Congress of the United States
Washington, DC 20515

April 28, 2011

The Honorable Thomas J. Vilsack
Secretary of Agriculture
United States Department of Agriculture
1400 Independence Ave., SW
Washington, DC 20250-0002

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Secretary Vilsack and Attorney General Holder:

We write with great concern over pending policy decisions your departments may soon make pertaining to the case, *Sierra Club v. United States Department of Agriculture, Rural Utilities Service, et. al. and Sunflower Electric Power Corporation*, Case No. 07-1860-EGS, currently pending before the Federal District Court for the District of Columbia. We oppose any effort by the U.S. Department of Agriculture (USDA) and the U.S. Department of Justice (DOJ), to settle this case and respectfully request that USDA and DOJ appeal the summary judgment finding of the Federal District Court for the District of Columbia. While we realize that litigation strategies are internal legal matters, whether or not to appeal or settle this case is an important policy issue for your Departments that will have significant impact on the future of USDA lending practices and economic development in rural America. If settled, this case would also materially undermine current Congressional policies.

Sierra Club v. USDA RUS, was brought by the Sierra Club against the USDA Rural Utilities Service (RUS) for an alleged failure to appropriately apply the National Environmental Policy Act (NEPA) to past approvals given to Sunflower Electric Power Corporation (Sunflower). Sunflower, in conjunction with Tri-State Generation and Transmission Association (Tri-State), is currently pursuing the development of an 895 Megawatt coal plant at a brown field site near Holcomb, Kansas (Holcomb Expansion Project). Sunflower has optioned the right to construct the Holcomb Expansion Project to Tri-State. Both of these generation and transmission cooperatives are current RUS borrowers, but this project will use 100 percent private sector financing. In addition to providing needed base load capacity to 1.5 million electric cooperative members in rural America with the newest, cleanest, and most cost effective

technology available, the project will provide thousands of needed construction jobs and hundreds of ongoing permanent jobs for U.S. laborers.

The Sierra Club has launched a multi-faceted attack on the Holcomb Expansion Project that includes a suit filed in 2007 by the Sierra Club against USDA, through the RUS, arguing that RUS should have prepared an Environmental Impact Statement (EIS) on the Holcomb Expansion Project before: (1) approving the 2002 corporate restructuring which allowed Sunflower to purchased almost all of "Old Sunflower's" assets and (2) approving the arrangements in 2006 and 2007 by which Tri-State purchased the exclusive option to develop coal-fired units at the Holcomb Site. If Tri-State exercises this option, it will have the sole right to build the single unit for which the State of Kansas issued the needed construction air permit on December 16, 2010. Sunflower joined the NEPA suit on May 9, 2008, to protect its interest in the litigation.

The central legal question raised in the suit is whether RUS has been correctly applying NEPA when processing needed RUS approvals connected to development of projects when RUS is not the lender. In such cases, RUS holds a shared lien on all borrowers' assets, and when third parties finance new assets, RUS must take action, including sharing its first lien *pro rata* with the private lender. It has been express Congressional Policy since 1993, when Congress amended Section 306E of the Rural Electrification Act of 1936 to encourage private financing for cooperative projects, that NEPA should not apply to situations where RUS is not the lender and merely approves a project funded by a third-party lender. In 1998, RUS modified its NEPA rules to implement the 1993 Congressional policy to reflect RUS' changed role to one more like a private market lender. Those rule changes, in particular 7 C.F.R., §1794.3, that expressly exempt such approvals and lien accommodations from the definition of "federal action" under NEPA, are at the heart of the Sierra Club attack.

Although RUS relied on that long-standing regulation when approving the 2002 and 2007 transactions, over a year after all briefing was completed and years after the consents by RUS were granted, the court issued an order on March 29, 2011, finding for the Sierra Club on all substantive arguments. This ruling does not "technically" invalidate the rule, but as a practical matter, it presents a powerful tool for opponents to challenge virtually all non-federally financed cooperative projects. Unless this case is brought to final judgment and subsequently appealed, opponents can be expected to attack numerous electric cooperative projects long after RUS has approved them.

The district court noted that "while fashioning a remedy may be difficult under the complicated circumstances that exist in the instant action, the practical difficulties identified by Sunflower both with respect to prospective and retroactive relief 'are more appropriately considered when weighing the equities of any particular remedy'." Thus, there remains the opportunity to substantially narrow the precedential effect of the court's final decision by establishing that no action can adversely affect non-parties (like Tri-State) or cooperatives with

RUS mortgages (like Sunflower) who daily implement costly business strategies in reliance on RUS approvals and the 1998 RUS NEPA rules.

We are concerned that DOJ and USDA attorneys might be willing to settle the case rather than submit briefs on remedies as directed by the court. Certainly, any offer to complete a full EIS on the Holcomb Expansion Project would not be a settlement, but rather a complete capitulation to the Sierra Club. Further, any settlement that would require an EIS on the Holcomb Expansion Project appears to go beyond what the court is contemplating, since the opinion recognizes the practical difficulties of fashioning a remedy years after Sunflower, their lenders, Tri-State, and many others relied and acted on the RUS approvals.

While we are understandably concerned about the outcome of this case for our rural constituents, we are equally concerned about the implications for millions of other rural residents that rely on USDA in a multitude of ways. A settlement would mean discarding policies RUS and borrowers have relied upon and followed for years. We are perplexed as to why USDA and DOJ would consider settlement without further litigation to establish and narrow the scope of remedies to be expected so long after the challenged actions.

If this decision is allowed to stand and the remedy not narrowed, it will have a substantial chilling effect on not only rural development programs, but all activities by entities that have received past government assistance. It will also make it difficult, if not impossible, for RUS borrowers or others who have given the government a shared lien to negotiate jointly owned facilities. Utilities and other RUS borrowers will not willingly submit to preparing an EIS on all development or repair projects or daily management decisions. Thus, the only alternative for such borrowers is to attempt to buy-out RUS loan interests and obtain private financing or delay needed repairs and development projects indefinitely. In the current economy, the first option may not be realistic, and the second decision would be disastrous for rural America.

The NEPA issues in question in this case were at the heart of negotiations among RUS, the Council on Environmental Quality, and the cooperatives when RUS first developed its current NEPA rules. Following these negotiations and before becoming final, the current NEPA rules were fully reviewed and approved by the President's Council on Environmental Policy, the principal authority on NEPA implementation. RUS has since followed these internal rules and regulations regarding NEPA for many years. Borrowers and their commercial partners have structured their businesses and transactions in reliance on that stable policy. More importantly, however, the regulations follow Congressional direction regarding when NEPA regulations impact RUS borrowers.

We believe a decision to settle at this stage would be based on a failure to fully take into account the long-term implications of the court's ruling and the damage it will have on the development of rural America. If USDA staff chooses not to defend RUS practice and interpretation of NEPA regulations, please communicate with us why USDA has decided not to

defend these long-standing policies. In addition, please include how any failure to defend RUS practice and interpretation of NEPA regulations will adversely affect USDA lending programs and steps Congress should to take to reinstate existing policy.

To insure the continued viability of the rural development programs throughout USDA, we urge you to direct DOJ and USDA attorneys to fully defend the position USDA and Sunflower argued during summary judgment proceedings, both on appeal and when narrowing the available remedy in current negotiations. Failure to do so could have significant implications not only for federal policies and programs aimed at assisting rural America, but for all federal programs where the government has maintained a security interest in a borrower's assets. In a time where we need to encourage investment in rural America for energy, broadband, and healthcare, settlement of this case would be a step backward.

We look forward to further discussing this substantial policy decision with you.

Sincerely,

Jerry Moran

Jerry Moran

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