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Before the U.S. Department of the Interior
U. S. Fish and Wildlife Service
Washington, D.C.

SAGE GROUSE COALITION
v.
U.S. DEP'T OF THE INTERIOR

April 26, 2010

**Information Quality Act Appeal to U.S. Fish and
Wildlife Service for Dissemination of Information
Related to Regulatory Protections Available for the
Sage Grouse in the January 2005 Final Listing
Determination for the Greater Sage Grouse**

**APPEAL OF THE SAGE GROUSE COALITION PURSUANT TO THE INFORMATION
QUALITY ACT, SECTION 515 OF THE TREASURY AND GENERAL GOVERNMENT
APPROPRIATIONS ACT FOR FISCAL YEAR 2001(Pub. L. No. 106-554; H.R. 5658)**

**To: Correspondence Control Unit
Attention: Information Quality Correction Request Processing,
USFWS, 1849 C Street, N.W., Mailstop 3238-MIB,
Washington, D.C. 20240-0001**

Introduction

This **Appeal** of the Request for Correction of Information (Request)¹ is hereby submitted under the Information Quality Act (IQA)² Guidelines issued by the United States Department of the Interior (DOI)³ and the U.S. Fish and Wildlife Service (FWS)⁴, and the Office of Management and Budget (OMB)⁵. The OMB Guidelines provide the blueprint for the agencies subject to the IQA mandates, and these agencies, including the FWS, have adopted administrative measures that are primarily procedural in nature, but incorporate OMB's substantive requirements as well. For purposes of this Appeal, we refer collectively to DOI's department wide Guidelines, OMB's Guidelines and Final Bulletin and FWS Guidelines as FWS IQA Guidelines since they are all applicable to this matter.

¹ See the original Request for Correction filed by the Coalition.

² Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. No. 106-554, H.R. 5658) provides in full the following:

(a) IN GENERAL.—The Director of the Office of Management and Budget shall, by not later than September 20, 2001, and with public and Federal agency involvement issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

(b) CONTENT OF GUIDELINES.—The guidelines under subsection (a) shall (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and (2) require that each Federal agency to which the Guidelines apply (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency by not later than 1 year after the date of issuance of the guidelines under subsection (a); (B) establish administrative mechanisms allowing affected persons to see and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and (C) report periodically to the Director (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and (ii) how such complaints were handled.

³ 67 Fed. Reg. 36642(May 24, 2002).

⁴ Available at www.fws.gov/informationquality.

⁵ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452(republished Feb. 22, 2002).

⁶ 70 Fed. Reg. 2664(Jan. 14, 2005).

The Sage Grouse Coalition (Coalition) is an affected organization and our members are affected persons within the meaning of the FWS IQA Guidelines. We are a coalition of farmers, ranchers, industry and affiliated businesses who depend upon and work the lands in the eleven states that will be affected by a listing of the greater sage grouse under the Endangered Species Act (ESA). The Coalition seeks to facilitate the delivery of accurate and timely information to Congress, regulatory agencies and our members on this particular listing determination.

This Appeal, including this cover document and all attachments, is filed in response to a letter dated August 13, 2009 from Ralph Morgenweck, the Senior Science Advisor, to Christopher West, Sage Grouse Coalition (FWS Letter). We find the FWS Letter to be unresponsive and dismissive of our myriad ongoing concerns with the erroneous information in the Final Listing Determination for the Greater Sage Grouse; errors which have and are being repeated in subsequent documents being disseminated by the FWS.

Appeal of General Statements

As we stated in our original Request, the Final Listing Determination for the Greater Sage Grouse is a highly influential scientific assessment. The ESA provides a standard for the information used in that assessment and the IQA along with the OMB Guidelines and Final Bulletin adopted by the FWS inform that standard by setting the bar for what constitutes the best available scientific data and how to obtain it. The FWS's failure to comply with the statutory standard for the quality of information used in the 2008 Biological Opinion constitutes a failure to comply with the most fundamental requirements of the ESA and the IQA and must be corrected.

The FWS Letter incorrectly asserts that the request submitted originally was duplicative of an existing process. The FWS then uses that statement to conclude that it will not consider the request (FWS Letter at page 1). We strongly disagree with the FWS's attempt to ignore our request for correction and to continue to rely on information contained in a document whose contents are divorced from the high quality science required by the ESA and from the standards set in the IQA and OMB Guidelines and Final Bulletin (the 2005 Final Listing Determination for the Greater Sage Grouse). Congress enacted the IQA out of a concern for the quality of information used in important decision making by federal agencies; the more influential the decision, the higher the quality required. Hence, the IQA, OMB Guidelines and Final Bulletin must be used by the FWS to provide much needed definition and uniformity to the ESA requirement that listing determinations be based solely on the best scientific and commercial data available.

Inexplicably, the FWS Letter takes an approach that undermines the entire premise of the IQA and suggests that a document that has been discredited by a federal Judge remain in the public record, be the basis of scientific citations pending a new listing determination. In fact, the court has already discredited the Final Listing Determination and remanded it to the FWS for revision. This is prima facie evidence that the document and its contents should be removed from the public domain. The fact that the FWS is reevaluating the determination and finds it inconvenient to withdraw the document does not relieve the FWS from its statutory responsibilities for complying with the requirements of the IQA. A new final listing determination on the greater sage grouse will not address the inaccuracies contained in the 2005 Listing Determination. The FWS has not repudiated the contents of this document and continues to cite the document in documents published subsequent to the court's remand. Claiming to comply with one statute while refusing to address the other's role in standardizing and verifying that compliance suggests the FWS misapprehends both statutes it is charged with administering. This Appeal is being filed under the IQA in an attempt to give the FWS

an opportunity to correct the 2005 Final Listing Determination by withdrawing it from the record or taking explicit action with respect to the contents which fail to comply with the Guidelines. The Coalition represents numerous businesses and individuals in the eleven states which may be affected by the listing determination. If the information in the 2005 Listing Determination is not withdrawn or corrected, other courts will be misled as to the extent and type of regulatory protections available to the sage grouse and economic activity within those states with resident sage grouse may be significantly adversely affected. .

There have already been adverse consequences to the FWS failure to adequately characterize the regulatory protections available for the Greater Sage Grouse. FWS has disseminated information in the Final Listing Determination that there is insufficient regulatory authority to protect the sage grouse, and this has led a federal judge to invalidate and remand the decision to the FWS. The information is based on a failure to explore the extent of regulatory protection available rather than a review of the actual available protections. However, the ESA requires that data, not speculation, hypothesis or assumption form the basis of the determinations under Section 4. In addition, the IQA standards require the very highest level of information quality for a highly influential scientific assessment which this Listing Determination constitutes. Failure to base findings in such an assessment on the best available information (in this case “data”, as required by the ESA) is a failure to comply with the procedural and substantive requirements of the IQA and the FWS IQA Guidelines. Thus, the information related to regulatory protections for the Greater Sage Grouse included in the 2005 Final Listing Determination is:

1. Inaccurate, in that it fails to meet the data standard required by the ESA for decision-making under the IQA as well as the standard under the Guidelines for highly influential scientific assessments.
2. Biased, in that it assumes no protections based on a failure to examine what protections were available rather than based on data collected through a review of the protections;
Incomplete, in that it fails to include material data and analysis that rebuts the information included in the Final Listing Determination that demonstrates clearly significant federal and state protections for the sage grouse.
3. Unclear and incomplete in that it fails to acknowledge that the data do not support an assumption that it is not possible to determine whether there are insufficient regulatory protections available to the Greater Sage Grouse.

To close, the new rulemaking that the FWS has undertaken will address the issues we raise regarding adequacy of existing regulatory mechanisms. However, it will not address the failure of the existing 2005 Final Listing Determination as the document is currently being disseminated by the FWS on its website and in official FWS documents prepared subsequent to the remand of the Agency’s final listing determination.

In order to comply with the requirements of the IQA we request that the FWS either issue an addendum correcting the specific errors identified in our original request as well as those documents which cite to the 2005 Listing Determination, or alternatively remove the 2005 listing determination from the public record and cease to cite to the Determination and remove all citations from existing documents being disseminated.