

Public Employees for Environmental Responsibility (PEER) is a non-profit organized in the District of Columbia to hold government agencies accountable for enforcing environmental laws, maintaining scientific integrity, and upholding professional ethics in the workplace. PEER has thousands of employee and citizen members nationwide, including employees both within FWS and in other public agencies whose work with the trumpeter swan is curtailed by the effect of this *90-Day Finding* in the management of trumpeter populations. PEER also represents a number of public employees who contend that the trumpeter swan *90-Day Finding* is a work of intellectual dishonesty, formulated as a result of political pressure. In addition, PEER members include citizens who have dedicated their careers to researching trumpeter swan populations. The dissemination of this false information, which circulated internationally via the world wide web, negatively affects the ability of reputable scientific study to address issues concerning the trumpeter swan population.

On January 28th, 2003, the U.S. Fish and Wildlife Service published a *90-day Finding* in response to a lawsuit by the Biodiversity Legal Foundation and the Fund for Animals that would designate the Tri-state Population of Trumpeter Swans as a Distinct Population Segment (DPS). In this *90-Day Finding* the FWS concluded, "the petition does not provide substantial information indicating that this flock is a Distinct Population Segment." 68 FR 4221, 4221 (Jan. 28, 2003).

On May 28th, 2003, PEER challenged the Finding under the Data Quality Act (DQA)). The Complaint (attached) made the following points:

- 1) The primary source relied upon to make the Finding was not subjected to peer-review, relied on unsupported statements, failed to use accepted methods of information collection, and made misleadingly selective use of data; and
- 2) FWS selected only certain data points from a second source that support a pre-determined outcome, and improperly re-interpreted the data.

The FWS response (Response) to the PEER Complaint, dated July 30, 2002, was disturbing. It was written by an External Affairs officer, rather than someone with a scientific background. Rather than a diligent application of the statute to the facts at

hand, the response is more media-product than a public determination and as such it ignored the central point of the Complaint.

In the Response, FWS makes charges so sweeping that it attempts to re-write the DQA altogether. The FWS Response to the Trumpeter Swan Data Quality Challenge is in violation of the Data Quality Act.

I. By Misconstruing the Basis of the Complaint, FWS Abdicates its Responsibility Under the Data Quality Act.

The FWS Response concludes that the PEER complaint hinged on “different stakeholders drawing different conclusions when looking at the same data.” Actually, the Complaint did not focus on interpretation of data at all. It was critical of the process by which the data were selected—this is the essence of the Data Quality Act. The Complaint argued that FWS relied primarily on a single source not compliant with OMB, Departmental and Service DQA guidelines, and secondarily on a source whose author has criticized FWS for misinterpreting her research. This type of shoddy science is precisely what the Data Quality Act was enacted to prevent.

The Response states that the PEER Complaint provides “No new information” that would show that the Tri-State population be considered a Distinct Population Segment. Again the FWS External Affairs Department misses the point of a challenge under the DQA. The Complaint demonstrated that the data the Service relied upon was hand-picked, not peer reviewed and incomplete based on the historic record. This alone is cause for dismissal of the original 90-Day Finding under the DQA.

II. By Redefining “Data,” FWS Attempts to Re-Write the Data Quality Act.

The FWS Response claims that the primary document relied upon to make the original 90-day finding, a non-peer-reviewed study by FWS biologists J.A. Dubovsky and J.E. Cornely, “was not advanced as a ‘scientific’ document; rather it was what the authors believed to be a critical, objective assessment of the information available for trumpeter swans.” (Response, p. 2) The FWS argument that compilations of

scientific research need not meet the credibility thresholds established by the DQA will fundamentally reinterpret the Act in such a way to render it meaningless.

If the Dubovsky and Cornely study is not a scientific document, then it has no business being used as the primary source for a complex, controversial biological decision. If it is indeed a scientific document for the purposes of an agency decision, then it must meet the threshold of the DQA, including peer review and scrutiny of its methodology and conclusions.

III. By Defending Their Right to Selectively Use Data, FWS Undermines the Intent of the Data Quality Act

In explaining its references to the Gale, et al study that were highly criticized by that study's lead author, FWS differentiates between its use of "data" and "conclusions," in the study (Response, p. 11). The Response contends that the Service has the freedom to pick de-contextualized data pieces of its choosing from peer-reviewed documents, and use those data to draw conclusions that contradict the conclusions of the original author.

The purpose of peer review, and the reason it the concept is codified in the DQA, is that it creates a method of professionals to critique their colleagues' work, establishes a collegial record of dissent, and ultimately leads to a better understanding of the subject. If FWS were to have cited reviews of Gale et. al that criticized its conclusions, those may be an acceptable basis for rejecting the study's conclusions. Instead, the Response defends the practice of selective citations from a document without regard to the rigorous process of peer-review that established the entire document as authoritative in the first place. This effectively violates the Department of the Interior's DQA guidelines, which require that FWS use the "best available science."

IV. By Anticipating Future Actions, FWS Exposes the Political Reasons Behind its Decision

While describing the rationale behind the 90-Day Finding, the Response concludes that the available data “did not support listing the Tri-State Area Flocks of the Rocky Mountain Population as endangered or threatened” (Page 2). This finding is many steps ahead of the process. The Finding was supposed to make a determination whether the behavior of the trumpeters merited the designation of a Distinct Population Segment. (DPS), and whether there exists “substantial scientific or commercial information indicating that [listing] *may be warranted.*” (Emphasis added) [16 U.S.C. 1533(a)(3)(A)].

In rejecting the petition, FWS applied a higher standard than required by law, apparently in anticipation of a future ESA listing petition. Such political calculations and anticipated future actions must not be the basis for the Finding. By making the political leap, FWS betrays that politics, not science, formed the basis of their Finding, once again in violation of the Data Quality Act.

Conclusion

The Response to PEER’s Complaint under the Data Quality Act regarding the FWS Finding in response to a lawsuit by the Biodiversity Legal Foundation and the Fund for Animals that would designate the Tri-state Population of Trumpeter Swans as a Distinct Population Segment raises new questions about the ability and desire of the FWS to objectively analyze the data in this controversial case.

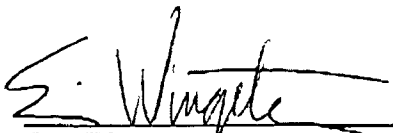
The fact that agencies, in general, are assigning DQA response duties to public affairs officers does not mean that DQA responses are public affairs events. Responses that interpret a statute of the Congress are to reflect the Executive Branch’s level respect for that institution. In an attempt to not concede any ground, the FWS Response made a number of legal, scientific and intellectual leaps that could effectively undermine and redefine the Data Quality Act altogether.

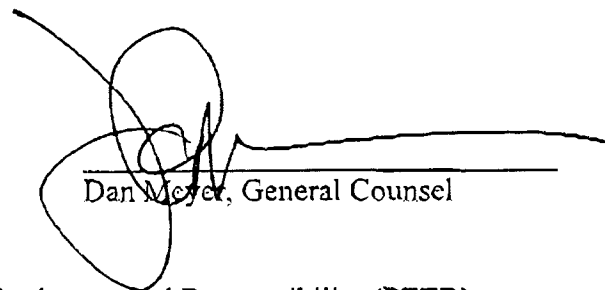
The FWS Response mischaracterized the premise of the challenge, characterizing it as a dispute over interpretation, rather than over the integrity of data; it claims that summaries of data, even when used as the primary basis for a biological Finding, are not data points themselves and therefore not subjected to the DQA; it vigorously defends the

right of agencies to pull out selective data points while ignoring the conclusions of peer-reviewed data; and it anticipates future political actions as a way to justify its findings. Each of the above fails to exhibit the levels of “objectivity”, “integrity” and “quality” of information required by the Data Quality Act.

According to the Data Quality Act guidelines for the U.S. Fish and Wildlife Service, “[h]igher levels of scrutiny are applied to influential scientific, financial, or statistical information, which must adhere to a higher standard of quality.” U.S. Fish and Wildlife Service Information Guidelines, Part III-1, at 4. The term “influential” is defined as “information with a clear and substantial impact on important public policies or important private sector decisions” including “rules, substantive notices, policy documents, studies [and] guidance” as well as “issues that are highly controversial or have cross-agency interest...” U.S. Fish and Wildlife Service Information Guidelines, Part III-2, at 4. For the reasons articulated, even if the 90-day Finding met ordinary levels of quality outlined in the DQA, it does not meet this higher level of scrutiny required of influential, scientific information.

In light of the evidence of multiple failures of the FWS to comply with the Data Quality Act in making its 90-day Finding on the trumpeter swan populations, and the public relations-inspired nature of its Response to the original Complaint, PEER demands that the Department of Interior overturn its Response, and immediately withdraw its 90-Day Finding.


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