

**BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR AND THE
U.S. FISH AND WILDLIFE SERVICE DATA QUALITY OFFICIALS**

GARFIELD COUNTY, COLORADO)
GRAND COUNTY, COLORADO)
JACKSON COUNTY, COLORADO)
MESA COUNTY, COLORADO)
MOFFAT COUNTY, COLORADO)
RIO BLANCO COUNTY, COLORADO)
CARTER COUNTY, MONTANA)
FALLON COUNTY, MONTANA)
FERGUS COUNTY, MONTANA)
MCCONE COUNTY, MONTANA)
MUSSELSHELL COUNTY, MONTANA)
PHILLIPS COUNTY, MONTANA)
PRAIRIE COUNTY, MONTANA)
RICHLAND COUNTY, MONTANA)
TOOLE COUNTY, MONTANA)
YELLOWSTONE COUNTY, MONTANA)
ELKO COUNTY, NEVADA)
EUREKA COUNTY, NEVADA)
UINTAH COUNTY, UTAH)
WESTERN ENERGY ALLIANCE)
AMERICAN EXPLORATION & MINING)
ASSOCIATION)
COLORADO MINING ASSOCIATION)
COLORADO WOOL GROWERS ASSOCIATION)
INDEPENDENT PETROLEUM ASSOCIATION)
OF AMERICA)
INTERNATIONAL ASSOCIATION OF)
DRILLING CONTRACTORS)
MONTANA ASSOCIATION OF OIL, GAS &)
COAL COUNTIES)
MONTANA PETROLEUM ASSOCIATION)
NEVADA MINING ASSOCIATION)
PETROLEUM ASSOCIATION OF WYOMING)
PUBLIC LANDS COUNCIL)
UTAH MULTIPLE USE COALITION)

**Request for Reconsideration:
Data Quality Act Challenge to
the U.S. Department of the
Interior Dissemination of
Information Presented in the
U.S. Fish and Wildlife Service
Conservation Objectives Team
Report**

August 12, 2015

Petitioners

v.

U.S. FISH AND WILDLIFE SERVICE

**REQUEST FOR RECONSIDERATION OF PETITIONERS' CHALLENGE FOR
CORRECTION OF INFORMATION PURSUANT TO THE DATA QUALITY ACT**

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On March 18, 2015, the counties and organizations listed above (the “Petitioners”) submitted their Data Quality Act Challenge to the U.S. Department of the Interior Dissemination of Information Presented in the U.S. Fish and Wildlife Service Conservation Objectives Team Report (“Challenge”).¹ This report, entitled “Greater Sage-grouse (*Centrocercus urophasianus*) Conservation Objectives Team Final Report (February 2013) (the “COT Report”) established range-wide conservation objectives for greater sage-grouse (“GRSG”) to inform and influence the U.S. Fish and Wildlife Service (“FWS”) in its upcoming listing decision. Petitioners found the COT Report lacks the scientific quality, integrity, objectivity and utility required by the DQA, the Guidelines and additional authority.

Petitioners requested FWS retract the COT Report and all reliance thereon in agency decisions on permits, authorizations and the listed status of GRSG under the Endangered Species

¹ Available at: <http://www.westernenergyalliance.org/knowledge-center/wildlife/greater-sage-grouse/DQA-Challenge>.

Act (“ESA”) or issue an amended COT Report that uses sound analytical methods and the best data available, including specifically the information omitted in the current COT Report and referenced in the Challenge, ensuring transparency and objectivity in the information disseminated. However, the Response was superficial and did not even begin to address the totality of issues raised in the Challenge.

On July 24, 2015, Anne E. Kinsinger, USGS Associate Director for Ecosystems; Amy Lueders, BLM Active Assistant Director for Resources and Planning; and Gary Frazer, FWS Assistant Director for Ecological Services, provided a combined response (“Response”) to this Challenge and two other challenges submitted by the Petitioners, purportedly addressing the Petitioners’ concerns about peer review, but completely failing to address the substance of the Challenge and the multitude of other serious issues raised in the nearly 200-page Challenge and exhibits.

Petitioners hereby submit this Request for Reconsideration of Petitioners’ Challenge for Correction of Information (“Request for Reconsideration”) against FWS pursuant to the Federal Information Quality Act, (44 U.S.C. § 3516) (“Data Quality Act” or “DQA”) and the “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information disseminated by Federal Agencies” issued by the Office of Management and Budget (67 Fed. Reg. 8452 (Feb. 22, 2002) (“OMB Guidelines”)), as well as the “Information Quality Guidelines” of the U.S. Department of the Interior (67 Fed. Reg. 50687 (Aug. 5, 2002) (“DOI Guidelines”)) and FWS Guidelines (“FWS Guidelines”)² collectively known as (the “Guidelines”) as well as presidential memoranda and secretarial orders on scientific integrity and transparency as discussed below.

² Available at: http://www.fws.gov/informationquality/topics/InformationQualityGuidelinesrevised6_6_12.pdf

I. Petitioners' Challenge

This Request for Reconsideration addresses the FWS' inadequate response and failure to retract or amend the COT Report. Petitioners renew their concerns that the COT Report: (1) violates the quality, objectivity, utility, and integrity standards of the DQA and its Guidelines; (2) misrepresents several key issues; (3) is subject to application of the DQA; and (4) does not comply with a myriad of other federal requirements and standards.

III. Disagreements with the FWS Response

Here, the Response improperly and unlawfully side-steps the requirements of the DQA as well as Obama Administration policies, guidelines, directives and orders cited by Petitioners by failing to address the Challenge and suggest instead that it will be considered in the 2015 listing determination for GRSG. This is unacceptable, inappropriate and contrary to the DQA and implementing guidelines. Under what authority does the FWS purport to delay responding to Petitioners' multitude of concerns in the Challenge in a subsequent agency action?

Petitioners have numerous issues with the COT Report that have serious implications for the West. Among many other serious flaws, the COT Report: fails to recognize that states, local governments and private entities have undertaken significant and successful efforts to conserve GRSG; ignores substantive threats to GRSG (such as raven predation) in favor of pre-conceived notions of human impacts; and fails to recognize that populations of any given species naturally fluctuate given weather patterns.

In its Response, FWS contends the COT Report was peer-reviewed but that FWS did not announce it on its Peer Review Agenda. FWS wholly fails to address the examples of bias, conflicts and other peer review issues detailed in some 10 pages of Petitioners' Challenge.³ Among other significant issues, a small number of specialist-advocates have had a

³ See, e.g. pp 15-25 of Petitioners' Challenge.

disproportionate influence on formulating federal policy. This insular group is selectively using its own research while ignoring contrary information and the full body of GRSG scientific literature.

In addition, FWS avers Petitioners' concerns were addressed in January 12, 2015, correspondence to Ms. Kathleen Sgamma of Western Energy Alliance. This belies reason. Petitioners' Challenge was filed more than two months later: on March 18, 2015. Accordingly, FWS has not adequately nor appropriately addressed the many issues relative to peer review raised in the Challenge.

Selective use of science creates a narrative that assumes GRSG populations are in decline despite contrary evidence. For example, recent news reports indicate the Western Association of Fish and Wildlife Agencies documented GRSG numbers grew by nearly two-thirds since 2013!⁴

For all the reasons herein, Petitioners request reconsideration of their Challenge, including but not limited to:

1. The Response Fails to Address Lack of Transparency

The Response fails to address the issue of the FWS' lack of transparency. The COT Report fails to meet quality and utility standards of the DQA and the Guidelines. OMB Guidelines require a high degree of transparency for influential information such as the COT Report. FWS failed to provide basic information to the public about the COT Report, despite the heavy reliance on it in agency decision-making. Only after extensive effort by the Petitioners, involving FOIA requests and litigation, did the FWS provide relevant information that should have been disclosed and open for the public review and comment.

⁴ Available at: <http://www.eenews.net/stories/1060022897>.

2. The Response Fails to Address Reproducibility

The Response fails to address the lack of reproducibility. OMB Guidelines provide a higher standard than even peer review applies to influential information, namely a “substantial reproducibility standard.”⁵ The COT Report fails to meet the substantially reproducible standard required under the DQA and the Guidelines.

3. The Response Fails to Address Robustness Checks

The Response fails to address the issue of required robustness checks. The COT Report failed to undergo adequate robustness checks to meet the DQA standards of quality, objectivity, utility and integrity. For example, there are substantial technical errors in the COT Report including misleading use of authority. Robustness checks are required for ensuring compliance with the DQA because the public will not be afforded any other mechanism for determining the objectivity, utility, and reproducibility of this non-disclosed information. In fact, “agencies shall apply especially rigorous robustness checks to analytic results and document what checks were undertaken.”⁶ DOI and FWS Guidelines mirror this requirement.⁷ The COT Report underwent no such rigorous checks.

4. The Response Fails to Address Conflicts of Interest

The Response fails to address the issue of conflicts of interest. A number of the relevant regulations and guidance stress the importance of independence⁸ and the need to avoid conflicts

⁵ OMB Guidelines, 67 Fed. Reg. 8452, 8457 (Feb. 22, 2002).

⁶ OMB Guidelines V3.b.ii.B.ii (emphasis added).

⁷ FWS Guidelines IV-3.

⁸ Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities 59 Fed. Reg. 34270 (Jul. 1, 1994); OMB Peer Review Bulletin; Memorandum for the Heads of Executive Departments and Agencies. 74 Fed. Reg. 10671 (Mar. 11, 2009), available at: <http://www.gpo.gov/fdsys/pkg/FR-2009-03-11/pdf/E9-5443.pdf> (<http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>); Performance Work Statement for Scientific, Technical and Advisory Services (http://www.fws.gov/informationquality/peer_review/IDIQ_Performance_Work_Statement_17Nov2011.pdf); Information Quality Guidelines and Peer Review (http://www.fws.gov/informationquality/topics/InformationQualityGuidelinesrevised6_6_12.pdf).

of interest.⁹ In this case, a small number of GRSG specialist-advocates have had a disproportionate influence on formulating federal policy including their overlapping participation in preparation of the NTT and COT Reports as well as the highly influential USGS GRSG Monograph and peer reviews thereon. The conflicts of interest that permeate the COT Report violate numerous sources of authority, including the DQA, its implementing Guidelines, the DOI Manual, NAS policy and various secretarial orders and presidential memoranda discussed herein.

5. The Response Fails to Address Significant Issues with Peer Review

The Response failed to address the individual areas of concern with the peer review process. The COT Report failed to undergo adequate peer review as required by the DQA, the Guidelines and the presidential and secretarial orders and memoranda. The Challenge detailed numerous areas in which the peer review was inadequate, including peer review standards, conflicts of interest of reviewers, failure of the peer review to undergo public comment, lack of peer review transparency, and the lack of objectivity.

6. The Response Fails to Address Best Available Science

The Response failed to address that the COT Report was not based on the best available science. The COT Report and the studies cited therein fail to meet the best available science standards. The information disseminated also failed to meet DQA standards for quality, objectivity, integrity and utility. Significant uncertainties were ignored and conjecture and opinion are presented as facts.¹⁰

⁹ Policy on Committee Composition and Balance and Conflicts of Interest for Committees Used in the Development of Reports (<http://nationalacademies.org/coi/>); Final Information Quality Bulletin for Peer Review 70 Fed. Reg. 2664 (Jan. 14, 2005); Memorandum for the Heads of Executive Departments and Agencies (<http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>); Department Manual, Part 305, Chapter 3 (<http://www.fws.gov/science/pdf/DOIScientificIntegrityPolicyManual.pdf>).

¹⁰ *Id.*

7. The Response Fails to Address Bias and Lack of Objectivity

The Response failed to address the bias and lack of objectivity. The COT Report failed to meet DQA standards for quality and integrity. It is biased by the use of policy-driven assumptions, inferences, and uncertainties that are not supported by scientific data. The COT Report inadequately treats uncertainties through presumptive interpretations of data, inaccurate portrayal of threats and differential treatment of environmental factors. FWS clearly failed to address these fundamental shortcomings with the COT Report and failed to adequately explain assumptions, limitations and bias in the information disseminated.

8. The Response Fails to Address Unfounded Restrictions on Human Activities

The Response failed to address the COT Report's unfounded restrictions on human activities. Despite the lack of scientific support, the COT Report proscribes land management actions such as: prevent fire in GRSG habitat; manage for sagebrush; manage land uses; improve grazing "systems," and close rangelands that are highly susceptible to fire due to OHV use during the fire season.¹¹ FWS would have these measures implemented without any tracking and testing of the effectiveness of the multitudes of currently required conservation efforts.

9. The Response Fails to Address Misrepresentation

The Response failed to address Misrepresentations. The Petitioners' Challenge detailed the COT Report's misrepresentation of several key issues including: GRSG populations; natural population fluctuations; predation and predator control; hunting; West Nile Virus; existing regulatory mechanisms; livestock grazing; state, local, and private conservation efforts; and multiple-use mandates.

¹¹ COT Report at 41.

III. The DQA Applies to the COT Report

The Petitioners' Challenge shows that the COT Report is subject to the DQA and Guidelines, as it is an "Information Dissemination Product."¹² The COT Report qualifies as highly influential information¹³ and if uncorrected, the COT Report will cause substantial harm to Petitioners and the West. The superficiality of the Response indicates FWS did not take its obligations under the DQA or the many other authorities cited in the Challenge seriously.

IV. The Response Ignores Compliance with other Federal Standards and Requirements

In addition to the failure of the COT Report to comply with the DQA and Guidelines, it also fails to comply with Presidential direction on scientific integrity and transparency, DOI scientific integrity standards, and possibly the Paperwork Reduction Act. The Response wholly fails to recognize and address these concerns.

V. Petitioners' Challenge was not Duplicative, Unnecessary or Unduly Burdensome

FWS may not abdicate its duties under the DQA or the other standards and requirements discussed at length in Petitioners' Request because FWS intends to publish a rule on the listed status of GRSG at a future date. Other than to belatedly publish a peer-review plan, the Response hardly merits use of the word. FWS has simply failed address substantive and serious concerns with transparency, peer review and integrity in any meaningful way. Accordingly, the FWS Response is unlawful pursuant to the DQA as well as arbitrary and capricious.

VI. The Response was Arbitrary and Capricious

The U.S. Supreme Court has held that an agency decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs

¹² OMB Guidelines, 67 Fed. Reg. 8452, 85460 (Feb. 22, 2002).

¹³ OMB Guidelines, 67 Fed. Reg. 8452, 8455 (Feb. 22, 2002).

counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Also, an agency action is arbitrary and capricious if the agency fails to “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 158 (1962)).

Here, the FWS Response fails to articulate a rational explanation for the scant conclusions contained therein. FWS has wholly failed to meet its obligations under the DQA in its Response.

VII. Petitioners and their Contact Information

Petitioners are affected persons or organizations¹⁴ as they may be harmed by the disseminated information with a material impact to their interests. Petitioners have a direct interest in the quality and integrity of agency science and decision making, including how the COT Report affects GRSG and public lands management in the West. Petitioners engage in ranching, grazing, mining, and energy development on multiple-use federal, state and private lands throughout the West, or are counties that rely on these activities for their economic and social viability. The management restrictions, regulatory measures and closures recommended in the COT Report will have a direct impact on the Petitioners, the economy and the future viability of scores of communities, local governments, small businesses, family farms and ranches, mining enterprises, electricity and oil and natural gas development in the West.

¹⁴ FWS Guidelines III-5.

Petitioners' primary representatives can be reached at the following addresses:

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Petitioners

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Attorney for Petitioners

VIII. Procedure

Upon receiving a request for reconsideration, FWS must designate a panel of officials to perform the review function.¹⁵ Such a panel may include directorate-level personnel from the FWS and other Department of the Interior agencies (the "Appeals Panel") will make a recommendation to the Director of the FWS. The Director will then make a final decision on the appeal within 60 calendar days of receipt of the appeal.¹⁶

IX. Conclusion

The COT Report is a highly influential document, as BLM and USFS are using it to make substantial land use decisions across nearly 60 million acres of public lands throughout eleven western states. As such, it must adhere to the standards of quality, integrity, objectivity and utility in the DQA as well as administration standards of scientific integrity and transparency. Unfortunately, the COT Report fails to meet these requirements. As detailed above, the Response failed to address the majority of issues raised in Petitioners' Challenge.

Petitioners respectfully request the Appeals Panel reconsider the Response issued on their Challenge and call for FWS to retract the COT Report and all reliance thereon in existing and subsequent Land Use Plans Amendments, as well as applicable decisions on listed status of GRSG and/or on permits and authorizations. Alternatively, FWS could, as required by the DQA

¹⁵ FWS DQA Guidelines V-7.

¹⁶ *Id.*

and the Guidelines, issue an amended COT Report that uses sound analytical methods and the best data available while ensuring transparency and objectivity. Any amended Report should incorporate all reliable information, not just the data supporting false hypothesis. It should also identify the limitations of data used rather than stating assumptions as fact. Finally, any amended Report should use and include the best available data as discussed herein.

Respectfully submitted this 12th day of August, 2015.

Holsinger Law, LLC

A handwritten signature in black ink, appearing to read 'K. Holsinger', with a stylized flourish at the end.

Kent Holsinger
Attorney for Petitioners