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August 19, 2004

Mr. Tom Grahl
Deputy Field Supervisor
U.S. Fish and Wildlife Service
1339 20th Street
Vero Beach, Florida 32960

Dear Mr. Grahl:

This letter will serve as my response to Mr. Allen Webb's July 13, 2004, letter proposing to end my 18-year career with the Fish and Wildlife Service (Service). My response is being submitted after the customary 30-day period because there was an agreement to allow me until the close of business on August 19, 2004, to respond. I appreciate the consideration provided regarding the extension.

However, I am very disappointed by the presentation and tone of the letter, which characterizes me as an employee who does not take his duties seriously. This attempt to malign my professionalism is misguided. In short, the allegations and arguments presented in the proposal to remove me from the position of Fish and Wildlife Biologist, GS-0401-11, Ecological Services, Vero Beach, Florida and from Federal service are without merit. The misuse of personnel procedures and the timing of actions taken by management establish a clear connection between my legally protected activities and any penalty or decision to terminate that may result from this process.

Below I will address the allegations made to support a decision to terminate my employment. My hope is that we can meet to discuss and resolve these issues and put them behind us so that I can continue to make an important contribution to the Service.

TIMELINESS ISSUES

Approximately eight pages of the 10-page letter were dedicated to claiming that my project work was untimely (see proposed removal letter at pages 2 – 9). Mr. Webb went to great lengths to attempt to track the progress of my work in order to assert that I am unusually untimely. This claim is invalid and the standards that have been applied to me are clearly inconsistent with the practice in an office that is typically overburdened and understaffed.

The first reason for the proposed action is based upon Mr. Webb's interpretation of the results of a Performance Improvement Plan (PIP), in effect 23Jun2003 through 31Dec2003 that instituted an unreasonable absolute standard of timelines, and excluded criteria for soundness, defensibility and thoroughness of my work. I believe that meeting the specified deadlines was not feasible and that the performance indicators were not appropriate or within my control. Mr. Webb could not fault the quality or quantity of my

work, and so focused exclusively on an unattainable metric of timeliness (the 30-day standard) that had not been enforced before and was not enforced for other biologists.

The second reason for the proposed action concerns three personnel actions taken on 29May2001, 28Apr2003, and 11Jan2004. In the first instance I admitted my error voluntarily and accepted the penalty, although another biologist in the office received a lesser penalty for the same infraction. In the second and third instances I denied that the actions had any merit and appealed both. The appeal on the third personnel action is still under review.

The performance review (28Apr2004 and 13Jul2004) submitted to support the proposed action of termination is incomplete. Mr. Webb omitted a substantial amount of relevant information that would lead to a different conclusion than the one reached. I request that these and other factors described herein be considered before deciding on the proposed termination of my career in the Service.

- Positive aspects of my performance: the number of projects I successfully completed and the overall quality and thoroughness of my work, aspects of which Mr. Webb, and all of the managers preceding him, have consistently praised.
- Other assigned duties that consumed substantial portions of the limited span of time available to review projects.
- The many mitigating factors familiar to Mr. Webb that caused delays beyond my control, such as project complexity, non-responsiveness of consultants, or reassignment of my projects to other biologists over issues not related to performance.
- Consideration of my performance in the context of office conditions of understaffing and heavy workload.
- Consideration of my changing role in panther recovery activities and reevaluation of "best available science," and the extent to which managers marginalized my involvement and retaliated against me for advocacy of what has been confirmed in several levels of peer-review to be sound science.
- Incidents in which I was threatened with a poor performance review or termination for matters unrelated to performance.
- Incidents in which I was prevented by supervisors from doing my job through threats of insubordination.

These factors are relevant to establishing the context and motivation for using unfair and unattainable criteria to evaluate my performance.

TIMELINESS STANDARD

Service manual 224 FW 1.8 E outlines criteria for selecting performance indicators that are stated clearly and positively, practical to measure, achievable, meaningful, and flexible. I contend that the performance indicators by which Mr. Webb judged my performance fail to meet the latter three criteria. I further contend, and provide corroboration herein, that I have been singled out for inequitable evaluation as a reprisal for my pro-science stance in the office.

The results of the Performance Improvement Plan were based on Critical Result B and Critical Result C of my fiscal year 2003 Employee Performance Plan and Results Report and absolute standards introduced at the beginning of the process. The performance evaluation criteria are listed below.

Critical Result B

B. Responsible for ensuring Biological Opinions and Fish and Wildlife Coordination Act Reports are sound and ecologically defensible under section 7 of the ESA and FWCA, respectively, and are submitted in a timely manner.

- a. All Federal project actions submitted, under public notices or correspondence by Federal; agencies (i.e., U.S. Coast Guard, Federal Highway Administration, Corps, etc.) must be reviewed and a Service response prepared, within 25 days of receipt of the notice. This time frame will allow 5 days for review and completion of work products. An exception to meeting this time frame must be approved in advance by your supervisor.
- b. Biological Opinions and Coordination Act Reports are considered complete documents available for review by your supervisor after the required 90 days from the date you began formal consultation. An exception to meeting this time frame must be approved in advance.
- c. Biological Opinions and Coordination Act Reports must be based on sound science and contain factual information and reflect the Service's policy regarding listed species. Once a Biological Opinion or Coordination Act Report has been determined to be the appropriate action, you will be given guidance, for example on mitigation, etc., and the Service's policy on listed species' issues. You will be expected to prepare the report in the format and context as defined in the Section 7 Handbook.
- d. All completed work assignments must be "logged-out" in the office's database tracking system within 30 days from the date of completion, and entries must include appropriate data to support end-of-the-year reporting to the Service's Regional and Washington Offices.

Critical Result C

C. Conducts site evaluations and prepares response letters to Corps section 10 and 404 applications and technical assistance letters for listed species occurrences. In addition conducts frequent meetings with Corps and consultants to ensure fish and wildlife resources are thoroughly considered in contracted documents.

- a. All correspondence received by the Service and assigned to you, must be reviewed and a Service response prepared within 25 days of the receipt date. This timeframe will allow 5 days for your review and completion of work products. An exception to meeting this time frame must be approved in advance.
- b. All of your completed work assignments must be "logged-out" in the office's database tracking system within 30 days from the date of completion, and entries must include appropriate data to support end-of-the-year reporting to the Service's Regional and Washington Offices.

The criteria by which I was judged, items a through d under Critical Result B and items a through b under Critical Result C, were added as absolute standards in the letter (23Jun2003) placing me on a Performance Improvement Plan.

Appropriateness of Absolute Standards of Timeliness – Formal Consultation

Timeframes for Service response letters are found in the Endangered Species Act (ESA), the Code of Federal Regulations, the Section 7 Consultation Handbook, and the Local Operating Agreement (LOA) between the Service and the Corps of Engineers (Corps).

The ESA references the 90-day formal consultation period and the 180-day period for preparation of a biological assessment by a Federal action agency. The Code of Federal Regulations and the Section 7 Handbook reference the 90-day formal consultation period, an additional 45-day period in which to deliver the biological opinion to the Federal action agency, the 180-day period for preparation of a biological assessment by a Federal action agency, and a 30-day period for the Service to review the biological assessment and prepare a sufficiency response to the Federal action agency.

Mr. Webb presents five projects in Table 1 of the 13Jul2004 letter as overdue without explaining the basis for his claim. Mr. Webb failed to break each consultation into its constituent parts such as the 30-day Corps Public Notice comment period, 180-day period for preparation of a biological assessment by the Federal action agency, the Service's 30-day review period to determine if the biological assessment is sufficient to conclude informal consultation or initiate formal consultation, the 90-day consultation period, and the 45-day period for delivery of the completed biological opinion.

If Mr. Webb is going to require that a biologist adhere to absolute standards then he should specify which standards are not being met. It is conceivable to meet some deadlines but not others and still successfully conclude informal or formal consultation. The examples below will illustrate how circumstances beyond the control of the biologist may play a role in the length of time required to complete a project or meet interim deadlines.

Mr. Webb cited *Walnut Lakes* as being 296 days overdue but failed to mention that it took 175 days for internal review and final processing of the Service's 30-day response to the Corps' Public Notice. The lengthy delay was likely due to an ongoing debate within the Service and between the Service, the Corps, the applicant, and the consultant about how to characterize panther habitat and panther habitat impacts and compensation.

Mr. Webb cited *Twelve Lakes* as being 337 days overdue but he might not have known that environmental review of the project began in 1994 when it was called Islesworth, that the Corps permit was never issued due to resource agency concerns, that a different applicant proposed the same site plan again in 2002, and that the resource agencies reiterated previous concerns. Project delays could be attributed to disagreement within the Service about whether or not the consultant submitted a complete consultation initiation package, whether or not the Service should recommend denial of the project for 60 acres of wetland impacts, and differences of opinion between the Service, the Corps, and the consultant regarding the species determinations.

Mr. Webb cites *Miramar Lakes* and *Terafina* as being 368 days and 646 days overdue but he does not distinguish whether or not interim deadlines were met. Mr. Webb failed to acknowledge the role that the Corps and applicant play in providing or reviewing the information needed to meet deadlines. He also failed to mention that some of the delay in each of these projects was associated with the debate on how to characterize panther habitat use. Mr. Webb then goes on to state that *Walnut Lakes*, *Miramar Lakes*, *Twelve Lakes*, and *Terafina* had to be reassigned to other biologists for completion but he failed to mention that I successfully completed formal consultation on seven panther-related projects, that I was simultaneously reviewing another six panther-related projects that would require formal consultation, or that all of this occurred during the period from 1Mar2001 to 2Apr2003 when *Walnut Lakes*, *Miramar Lakes*, *Twelve Lakes*, *Terafina*, and *Lely Drainage District* were active.

Appropriateness of Absolute Standards of Timeliness – Other

The Service is obligated to respond to Corps Public Notices for Clean Water Act section 404 wetland (dredge and fill) permits within 30 days *only* if the Service wishes to retain standing under the 1992 404(q) Memorandum of Agreement which governs the elevation and denial of permits for projects that impact Aquatic Resources of National Importance. Fewer than a dozen denial letters are written each year (less than one percent of the workload); therefore, it is not critical to respond within 30 days on a majority of projects.

In the performance review Mr. Webb references *Terafina* as an example of a tardy project, but he failed to state that certain aspects regarding review of the project were not under my control and that I completed the letter of denial within the 30-day time-frame necessary to retain standing under the 1992 404(q) Memorandum of Agreement with the Corps.

The Service does have an “informal policy” of responding to all correspondence (including technical assistance) within 30 days. Adherence to this policy is desirable, but in the past supervisors recognized that biological opinions, coordination act reports, planning aid letters, and responses to Corps Public Notices took precedence over technical assistance letters. The directive was to address the complex projects first, then provide technical assistance responses as time allowed. At other times the Vero Beach Field Office has adopted a “first in, first out” policy, regardless of project complexity.

The office has gone back and forth on this issue, but in a staff meeting around the time Mr. Webb proposed to put me on the PIP he indicated that the “first in, first out” policy would be the new standard. I mention this because the first six projects listed in Table 5 of the 13Jul2004 letter reflect a shift in office policy from technical assistance as low priority to one where technical assistance requests are treated on an equal basis with requests for formal or informal consultation with Federal action agencies. The fact that these six technical assistance requests were considered to be low priority tasks caused them to lose their place in the queue before the PIP began, resulting in later completion dates than would have been the case had they entered the queue after the change in priority policy.

In the 23Jun2003 letter Mr. Webb notified me that I would be subject to a Performance Improvement Plan. Mr. Webb stated that under Critical Result B and Critical Result C

that all Federal action agency requests and technical assistance requests would be reviewed and a Service response prepared within 25 days from the date the request is received in the office to allow 5 days for internal review and final processing.

An examination of the table below will show that it is not possible to meet this standard given the amount of time elapsed between the date of the Federal action agency request and the time it is received in the office. The table will also show that it often takes more than five days for supervisory review and signature of the letter. The projects listed below correspond to those listed in Tables 3 and 4 of the 13Jul2004 letter.

Project Name	Request Date	Date Received	Time (days)	Date of Draft Letter	Date of Final Letter	Time (days)	
Placid Lakes	03/17/03	03/24/03	7	06/03/03	06/11/03	8	
Westerra-Martin	04/12/03	04/18/03	6	06/30/03	07/08/03	8	
Euro Properties	comparable data not available						
Jerry Wells	07/21/03	07/25/03	4	12/12/03	01/12/04	31	
Jensen Beach	08/28/03	09/02/03	4	11/18/03	11/21/03	3	
Americana Plaza	comparable data not available						
Don Polletta	10/28/03	11/04/03	6	02/26/04	03/08/04	10	
Stewart Mine	11/07/03	11/10/03	3	03/04/04	03/11/04	7	
Delta Farms	comparable data not available						
Average (days)				5			11

Column 4 of the table shows the amount of time elapsed between the date of the Federal action agency request and the time the request reaches the office. It took 3 days for *Stewart Mine* to reach the office and 7 days for *Placid Lakes* to reach the office. The average time elapsed for all projects, 5 days. This would include the amount of time necessary for the Corps to prepare and mail the Public Notice, the length of time it takes the U.S. Postal Service to deliver the mail, and the amount of time it takes Service administrative staff to check the mail in, date stamp it and place it the biologist's inbox.

Column 7 of the table shows the amount of time elapsed between the date the biologist submits a draft letter for internal review and final processing and the date the letter is completed. It took 3 days to review and process the letter for *Jensen Beach* and 31 days for *Jerry Wells*. The former letter went through on the first draft and the latter after four drafts. The average time elapsed for all projects, 11 days. Only one project in this example met the 5-day internal review and final processing standard. On average, the review process took 6 days longer than anticipated.

The 30-day standard allocates 25 days for the biologist to review a project and draft a response letter and 5 days for managers to edit the letter and for administrative staff to finalize the letter for signature. The table above shows that it actually took an average of 5 days for the Public Notice to reach the biologist and 11 days to finalize the letter, leaving the biologist with 14 rather than 25 days to complete their portion of the assignment.

I made a similar analysis of the 51 projects listed in Table 5 of the 13Jul2004 letter. See the table below. Column 4 of the table shows the amount of time elapsed between the

Project Name	Date of Request	Date Received	Time (days)	Date of Draft Letter	Date of Final Letter	Time (days)
Vista Properties	08/07/02	08/12/02	5	07/23/03	07/31/03	8
Lock Road Subdivision	08/27/02	08/29/02	2	07/01/03	07/10/03	9
Emerald Harbor	10/15/02	10/18/02	3	07/01/02	07/10/03	9
WCI Industries	12/13/02	12/23/02	10	06/30/03	07/08/03	8
Murray Cove	01/09/03	01/16/03	7	07/01/03	07/10/03	9
Cove Lakes PUD	01/09/03	01/17/03	8	07/01/03	07/10/03	9
Florida DOT	Comparable data not available.					
Banyan Bay	Comparable data not available.					
The Gardens	03/17/03	03/25/03	8	07/01/03	07/10/03	9
The Falls	03/24/03	03/31/03	7	07/25/03	08/04/03	10
Avonlea	03/24/03	03/31/03	7	07/31/03	08/06/03	6
Sunset Commercial	04/07/03	04/09/03	2	07/01/03	07/10/03	9
Lake June Oaks	04/08/03	04/09/03	1	06/30/03	07/09/03	9
USCG-Auxiliary	Comparable data not available.					
Jankins Tower	05/23/03	06/02/03	10	06/06/03	06/17/03	11
Plantation Hill	05/05/03	05/07/03	2	06/30/03	07/08/03	8
Park Place	05/16/03	05/22/03	6	07/01/03	07/10/03	9
Tractebell Pipeline	Comparable data not available.					
Eagle Marsh Club	Comparable data not available.					
Prosperity Development	07/01/03	07/11/03	10	12/03/03	12/19/03	16
Tim Blackman	07/08/03	07/11/03	3	09/17/03	09/24/03	7
Camper Corral	07/09/03	07/11/03	2	12/12/03	12/23/03	11
MHK Investments	07/21/03	08/25/03	4	09/03/03	09/17/03	14
Black Stallion Estates	Comparable data not available.					
Waterway Villages DRI	07/31/03	08/04/03	4	01/13/04	01/23/04	10
Wetland MTG	08/05/03	08/11/03	6	01/14/04	01/22/04	8
Florida Heritage	08/19/03	08/21/03	2	01/15/04	02/04/04	20
Preserve Estates	Comparable data not available.					
Maya Estates	08/25/03	09/22/03	28	01/15/04	01/26/04	11
Red Beach Lake Site	08/27/03	08/28/03	1	01/16/04	01/22/04	6
Hillcrest at Hobe Sound	Comparable data not available.					
Treasure Cove RV Park	09/02/03	09/08/03	6	01/21/04	01/26/04	5
Venice USCG Auxiliary	Comparable data not available.					
Sarasota County	Comparable data not available.					
The Meridian Club		09/15/03	No data	01/21/04	01/26/04	5
Suncrest Ranch	Comparable data not available.					
Mariner Village	Comparable data not available.					
Ken Kubeck	Comparable data not available.					
Unnamed 28-acre Project	09/25/03	09/29/03	4	01/27/04	02/12/04	16
Adventist Health System	10/07/03	10/09/03	2	01/22/04	01/29/04	7
Cooney Midway Groves	10/08/03	10/16/03	8	01/23/04	01/30/04	7
Kimmel Project Site	09/18/03	09/27/03	9	01/23/03	02/02/04	10
Communication Services	11/03/03	11/06/03	3	02/26/04	03/03/04	5
Watkins and Sons	Comparable data not available.					
Crossroad Environmental	10/10/03	11/14/03	4	01/23/04	01/30/04	7
HUD Shelter	11/12/03	11/17/03	5	01/27/04	02/09/04	13
Dickerson Florida, Inc.	11/14/03	11/18/03	4	01/23/04	02/05/04	13
Southwood Commercial	11/17/03	11/18/03	1	02/26/04	03/03/04	5
Renar River Place PUD	11/17/03	11/18/03	1	02/26/04	03/03/04	5
Tom W. Conely	11/25/03	11/28/03	3	03/05/04	04/06/04	32
Average (days)			5			10

date of the request and the time the request reaches the office. It took 1 day for *Red Beach Lake Site* to reach the office and 28 days for *Maya Estates* to reach the office.

The average time elapsed for all projects, 5 days. Even though the biologist is allowed 25 days from the correspondence receipt date to prepare a response rather than 25 days from the actual date of the request it is important to note the variability in the length of time it takes the U.S. Postal Service to deliver the mail, and the amount of time it takes Service administrative staff to check the mail in, date stamp it and place it the biologist's inbox.

Column 7 of the table shows the amount of time elapsed between the date the biologist submits a draft letter for internal review and final processing and the date the letter is completed. In this example the amount of time varied from 5 to 32 days. The average time elapsed for all projects, 10 days. On average, the review process took 5 days longer than anticipated. Only four projects in this example met the 5-day internal review and final processing standard. It took 32 days to review and process the one letter because there was some debate about whether and how the Service could provide technical assistance on a project that was the subject of an active law enforcement investigation.

I conclude that performance indicators in the June 23, 2003, to December 31, 2003, Performance Improvement Plan are not flexible and cannot be achieved with an acceptable quality of work.

Relevant regulations:

224 FW 2, Appendix 2, The Impact on Standards on Actions: The Impact of Performance Elements and Standards on Taking Performance-Based Actions.

“There is nothing in law or OPM regulation that prohibits agencies from establishing absolute standards. Positions such as nurse, physician, air traffic controller, and others in which public safety, health, or national security is involved may warrant absolute standards. However, supervisors should be aware that the establishment of an absolute standard generally constitutes an abuse of discretion warranting reversal of a performance-based action under this chapter unless a single failure to meet the standard could result in death, injury, breach of security, or great monetary loss.”

Notification of Performance Evaluation Results

My PIP ended on 31Dec2003, at which time I was told that the results were satisfactory. A draft report stating I had “not achieved” Critical Result B and Critical Result C was delivered four months later on 28Apr2004 and in final form on 17May2004. See *The Role of Discriminatory Reprisals* below for a discussion of reasons why the initial evaluation of my performance was reversed 4 months later. In addition to other problems associated with my performance evaluation (e.g. reaching a different conclusion than I had been told, inappropriate absolute standard of timeliness, exclusion of positive aspects of performance, exclusion of other relevant criteria), this delay is counter to Service regulations [370 DM 430.2.3(A)] which state that within 60 days following the end of the rating period, the rating official will consider the employee's performance during the rating period, including any feedback received, and assign a rating for each critical result.

It is beyond ironic to note that Vero Beach supervisors have not met the 5-day standard for internal review and final processing of letters.

Delays Beyond the Control of Service Biologists

Mr. Webb provided an extensive list of overdue projects, implicitly attributing all delays to the Service biologist although he is fully aware that this is not the case. Delays are often caused by Service management, Service administrative staff, the Corps' project manager, the consultant, and the applicant.

Bookkeeping Errors

Since October 2002 all projects are tracked in a computer spreadsheet, so a wide variety of statistics can be examined. Surname routing slips indicate the length of time taken for review and edits. The date a draft letter is submitted for review is included, as is the date the letter is signed. A simple case can be made against the 30-day rule by showing that management cannot review, edit, finalize, and sign the letter quickly enough to give the biologist a reasonable amount of time to conduct review of the project.

On some of the larger, more controversial, and grossly overdue projects, delays reflect failure to reset the clock when a Service Request for Additional Information (RAI) letter was written. A simple file search will reveal if this has occurred. If I did not reset the clock it may be that the applicant and consultant took several weeks to several months to provide a response. Delays also occur in the Corps office at this point if the applicant response is found lacking and the Corps writes an RAI letter of their own.

Non-responsiveness of Applicants

The records Mr. Webb submitted do not include mitigating factors such as delays caused by applicants. Some projects dragged on because the applicant did not submit a complete ESA section 7 consultation initiation package (information on the direct, indirect and cumulative effects, along with conservation measures).

Mr. Webb referenced *Terafina*, but failed to state that that it was linked by a 3-mile long, 200-foot wide, 4-foot deep ditch with two other projects, *Mirasol* and *Olde Cypress*. The three projects together proposed to fill about 1,000 acres of wetlands and to drain another 2,500 acres of wetlands. There was a legal or contractual agreement between the three landowners with a provision that each property owner would allow the ditch to cross their land. Since *Mirasol* was the first project to go out on Public Notice, the burden of addressing issues associated with the ditch fell on this applicant. As noted elsewhere in this letter the issues were not easily resolved and the project faltered.

It did not seem prudent to initiate formal consultation on *Terafina* until the *Mirasol* issues were resolved, so *Terafina* languished. To put it another way, if issues on *Mirasol* could have been properly addressed in a timely manner, then formal consultation on *Terafina* could have been easily completed. Instead, the Service wrote a hasty biological opinion on *Mirasol*, yet afterward the Corps required the applicant to reanalyze the project to correct hydrology errors identified by the Service during its review. Now 1.5 years have

passed since the Service wrote the biological opinion, the applicant separated the ditch from the development project, and the Corps has yet to issue a permit for the ditch, *Olde Cypress* (which never actually went out on Public Notice), *Mirasol*, or *Terafina*.

Project Complexity

The records Mr. Webb submitted also do not include mitigating factors such as delays caused by the complexity of the project. Mr. Webb referenced the *Lely Drainage District*, but failed to state that this complex and controversial project, which proposes to “manage water” within a 17-square mile watershed, had been under review for 14 years prior to my involvement. The project components are constantly evolving due to input from multiple review agencies, and delays during the performance evaluation period are of little consequence to the overall project timeline.

Workload

The records Mr. Webb submitted do not provide an analysis of workload - the number of hours each project should take in the context of the number of working hours available during the performance period for their completion, factoring in staff meetings and required tasks such as responding to congressional inquiries and Freedom of Information Act (FOIA) requests. I submitted an affidavit on March 14, 2003, that provided a detailed workload analysis indicating it was not possible to meet the specified deadlines. Mr. Webb did not respond. I am submitting the affidavit again for thoughtful consideration by Vero Beach Field Office supervisors.

Mr. Webb failed to note that during the performance evaluation period 67 projects were assigned to me, and I completed 67 projects during this period. My output kept pace with my input, and also with the output of the rest of the office. Graphs of cumulative totals of incoming and outgoing projects for the office over this period show that my productivity was in line with that of other biologists (Figure 1). The time lag between number of projects initiated (solid line) and projects completed (dashed line) reflects processing time for work in progress. Note that the graph for an individual will invariably show more micro-variation than cumulative totals for a group of individuals. Note also that my productivity during the evaluation period showed improvement from the previous six months, a factor relevant to my evaluation that he failed to consider.

Other Duties as Assigned

The performance review Mr. Webb submitted failed to consider other duties as assigned, including a FOIA request, a congressional inquiry, and the preparation of an administrative record.

Beginning June 4, 2003, and concluding October 29, 2003, I prepared the administrative record for the *Florida Rock* project. The majority of the work was done in the months of August, September, and October. This included organizing in chronological order all documents used in reviewing the project and writing the biological opinion, scanning 187 documents into Adobe (pdf) format, naming the scanned files, and hyperlinking all files to an index. This was the first such administrative record of its type prepared in the Vero Beach Field Office, and my work set the standard for all administrative record

compilations and FOIA responses that followed. Although I was not officially recognized for raising the office standard, co-workers later told me that my innovative efforts were acknowledged and praised in a managers meeting.

Between November 25, 2003, and January 11, 2004, I prepared the response for FOIA #2003-00960. This response involved a computer file search of all projects involving bald eagles, screening of the computer list to identify projects responsive to the request, physically locating the appropriate project files, isolating the responsive documents, scanning 357 documents into Adobe (pdf) format, naming the scanned files, and hyperlinking all files to an index.

During the month of October 2003, I was tasked with locating and compiling all biological opinions and concurrence letters written on the Florida panther from 1Jul2000 through 7Aug2003, the date Senator Joseph Lieberman sent a letter to Service Director Steven A. Williams requesting the records. This response involved a computer file search of all projects involving panthers, screening of the computer list to identify projects responsive to the request, physically locating the appropriate project files, isolating the responsive documents, scanning 77 documents into Adobe (pdf) format, naming the scanned files, and hyperlinking all files to an index.

Reassignment of Projects

Mr. Webb listed four projects, *Walnut Lakes*, *Miramar Lakes*, *Twelve Lakes*, and *Terafina* that were reassigned from me to another biologist (see Table 1 of the 13Jul2004 letter), but he failed to differentiate the amount of time that I had expended on the projects versus the amount of time it actually took the biologist to complete the projects once they were reassigned. Most importantly, he failed to acknowledge that I had all of these panther-related projects under review at the same time and that he reassigned them after we disagreed over whether or not I would consider a jeopardy opinion on *Mirasol*.

The records Mr. Webb submitted do not indicate that some of the projects were already overdue when they were assigned to me. For example, *Terrabrook* was 11 days into the 30-day response period when it was reassigned, *Tractebel Pipeline* was due on the very day it was reassigned, and *Preserve Estates* was 266 days over due when it was reassigned to me. Projects are often reassigned to relieve employees and more efficiently manage the office workload. This strategy is an indication that the office is understaffed. Five new employees were hired in November and December 2003, the final months of the PIP period, and despite having doubled the staff the Project Planning Section still cannot meet the specified deadlines.

The Role of Discriminatory Reprisals

I question both the timeliness and timing of the performance review (28April2004) concluding that I had failed the PIP, coming 4 months after the PIP ended (31Dec2003) and despite the fact that Mr. Webb told me in January 2004 that I had passed the PIP. The 4-month delay violates the Service's 60-day rule for reporting results of evaluations (Performance Appraisal Systems, Chapter 430, 370 DM 430.2.3A). While the review was not a timely follow-up to the PIP, it came just weeks after publication of a *Southeastern Naturalist* paper I co-authored and for which I had been threatened with termination. The

review also came as word of the impending filing of my DQA complaint (4May2004) began circulating within the office.

I believe that the Vero Beach Field Office is discriminating against me and that the basis for discrimination is rooted in disagreements over process and science dating back to a 12Dec2001 incident when I was told to insert language in the *Lee County Port Authority* biological opinion stating that there was a surplus of 28 panthers, language on which I think the Service intended to base its policy of no jeopardy for the panther. Since that time, my conduct and performance have been judged using a different standard than was applied to me previously and than is applied to other biologists in the office.

I believe that the discrimination has manifested itself in several ways, including being told on at least three occasions that I should get another job, denial of a within-grade increase in pay, disciplinary actions based on hearsay and without merit, judging my performance by absolute deadline standards that are not enforced for any other biologist, delivery of a failed performance review after 17 years of satisfactory reviews, and a proposal for termination that was initiated before my appeal of the 14-day suspension was resolved and without giving due consideration to my performance review grievance.

In weighing whether the proposal to terminate me is based on fair and objective criteria, I request that evaluators consider that I was subjected to the inappropriate supervisory tactic of repeatedly being threatened with bad performance reviews and insubordination over matters that had nothing to do with performance. Supervisors have no legitimate authority to order biologists to violate laws or agency policies.

It is my contention that supervisory authority and performance reviews have been used by Vero Beach Field Office managers to intimidate and pressure me to participate in or be silent about misrepresentation of science and non-enforcement of the ESA and to retaliate against me when I did take a stand. The degree to which Vero Beach is a rogue Field Office that has violated Service policy for ESA enforcement and personnel reassignment is currently the subject of a Congressional inquiry. It may take depositions of relevant personnel to establish a reliable history of events related to enforcement of endangered species and wetlands regulations and heavy-handed attempts to coerce employees to participate in actions that violate ethical, professional, and legal guidelines.

The records Mr. Webb submitted do not list incidents in which I was threatened with a poor performance review for matters that had nothing to do with performance, nor do the records list incidents in which I was prevented from doing my job by supervisors through threats of insubordination. Descriptions of several such incidents are provided below.

Told to “Hit the bricks” after Press Interview

In the spring of 2002, I was interviewed by Michael Grunwald for a Washington Post news article (25Jun2002), "Growing Pains in Southwest Florida." I expressed my concern about habitat issues and my frustration with the Service's stance on jeopardy, noting legal obligations of the agency, and described the (overruled) draft jeopardy opinion we wrote on Florida Gulf Coast University. ("At least seven times, Fish and Wildlife biologists have drafted proposals to block Corps permits they believed would jeopardize the panther's survival, but their bosses rejected their conclusions. `It's a heinous process, and

it's getting worse,' said Andy Eller, a Fish and Wildlife biologist who helped draft the 1993 plan. `Southwest Florida can wear a biologist down.' "). I was subsequently instructed by supervisors not to talk to the press and asked if I was responsible for a quote in the article that was embarrassing to our Field Office Supervisor, Jay Slack. I said I was not, but because one critical remark was incorrectly attributed to me I became a convenient target on which to pin all such remarks or information leaks.

On July 8, 2002, I had a meeting with Vero Beach Field Office Supervisor Jay Slack, prompted by the Washington Post article. During the course of this meeting he stated that I needed to find another job, that our relationship was not working, and that it was time for me to "hit the bricks."

Denied Option of Transfer

On 26Aug2003 I met with Mr. Webb regarding the Performance Improvement Plan. During that meeting he informed me that I was not suited for work in the Project Planning Section and that I should find another job. I requested a transfer, and he indicated that transfer was not an option. This was the first, but certainly not the last, time Mr. Webb informed me that I should get another job. Denial of transfer after being informed that I had no future in the office limited the options for resolution, creating the impression that he was making an example of me to warn other biologists that scientific debate in the Vero Beach Field Office could be a career-ending activity.

Informed of Intent to Terminate

On 30Dec2003 Vero Beach Field Office Supervisor Jay Slack and Assistant Field Supervisor Linda Ferrell came to my office to hand-deliver the letter that stated I would be suspended for 14 days without pay beginning January 11, 2004 (my birthday). I was told by Field Supervisor Slack that he intended to remove me from Federal service. My appeal of this suspension is still under review by the agency.

Personnel Sanctions Linked to Jeopardy Issue

Mr. Webb threatened me with personnel sanctions if I wrote a jeopardy opinion on the *Mirasol* project (described in detail under *The 5-Day Suspension* below). The project was reassigned to two other biologists who were forbidden to communicate with me, material that indicated the Florida panther was in jeopardy was removed from the opinion, and I was in fact suspended for 5 days.

Threatened with Insubordination for Thoroughness

Right next door to *Winding Cypress* is a project called *Naples Reserve*, which the Service reviewed in 1999. The applicant proposed impacts to 113 acres of wetlands. The Service notified the Corps in accordance with the procedural requirements of the 1992 404 (q) Memorandum of Agreement, Part IV, 3(a) and (b) that the proposed work may affect Aquatic Resources of National Importance and recommended denial. The Corps rejected the request for permit denial without adequate explanation.

The Service later reviewed a Corps permit application for a project called *Winding Cypress* in 2002. I was instructed not to write a letter of denial, even though the applicant proposed to impact at least 200 acres of wetlands (almost twice that of *Naples Reserve*). During the review process I questioned, with concurrence from the Environmental Protection Agency, the classification of another 370 acres as uplands rather than wetlands by the project consultant. I was told two times by supervisors to drop the issue. On July 15, 2002, I was told a third time under threat of insubordination to drop the issue. I did.

The different treatment of two projects adjacent to one another is striking. I allege that Vero Beach Field Office supervisors engaged in unethical conduct in violation of Service Manual 212 FW 1, Standards of Conduct, section 1.8(H), which states that Federal employees should “act impartially and not give preferential treatment to any private organization or individual.” The Service wrote letters of denial on five other projects in 2002, but not *Winding Cypress*, which is owned by the Collier family of Florida.

Instructed to Misrepresent Science

In the course of my work on the biological opinion for the Southwest Florida International Airport, I met with the Vero Beach Assistant Field Office Supervisor and a co-worker who joined us with information to include in the opinion (12Dec2001). The co-worker provided a draft marked with handwritten comments, including statements comparing the known population of 78 panthers, documented by field biologist Roy McBride, with a target number of 50 breeding adults (25 breeding females), implying that we currently had a surplus of 28 beyond the number of panthers needed for viability. I was told to incorporate the material without questioning it, under threat of insubordination.

This comparison that treated the entire known population as breeding adults was wrong in so many ways it's hard to know where to start. The known population, described in detail in McBride's written report to the Service, included 16 juveniles, panthers too old to breed, introduced female Texas panthers with contraceptive implants, and females in an isolated subpopulation with no access to mates. There were probably fewer than 7 or 8 regularly breeding females at that time. The implicit acceptance of a minimal population size of 50 as a viability target, even if all were breeders, is itself untenable, as this target was predicated on many assumptions known to be violated in south Florida.

This grossly inaccurate comparison was included as Item 2B in the Eller/PEER Data Quality Act complaint (4May2004).

The handwritten comments instructed me to cite McBride's count throughout the document as a personal communication rather than citing his detailed written report, an office policy that was later reversed due to considerable protest after citations to McBride's reports in drafts of the Conservation Strategy were also edited by Vero Beach Field Office staff to read “personal communication.”

I regret that I did insert the paragraph as I was instructed. Despite strong objections in May and June 2002 from other biologists in the office, Panther Subteam members, and the Wildlife Federation (see Eller/Peer 2004), this comparison remained part of the “template” text for biological opinions and appeared in at least 5 opinions between December 2001 and September 2002, although no manager disputed the objections or

contended that there actually were 25 breeding females in the population. This was an example of blatant misrepresentation of scientific information to make the panther appear less endangered than it was, and of intimidation of a biologist (myself in this case) that interfered with the performance of my duties.

I removed the paragraph myself in September 2002 while working on another biological opinion, hoping no one would notice. However, the Assistant Field Office Supervisor did notice and ordered me to put it back in. I did not do so and heard no more about it. I do not know whether supervisors failed to check the final draft of the opinion, or if they were dissuaded by the appearance soon thereafter of a new field report by McBride, available online and widely read (<http://www.panther.state.fl.us/news/pdf/rtm2002.pdf>), which explicitly discussed the comparison and explained why it was wrong.

The office showed no trepidation about such bold misrepresentations of panther science, known by the entire scientific community to be wrong, and showed no qualms about ignoring objections from the recovery community or coercing Service biologists to play a complicit role in subverting the ESA. The office provided inaccurate information about this incident in their response to the Eller/PEER DQA complaint, a pattern I find disturbing. Perhaps the full story will be told in the Service's response to the Lieberman inquiry (21Jun2004).

In meshing science with office policy, there is a line that can't be crossed without violating ethical, professional, and legal standards. In retrospect, I should have drawn the line with this episode by refusing to bow to pressure that all parties realize was inappropriate.

Scientific Concerns Ignored

In June 2002, a Panther Subteam member sent the Service a series of email messages describing flaws in the scientific basis of the method of habitat evaluation the Service was using, requesting that the Service address the fact that applicants were reporting impacts only to day-use habitat for a nocturnal animal, noting that the Subteam was facing resistance over the same issues. I included her concerns in a draft of the Winding Cypress biological opinion (26Sep2002) pending resolution of the issue. However, a supervisor removed the material from the draft opinion and the problem was never resolved, although Service guidelines mandate that we address such challenges to the science used by the agency. The supervisor did not discuss with me, as the biologist of record, the appropriateness or advisability of removing the material from the opinion, and did not provide an explanation of why the Service would not address the scientific basis of the Subteam member's argument, which was clear and straightforward.

The obligation of Service biologists to consider the view of panther science emerging from experts on the Panther Subteam led to conflicts with office management. The Subteam view was soundly supported by science, so management challenges to its use employed tactics of stonewalling, intimidation, and misinformation rather than rational evaluation. Discussion of relevant issues was forbidden, peer-review comments were buried, and communication with Subteam members was stopped. Biologists were caught in the middle. We could not do our job conscientiously without coming into conflict with management.

Termination Linked to Journal Article

In February of 2004 I notified Mr. Webb, as my immediate supervisor, that I had co-authored a peer-reviewed article in the journal *Southeastern Naturalist* with Panther Subteam member Jane Comiskey and former Service biologist Dustin Perkins, to be released in late March. Our paper critiques the Panther Habitat Evaluation Model (PHEM) of Maehr and Deason (2002). Because the science underlying PHEM has dominated panther habitat evaluation under the ESA, resolving questions about the soundness of this model is fundamental to designing and implementing a defensible habitat conservation strategy.

While other Service biologists who publish in their field are commended for their efforts, Mr. Webb informed me in mid-March that I would probably be terminated for my participation, although I had worked on the paper on my own time, received no remuneration, and did not criticize the agency. Lead author Comiskey wrote to Vero Beach Field Office Supervisor Jay Slack to praise my contribution and point out that it reflects well on the office to have experienced staff who contributed to resolving key habitat issues. Mr. Slack did not reply. It is interesting to note that another biologist in the Vero Beach Field Office was recently presented an award for his peer-review of journal articles while the Service has yet to openly acknowledge my role as co-author of the *Southeastern Naturalist* paper.

Termination Linked to Data Quality Act Violation Complaint

The final summary of PIP findings was delivered seven months later along with my 30-day notice of termination (13Jul2004), coincident with work on my appeal of the Eller/PEER Data Quality Act complaint against the Service (28Jul2004).

THE EVALUATION PROCESS

I request that evaluators review the supervisory process and the role of supervisory malfeasance, inexperience, incompetence in (a) contributing to project delays, (b) faulting me for delays over which I had no control, (c) evaluating my performance using inequitable and capricious standards, (d) providing inappropriate information and misinformation to the press related to my case, and (e) using supervisory authority to retaliate against me for my stance on scientific issues and for speaking out against violations of agency protocols and policies.

As supervisor of the Project Planning Section, it is Mr. Webb's responsibility to create the working conditions necessary to meet desired goals, i.e. to train staff, increase the number of staff or streamline workload, and use performance reviews to increase efficiency, not to threaten or intimidate personnel. It is my understanding that his probationary period as a first-time manager has been extended for shortcomings in these areas. Singling out one individual for punishment when the section as a whole was experiencing similar difficulties under his guidance is irresponsible and serves to deflect attention from poor management, while using supervisory authority to silence criticism of office practices.

Capricious Standard

Mr. Webb's actions in my performance evaluation have been arbitrary and capricious. After the first three months of my PIP, he told me it had gone well, then without explanation extended the period of evaluation three more months. At the end of the second PIP period he again gave me verbal reassurance that there was no cause for concern, saying the evaluation had gone so well that I could even write up the summary myself if I was in a rush to get the results, as he would be out of town. Unfortunately, I did not follow up on Mr. Webb's offer.

Inequitable Standard

In denying my appeal of the PIP evaluation, Vero Beach Field Office Supervisor Jay Slack rejected my objection that I was being held to a much more stringent standard than the rest of the office and punished for performance levels that are acceptable for other staff. He did not deny the inequity of the standard by which my performance was judged, but stated that "employees are not evaluated against one another but rather only against their individual performance standards" (13Jul2004). Such a rule is designed to protect an employee from being held to an unreasonable standard, e.g. so that an employee engaged in complex projects will not be compared against those assigned more numerous simpler projects. This rule cannot be reversed and used to justify an unreasonable individual standard that no other employees are expected to meet. As my supervisor, Mr. Webb has an obligation to show that the standard used in my case is objective and attainable. A supervisor cannot hold an employee to an impossible standard by requiring an employee to work more hours than there are in the day. He cannot misrepresent an employee's workload or exclude from consideration positive aspects of his performance to make his performance appear deficient. He cannot discriminate against an employee by using unattainable performance metrics as a reprisal for matters unrelated to performance.

Violation of Privacy Rights and Due Process

Compounding the damage to my career from a highly irregular performance evaluation process, Vero Beach Field Office spokesman Bert Byers has violated agency policy by commenting about my case to the press, providing misinformation that could prejudice the public against me.

“Byers said he has not heard of anyone else missing so many deadlines or having similar problems.”

http://www.news-press.com/news/local_state/040721biologist.html

“Byers dismissed accusations that agency officials pressured biologists to issue favorable opinions on proposed developments. Had that been the case, he said, many other scientists would have filed protests... Byers... denied Eller's contention that employees routinely completed projects late. ‘The norm is to have deadlines,’ Byers said. ‘And the deadlines are met by most if not all scientists, except Mr. Eller.’

<http://www.sun-sentinel.com/news/local/broward/sfl-cpanther21jul21,0,1217949.story>

In an article in the Endangered Species and Wetlands Report (ESWR July/August 2004), Mr. Byers modified his statement to say, "The deadlines are met by most if not all scientists, except *apparently* Mr. Eller," reaffirming his contention that most, if not all, other employees are able to meet deadlines. Such misinformation provided to the press has been an inexcusable breach of agency policy not to discuss personnel matters publicly and has served to place the weight of the agency behind Mr. Webb's inaccurate contention that the deadlines he faulted me for not meeting are reasonable requirements met by the rest of the office. In addition to dissuading readers from supporting my appeal by creating a preconception of guilt, Mr. Byers' statements characterizing my performance as worse than that of other employees could impair my ability to find other employment in the future. This is particularly true of his statements in ESWR, which is widely read within agency circles. It is my understanding that Mr. Byers has not responded to two requests from the public for clarification of the source and accuracy of his information about my case (22Jul2004 and 2Aug2004).

Mr. Byers also states in the ESWR article that the termination "was initiated, at the field level, prior to the [4May2004] filing of the IQA complaint." If this statement is accurate, then the office's decision to pursue termination was also made before submission of my position statement in the appeal of my 14-day suspension (7May2004), and before the filing of my appeal of the performance evaluation (31May2004). It is not surprising, in light of the fact that the decision had already been made, that the points in my performance evaluation appeal were not addressed in a meaningful way in Vero Beach Field Office Supervisor Jay Slack's rejection of my appeal (13Jul2004) that accompanied the notice of intent to terminate me. My appeal of the 14-day suspension, cited as a contributing factor in the termination notice, is still pending.

PERSONNEL ACTIONS

I take responsibility for conduct leading to the 1-day suspension, and in fact reported it myself. Although other personnel have done far worse without penalty, I did not protest the suspension. I deny that the other 2 suspensions, which I did appeal, had any merit. In both cases, relevant information provided in my appeals was not addressed by the Service. I regard them as part of a management strategy to intimidate and discredit me and build a false case for my termination.

The 1-day Suspension

I said "f--- it" in a conversation 2Apr2001 with a consultant about panther habitat compensation for a project called *Colonial Golf and Country Club*. I realized that my language was inappropriate and called Vero Beach Field Office Supervisor Jay Slack immediately after the conversation was over. I apologized to Mr. Slack and to the consultant. I learned from this incident and have not repeated it.

The 5-day Suspension

I was assigned 16Dec2002 to write a draft biological opinion on *Mirasol*, a complex and controversial project that would impact panthers, wood storks, and 3,000 acres of wetlands. I was instructed to complete the opinion by 31Jan2003 (46 calendar days).

Although the standard consultation period is 135 days, the deadline had been accelerated for this project at the request of a United States Senator.

I was unable to meet this deadline for the following reasons:

- The applicant had not submitted a complete formal consultation initiation package as required in the regulations (50 CFR 402.14).
- This assignment included writing a precedent-setting first biological opinion on the wood stork, a significant effort since the largest colony in the United States is located in southwest Florida.
- Hydrological aspects of the project were outside my area of expertise and required extra time to evaluate properly.
- The applicant failed to provide hydrologic information essential to analysis of project impacts to wood storks, requested on six occasions over a one-year period.

The Service proposed a 5-day suspension without pay (28Feb2003) when I failed to meet the assigned deadline. With assistance from PEER, I appealed the suspension (14Mar2003), submitting an affidavit on work management standards and requesting that the Service consider the mitigating circumstances.

The Service denied my appeal (17Apr2003). I then filed a grievance (2May2003) on grounds that the Service had not addressed the matters raised in my appeal, that the office work load did not allow sufficient time for proper environmental review of projects, that the applicant for *Mirasol* failed to supply the requested information or a complete consultation initiation package, and that the reviewing official had a conflict of interest.

The Service rejected the grievance (6Jun2003), raising the issue of my pre-application involvement in 1999, although the project was not officially assigned to me at that time. The Service noted availability of "template" language I could have reused for the Florida panther, without addressing the fact that the entire concept of what could be considered "best available science" for the panther had been overturned since the template language was written. Peer-reviews of the Draft Conservation Strategy, a peer-reviewed paper (Comiskey et al. 2002), and initial feedback from the ongoing Scientific Review Team investigation of panther literature all indicated that the original peer-review of key papers (e.g. Maehr and Cox 1995) that had guided the Service's regulatory practices were invalidated by unacknowledged data omissions and unsupported assumptions. Issuing a biological opinion for a major development project in this highly-charged atmosphere required considerable thought. Significantly, the Service also did not address the fact that template language did not exist for the wood stork, for which this biological opinion would be the precedent-setting first.

In writing the *Mirasol* biological opinion, I was faced with resolving a number of troubling conflicts:

- Management's commitment to an accelerated deadline, based on a request from a United States Senator *versus* the applicant's failure to complete the required consultation initiation package.
- The office's stated policy that no jeopardy opinions would be written *versus* strong evidence supporting a jeopardy determination for the panther.

- What the Service had considered “best available science” *versus* a strong alternative view emerging from the Panther Subteam.

Mr. Webb stated that if I wrote a jeopardy opinion he would just change the conclusion, since it was office policy under Secretary Norton not to write jeopardy opinions. This policy was articulated in a spring 2001 staff meeting by Vero Beach Field Office Supervisor Jay Slack and reiterated by Mr. Webb in several meetings. Mr. Webb said I should look for another job unless my view of jeopardy changed, as it was incompatible with office policy.

In my opinion, the basis for a jeopardy opinion rests on cumulative effects and population viability - jeopardy cannot legally be addressed by a blanket policy and biologists should not be asked, or forced, to leave the agency for disagreeing with such a policy. I included in my draft opinion information on habitat conservation trends and land development trends that showed land was being lost 1.5 times faster than it was being protected, a trend that supported a jeopardy determination.

The *Mirasol* biological opinion was reassigned to two other biologists for completion. Communication between myself and both biologists was forbidden under threat of insubordination. My discussion of habitat conservation trends and land development trends, relevant to deciding jeopardy for the panther, was edited from the document.

I know of no case in which the Service has faulted a biologist under similar circumstances, issuing a suspension to enforce accelerated deadlines at the expense of scientific soundness and defensibility. In my view this suspension was issued as a reprisal for my stance on jeopardy for the panther.

The 14-day Suspension

During a 16Oct2003 phone conversation I asked a consultant to put a question in writing in order to establish the proper context for my response. I had been advised to do this by another Vero Beach Field Office biologist because the consultant had a history of taking Service responses out of context in a way that misrepresented those responses to the detriment of the Service. The consultant alleged that this request was discourteous, and lodged a complaint against me to that effect.

The Service proposed a 14-day suspension without pay (6Nov2003). I appealed the suspension (21Nov2003) on the grounds that no discourteous conduct had occurred and no evidence of such conduct had been presented. I provided an affidavit from the Service biologist who had advised me to ask for the question in writing and five letters illustrating lack of cooperation from the consultant during the past ten years. The Service rejected my appeal (30Dec2003).

I then filed a grievance on the 14-day suspension, citing lack of evidence and inconsistency with Service guidelines (14Jan2004). The Service commuted the suspension to 10 days without pay (24Feb2004).

I then appealed the suspension to the Dept. of the Interior's Office of Hearings and Appeals (OHA) (2Mar2004). My position statement explained that no discourtesy

occurred, that my request for information in writing from the consultant was made to ensure clarity and prevent future misunderstanding, and that the agency did not articulate a standard of customer service prior to the incident (*i.e.* no indication that my approach to dealing with this situation was inappropriate, no alternative method proposed).

No decision has yet been made on my appeal to OHA.

The consultant was offended because I requested the information in writing. Management conceded that I acted appropriately in asking for the information in writing, but faulted me instead for explaining to the consultant why I had made this request, maintaining that discourtesy was implicit in the very fact that I had explained my request, regardless of the considerable tact I had used.

My professional relationship with consultants has been built on honesty and forthrightness on my part. In explaining why I requested the information in writing, I sought to avoid such problems in the future. I maintain that I was acting in the best interests of the agency in explaining my request to the consultant, and know of no agency guidelines that were violated. The office has not articulated a standard of conduct, either before or after this episode. It is my contention that any conscientious, well-meaning biologist would approach the situation in the same way I did. If my conduct was inappropriate, it is imperative that the office provide alternative guidelines for biologists to follow in such situations.

Service biologists have an obligation to protect the agency from practices such as those engaged in by this consultant. It would be counterproductive to give consultants the impression that such actions are acceptable. Biologists cannot maintain parity with consultants in negotiations if the Service will not support biologists by articulating standards of appropriate conduct on the part of consultants.

I know of no case in which the Service has faulted a biologist under similar circumstances. I can think of no other explanation for this suspension other than to build a false case for my termination.

CONCLUSION

My conflicts with Vero Beach Field Office managers over jeopardy issues and enforcement of the ESA have focused on whether the office was obeying the law and whether biologists were being coerced into complicity with legal violations. In my view, the office's behavior at some point crossed the line between seeking "flexibility" in panther science and violating laws and guidelines designed to protect endangered species. Office managers have some latitude in determining a project's impacts to panthers and in deciding that science does not support jeopardy decisions. However, they may not misrepresent science to provide support for such decisions, nor may they order Service biologists to participate in misrepresentation. It is important that the scientific community and the public view the Service as honest, objective and law-abiding in its endangered species work and personnel management practices. I also view it as important for career biologists within the agency to be able to take pride in our work and be confident that we are fulfilling the goal of the agency to protect our nation's resources.

Allegations of poor performance and discourteous conduct surfaced only after I expressed opinions within the agency that were counter to management positions about panther science. My performance has not suddenly changed for the worse after 17 years of good reviews. If I had not objected to creating “surplus” Florida panthers in biological opinions, had not expected applicants and agencies to abide by the law, had not attempted to define a jeopardy standard for the Florida panther, and had not challenged the office's compliance with the Data Quality Act, I am convinced that I would still be in good standing with managers in the Vero Beach Field Office and in the Service.

However, I was obligated to keep management informed about the science underlying ongoing panther recovery controversies. As the most experienced Service biologist working with panther issues, I was familiar with the literature and in touch with panther scientists. I remain convinced that my positions on these issues are sound and supported by other scientists in the field.

I am encouraged that the office understands the concept of cumulative effects resulting from individual actions; however, the concept would be better applied to panther habitat conservation. In my case, the supporting evidence for individual infractions is without merit, and the cumulative result of termination is unwarranted and does not reflect meaningful standards for evaluating the performance of Service biologists. When I weigh the unavoidable tardiness of a competent biologist against the serious violations of law and Service policy I have witnessed and experienced at the Vero Beach Field Office, I see a substantial imbalance in priorities. The office is already known for drive-through permitting. This episode will add drive-by personnel management to its reputation.

I have tried to avoid controversy, and will continue to do so in the future, but I would not be serving the agency well if I provided less than an accurate assessment of the plight of the panther. The agency's policy in such matters is to tolerate a diversity of opinions within its ranks and not to seek, through reprisals or intimidation, to coerce biologists to abandon sound science. Vero Beach Field Office managers have violated this policy in their conduct towards me. I urge the agency to embrace and follow this policy in considering my case and in charting a course through future conflicts between biodiversity and development.

Sincerely yours,

Andrew C. Eller, Jr.

cc: Allen Webb

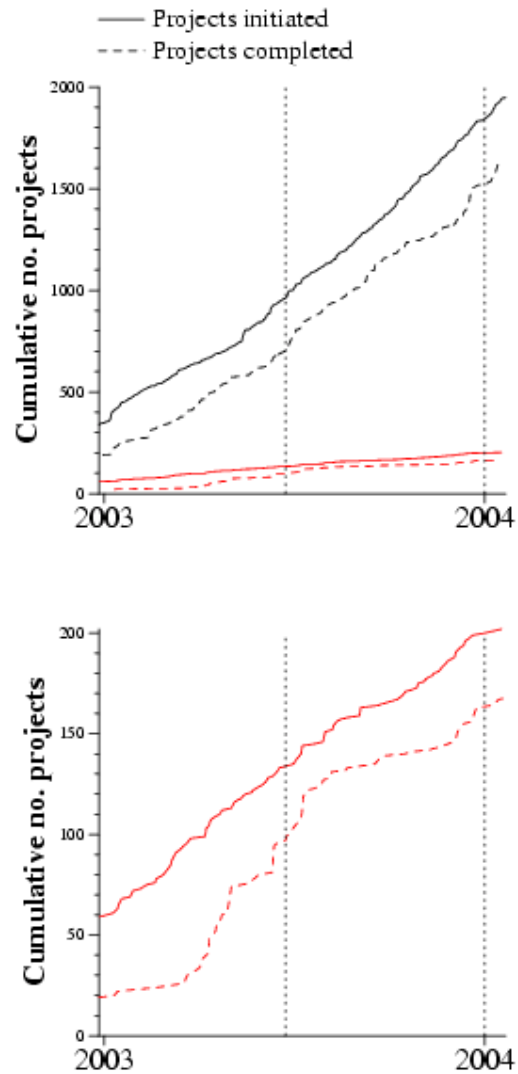


Figure 1. Cumulative number of projects initiated (solid lines) and projects completed (dashed line) at the Vero Beach Field Office. (a) All projects, (b) Projects assigned to Fish and Wildlife Biologist Eller. Dotted vertical lines denote performance evaluation period. The time lag between number of projects initiated and projects completed reflects processing time for work in progress.