



October 16, 2012

VIA CERTIFIED MAIL

Margaret O'Dell
Deputy Director, Operations
National Park Service
Office of the Director
Attention: Information Quality Request
1849 C Street, NW, Mail Stop 3115
Washington, D.C. 20240

**RE: ADMINISTRATIVE APPEAL OF THE NATIONAL PARK SERVICE'S
RESPONSE TO COMPLAINT ABOUT INFORMATION QUALITY L7617 (PWR-NR)**

Dear Ms. O'Dell:

Pursuant to Part IV.G of Director's Order #11B,¹ we write to appeal the National Park Service's ("NPS") October 3, 2012, Decision Letter² regarding the Complaint About Information Quality L7617 (PWR-NR) ("Complaint") that was submitted on behalf of Kevin and Nancy Lunny (collectively "Lunnys") and Dr. Corey Goodman on August 7, 2012. The Complaint challenges information NPS disseminated in the *Draft Environmental Impact Statement: Drakes Bay Oyster Company Special Use Permit* ("DEIS") and the March 2012 *Atkins North America, Final Report on Peer Review of the Science Used in the National Park Service's Draft Environmental Impact Statement: Drakes Bay Oyster Company Special Use Permit* ("Atkins Report"). For the reasons stated below and in the Complaint, which is incorporated by reference as if fully set forth herein and attached as Exhibit B,³ we respectfully urge you to adopt the proposed corrections to the DEIS and Atkins Report set forth in the Complaint. We also urge you, per Part IV.G of Director's Order #11B, to require the withdrawal of the DEIS and Atkins

¹ Director's Order #11B: Ensuring Quality of Information Disseminated by the National Park Service (2002) [hereinafter Director's Order #11B].

² See Letter from Christine S. Lehnertz, Regional Director, Pacific West Region, National Park Service, to Amber D. Abbasi, L7617 (PWR-NR) (October 3, 2012) (attached as Exhibit A) [hereinafter "Decision Letter"].

³ In the interest of brevity, this Appeal Letter solely responds to NPS's October 3, 2012, Decision Letter and does not address the merits of the Complaint's proposed corrections to information NPS disseminated via the DEIS and Atkins Report. We ask that you meaningfully review and consider both the Appeal Letter, which supplements the Complaint, and the Complaint itself (Exhibit B) before making a determination as to the merits of the proposed corrections to the DEIS and Atkins Report.

Report from the public domain and prohibit their use in any agency decisionmaking process until they are corrected to comply with minimum applicable information-quality standards.⁴

1. Background

By way of background,⁵ the Lunnys own Drakes Bay Oyster Company (“DBOC”), an environmentally responsible, sustainable oyster farm employing about thirty (30) full-time workers. DBOC is located in Drakes Estero, California, which is part of the Point Reyes National Seashore. The Lunnys hold a renewable Reservation of Use and Occupancy (“RUO”) and renewable Special Use Permit (SUP) that allow them to farm oysters in the Point Reyes National Sea Shore. DBOC’s RUO and SUP will expire on November 30, 2012. However, DBOC will be able to continue operating if the Secretary of the Interior, Ken Salazar, grants the Lunnys an additional ten-year SUP.⁶ The publications that are the subject of the Complaint, the DEIS and Atkins Report, were produced for the specific purpose of enabling the Secretary to make an informed, reasoned decision on whether to grant the Lunnys and DBOC another ten-year SUP. Because the challenged information at issue in the Complaint strongly militates toward the conclusion that DBOC should not be issued another ten-year SUP, which would force the Lunnys to close their family business and lay off their employees, it is particularly important to not only the Lunnys but also numerous families whose primary source of income is the jobs that DBOC provides that you address the merits of the Complaint with alacrity.

As NPS’s October 3, 2012, Decision Letter acknowledges, the DEIS and Atkins Report were prepared pursuant to and use the procedures required by the National Environmental Policy Act (“NEPA”).⁷ Under Part IV.E of Director’s Order #11B, complaints about information quality regarding “analyses conducted under ... NEPA ... will be considered prior to the final ... information product”—here, the Final Environmental Impact Statement (“Final EIS”)—if “an early response would not unduly delay issuance of the ... information, and the complainant has shown a reasonable likelihood of suffering actual harm” from the information unless NPS “resolve[s] the complaint” before the final information product is disseminated. Given the substantial risk that, if the DEIS and Atkins Report are not timely corrected, the Lunnys, DBOC, and its employees will suffer severe and irreparable harm, we ask that you give expedited review

⁴ See Director’s Order #11B, pt. IV.G. (“If th[e deciding] ... official determines that an appeal of a determination of merit or the proposed correction of information has merit, the affected program office or park will be... withdrawn ... from the public domain and will not be used in any Departmental, bureau, or office-decision-making process until it is corrected.”).

⁵ For a more detailed discussion of the circumstances leading the Lunnys and Dr. Goodman to submit the Complaint, see Exhibit A at i-ii, 1-7.

⁶ See Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Pub. L. No. 111-88, § 124, 123 Stat. 2904, 2932 (2009) (“Prior to the expiration on November 30, 2012, of the Drake’s Bay Oyster Company’s Reservation of Use and Occupancy and associated special use permit ... within Drakes Estero at Point Reyes National Seashore, notwithstanding any other provision of law, the Secretary of the Interior is authorized to issue a special use permit with the same terms and conditions as the existing authorization ... for a period of 10 years”).

⁷ See Decision Letter at 1.

to this Administrative Appeal and independently evaluate the merits of the Complaint and adopt its proposed corrections in the Final EIS.⁸

2. NPS's Decision Letter Responding to the Complaint is Insufficient to Satisfy NPS's Information-Quality Obligations.

2.1 NPS is Statutorily Obligated to Consider Information Quality Act Complaints that Comply with Director's Order #11B's Procedural Requirements.

As an initial matter, contrary to the Decision Letter's claim that NPS "has considered ... [the] Complaint as a matter of discretion," it is statutorily obligated to do so, as the Complaint was submitted in accordance with the procedures prescribed by Director's Order #11B. Under the Information Quality Act ("IQA"),⁹ as supplemented by mandatory Office of Management and Budget Guidelines ("OMB Guidelines"),¹⁰ federal agencies, such as NPS, are required to "issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency ... [and] establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with th[ose] guidelines"¹¹ As Director's Order #11B expressly acknowledges, OMB "guidelines require ... that administrative mechanisms be established to allow affected persons to seek and obtain correction of information ... when that information does not comply with [information-quality] guidelines"¹² And as Director's Order #11B explains, "[t]he purpose of this Director's Order is to establish ... NPS guidelines to comply with these requirements."¹³

Consideration of IQA complaints is not a matter of grace left to individual agencies' untrammelled discretion but rather a responsibility and duty that Congress wisely chose to impose on federal agencies in an effort to ensure that the information disseminated by those agencies meets basic minimum standards for information quality, such as those prescribed by Director's Order #11B. Information NPS develops must be based on "reliable data sources...[that] will ensure information quality";¹⁴ "based on accepted practices and policies";¹⁵ transparent;¹⁶

⁸ Because the DEIS was so inadequate as to preclude meaningful analysis by the public, thereby violating NEPA's implementing regulations, *see* 40 C.F.R. § 1502.9(a), to comply with its NEPA obligations NPS is required to not only revise the DEIS and implement the Complaint's meritorious proposed corrections but re-circulate it and seek public comment on the Revised DEIS.

⁹ Treasury and General Government Appropriations Act for the Fiscal Year 2001, Pub. L. No. 106-554, § 515 (2001) (codified at 44 U.S.C. § 3516 Note).

¹⁰ Office of Management and Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Final Guidelines, With Request for Public Comment 66 Fed. Reg. 49,718 (Sept. 28, 2001).

¹¹ 44 U.S.C. § 3516(b)(2)(A)-(B) Note.

¹² Director's Order #11B, pt. I.

¹³ *Id.*

¹⁴ *Id.*, pt. III.A.

¹⁵ *Id.*

“accurate, timely, and reflect the most current information available”;¹⁷ documented;¹⁸ and objective and unbiased.¹⁹ Dissemination of inaccurate, nontransparent, and misleading information by federal agencies has the potential to cause serious, real-world injuries to individuals like the Lunnys and Dr. Goodman. Congress intended that the IQA and guidelines promulgated pursuant to it would provide a mechanism for individuals and entities that are adversely affected by this sort of “information” to obtain redress.

Director’s Order #11B is mandatory and binding on NPS personnel, as 43 C.F.R. § 20.502 makes abundantly clear: “Employees are required to carry out the announced policies and programs of the Department and to obey proper requests and directions or supervisors.” As NPS’s 2006 Management Policies elucidate: “Service-wide policy is articulated by the Director of the National Park Service. NPS employees must follow these policies unless specifically waived or modified in writing by the Secretary, the Assistant Secretary, or the Director.”²⁰ NPS has an obligation to adhere to the procedures and standards for information quality established by Director’s Order #11B.

2.2 Because the Complaint was Timely Filed Under Director’s Order #11B, NPS is Required to Adopt the Complaint’s Meritorious Proposed Corrections in the Final EIS.

Contrary to the Decision Letter’s bald assertion that because the Complaint “was ... submitted after the close of the official DEIS public comment period ... [it] was untimely,”²¹ Director’s Order #11B does not require that a complaint about information quality regarding information disseminated in a draft environmental impact statement must be submitted within the public comment period—quite the opposite. Under Part IV.E of Director’s Order #11B, the *only* timing requirement for information-quality complaints submitted in connection with structured reviews is limited to circumstances where the complaint “pertains to a final document”:

In cases where a request [for correction of information submitted pursuant to Director’s Order #11B] *pertains to a final document*, the NPS will first determine whether the request pertains to an issue discussed in the draft document upon which the requester could have commented. If the NPS determines that the requester had the opportunity to comment on the issue at the draft stage and failed to do so, it may consider the request to have no merit.²²

¹⁶ *See id.*

¹⁷ *Id.*, pt. III.B.

¹⁸ *Id.*

¹⁹ *See id.*, pt. VI.C.

²⁰ National Park Service, Management Policies 2006, 4 *available at* <http://www.nps.gov/policy/MP2006.pdf> (last visited October 9, 2012) [hereinafter Management Policies 2006].

²¹ Decision Letter at 1.

²² Director’s Order #11B, pt. IV.E (emphasis added).

Part IV.E of Director's Order #11B contains no other timing requirements for information-quality complaints submitted in connection with structured NEPA reviews. And the Decision Letter fails to cite any language from Director's Order #11B indicating that the Complaint was untimely under Part IV.E of Director's Order #11B. Because Director's Order #11B does not contain timing requirements for information-quality complaints submitted in connection with structured reviews prior to the release of the final document, logic and common sense dictate that there are none. Where, as here, a Director's Order comprehensively describes all of the timing requirements for submitting complaints about information quality, there is no basis for reading additional "implied" timing requirements into that Order that are not supported by its text or structure.²³

The Complaint was submitted on August 7, 2012. As the Decision Letter acknowledges, the Final EIS has not been released.²⁴ Therefore, the Complaint was timely submitted, as required by Director's Order #11B. Because the Complaint was timely submitted in accordance with Part IV.E of Director's Order #11B, the Complaint's meritorious proposed corrections must be adopted in the Final EIS.²⁵

2.3 The Atkins Report is Subject to and Must Comply with Director's Order #11B and Other Binding Sources of Minimum Information-Quality Standards.

According to the Decision Letter, "the Atkins Report serves a primarily internal function and is not being separately 'disseminated' to the public in a manner subject to the IQA or Director's Order 11B."²⁶ In other words, the Decision Letter claims that the Atkins Report is not subject to the IQA, Director's Order #11B, and other sources of binding minimum information-quality standards because it was not "disseminated" within the meaning of Director's Order #11B.²⁷ But that claim is belied by Director's Order #11B's definition of the term "[d]issemination," which broadly "means NPS initiated or sponsored distribution of information

²³ As the Supreme Court has explained, "The logic that invests the omission with significance is familiar: the mention of some implies the exclusion of others not mentioned." *United Dominion Indus. v. United States*, 532 U.S. 822, 836 (2001).

²⁴ See Decision Letter at 2.

²⁵ See Director's Order #11B, pt. IV.E (if an information-quality complaint concerning a draft document associated with a structured review is submitted prior to release of the final document, NPS's "response will be included in the final document"). As explained in greater detail below, because NPS took great pains to conceal the inaccuracies and deliberate misrepresentations in the DEIS, Dr. Goodman did not discover the extent to which the conclusions in the DEIS were supported by false and deliberately misleading information until well after the initial public comment period had closed. (The DEIS was made publicly available on September 21, 2011; the public comment period closed on December 9, 2011.)

²⁶ Decision Letter at 1.

²⁷ Under Director's Order #11B, only "information" that is "disseminated" by NPS to the public" or "utilized by the NPS" is subject to its information-quality guidelines. See Director's Order #11B, pt. III. The Decision Letter—correctly—does not question that the Atkins Report constitutes information subject to Director's Order #11B and other binding minimum information-quality standards.

to the public.”²⁸ As the Decision Letter concedes, the Atkins Report has been “provided to the public”²⁹ In fact, the Atkins Report has been—and continues to be—publicly available on the U.S. Department of Interior’s (“DOI”) website (NPS is an agency of the DOI).³⁰ Thus, the Atkins Report has been “disseminated” according to NPS’s own definition of that term.

Part VI.F of Director’s Order #11B does limit the scope of the general definition of “dissemination,” explaining that “[d]issemination does not include distribution *limited to* [i.e., exclusively to] government employees or NPS contractors or grantees; intra- or inter-agency use or sharing of government information; and responses to requests for agency records”³¹ But here, distribution was not limited to government employees or contractors, partners, or grantees, or to intra- or inter-agency use or sharing: DOI made the Atkins Report publicly available on its website so that anyone with Internet access could view it at any time. And the Atkins Report was not publicly released in response to a request for agency records. Part VI.F of Director’s Order #11B also excludes “distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes” from the definition of “dissemination.” But the Atkins Report is not correspondence; it is not a press release; it is not an archival record; it is not a public filing; it is not a subpoena; and it is not related to any adjudicative process. Although the Decision Letter suggests otherwise—and even assuming that the Atkins Report “serves a primarily internal function,” which we dispute—Part VI.F of Director’s Order #11B does not contain an exception for information contained in documents that “serve[] a primarily internal function” that are “provided to the public solely in order to disclose ... [their] role in informing the EIS.”³² As explained in Part 2.2 of this Appeal Letter, because Part VI.F of Director’s Order #11B comprehensively lists all of the exceptions to the general definition of “dissemination” and conspicuously omits mention of any “primarily internal function” exception, it is readily apparent that Director’s Order #11B does not contain such an exception. The Decision Letter appears to have contrived this exception without any textual basis or source of authority for doing so.

Therefore, because the Atkins Report has been “disseminated,” within the meaning of Part VI.F of Director’s Order #11B, and no exception applies, the Atkins Report is subject to the same information-quality standards as the DEIS.

2.4 Under Director’s Order #11B, NPS is Obligated to Address the Merits of All Issues Raised in the Complaint, Irrespective of Whether Those Issues Were Also Raised in Public Comments and the Supplemental National Academy of Science Review of the DEIS.

The Decision Letter implies that, although NPS has discretion to address the merits of the Complaint’s proposed corrections in the Final EIS, it is only obligated to consider earlier public

²⁸ Director’s Order #11B, pt. VI.F.

²⁹ Decision Letter at 1.

³⁰ See Atkins Report, (March 2012), *available at* <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=284844>.

³¹ Director’s Order #11B, pt. VI.F (emphasis added).

³² Decision Letter at 1.

comments and the *Scientific Review of the Draft Environmental Impact Statement, Drakes Bay Oyster Company Special Use Permit* (“Scientific Review Report”)³³ that the National Academy of Sciences (“NAS”) published on September 27, 2012. But the IQA and Director’s Order #11B demand much more than this. Again, as explained above, under the IQA and Director’s Order #11B, NPS does not have “discretion” to adhere to its information-quality obligations and address the merits of properly submitted information-quality complaints such as the Complaint at issue here—it is required to do so.

Further, although there is some limited overlap between issues raised in public comments and the Scientific Review Report, the Complaint raises issues and requests specific corrections of information disseminated in the DEIS and Atkins Report that are outside the scope of the issues raised and corrections proposed by public comments and the Scientific Review Report. Although both the Scientific Review Report and the Complaint address at some level the DEIS’s Impact Levels for Soundscape, Harbor Seals, and Birds and Bird Habitat, the Scientific Review Report—which supports the conclusions and corrections advocated in the Complaint—does not address those Impact Levels with the same level of specificity as the Complaint. For example, the Scientific Review Report concludes that there is a “High” level of uncertainty about the accuracy of the DEIS’s claim that DBOC causes a major long-term adverse impact on Drakes Estero’s Soundscape, noting that “[b]ased on the data presented in the DEIS, impacts could be moderate to minor”; there is a “High” level of uncertainty about the accuracy of the DEIS’s claim that DBOC causes a moderate long-term adverse impact on Drakes Estero’s harbor seal colony, determining that DBOC activities may only have a “minor impact” on the seals; and that there is a “Moderate” level of uncertainty about the accuracy of the DEIS’s claim that DBOC causes a moderate long-term adverse impact on Drakes Estero’s bird population, stating that DBOC’s “[i]mpact may be minor”³⁴ And, the Scientific Review Report does broadly highlight some of information-quality deficiencies that plague the DEIS and Atkins Report.³⁵ But the Scientific Review Report could not and does not propose specific corrections to that information and does not address those issues in as much detail as the Complaint. And unlike the Complaint, the Scientific Review Report does not address the DEIS’s Wilderness and Visitor Experience Analysis, which NAS determined was too subjective for meaningful scientific review. Likewise, the public comments do not address the information-quality issues related to the Atkins Report.

The Decision Letter states that resolution of the question whether Dr. Goodman is an “‘affected person’ under the IQA ... [will] not affect the ultimate disposition of ... [the] Complaint, because the other complainants [i.e., the Lunnys] qualify as ‘affected persons.’”³⁶ For purposes of this Appeal Letter, we take this statement at face value and will therefore not address the merits of this claim. Nevertheless, we dispute the assertion that Dr. Goodman does not qualify as an “affected person” for the reasons outlined in the Complaint and reserve the right to

³³ The Scientific Review Report is attached as Exhibit C.

³⁴ Scientific Review Report at 5.

³⁵ See, e.g., *id.* (noting “lack of direct measurements of sound levels related to DBOC operations” in the DEIS); *cf.* Complaint at 15-19 (discussing NPS’s failure to take on-site measurements of DBOC noise-generating activities).

³⁶ Decision Letter at 2.

address the merits of this assertion at a later time, in the event that litigation is required to resolve this matter.

3. Conclusion

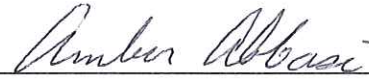
The Complaint is the *third* information-quality complaint that NPS and DOI have received requesting correction of information NPS has disseminated concerning DBOC and Drakes Estero in about five years. NPS has not addressed the merits of any of those complaints—and did not even bother to respond at all to one of them.³⁷ Yet the subject of the first two complaints—an NPS report entitled “Drakes Estero: A Sheltered Wilderness Estuary”—was the object of a DOI Office of Inspector General Investigative Report that expressly concluded that NPS had “misrepresented research” in that document.³⁸ To date, NPS has flouted its obligations under the IQA and Director’s Order #11B. We urge you to break this pattern and honor NPS’s obligations under the IQA and Director’s Order #11B, independently review our Complaint, and meaningfully consider the merits of its proposed corrections.

Thank you for your attention in this matter. All communications regarding this Appeal Letter and the Complaint should be directed to the Lunnys’ and Dr. Goodman’s attorney in this matter, Amber D. Abbasi, Chief Counsel for Regulatory Affairs, Cause of Action, 2100 M Street, N.W., Suite 170-247, Washington, D.C. 20037, Phone: (202) 507.5880, Fax: (202) 507.5881, E-mail: amber.abbasi@causeofaction.org. Please do not hesitate to contact me if you have any questions or concerns about this Appeal Letter. We look forward to timely correction of the inaccurate, nontransparent, and misleading information within the scope of the Complaint.

³⁷ See Letter from Robert Plotkin to Earl E. Devaney, Inspector General, U.S. Dep’t of Interior (July 19, 2007) (information-quality complaint requesting correction of “Drakes Estero: A Sheltered Wilderness Estuary”) (attached as Exhibit D). Compare Letter from Samuel W. Plauché to NPS Correspondence Control Unit Officer (August 23, 2007), available at <http://www.nps.gov/policy/Plaucheltr.pdf> (last visited October 11, 2012) (information-quality complaint requesting correction of “Drakes Estero: A Sheltered Wilderness Estuary”), with Letter from Jonathan B. Jarvis, Regional Director, Pacific West Region, National Park Service, to Samuel W. Plauché (October 23, 2007), available at <http://www.nps.gov/policy/infoqualcorrect.htm> (last visited October 11, 2012) (“NPS finds that the concerns in your IQA complaint are moot and no further correction is warranted”).

³⁸ See DOI OFFICE OF INSPECTOR GENERAL, REPORT OF INVESTIGATION—POINT REYES NATIONAL SEASHORE, Case No. OI-CA-07-0297-1, at 2 (July 21, 2008) (concluding that NPS employees “misrepresented research” in initial versions of a 2007 report regarding DBOC’s oyster farm) (attached to the Complaint as Exhibit 1).

Sincerely,

A handwritten signature in cursive script that reads "Amber D. Abbasi". The signature is written in black ink and is positioned above a horizontal line.

Amber D. Abbasi

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