BEFORE THE U.S. DEPARTMENT OF THE INTERIOR

U.S. GEOLOGICAL SURVEY
WASHINGTON, D.C.

Request for Correction of Information submitted under USGS Information Quality Guidelines Regarding "Ecological Minimum Requirements for Distribution of Greater Sage-Grouse Leks: Implications for Population Connectivity Across Their Western Range"

Prepared and Submitted by: Western Energy Alliance

Dated: July 30, 2013

I. INTRODUCTION

This request is made pursuant to the "Data Quality Act" (Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153-154 (2000))("DQA") and was prepared and submitted by Western Energy Alliance ("Western Energy"), which is a non-profit, regional trade-association representing more than 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West.

Western Energy requests action on the part of the United States Geological Survey ("USGS") to rectify the informational deficiencies related to the peer review of the Modeling Ecological Minimum Requirements for Distribution of Greater Sage-Grouse Leks: Implications for Population Connectivity Across Their Western Range (2013) ("Modeling Study").[1] The Modeling Study is a highly influential report characterizing sage-grouse habitat that was, and is, heavily relied-upon by the U.S. Fish and Wildlife Service ("FWS") in its decision-making with respect to the greater sage-grouse under the Endangered Species Act. The FWS's decision-making with respect to the greater sage-grouse will have direct and concrete effects upon Western Energy's members.

It is understood that the Modeling Study has been subject to peer review. However, in direct contravention of the DQA and the Office of Management and Budget ("OMB") it appears that the USGS has failed to employ proper and necessary public transparency mechanisms with respect to this review. In order to rectify these informational deficiencies, Western Energy requests the USGS provide specific and detailed information regarding the peer review process employed

---

[1] Steven T. Knick, Steven E. Hanser, and Kristine L. Preston, Modeling ecological minimum requirements for distribution of greater sage-grouse leks: Implications for population connectivity across their western range, Ecology and Evolution 3(6): 1539 – 1551 (2013), available at http://pubs.er.usgs.gov/publication/70045558; http://fresc.usgs.gov/products/ProductDetails.aspx?ProductNumber=3068.

with respect to the Modeling Study, including, but not limited to the information requested in section III, below.

II. LEGAL FRAMEWORK

Under the DQA, Congress directed the OMB to issue guidelines to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of information" disseminated by federal agencies. Pub. L. No. 106-554, § 515(a). The DQA was based on the federal government's recognition that "[b]ecause the public disclosure of government information is essential to the operation of a democracy, the management of [f]ederal information resources should protect the public's right of access to government information." OMB, Circular No. A-130 Revised, Memorandum for Heads of Executive Departments and Agencies: Management of Federal Information Resources, 7.f. (originally issued Feb. 8, 1996).

The OMB issued the required guidance in several stages with the final version issued in the February 22, 2002 Federal Register. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication, 67 Fed. Reg. 8452 (Feb. 22, 2002) ("OMB Guidance"). The OMB provided further guidance regarding proper peer review procedures and public transparency thereof in a subsequent memorandum issued in 2004. OMB, Memorandum for Heads of Department and Agencies: Issuance of "OMB's Final Information Quality Bulletin for Peer Review" (Dec. 16, 2004) ("OMB Bulletin").

As required by the OMB Guidance, each federal agency was required to issue its own, agency-specific DQA implementing guidelines. OMB Guidance at 8452 (§ II.1.); *see also* Information Quality Guidelines Pursuant to Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, 67 Fed. Reg. 36642 (May 24, 2002). The USGS complied with this requirement by issuing guidance most recently updated in 2012. USGS, U.S. Geological Survey Information Quality Guidelines (FY 2012), available at: http://www.usgs.gov/info_qual/ ("USGS Guidelines").

As set forth below, the OMB's Guidance and Bulletin provide clear and unavoidable public transparency requirements relevant to this request.

A. <u>OMB Guidance</u>

The OMB Guidance focuses on four key characteristics of information dissemination by a federal agency: quality, utility, objectivity, and integrity. 67 Fed. Reg. 8453, 58, 59. As explained below, under the OMB Guidance, a primary component of utility and objectivity is public transparency.

"Utility" is defined by the OMB as "the usefulness of the information to its intended users, including the public"; accordingly,

> the agency needs to consider the uses of the information not only from the perspective of the agency but also from the perspective of the public. As a result, when transparency of information is relevant for assessing the information's usefulness from the public's perspective, the agency must take care to ensure that transparency has been addressed in its review of the information. *Id*. at 8453 (OMB Guidance V.2.).

Similarly, the "objectivity" requirement provides that,

> the agency needs to identify the sources of the disseminated information (to the extent possible, consistent with confidentiality protections) and, in a scientific, financial, or statistical context, the supporting data and models, so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. *Id*. (OMB Guidance V.3.a.).

With respect to objectivity and peer reviews, the information subject to peer review may generally be presumed to be of "acceptable objectivity"; however, this presumption is expressly rebuttable. *Id*. at 8459 ("…this presumption is rebuttable based on a persuasive showing by the petitioner in a particular instance."). The fact that the presumption of objectivity is rebuttable lends itself to the disclosure of the peer reviewers' identity, credentials, and other relevant information; after all, what possible showing could the public make that would serve to rebut the presumption of objectivity if this information is withheld?

Furthermore, if peer review is used to satisfy the objectivity standard, "it shall meet the general criteria for competent and credible peer review" recommended by the OMB—[Office of Information and Regulatory Affairs]," namely:

> [T]hat (a) peer reviewers be selected primarily on the basis of necessary technical expertise, (b) peer reviewers be expected to disclose to agencies prior technical/policy positions they may have taken on the issues at hand, (c) peer reviewers be expected to disclose to agencies their sources of personal and institutional funding (private or public sector), and (d) peer reviews be conducted in an open and rigorous manner." 67 Fed. Reg. at 8459 – 60 (OMB Guidance V.3.b.i.).

Thus, if the public is to have assurance that the peer reviewers selected by the federal agency serve both the utility and objectivity standards set by the OMB's Guidance it must (at the very least) disclose to the public the peer reviewers' expertise, prior positions, and sources of funding, and in a scientific context, such as with the Modeling Study, data and models relied upon by the peer reviewers.

B. <u>OMB Bulletin</u>

The OMB Bulletin establishes "government-wide guidance aimed at enhancing the practice of peer review of government science documents." Joshua B. Bolton, Director, OMB, Memorandum

for Heads of Departments and Agencies (Dec. 16, 2004). Specific to certain, "influential scientific disseminations" the OMB Bulletin sets forth "stricter minimum requirements" in particular with respect to public transparency. OMB Bulletin at 2.

Influential scientific information "means scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." *Id*. at 11. The Modeling Study clearly falls within the scope of this definition and therefore the higher minimum requirements with respect to public transparency, explained below, are applicable.

To begin with, influential scientific information must be subject to peer review prior to dissemination. *Id*. at 12. However, not just any peer reviewer will do, the agency must ensure the peer reviewers selected must: possess the appropriate knowledge, experience, and skills set (expertise); be representative of a diversity of relevant perspectives (balance); not be associated with the production of the document which they are reviewing (independence); and have no conflict of interest that would impair their objectivity (conflict of interest). *Id*. at 16 – 18.

Moreover, after observing that "[t]he public may not have confidence in the peer review process when the names and affiliations of the peer reviewers are unknown," with respect to influential scientific disseminations, the OMB requires the disclosure of the identity of the peer reviewers and affiliations to the public. *Id.* at 20 – 21, 37 ("The agency shall disclose the names of the reviewers and their organizational affiliations in the report.").

Thus, pursuant to the OMB Bulletin, the peer review process undertaken for the Modeling Study is subject to higher and more rigorous public transparency requirements than other publicly disseminated information including the requirement that the USGS disclose the identity and affiliations of the peer reviewers to the public. [2]

C. <u>USGS Guidance</u>

Consistent with the OMB Guidance and Bulletin, the USGS's Guidance requires the agency ensure that its "data collection and research activities are carried out in a consistent, objective, and replicable manner that has been vetted through a vigorous and open process of peer

[2] The OMB Bulletin provides a procedure by which an agency may employ "alternative procedures" in its peer review process. OMB Bulletin at 27 – 28, 41. These alternative procedures include reliance on report produced by the National Academy of Sciences ("NAS"), peer review by the NAS, or other alternative procedures approved by the Administrator in consultation with the Office of Science and Technology Policy ("OSTP"). *Id*. Unless the USGS utilized the NAS in its peer review process, the USGS would have been required to gain the approval of the Administrator in consultation with the OSTP to utilize an alternative procedure with respect to peer review of the Modeling Study. If the USGS did not gain such approval, peer review of the Modeling Study should have proceeded according to the default procedure described in this section. In any case, the USGS should strive for the utmost public transparency possible to ensure dissemination of credible, unprejudiced information.

review to ensure that the best possible results are achieved and that there are no weaknesses or errors in the data or conclusions." USGS Guidelines at III.2.

However, with respect to studies carried-out by third-parties, the USGS Guidelines apparently attempt to disclaim responsibility under the DQA. Specifically, the USGS's Guidance states,

> The USGS takes steps to ensure that the quality and transparency of data and information provided by external sources are sufficient for the intended use. Reference to and use of third party data and information is complex and requires extensive collaboration with the scientific and technical community and other external data providers. Third-party data may carry inherent accuracy weaknesses in that the data content often cannot be checked nor their accuracy controlled. In instances where the referenced information is not verifiable, the source will be made transparent to the public, and *such information will not be subject to these guidelines*." *Id*. at III.5 (emphasis added).

Thus, although the USGS commits to information quality and transparency, it simultaneously attempts to avoid responsibility for ensuring such quality and transparency with respect to third-party data.

Should the USGS adjudge the Modeling Study to be third-party data and therefore not subject to the USGS Guidelines, it should be emphasized that the USGS Guidelines' disclaimer does not alter the agency's responsibilities under the DQA, OMB Guidelines, or the OMB Bulletin. As stated in the OMB Guidelines, "subsequent agency dissemination of such [third-party] information requires that the information adhere to the agency's information quality guidelines." OMB Guidelines at 8454. Likewise, the OMB Bulletin states that "if an agency plans to disseminate information supplied by a third party, the requirements of the Bulletin apply, if the dissemination is 'influential'." OMB Bulletin at 9 (internal parenthetical omitted). Moreover, the UGSG's own Guidelines explicitly acknowledge the existence of the OMB Bulletin and the fact that it "establishes requirements regarding peer review of scientific information disseminated by the federal government which is defined by the OMB as 'influential scientific information'…." USGS Guidelines at VI.

Consequently, with respect to the Modeling Study, the USGS is required to comply with the public transparency requirements of the DQA, OMB Guidance, and OMB Bulletin, as set forth above.[3]

III. INFORMATIONAL DEFICIENCIES

Western Energy requests that the USGS comply with the DQA, OMB Guidelines, and OMB Bulletin with respect to its obligations to publicly disclose information related to the peer

[3] Western Energy does not argue that the USGS's Guidelines attempting to disclaim responsibility under the DQA should be declared void for non-compliance, but rather notes and preserves this argument should the USGS fail to make the disclosures requested herein.

review process of the Modeling Study. Disclosure of such information includes, but is not limited to the following:

1. The names and institutions of employment and/or affiliations (e.g., university, scientific organization, corporation, agency, etc.) of all persons contacted for the purposes of providing peer review of the Modeling Study, including internal USGS reviews that are required prior to release.

2. The names and institution of employment or affiliation (e.g., university, scientific organization, corporation, etc.) of those who actually engaged in peer review of the Modeling Study (the "Peer Reviewers").

3. The questions asked and/or issues presented to the Peer Reviewers with respect to the Modeling Study.

4. Any formal or informal report(s), paper(s), raw data, final data, data compilation(s), communication(s), comment(s), red-line(s), summary(ies) or other document type related to the Peer Reviewers' review or impression of the Modeling Study, including, but not limited to:

    a. An electronic copy of the raw lek count data[4] (i.e. in a spreadsheet) that was available to the authors of the Modeling Study for analyses in the study area (spanning the years 1965 – 2007).

    b. An electronic copy of the final lek count data[5] that was used by the authors of the Modeling Study in their analyses (as described by the authors, "[w]e modeled species presence from location of 3184 sage-grouse leks known to be active between 1998 and 2007." Modeling Study at 1541).

    c. Both the raw and final data sets should minimally include: state/province, sage grouse management zone ("SMZ"), population name, lek name, latitude and longitude or UTM, year of count, date of maximum male count, and maximum male count. [6]

---

[4] "Raw lek count data" means data provided to the authors of the Modeling Study by outside parties and compiled for analysis by the authors.

[5] "Final lek count data" refers to the data set used by the authors as the basis of the Modeling Study.

[6] Should the USGS resist compliance with Western Energy's request on the basis that it includes sensitive information, Western Energy notes: (1) there is no substantive reason, nor proof to presume that sage-grouse attending leks would be at risk as a result of disclosure of the requested information; (2) several states make lek locations public (i.e. Wyoming and Colorado); (3) these same data (or subsets thereof) have already been shared among multiple parties for their use private use (e.g., Sage- and Columbian Sharp-tailed Grouse Technical Committee, Western Association of Fish and Wildlife Agencies, Greater Sage-grouse Population Trends: an Analysis of Lek Count Databases 1965 – 2007 (2008) (unpublished)(on file with Western Energy); E.O. Garton, J.W. Connelly, J.S. Horne, C.A. Hagen, A. Moser, and M.A. Scroeder, Greater Sage-Grouse Population Dynamics and Probability of Persistence, 38 Studies in Avian Biology 293 (2011)); and 4) locations are already identified on maps produced as a part of scientific publications (e.g., B.L. Walker, D.E. Naugle, and K.E.

d. The name(s) and contact information of any persons or organizations from whom any raw lek count data used in the Modeling Study was obtained.

e. A list of the data excluded from the analyses in the final lek count data set, and the specific criteria used for each exclusion.

f. A copy of any permission letter or related correspondence to the authors of the Modeling Study to use outside data in the publication (in particular referring to the authors' statement "[l]ek data were used by permission… ." Modeling Study at 1549).

g. A copy of the funded grant, contract, or cooperative agreement that resulted in funding by the Great Northern Landscape Conservation Cooperative.

h. A detailed statement of methods and quantitative results that show the degree of correlation between the theoretical resistance of electrons flowing through circuits, and actual field data that quantifies sage grouse movements among leks. Modeling Study at 1543.

i. Figure 6 of the Modeling Study shows estimated potential for sage-grouse movement among leks, the range of which goes from <0.02 to 5. Modeling Study at 1548. No discussion or explanation is provided for the scale or units of "movement potential." Therefore, please provide a clear and detailed explanation of the method by which this estimate was derived, as well as the meaning of the scale and units of movement potential, so the method and results may be subject to reproduction.

Thank you in advance for your attention to this matter. Correspondence regarding this request may be directed to the undersigned.

Respectfully submitted this 30th day of July, 2013.

Kathleen Sgamma
Western Energy Alliance
410 17th St., Ste 700
Denver, Colorado 80202
T: (303) 623-0897
E: ksgamma@westernenergyalliance.org

Doherty, Greater Sage-grouse Population Response to Energy Development and Habitat Loss, 71(8) Journal of Wildlife Management 2644 (2007).