should step down (recuse yourself) and let another manager decide the case.⁵

Here there is a prior history and an appearance of conflict that would taint a decision if you make it. The agency must find an alternate Deciding Official with no such prior history. Many other options exist. Your refusal to recuse would be an additional indication of a retaliatory intent.

Other background facts:

Walter Loewen, is a family man who resides in Cheyenne. He is a veteran with time in service totaling six years. This includes three years of active duty, including combat duty in Desert Shield/Desert Storm with the Army, 82nd Airborne Division.

Before receiving the NPR from Jennifer Fleuret, he had 16 years of experience as a NEPA specialist across several agencies, including six years at WY BLM SO with a strong past performance record. Based on his attached Performance Evaluations from FY2015 through FY2019 Mr. Loewen was receiving predominantly ratings of "3" or "4". See attached EPAPs of 2015-2019, which are all combined into **Exh. 4**. He also received five cash awards in recognition of his work for WY BLM in 2015, 2016 (two), 2017, and 2019, which are combined into **Exh. 5**.

His "Star" award in 2017 from his former supervisor Michael Abel includes this extremely positive summary (the last page of Exh. 5):

This award is in recognition for outstanding dedication and critical work accomplishments for assigned duties in multiple areas of responsibility, as well as

⁵ Gibson, B. 2008. Deciding an Adverse Action: What the Manager Must Consider. FedSmith.Com, May 29, at: www.fedsmith.com/2008/05/29/deciding-adverse-action-what-manager-must/

additional duties assumed and accomplished during the year (eg., WHB, Black Footed Ferret, invasives programs).

You are an important and valued team member and your hard work is very much appreciated! Thank you for everything you do for WY BLM!

Thanks Walt !

Discussions with Mr. Loewen's other co-workers describe him as very helpful, friendly, competent, and able to prepare quick and effective NEPA documents. See **Exh. 3, Keefe Declaration**, at par. 3 **"I have observed Walter's NEPA-focused work as a colleague and always found him to be a competent specialist and a thoughtful, helpful coworker"**; and **Exh. 8, Gamper Declaration**, at par.s 3 and 4: **"I found him to be a competent Planning and Environmental Coordinator and never had occasion to question his judgement or conclusions...[H]e always provided timely and consistent communication, including appropriate follow-up to comments and questions."** None of the facts about his background indicate that he ever failed at his job for BLM.

However, suddenly when Ms. Fleuret took over as his supervisor he received straight "0"s in his FY2020 EPAP. **Exh. 6**. This change was neither credible nor indicative of his actual work performance in that year, especially when considering his multiple performance awards from FY2015 through FY2019. That is, no rational reason existed to explain why his performance would suddenly drop from steady 3s and 4s to 0s. Rather, the drop can only be explained by Ms. Fleuret's retaliation and bias against Mr. Loewen.

Retaliatory motive:

Ms. Fleuret's retaliatory motive is indicated by the apparent decision in the SO to "sideline" Mr. Loewen starting in late 2019 from doing any more NEPA project work shortly after his repeated internal disclosures of the expected high mortality of ferruginous hawks and other raptors resulting from the Converse County oil and gas. **Exh. 3, Keefe Declaration**, par.s 4 and 5.

Bias:

Ms. Fleuret's apparent bias against Mr. Loewen was based on gender and age, as reflected in her frequent suggestions that he "should find a new job" and insulting comments she made about Mr. Loewen within a small "clique" of typically female co-workers that could be easily overheard by

his co-workers. Exh. 3, **Keefe Declaration**, par. 4. She favored younger workers and improperly re-assigned work that had been Mr. Loewen's to less-experienced, younger staff.

Improper performance management:

The DOI Manual section that Ms. Fleuret referenced in her NPR was 370 D.M. 430. Her 30-day NODAP process from August 25 through September 24, 2020, led to the allegation that Mr. Loewen failed to accomplish four Critical Elements. That is her basis for proposing his removal. However, the Critical Elements that she imposed in the NODAP process were inconsistent with the terms of that Manual section. It provides in § 1.4 – Definitions:

***D. Critical Element.** A work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable.*

Ms. Fleuret's direction to Mr. Loewen during the 30-day NODAP that led to the NPR was for him to do numerous "make work" tasks. The tasks did not address actual BLM land use projects of the type that he had assessed throughout his career. It was not work of "such importance" that it indicated that this 16-year, highly-experienced, NEPA practitioner's performance level had suddenly fallen down to "unacceptable". She compelled him to produce **18 documents totaling 174 pages** in basically **21 work days** starting in late August and extending over Labor Day (per the exhibits produced by him attached to the NPR, labelled "06 – CE 1" through "25 – CE 4," excluding only document 14 – CE 3, which is an email from Travis Bargsten). He worked long, hard, and patient hours to meet her demands. Her review comments on Mr. Loewen's drafts reveal she took an obsessive "schoolteacher-like" approach. Ms. Fleuret frequently berated Mr. Loewen afterwards for not doing them in the way she would have, without providing "objective criteria" by which to judge the assignments. This was contrary to 5 U.S. Code § 4302, on "Establishment of performance appraisal systems," which provides (emphasis added):

*(c)Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—
(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;*

Before addressing the four Critical Elements in the NODAP individually, it is important to emphasize the one common feature of the first three Elements: Ms. Fleuret’s insertion of this specific requirement to bring Mr. Loewen’s level to “Fully Successful” he must: “Incorporate all of my comments and other feedback.”

Thus, she had a “pre-wired” way to fail him – simply find that he had not incorporated all of her numerous comments and feedback. That, in fact, is what she did in failing him on Elements 1, 2 , and 3. She retroactively determined he had not heeded every one of her comments, paving the way for subjective determinations regarding a total of twelve alleged failures in his NODAP (see NPR, pp 3-11). It must be emphasized that her judgments never found that Mr. Loewen had failed to deliver any actual BLM NEPA work as described in his Position Description (PD) that could be measured against an objective agency criterion, as required under to 5 U.S. Code § 4302(c)(1), *supra*. See full PD, **Exh. 7**. Federal employees are not judged based on pedantic requirements placed on superfluous work, but on their performance of duties in their PD.

Then there is the matter of the COVID-19 pandemic, during which all of the NODAP work was prepared and critiqued by Ms. Fleuret. Normal face-to-face feedback and constructive criticism were hampered by the remote and email-heavy nature of her critiques of what literally was his “homework”. Misunderstandings by Mr. Loewen of one or two of her multiple assignments may have occurred. However, the NPR neither mentions the unprecedented communication challenges caused by the pandemic, including IT issues with failing computer equipment, nor takes them into account. That is another reason to discount the analysis by Ms. Fleuret.

To make matters worse, for each of the Alleged Failures in the NPR, Ms. Fleuret herself fails to link back to the specific agency file number of the document that she claims failed her review.

Critical Element 1 (starting at p. 5 of NPR)

Alleged failure No. 1: DOI Talent site on NEPA and CEQ regulations. Ms. Fleuret’s allegations of failure on this assignment are classically subjective. As is shown in agency document **06 - CE1**, Mr. Loewen did prepare the requested report and did accurately summarize the NEPA information she sought. Any fair reader will see it is not verbatim copying from another site,

although with all such NEPA information there is use of the standard CEQ regulation language. She admits in her paragraph 1 at the top of p. 5 of the NPR that Mr. Loewen did accurately summarize the information requested. But, then she hypercritically states he did not put it in his own words or adequately demonstrate that he had learned “how to apply this knowledge”. Her approach in No. 1 is demeaning to a 16-year veteran NEPA practitioner. The document 06 - CE1 speaks for itself and is objectively fully on point with the assignment.

Alleged failure No. 2: ROD Template. First, it should be noted that this assignment was from May 14, 2020, so three or four months before the NODAP 30-day period; its inclusion in the NODAP is doubtful as to propriety. Second, as can be demonstrated by reading the first page, she mischaracterizes that somehow Mr. Loewen confused a ROD and an RMP. Starting at the bottom of p. 1 of agency document **08 – CE1**, subheading “1.0 Record of Decision,” the rest of the template document he produced clearly does address both RODs and RMPs, but only when they were appropriately mentioned together. Yet, she mischaracterizes the document as somehow focused just on RMPs. Her critique is off-base. At least she admits in her Track Changes comment at the top of p. 2 of 08 – CE1, that he gives good background information on RODs. A fair review of the document reveals that it is a useful template.

Alleged failure No. 3: Table of Administrative Remedies. Here Ms. Fleuret’s criticism is mystifying because she admits (emphasis added):

You were directed to develop a table of administrative remedies for each program the BLM manages. Although you did create a table for each program and reference the appropriate regulation, you did not include the appropriate language. I did not ask for a regurgitation of the regulations; I asked for the appropriate language for the appropriate appeal/protest language, which as a FPL GS-12 P&EC, you should understand means the language that appears in whatever decision document is being signed.

Frankly, her assertion that he should have known that she “mean[t] the language that appears in whatever decision document is being signed” makes little sense. Her assignment to Loewen was to create a useful table sorting through the regulations regarding each type of administrative remedy. He did exactly that, citing to and pulling from 34 different sections of the CFR, as shown in his 14-page document **09 - CE1**. There is no way that such a table could include language from “decision documents” as she states. That language would come from the Office of the Solicitor

and be decision-specific. She wraps up her critique by saying she hoped he “would provide clarity to a confusing issue”. She admits it was a confusing issue, but her directions to Loewen did not clarify the task.

Critical Element 2 (starting at p. 6 of NPR)

Alleged failure No. 1: This relates to document number **10 – CE2**. The key phrase that undercuts her allegation that Mr. Loewen failed is in her Track Changes comment on the top of p. 1. It states: “I think you may have understood the intent of this assignment.” Despite their admitted miscommunication, during an unprecedented pandemic when everything was done remotely, and despite her other comment that “there is good information in this document,” she failed him on it. Absent a showing that the failure of communications on this assignment was Mr. Loewen’s fault, this cannot form the basis of a removal. Mr. Loewen’s product was based on a reasonable interpretation of Fleuret’s request.

Alleged failure No. 2: This relates to document number **11 – CE2**. The assignment was to create a template “open house” presentation and the document he provided does exactly that. It is based on an existing template, but Mr. Loewen’s use of red font and parentheses plainly indicates information that the new user can customize. Ms. Fleuret makes a highly offensive charge of “plagiarism,” but it is obvious to an unbiased reader that Mr. Loewen was not trying to pass it off as entirely his own creation, rather he was building on a good example of such a template already in use. On this plagiarism charge by Fleuret, Mr. Loewen states:

She claims that I took language from the Montana State Office, but it was language formally given permission to use, in whole or in part, by Division Chief (HQ 200 division), Division of Decision Support, Planning and NEPA, Heather Bernier, Megan Gilbert, Senior NEPA Specialist, BLM HQ 200 Division, and the original author, Ruth Miller, Montana State Office, in a “Friday Forum” meeting and posted on the NEPA Sharepoint for “ALL P&EC’s,” nationwide, to use. Thus, it was considered “open source” material that did not require citation. I only used the part of the language pertinent to the assignment, modified it by more than 20%, and had permission to use it by the original author. I would not call this plagiarism and find her comment offensive and untrue.

As with many other NEPA documents it was entirely appropriate for him to build on an existing template commonly used by the Bureau; Mr. Loewen repurposed it in a form that users

could customize to their particular projects. As part of the assignment Ms. Fleuret also critiqued his Scoping Strategy document, **12 – CE2**. Her subjective criticism seems based on the idea that a Bureau user would not understand the information Mr. Loewen provided, as if the audience he should address would be complete novices. However, the information in 12 – CE2 is understandable template guidance for a sophisticated BLM reader, which was the audience that Mr. Loewen reasonably targeted his Scoping Strategy at. Again her criticism is off-base, which also suggests the real problem was the vagueness of her directions.

Critical Element 3 (starting at p. 9 of NPR)

Mr. Loewen objects as a matter of due process to the way this so-called failed Critical Element is not properly documented in the agency file. Again, Ms. Fleuret, despite her fastidiousness about Mr. Loewen’s work, has provided basically a “pile” of ten documents, 13 - CE3 through 22 – CE3, but her narrative of his alleged failures is not tied clearly to the specific agency documents.

Alleged failure No. 1: Ms. Fleuret refers to a “PowerPoint presentation”. That appears to be document 17 – CE3. She describes what Mr. Loewen submitted as “accurate”. She agrees he used existing Montana State guidance, but, again, appears to prefer that he neglect existing guidance and instead create documents from scratch. Given the 21 workdays available to him during the NODAP period, and all the many additional assignments she compelled him to do, her demand for complete originality was unreasonable when accurate guidance could be adapted to the task. Her approach might have been appropriate for an introductory college class, but not for assessing a seasoned NEPA veteran.

Alleged failure No. 2: The agency file document prepared by Mr. Loewen that seems most responsive to this assignment, although it is not clear from Fleuret’s critique, is **18 – CE3**, entitled “Strategies for DOI Review Team Process”. In fact that is a sophisticated analytical summary of helpful strategies, that appears well-grounded in Mr. Loewen’s many years of involvement with such teams. Her suggestion that he failed this task is very subjective.

Alleged failure No. 3: In both 3.a and 3.b. she criticizes Mr. Loewen for the fact that he consulted with another environmental specialist in the office for his input. That was Travis

Bargsten, a P&ES in the WY SO. But, reviewing Mr. Bargsten's actual email of September 10, 2020, **14-CE3** shows that he was grateful to Walter for asking him and, in a collegial manner, made suggestions, but he did not critique his draft document in the way Ms. Fleuret did. He was not harsh, acerbic, or dismissive. She retroactively criticizes him for consulting a co-worker despite not prohibiting him ahead of time from doing so, again treating Mr. Loewen like her wayward pupil. Then, in document **21-CE3**, at p. 2, Ms. Fleuret again notes that "what you've provided is accurate information," but still rejects his work.

Alleged failure No. 4: This appears to relate to agency document **22 – CE3**. Ms. Fleuret claims that Mr. Loewen did not identify areas to achieve better consistency across the FOs in the development of EAs. However a fair reading of that document shows that he does provide numerous recommendations for achieving consistency. Her failure judgment appears superficial and flatly incorrect. For example, she state under "4.": "None of what you provided actually address any actual NEPA issues/problems." That is entirely unreasonable because Mr. Loewen, a six-year NEPA specialist in Wyoming, titled his document "Review and suggestions related to improvement of WY NEPA" and virtually every bullet in it in fact addresses a NEPA issue or problem. The document speaks for itself; that she mischaracterizes it indicates her bias.

Critical Element 4 (starting at p. 11 of NPR)

Satisfactory completion of No. 1: BFF EA. Here, Ms. Fleuret has finally recognized that Walter Loewen's written work "appears to be satisfactory" (!), referring to **23 - CE4**, the black-footed ferret EA. While she was profuse in her criticism of all of his other NEPA documents, she passes over the fact that this successful EA was 55 pages of work, the largest document in the agency record by far.

Alleged failure No. 2: BFF Implementation Plan. Ms. Fleuret's critique is unfair; Mr. Loewen's proposed plan, **24 - CE4**, does much more than just regurgitate the EA. He sets out the activities that need to be undertaken in a clear, orderly manner. She critiques him for not being specific on "who does what and when," but the task focuses on "plague treatment". Specifics of that task of course are wildlife veterinary and conservation questions beyond Mr. Loewen's

expertise or position description (see **Exh. 7**). The who/what/when are plainly factors that should be determined by the BFF Recovery Team, not a NEPA specialist.

Alleged failure No. 3: BFF Public Participation Plan. This is agency document **25 - CE4**. As with other documents, she is hypercritical; the document actually contains very clear and useful resources. And, again, the BFF recovery planning minutiae is not a task on which Mr. Loewen can be appropriately assessed. Ms. Fleuret's assigning it underscores the busywork nature of her overall NODAP, and that she failed him on it underscores her bias.

In sum, a fair review of the 18 documents that Mr. Loewen produced shows that on the whole they were **adequate and consistent with long-established NEPA practices** within WY BLM. His substantial body of work shown in the NPR documents 06–CE 1 through 25–CE 4 certainly does not provide justification for his removal from Federal service on performance grounds. That extreme sanction on the basis of adequate documents he produced under her rushed and oppressive NODAP assignments is further indication of Ms. Fleuret's retaliatory motive.

Mr. Loewen would testify that Ms. Fleuret never accepted any of his work the first time he submitted it, even when he had other NEPA specialists review his draft for accuracy beforehand. She accused him of so-called plagiarism when any NEPA practitioner knows that there are many existing template documents from which it is standard practice to borrow. NEPA and its regulations encourage standardization of terminology and the use of comparable programmatic approaches. If all NEPA practitioners in the Department of the Interior were held to the subjective “nit-picking” she applied to him, there would be no NEPA practitioners left in the Department.

Broader implications for the Planning, Social and Cultural Resources Branch:

The pattern of actions by Ms. Fleuret since she assumed the Planning, Social and Cultural Resources Branch Chief position has led to: a) decreased morale and productivity in the Branch, b) excessive tension within the Branch and with the SO leadership, c) isolation of staff, d) frustration and loss of trust; and e) resulting high numbers of early retirements, transfers, and other

departures of needed staff. That formerly cohesive and very productive Branch has suffered under her. Mr. Loewen's NPR situation is a symptom of her rigid approach.

A number of current and former Branch staff can testify to these facts, as well as to Ms. Fleuret's derogatory attitude towards Mr. Loewen.

Alternate resolutions:

The capriciousness and excessive severity of Ms. Fleuret's NPR is demonstrated by her determination to remove Mr. Loewen entirely from Federal service based on her 30 days of assignments as opposed to a lesser sanction. Normally, it should have been done as a Performance Improvement Plan (PIP) under 5 U.S.C. § 4302 and 5 C.F.R. § 432.104. Yet, no PIP was proposed or initiated, just the rapid NODAP under the now revoked Trump EO 13839, as discussed in the beginning of this Reply.

Regardless of whether it was a PIP or NODAP approach, Ms. Fleuret also had discretion to impose a reduction of one grade per 5 U.S. Code § 4303 and 5 CFR § 432.105, the sections on which she based the NPR. However, the document reveals that no consideration was given to that alternative. It should have been.

In addition to that alternative, the Deciding Official should now consider another **preferred resolution**, that is, recommending that Mr. Loewen be **transferred** from the supervision of Ms. Fleuret to another suitable position in another mutually-agreed BLM or Interior office in Wyoming or Colorado. He is qualified for these positions: Planning and Environmental Analyst, Planning and Environmental Coordinator, Natural Resource Specialist, and Rangeland Management Specialist.

Mr. Loewen also is considering taking a **120-day detail** in another BLM office in Idaho, which the Deciding Official here should allow.

Negotiating a transfer or detail for Walter Loewen would aid all parties involved. They would provide a separate, more objective, opportunity for him to demonstrate that his performance remains consistent with his past work history (pre-Ms. Fleuret) of Fully Successful work. Further,

they would avoid the major time waste, hardship, and glare of publicity that would be inherent in a Merit Systems Protection Board appeal over his unnecessary removal. (PEER specializes in such appeals and publicity for them.) The proposed alternative resolutions would, on the whole, enhance the future effectiveness of the BLM in carrying out its mission.

In conclusion, a lack of substantial evidence exists to support Walter Loewen's removal from Federal service. Extensive documentation, including the two declarations that support him from current BLM staff, provides more than sufficient evidence to rebut the allegations in the NPR.

Thank you for considering this Reply. For further information please contact me directly at 202.265.4189 or email: pjenkins@peer.org .

Sincerely,

/s/

Walter Loewen

A handwritten signature in black ink, appearing to read "Peter T. Jenkins". The signature is written in a cursive style with a horizontal line underneath the name.

Peter T. Jenkins, Senior Counsel

Attachments