

September 6, 2011

To:

Assistant Director, Information Resources Management
U.S. Bureau of Land Management
1849 C. Street, NW
Washington, D.C. 20240

By Petitioners:

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APPEAL TO THE RESPONSE OF THE NEW MEXICO OFFICE OF THE BUREAU OF LAND MANAGEMENT
REGARDING THE
REQUEST FOR CORRECTION OF INFORMATION CONTAINED IN THE SCOPING DOCUMENTS
FOR THE SUN ZIA SOUTHWEST TRANSMISSION PROJECT

1) Statement of Appeal

This appeal pertains to the response of August 17, 2011 by the New Mexico Office of the Bureau of Land Management (BLM), document reference NM-114438 2800 (9320), to our Request for Correction of information disseminated by the New Mexico Office of the BLM in scoping documents for the SunZia Southwest Transmission Project. A copy of the original Request for Correction, dated July 12, 2011, is attached. This Appeal is made by the original Petitioners, the Winkelman Natural Resource Conservation District (WNRCD) and the Redington Natural Resource Conservation District (RNRCD), and is submitted under Public Law 106-554- Section 515, Office of Management and Budget (OMB) Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies, and the BLM's Information Quality Guidelines.

2) Statement of How the Petitioners are Affected by the New Mexico BLM Response

Both Petitioners are Natural Resource Conservation Districts, local units of government of the State of Arizona, that are charged with the protection and restoration of natural resources through active engagement with District Cooperators and the public. Several of the proposed routes for the SunZia Southwest Transmission Project would pass through the Conservation Districts of the Petitioners, and would have significant effects on the landscape and associated habitats. It is within the purview of the Districts to ensure that the proposed SunZia project is reconciled with our local plans and policies as local governments charged with the protection of our natural resources by the Arizona legislature, and that the public has an opportunity to comment on an accurate description of the proposed project prior to the final development of the Draft Environmental Impact Statement (DEIS).

3) Specific Challenges by the Petitioners to BLM document NM-114438 2800 (9320)

In the response made by the New Mexico Office of the BLM, Acting State Director Jesse Juen does not address the five specific statements challenged in the original Request for Correction, the four requested disclosures, the evidence of systematic bias, and the importance of an accurate and unbiased description of the project as the basis for public comment during the scoping period. His only specific reference to our Request for Correction is the denial of the request for an additional scoping comment period prior to the release of the DEIS, stating that *"...it would be duplicative of the protections to data quality in the ongoing National Environmental Policy Act [NEPA] process"*. This response culminates eleven months of refusal by the New Mexico Office to respond to public requests for correction to their statements of purpose and need for the proposed SunZia project. A copy of a previous request for correction, dated September 28, 2010, and referenced in our July 12, 2011 Request for Correction, is also attached.

The August 17, 2011 response by Mr. Juen is unsatisfactory, because BLM Information Quality Guidelines, under the heading of Duplicative, unnecessary or unduly burdensome requests, states that *"... requests for correction will be considered prior to the final agency action or information dissemination in those cases where the agency has determined that an earlier response would not unduly delay issuance of the agency action or information and the complainant has shown a reasonable likelihood of suffering actual harm from the agency's dissemination if the agency does not resolve the complaint prior to the final agency action or information product"*. This provision has two parts:

a) Undue delays and burdens- At the time we filed our Request for Correction, our Districts had been informed by our assigned BLM contacts (Jim Kenna, Brian Bellew, and Melissa Warren) that the DEIS would not be released for at least 90 days, perhaps longer. The correction requests we made were not highly technical, and were mainly related to speculative statements, biased presentation, and missing information. The arguments for these corrections will not be repeated in this Appeal letter, and it is assumed that all attachments to this Appeal will be considered. At the time we filed the Request for Correction, the need for correction was obvious to the point that our BLM contacts acknowledged verbally and in writing that changes needed to be made. However, these BLM representatives indicated that these changes would be made at a later date in the DEIS and the comment period that followed.

Regarding the opening of an additional comment period, we do not make the burdensome request for additional public meetings, but rather ask that the requested corrections and disclosures be disseminated to the same distribution list used during the original scoping period, and that a 45-day comment period be opened prior to the final development and release of the DEIS. Further, it should be noted that the New Mexico Office of the BLM was first informed of discrepancies in their statements of purpose and were asked to make corrections and reopen the scoping process during the last comment period (see attached request of September 28, 2010). In that particular request, it was acknowledged that the BLM may have been misled by the applicant (SunZia, LLC) regarding the statements of purpose. By refusing to make the requested corrections and reopen the scoping process in a timely manner, the BLM has moved beyond making an honest and relatively easily remedied mistake and is now in the position of extending their misleading description of the project for an undetermined number of additional months and ultimately undermining the purpose of the scoping period. Any burdens experienced by the BLM as a result of this response will be self-imposed, a consequence of not making the corrections in a timely manner.

b) Reasonable likelihood of suffering actual harm- Page 7 of our Request for Correction of July 12, 2011 references the purpose of the scoping period, as regulated by the Council on Environmental Quality. The BLM is already familiar with the purpose of the scoping period as stated in 40 C.F.R. 1501.7 (2010), and understands that the process was designed to identify issues that will be addressed in the EIS, as well as the extent to which those issues will be analyzed. By stating that an additional scoping period would be duplicative of the protections to data quality in the ongoing NEPA process, Mr. Juen is effectively stating that a valid scoping process is not dependent upon an accurate description of the proposed project. This interpretation does not respect the rights of the public and stakeholder groups to utilize an objective project description as the basis to identify important issues and alternatives and determine the extent to which these issues will be considered in the development of the DEIS. Also, this interpretation is not consistent with the most widely employed standard of review for the preparation of an EIS, which is whether this preparation fostered "*both informed decision-making and informed public participation.*" *California v. Block*, 690 F. 2d 753,761 (9th Cir. 1982)

Comments submitted in response to a public scoping notice are significantly influenced by what the agency states is the purpose and need of the project. In fact, the BLM NEPA Handbook recommends that the agency draft a purpose and need statement early in the NEPA process and include it in the scoping materials for precisely this reason, in order to "*help focus internal and external scoping comments.*" (H-1790-1 at 36). The same Handbook states that "*a carefully crafted purpose and need statement can be an effective tool in controlling the scope of the analysis and thereby increasing efficiencies by eliminating unnecessary analysis and reducing delays in the process.*" By this same logic, a misleading purpose and need statement can distort the scope of the analysis, obscure otherwise necessary analysis, and increase delays in the process.

By making unfounded statements and by not disclosing significant information related to future access to the proposed transmission lines, the BLM did not provide the public with a realistic understanding of the proposed transmission project. The bias in presentation was significant to the point that the BLM, in effect, acted as a project proponent during the scoping period, promoting an unfounded perception that the project would result in significantly greater environmental benefit than is likely to occur, particularly with regard to carbon dioxide emissions resulting from the ultimate mix of renewable and non-renewable generation sources (see page 10 of our Request for Correction). This skewed presentation had a contaminating effect on the entire scoping process.

The Data Quality Act (PL 106-554- Section 515) was developed to ensure that the federal government would make every effort to use accurate information, provided to the public in a timely manner, as the basis for sound and orderly decision making. This law references key provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), including the purpose of providing "*for the dissemination of public information on a timely basis, on equitable terms, and in a manner that promotes the utility of the information to the public.*" This purpose provides the basis for setting time limits on response to requests for corrections, because timeliness is vital to utility. For the same reason that we have laws preventing bait-and-switch advertising, this Data Quality Act is focused on making corrections with sufficient timeliness to ensure utility to the public. In this case, the public depends upon an accurate description of the project in order to provide informed input on the full range of alternatives that will be considered in the DEIS. Both the scoping comment period and the DEIS comment period have unique purposes, and the latter is not duplicative of the former, as implied by Mr. Juen in his response to the Petitioners' Request for Correction. Step A (the scoping process) must be completed properly before completing Step B (the development of the DEIS).

Based on a review of the public input received during the scoping period, the BLM's unfounded statements about the purpose and need of the project and the non-disclosure of information about future access to the proposed transmission lines very likely influenced the issues, impacts, and alternatives that the agency is being asked to consider, undermining the very purpose of the scoping process, with potentially fatal consequences to the balance of economic and environmental considerations in the EIS. In *Natural Resources Defense Council v. United States Forest Service*, 421 F. 3d 797 (9th Circuit 2005), faulty information rendered an entire analysis and resulting decision arbitrary and capricious, in violation of the Administrative Procedure Act.

The rationale for timeliness in information correction is based upon the understanding that the longer a myth remains public and the more times it is repeated, the more it becomes influential in the decision making process. This was evident during the scoping period with the almost universal acceptance by the media that the proposed project would primarily transport renewable energy. The unsubstantiated statements made about the proposed project by the BLM have now been repeated in print and in public since May of 2009, with requests for correction denied during the last eleven months of that period. The BLM is currently proposing to delay a public correction by an additional undetermined period, and to handle the specifics of our Request for Correction as if they were comments submitted during the scoping period. Quoting Mr. Juen:

"The BLM welcomes input from the public and stakeholders on all issues related to the SunZia proposal. The issues you raised in your letter concerning the discrepancies in data will be considered, and the concerns you raise will be addressed in the Draft EIS."

The Petitioners did not send a "letter". We submitted a formal Request for Correction, as prescribed by the BLM Information Quality Guidelines, with ten specific requests and evidence of systematic bias. A vague assurance that our concerns will be addressed in the Draft EIS at an undetermined later date is not sufficient to meet the intent of the 2001 Data Quality Act and the response requirements of the BLM Information Quality Guidelines. The New Mexico Office of the BLM was responsible for reviewing and substantiating the information that they disseminated to the public and the stakeholders during the scoping process, and thus should have been able to respond to each of the five requested corrections, the requested disclosure of four statements that are relevant to future access to the proposed lines, as well as the evidence of systematic bias in the BLM's presentation of the statements of purpose and need.

With this appeal, the Petitioners request that each of these requests be given a specific response, and that an objective statement of purpose and need with disclosures associated with transmission access be published and disseminated to the same distribution list used by the BLM during the previous comment periods, with a 45 day comment period to precede the final development and release of the draft EIS, as intended by the 2001 Data Quality Act and the cited regulation related to the scoping process.

Respectfully submitted,

William Dunn, Winkelman NRCD

Andrew Smallhouse, Redington NRCD

(Contact information at the head of page 1)

Attachments:

Request for Correction of Information Contained in Scoping Documents for the SunZia Southwest Transmission Project, July 12, 2011.

Request to Adrian Garcia from a Resident in the Winkelman Conservation District, September 28, 2010.

Copy to: Council on Environmental Quality