



EARTHJUSTICE

Because the earth needs a good lawyer

July 16, 2008

By Federal Express Priority Overnight Service and by Email

George Vargas
USDA Forest Service
ATTN: Data Quality Office
Mail Stop 1113, 1SW Yates Building
1400 Independence Avenue, SW
Washington, DC 20250-1143

gvargas@fs.fed.us

Assistant Director
Information Resources Management, BLM
1849 C. Street, NW
Washington, DC 20240

joseph_kraayenbrink@blm.gov

Re: Request for Reconsideration of Denial of Petition to Correct Information (BLM File Code: 3500, I-27512, I-01441, FS File Code: 1300-1/2800-1/2820-5)

Dear Mr. Vargas and Assistant Director of Information Resources:

Enclosed please find a Request for Reconsideration of the denial of our Petition to Correct Information submitted pursuant to Public Law 106-554 § 515. This Request for Reconsideration is filed on behalf of the Greater Yellowstone Coalition (GYC) and Natural Resources Defense Council (NRDC).

Our detailed rationale for the Request for Reconsideration is set out in the attached memorandum by Tom Myers, Ph.D. (Attachment 1). Also attached is GYC and NRDC's Petition to Correct Information dated April 4, 2008 (Attachment 2), the Forest Service's denial of this Petition dated June 3, 2008 (Attachment 3), and the Bureau of Land Management's (BLM) denial and memorandum in support of its denial dated June 3, 2008 ("Staff Memo") (Attachment 4).

On April 4, 2008, GYC and NRDC filed a Petition pursuant to the Data Quality Act to correct information disseminated by the Forest Service and BLM. The Petition to Correct Information pertained to information contained in the Final Environmental Impact Statement (FEIS) for the Smoky Canyon Mine Panels F and G Expansion Project published on October 26, 2007. The Petition also pertained to the Final Modeling Report, Groundwater Flow and Solute Transport, Smoky Canyon Mine Panels F and G Extension Area, prepared for the Forest Service

and BLM by JBR Environmental Consultants (“JBR 2007”). JBR 2007 is the groundwater flow and transport model used by the Forest Service and BLM as a basis for water quality impact analysis in the FEIS. The information disseminated by the Forest Service and BLM in the FEIS provided justification for the agencies’ decision to approve the Smoky Canyon Mine Panels F and G Proposed Mine Expansion, as evidenced in their June 6, 2008 Records of Decision.

The GYC/NRDC Petition requested the correction of information in the FEIS based on information presented in a 2005 technical memorandum written by Simplot’s consultants, Brian Buck and Alan Mayo of JBR Associates (“Buck/Mayo memo,” attached hereto as Attachment 5). The Buck/Mayo memo presented data and rationale that contradicted the critical assumption in the FEIS and groundwater model that chemical attenuation of selenium will occur in the upper Wells Formation aquifer at the Smoky Canyon Mine. Because neither the FEIS nor JBR 2007 provided any data or explanation to refute the Buck/Mayo memo, GYC and NRDC filed the April 4, 2008 Petition to Correct Information.

On June 3, 2008, the Forest Service and BLM denied the GYC/NRDC Petition and determined that neither the FEIS nor the groundwater model “requires correction with respect to the inclusion of selenium attenuation.” (June 3, 2008 letter from BLM to Earthjustice) The agencies also determined that the FEIS “will not be changed or withdrawn in response to this petition.” *Id.* The agencies’ response principally alleged that: (1) additional memos by Simplot’s consultants provided rationale for the chemical attenuation relied upon in the FEIS and JBR 2007; (2) the Buck/Mayo memo did not strictly preclude attenuation; and (2) the FEIS did, in fact, already consider a “no attenuation” option, and thus no further agency action was required.

We respond to these assertions in detail in the attached technical memorandum. In sum, we find that the agencies’ response still betrays a failure to satisfy agency guidelines for dissemination of information. First, while the agencies claim that the FEIS, JBR 2007 and two 2006 JBR memos contain analyses and data that refute the concerns clearly set forth in the 2005 Buck/Mayo memo, there is nothing in the Staff Memo that demonstrates this. The citations to the FEIS and JBR 2007 provided in the Staff Memo do not stand for this proposition, as detailed in the attached technical memorandum. Furthermore, the agencies did not provide copies of the 2006 memoranda, nor did they cite excerpts from those documents in their denial of the GYC/NRDC Petition. Thus there is no evidence that these memoranda effectively refute the conclusions of the Buck/Mayo memo.

Second, the BLM Staff Memo also argues that the Buck/Mayo memo did not conclusively rule out chemical attenuation. But in pursuing this argument, the agencies misconstrue the GYC/NRDC Petition. The Petition alleged that, as of the date of the Buck/Mayo memo in January 2005, Simplot’s consultants concluded that there were no data to support chemical attenuation of selenium in the Wells Formation aquifer. In fact, the Buck/Mayo memo cited data that indicated that selenium attention was not occurring and could not occur. The GYC/NRDC Petition quoted the memo as follows:

Empirical data obtained to date from GW-11, GW-IW, GW-CW, GW-16, GW-18, DC-MW-5, MC-MW-1, the major springs down gradient of Panels F and G and the theoretical information discussed in this memo indicate that chemical attenuation of Se has not been demonstrated for flow pathways through the upper Wells Formation aquifer

at the Smoky Canyon Mine. After review of the information presented in this memo, **at this time, we have not been able to identify quantifiable chemical attenuation mechanisms for Se that can be used in the Panels F and G groundwater impact analysis and recommend modeling Se attenuation due only to dilution and dispersion.**” (Emphasis in original.)

The GYC/NRDC Petition stated that, subsequent to the Buck/Mayo memo, neither Simplot’s consultants nor the agencies identified quantifiable chemical attenuation mechanisms for selenium applicable to the Panels F and G groundwater impact analysis. The Petition pointed out that no demonstration was made in any subsequent memos in the record, in the groundwater model or in the FEIS. Nothing in the agencies’ June 3, 2008 response to the GYC/NRDC Petition indicates that the empirical data cited in the 2005 Buck/Mayo memo has been refuted. Consequently, GYC and NRDC maintain that the FEIS and JBR 2007 still require correction.

Third, the agencies’ posit that it is not necessary to correct information in the FEIS because the FEIS already included a prediction of impacts to water quality for “no attenuation” scenarios for Simplot’s proposed action and all mining alternatives. As evidence of the agencies’ evaluation of “no attenuation,” the agencies cited several tables contained in the FEIS. Again, the agencies have misconstrued the GYC/NRDC Petition. The FEIS and JBR 2007 explicitly embraced Simplot’s chemical attenuation premise. There is no question that the agencies explicitly rely upon an estimate of “15 to 25 percent” selenium attenuation. The fact that scenarios were calculated without attenuation is not dispositive. The agencies’ decision specifically relied on attenuation mechanisms, although the existence of those mechanisms was explicitly refuted in the Buck/Mayo memo. We maintain that those mechanisms were never established in the record and that no document demonstrates the base geochemical conditions that would allow attenuation. The agencies’ response to the GYC/NRDC Petition provides no evidence to the contrary.

Whether one applies OMB’s general Information Quality Guidelines, the more specific USDA guidelines applying to environmental impact statements, or the more stringent USDA guidelines applying to “influential regulatory information,” the basis for appeal remains the same. OMB’s Information Quality Guidelines set forth general criteria requiring that the dissemination of material by federal agencies meet minimum standards of objectivity, utility and integrity. The agencies’ failure to provide the rationale behind a fundamental shift in analysis, where that analysis provides the very basis for the agencies’ Record of Decision, is most certainly a violation of the Information Quality Guidelines of both the United States Department of Agriculture and the Department of the Interior. As currently written, the FEIS fails basic standards of objectivity, transparency, and integrity. Specifically, as explained fully in the GYC/NRDC Petition and the attached technical memorandum, the FEIS fails to:

- Use sound analytical methods in carrying out scientific analyses.
- Use reasonably reliable and reasonably timely data and information.
- When using data obtained from or provided by third parties, ensure transparency in its dissemination by identifying known sources of error and

limitations in the data.

- Ensure transparency of the analysis by (1) Presenting a clear explanation of the analysis to the intended audience; (2) Providing transparent documentation of data sources, methodology, assumptions, limitations, uncertainty, computations, and constraints; (3) Explaining the rationale for using certain data over other data in the analysis; and (4) Presenting the model or analysis logically so that the conclusions and recommendations are well supported.
- Clearly identify sources of uncertainty affecting data quality.
- For quantitative assessments, clearly state the uncertainty of final estimates to the extent practicable. Data and data collection systems should, as far as possible, be of sufficient quality and precision that uncertainty in the final estimates is appropriately characterized.
- For qualitative assessments, provide an explanation of the nature of the uncertainty in the analysis.

(Citing USDA Guidelines for Objectivity of Regulatory Information. See http://www.ocio.usda.gov/qi_guide/regulatory.html.)

GYC and NRDC are non-profit membership organizations. Their members currently use and plan to continue to use the lands on the Caribou-Targhee National Forest that will be affected by the expansion of the Smoky Canyon Mine. The pollution of groundwater and surface water from selenium, resulting from the mining activities, will adversely affect members' recreational, financial, and personal interests. The failure of the agencies to follow the applicable information quality guidelines and to correct information disseminated in the FEIS has resulted in a Record of Decision that permits the expansion of the Smoky Canyon Mine to the detriment of GYC and NRDC's members' interests.

Thank you in advance for your attention to this matter. If you have any questions about this Request for Reconsideration, please do not hesitate to contact me at 781-631-4119.

Submitted respectfully by,

Lisa Evans

Lisa Evans
Attorney

kr

On behalf of:

Greater Yellowstone Coalition
162 North Woodruff Avenue
Idaho Falls, Idaho 83401
www.greateryellowstone.org

Natural Resources Defense Council
111 Sutter Street, 20th Floor
San Francisco, CA 94104
www.nrdc.org