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PEER Memorandum to the Interior Office of the Inspector General - May 13, 2019

Re: supplemental information for pending complaint number OIG 19-0467

P. Daniel Smith's Role as Deputy Director, National Park Service --- Eight Documented Violations of the Federal Vacancies Reform Act, National Park Service Organic Act and Other Federal Laws

Background: The position of National Park Service (NPS) Director is established in the NPS Organic Act; it requires Senate advice and consent.¹ For the last 16 months, the position has been carried out by P. Daniel Smith, Deputy Director, who has not had Senate advice and consent.² Below are eight instances of that role being performed in violation of Federal law because of Mr. Smith's lack of Senate confirmation:

1. Then-Secretary of the Interior Ryan Zinke's appointment of Mr. Smith as "acting Director" of the NPS on January 24, 2018,³ violated the Federal Vacancies Reform Act (FVRA)⁴ because Mr. Zinke lacked authority under FVRA to make that appointment and Mr. Smith did not otherwise qualify under FVRA to accede to that position. Only the President had authority to name an acting Director, under 5 USC §3348(d).
2. Mr. Smith now uses the title of "Deputy Director, Exercising the Authority of the Director of the National Park Service" as per the NPS website⁵ and numerous documents he has issued, and Secretary of the Interior David Bernhardt's Redelegation Order of Jan. 19, 2019.⁶ This title contravenes the NPS Organic Act's allocation of leadership positions, 54 USC §100302(b), which specifies only two Deputy Director positions and is explicit as to the roles of those Deputy Directors (one for "operations" and the other for "other

¹ 54 USC §100302.

² Redelegation Order Amendment 15, at: <https://www.documentcloud.org/documents/4627065-15-January-24-2018-SO-3345-A15-Temporary.html> .

³ NPS News Release, Jan. 24, 2018, "Secretary Zinke Announces Changes in National Park Service Leadership," online at: <https://www.nps.gov/orgs/1207/01-24-2018-leadership.htm> .

⁴ 5 USC §§3345-3349d.

⁵ NPS Contact Information webpage, at: <https://www.nps.gov/aboutus/contactinformation.htm> .

⁶ Secretary (Acting) of the Interior, Order No. 3345, Amendment No. 24, "Temporary Redelegation of Authority for Certain Vacant Non-Career Senate-Confirmed Positions," Jan. 29, 2019, at: https://www.doi.gov/sites/doi.gov/files/elips/documents/so_3345_amendment_24_signed.pdf .

programs”). It does not provide for the Deputy position into which Smith was appointed, while the two allowed-for Deputy Director positions already had occupants at that time.⁷

3. Mr. Smith has repeatedly violated FVRA’s restriction on not performing a “duty or function” prescribed by statute or regulation as a duty or function exclusive to the NPS Director.⁸ That restriction is reiterated in Sec. 4 of the Bernhardt Redlegation Order, which provides: “The Secretary must perform any functions or duties required by statute or regulation to be performed only by the Senate-confirmed official occupying the position.” On April 12, 2019, Mr. Smith name David Vela as the NPS’s Acting Deputy Director of Operations.⁹ However, Deputy Director Smith lacked the legal authority to appoint Mr. Vela into that position. Under the NPS Organic Act, 54 USC §100302(b), only the Senate-confirmed Director or one properly named as “acting” under FVRA, of which Smith was neither, could have legally appointed the Deputy Director of Operations position. Smith’s use of the “acting” label before Vela’s title did not mitigate that *ultra vires* action. One Deputy Director cannot appoint another Deputy Director.
4. Another prominent such function/duty violation involves Mr. Smith’s sitting on the Board of Directors of the National Park Foundation, which oversee private/public fundraising efforts on behalf of the National Parks nationwide. The Foundation’s basic law provides (emphasis added):

54 USC § 101112. Board (a) MEMBERSHIP.—The National Park Foundation shall consist of a Board having as members the Secretary, the Director, and no fewer than 6 private citizens of the United States appointed by the Secretary. (b) TERM OF OFFICE AND VACANCIES.—The term of the private citizen members of the Board is 6 years. If a successor is chosen to fill a vacancy occurring prior to the expiration of a term, the successor shall be chosen only for the remainder of that term. (c) CHAIRMAN AND SECRETARY.—The Secretary shall be the Chairman of the Board and the Director shall be the Secretary of the Board.

⁷ NPS News Release, Jan. 9, 2018, “Department of the Interior Names New National Park Service Deputy Director,” at: <https://www.nps.gov/orgs/1207/01-09-2019-deputy-director.htm> .

⁸ FVRA, 5 USC §3348(d) provides: (1) *An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect. (2) An action that has no force or effect under paragraph (1) may not be ratified.*

⁹ Apr. 12, 2019, letter from Smith naming Vela as Acting Deputy Director, online at: https://www.eenews.net/assets/2019/04/15/document_gw_02.pdf . On April 17, PEER filed a complaint with the Interior Deputy Inspector General (IG) requesting her investigation of the legality of Smith’s appointment of Vela Assigned IG complaint number 19-0467. See these links: [PEER’s complaint to Interior’s Inspector General](#) and [PEER “Bernhardt’s Bad Actors” report](#) .

Mr. Smith is illegally performing that Secretary function as if he were the actual Director per the Foundation's website that describes him as follows:¹⁰

*Dan Smith, Secretary, Ex-Officio Director
Deputy Director, National Park Service
Washington, DC*

5. A similar violation is Smith's serving in the role of the NPS Director in convening and submitting issues for consideration to the National Park System Advisory Board. The applicable statute, 54 USC § 102303, provides (emphasis added):

National Park System Advisory Board (a) DEFINITION.—In this section, the term “Board” means the National Park System Advisory Board established under subsection (b). (b) ESTABLISHMENT AND PURPOSE.—There is established a National Park System Advisory Board, whose purpose is to advise the Director on matters relating to the Service, the System, and programs administered by the Service. The Board shall advise the Director on matters submitted to the Board by the Director as well as any other issues identified by the Board....

Mr. Smith illegally performed the Director's function when he called a meeting of that Advisory Board for Dec. 5, 2018, in Washington, DC.¹¹

6. Another similar FVRA violation involves the NPS Director's role as Chairman of the National Capital Memorial Advisory Commission, which meets twice yearly primarily to coordinate the planning of memorials on and near the National Mall.¹² The NPS Director

¹⁰ See, <https://www.nationalparks.org/about-foundation/board-directors> . Note that the Secretary of the Interior serves as the Chairman so he cannot be also performing the Board Secretary duties allocated to Smith, as Sec. 4 of the Bernhardt Redlegation Order contemplates.

¹¹ See, <https://www.nps.gov/articles/upload/Agenda-12-5-2018-2.pdf> , 160th Meeting of the National Park System Advisory Board - December 5, 2018, Washington, DC. The agenda provided: “9:30 am CONVENE MEETING - CALL TO ORDER / INTRODUCTIONS / AGENDA REVIEW Dan Smith, Deputy Director, Exercising the Authority of the Director of the National Park Service.”

¹² 40 USC §8904 (emphasis added). *National Capital Memorial Advisory Commission*
(a) *Establishment and Composition.—There is established the National Capital Memorial Advisory Commission, which shall be composed of—*
(1) the Director of the National Park Service;
(2) *the Architect of the Capitol;*
(3) *the Chairman of the American Battle Monuments Commission;*
(4) *the Chairman of the Commission of Fine Arts;*
(5) *the Chairman of the National Capital Planning Commission;*
(6) *the Mayor of the District of Columbia;*
(7) *the Commissioner of the Public Buildings Service of the General Services Administration; and*
(8) *the Secretary of Defense.*
(b) Chairman.—The Director is the Chairman of the National Capital Memorial Advisory Commission.
(c) *Advisory Role.—The National Capital Memorial Advisory Commission shall advise the Secretary of the Interior and the Administrator of General Services (as appropriate) on policy and procedures for establishment of, and proposals to establish, commemorative works in the District of Columbia and its environs and on other matters concerning commemorative works in the Nation's Capital as the Commission considers appropriate.*
(d) *Meetings.—The National Capital Memorial Advisory Commission shall meet at least twice annually.*

is specifically appointed into the Chair duty and function by 40 USC §8904, which established the Commission. Yet, at a meeting on Tuesday, May 15, 2018 (four months after Smith began his current tenure), the agenda and public notice announcing the meeting identified “Peter May for the Director, National Park Service (Chairman),” serving as the lead official. Mr. May apparently is an Associate Regional Director in the NPS.¹³ Because there was no confirmed NPS Director at the time, Mr. May could not have properly served as Chairman “for” a non-existent Director and Mr. Smith could not have somehow named him as a proxy. Thus, Mr. May’s convening of the Commission’s meeting last year for the Director was illegal under the Commission’s basic statute and FVRA.

7. A recent similar violation involves the National Parks Air Tour Management Act, under which the NPS Director and Federal Aviation Administration (FAA) Administrator regulate airplane and helicopter overflights with the purpose of avoiding excessive disturbance of the Parks. On Apr. 5, 2019, the Federal Register contained a Notice of Meeting of the National Parks Overflights Advisory Group (NPOAG).¹⁴ As indicated in the Notice, “the Administrator of the FAA and the Director of NPS (or their designees) serve as *ex officio* members of the group”. Yet, there is no NPS Director and therefore the Director has no “designee”. A year earlier, the same Notice went out and the 2018 NPOAG meeting took place (on Sept. 18) and numerous consultations and action items resulted from it, with a lower NPS official purporting to serve as the Director’s representative despite the fact that no Director existed to designate her.¹⁵ Such actions by pseudo-designees are illegal under the Air Tour Management Act and FVRA.
8. A related violation occurred under the National Parks Air Tour Management Act. The statute, 49 USC § (a)(5)(c), provides that the Director and the Administrator shall “jointly publish” an annual list of less-overflown Parks that they determine to be exempt from the Act’s planning requirements, as well as other related duties. In 2018, the NPS Director purported to issue such a list of exempt Park System units, via a Federal Register notice.¹⁶ However, there was no Director in place who could publish the mandated list. Instead it was done by Raymond Sauvajot, the Associate Director for Natural Resource Stewardship and Science. However, the statute does not authorize the Associate Director to publish the list in the Federal Register for a non-existent Director and Mr. Smith could not have legally somehow named Sauvajot as a proxy. Thus, the publication of the list of exempted National Parks was illegal under the Act and under FVRA.

The above list is not exhaustive; other violations likely exist but need more research to document.

¹³ See, https://edit.doi.gov/ocl/hearings/112/hr2489_12412 .

¹⁴ At: <https://www.federalregister.gov/documents/2019/04/05/2019-06763/notice-of-meeting-of-the-national-parks-overflights-advisory-group> .

¹⁵ At: <https://www.federalregister.gov/documents/2018/08/14/2018-17460/notice-of-meeting-of-the-national-parks-overflights-advisory-group> .

¹⁶ At: <https://www.federalregister.gov/documents/2018/04/11/2018-07382/list-of-units-of-the-national-park-system-exempt-from-the-provisions-of-the-national-parks-air-tour> .