IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. ______________________

WILDEARTH GUARDIANS,

Plaintiff,

v.

U.S. BUREAU OF LAND MANAGEMENT,

Defendant.

PETITION FOR REVIEW OF AGENCY ACTION

INTRODUCTION

1. The Denver Metro and North Front Range region is under siege by ground-level ozone pollution. Ozone is a poisonous gas. Researchers have linked ozone to asthma, lung disease, other respiratory ailments, and heart attacks. The most recent scientific evidence suggests that excessive ozone exposure contributes to premature death. Ozone is the main ingredient in smog. From Douglas County, Colorado, north to Larimer and Weld Counties, ozone levels consistently exceed allowable health limits, putting the region's health at great risk.

2. The legally allowable limit of ozone concentrations in the air is set by the United States Environmental Protection Agency ("EPA") pursuant to the federal Clean Air Act. The limit prescribes the maximum allowable amount of ozone that can be in the air over an 8-hour period without risking public health.

3. In 2008, EPA promulgated a stricter 8-hour standard for ozone concentrations that superseded a previous limit promulgated in 1997. EPA lowered, and thereby strengthened, the

8-hour ozone limit because significant new scientific research demonstrated that serious respiratory and cardiovascular effects occur when humans are exposed to ozone concentrations below the 1997 limit. EPA lowered the 2008 limit again in 2015.

4. For many years, EPA has declared a nine-county region along Colorado's Front Range to be in violation of health-based ozone limits. EPA has designated this region as a "Nonattainment Area" for ozone. The nine counties in the region include all of Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, Jefferson Counties and portions of Larimer and Weld Counties. Hereafter, this region will be referred to as the "Denver Nonattainment Area."

5. EPA first designated the Denver Nonattainment Area because it exceeded the 1997 ozone standard. In 2008, EPA again designated the Denver Nonattainment Area as in nonattainment for violating the 2008 ozone standard. The Area remains in violation of the 2008 ozone standard. In 2016, EPA reclassified the Denver Nonattainment Area from a "marginal" to a "moderate" nonattainment area due to ongoing failure to comply with the 2008 ozone standard. In 2017, the Denver Nonattainment Area is again set to be designated as in nonattainment with the 2015 ozone standard. The ozone problem in the Denver Nonattainment Area is not getting better. It is getting worse.

6. The elevated levels of ozone in the Denver Nonattainment Area are attributable, in part, to the significant amount of oil and gas development occurring within the Area's boundaries, particularly in and around Weld County. Oil and gas development activities, including wellhead compressors, condensate tanks, and other pollutant emitting activities release high levels of the pollutants that contribute to the formation of ozone. Defendant U.S. Bureau of

Land Management ("BLM") has authorized much of this oil and gas activity through the issuance of federal oil and gas leases.

7. BLM recently authorized additional oil and gas activities within the Denver Nonattainment Area by authorizing, selling, and issuing 67 leases in two lease sales held in May and December of 2015. These leases cover more than 36,000 acres. Much of this acreage is situated in the Pawnee National Grassland, an iconic expanse of public lands in northeast Colorado. Development of these new leases will contribute to ozone levels in the Denver Nonattainment Area. Development of these new leases will also contribute to the Area's continuing violations of the 2008 ozone standard.

8. To protect air quality and public health within the Denver Nonattainment Area, Plaintiff WildEarth Guardians ("Guardians") brings the present action alleging that BLM's authorization of increased oil and gas development in the Denver Nonattainment Area violates the Clean Air Act, 42 U.S.C. §§ 7401-7671(q), within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

JURISDICTION, VENUE, AND NOTICE

9. This action arises under the Clean Air Act, 42 U.S.C. § 7506(c), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

10. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question) and 1346 (United States as a defendant). The Court has the authority to issue the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202, and 5 U.S.C. §§ 705, 706.

11. Guardians' claim arises under the judicial review provision of the APA, 5 U.S.C. §§ 701-706. BLM's approval, sale, and issuance of the 67 oil and gas leases are final agency actions subject to judicial review pursuant to the APA.

12. An actual and present controversy exists between the parties within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201.

13. Guardians has exhausted any and all available and requested administrative remedies.

14. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e). A substantial part of the events and omissions giving rise to Guardians' claims occurred in the District of Colorado. All 67 oil and gas leases challenged herein are located in Colorado. The Colorado State Office of the BLM, located in Lakewood, was responsible for authorizing, selling, and issuing these 67 leases. Additionally, Guardians maintains a major office in Denver.

PARTIES

15. Plaintiff WILDEARTH GUARDIANS ("Guardians") is a non-profit conservation organization with a major office in Denver, Colorado. Guardians is dedicated to protecting and restoring wildlife, wild rivers, and wild places in the American West, and to safeguarding the Earth's climate and air quality. Guardians and its members work to reduce harmful air pollution in order to safeguard public health, welfare, and the environment. Guardians has approximately 200,000 members and activists, including over 10,000 members and activists in Colorado, many of whom live, work, and/or recreate in the Denver Nonattainment Area.

16. Guardians' members who live, work, recreate, and conduct other activities in the Denver Nonattainment Area are affected by poor air quality associated with existing oil and gas development in the Area, and have a substantial interest in ensuring they breath the cleanest air

possible. Guardians' members use and enjoy the areas in the Denver Nonattainment Area for work, residential, recreational, scientific, aesthetic, conservation and other purposes, and will continue to do so. Guardians' members are harmed by the local aesthetic and environmental impacts of smog, ozone pollution, and oil and gas development in the Denver Nonattainment Area.

17. Guardians' members regularly use and enjoy public lands in the Denver Nonattainment Area that are affected by ozone pollution, including but not limited to lands within the Pawnee National Grassland, Arapahoe-Roosevelt National Forest, Rocky Mountain National Park, various open space lands, and the Rocky Mountain Arsenal Wildlife Refuge. Their recreational enjoyment of these lands is diminished during high ozone days in the summer. Many Guardians' members also live and raise families in the Denver Nonattainment Area. Their health and quality of life is diminished whenever there is excessive ozone in the air.

18. Guardians' members also have a substantial interest in ensuring that BLM complies with federal law, including the requirements of the Clean Air Act and the APA. Guardians' and its respective members' interests have been, are being, and will continue to be irreparably harmed by BLM's authorization and issuance of oil and gas leases in the Denver Nonattainment Area that will further degrade air quality.

19. Defendant BUREAU OF LAND MANAGEMENT is a federal agency within the Department of Interior. BLM is directly responsible for carrying out the Department's obligations under statutes and regulations governing oil and gas leasing and development, including the Clean Air Act.

LEGAL FRAMEWORK

I. Applicable Clean Air Act Requirements

20. The Clean Air Act aims "to protect and enhance the quality of the Nation's air resources . . . ." 42 U.S.C. § 7401(b)(1). To help meet this goal, the Clean Air Act prohibits any federal agency from authorizing activities that do not conform to the appropriate State Implementation Plan ("SIP"). 42 U.S.C. § 7506(c)(1). A SIP is a federally approved set of state regulations that are designed to prevent air quality deterioration and to restore clean air in areas that are out of attainment with federal standards.

21. Conformity to a SIP as defined in the Clean Air Act, 42 U.S.C. § 7506(c)(1)(A-B), means:

> (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and
>
> (B) that such activities will not—
>
> > (i) cause or contribute to any new violation of any standard in any area;
> >
> > (ii) increase the frequency or severity of any existing violation of any standard in any area; or
> >
> > (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

22. The "assurance of conformity" to a SIP "shall be an affirmative responsibility" of a federal agency. 42 U.S.C. § 7506(c)(1).

23. In 1993 EPA promulgated the General Conformity Rule that established criteria and procedures governing conformity determinations for all Federal actions. 58 Fed. Reg.

63,247 (Nov. 23, 1993), 40 C.F.R. §§ 51.850-51.860. These rules were incorporated by reference into Colorado's SIP in 1999. *See* 64 Fed. Reg. 63,206 (Nov. 19, 1999).

24. On April 5, 2010, EPA revised the general conformity regulations. *See* 75 Fed. Reg. 17,254-79 (April 5, 2010). The newly promulgated 40 C.F.R. part 93, subpart B (§§ 93.150-93.165), "essentially duplicates" the old 40 C.F.R. part 51, subpart W (§§ 51.850-51.860) conformity regulations, deleting all of subpart W except for § 51.851 which was revised. 75 Fed. Reg. 17,256. 40 C.F.R. § 51.851(g) provides that "[a]ny previously applicable SIP or TIP requirements relating to conformity remain enforceable until EPA approves the revision to the SIP or TIP to specifically remove them."

25. For Federal actions not related to transportation plans, "a conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions of the criteria pollutant or precursor in a nonattainment or maintenance area caused by a Federal action would equal or exceed. . . 100 [tons/year.]". 40 C.F.R. § 95.153(b).

26. "Direct emissions" are defined as "those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action . . . and occur at the same time and place as the action." 40 C.F.R. § 93.152. "Indirect emissions" are defined as "those emissions of a criteria pollutant or its precursors that [a]re caused or initiated by the Federal action . . . but occur at a different time or place as the action; [t]hat are reasonably foreseeable; [t]hat the agency can practically control; [f]or which the agency has continuing program responsibility." *Id*.

27. Federal agencies must make a determination that a federal action that will emit one or more criteria pollutants conforms to the applicable SIP before undertaking the action. 40 C.F.R. § 93.150(b).

28. To demonstrate conformity with a SIP, the agency must follow the procedures at 40 C.F.R. §§ 93.158 and 93.159.

29. There are certain limited exceptions to general conformity requirements under the Clean Air Act, such as when emissions from federal actions are below *de minimis* thresholds. Portions of federal actions that require a permit under the Clean Air Act's new source review program, as set forth under 42 U.S.C. §§ 7410(a)(2)(c) and 7503, are also not subject to general conformity requirements. *See* 40 C.F.R. § 93.150(d).

II. The Administrative Procedure Act

30. The APA provides a right to judicial review for any "person suffering legal wrong because of agency action." 5 U.S.C. § 702. Actions that are reviewable under the APA include final agency actions "for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

31. Under the APA, a reviewing court shall "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S. C. § 706(2)(A). A court must also compel agency action "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

FACTUAL ALLEGATIONS

I. <u>Ozone Levels and Impacts</u>

32. Ground-level ozone is a dangerous pollutant that causes a variety of significant adverse impacts to human health. According to EPA, elevated levels of ozone have a "causal relationship[] with a range of respiratory morbidity effects, including lung function decrements, increased respiratory symptoms, airway inflammation, increased airway responsiveness, and respiratory-related hospitalizations and emergency department visits . . . ." 73 Fed. Reg. 16,436, 16,443-46 (March 27, 2008). Furthermore, EPA has stated that the latest scientific evidence on

ozone effects is "highly suggestive that [ozone] directly or indirectly contributes to non-accidental and cardiorespiratory-related mortality," including "premature mortality." *Id*. at 16,443-44. EPA has concluded that individuals with asthma are at particular risk from the adverse effects of ozone. *Id*.

33. Ozone forms when sunlight reacts with two key air pollutants—volatile organic compounds ("VOCs") and nitrogen oxides ("NOx"). VOCs and NOx are referred to as ozone precursors.

34. Ozone is a criteria pollutant under the federal Clean Air Act, 42 U.S.C. § 7408. The Clean Air Act establishes a National Ambient Air Quality Standard ("NAAQS") for each criteria pollutant that represents the maximum allowable concentration of each pollutant that can occur in the air and still protect public health. *See* 42 U.S.C. § 7409.

35. Until 2008, the effective NAAQS for ozone was 0.084 parts per million ("ppm") over an 8-hour period. This standard is referred to as the 1997 ozone standard.

36. On March 27, 2008, EPA published a final rule for a new ozone NAAQS that strengthened the 8-hour standard by lowering the limit to 0.075 ppm. 73 Fed. Reg. 16,436 (March 27, 2008). This new ozone standard became effective on May 27, 2008, superseding the prior 1997 ozone NAAQS as of that time. The new standard is referred to as the 2008 ozone standard.

37. EPA's decision to strengthen the ozone standard was based on numerous human health studies conducted over the past decade documenting the adverse effects of ozone on public health. After examining the data from these studies, EPA concluded that "the current [1997 ozone] standard is not requisite to protect public health with an adequate margin of safety because it does not provide sufficient protection and that revision of the current [ozone] standard

is needed to provide increased public health protection." 73 Fed. Reg. 16,436, 16,471 (March 27, 2008).

38. Ozone concentrations are measured on an hourly basis. 40 C.F.R. § 50.15. An exceedance of the ozone standard occurs if the average of eight consecutive hourly readings exceeds 0.075 ppm, which is the 2008 NAAQS for ozone. *Id.* A violation of the standard occurs when the "3-year average of the annual fourth-highest 8-hour" ozone concentrations exceeds 0.075 ppm. *Id.*

39. When the 3-year average for ozone levels for any given region falls below 0.075 ppm, the region is considered to be in attainment with the ozone NAAQS. 42 U.S.C. § 7407(d)(1)(A)(ii). Conversely, when the 3-year ozone average is above 0.075 ppm, the region is considered a nonattainment area for ozone. 42 U.S.C. § 7407(d)(1)(A)(i).

40. In response to evolving science and public health needs, in 2015 EPA again lowered the 2008 ozone NAAQS, setting a new, more stringent 8-hour limit of 0.070 ppm. 80 Fed. Reg. 65,292 (Oct. 26, 2015). According to EPA, the new limit was necessary "to provide requisite protection of public health and welfare . . . ." *Id.*

II. BLM's Oil and Gas Leasing and Development Process

41. BLM manages onshore oil and gas development through a three-phase process. Each phase is distinct, serves distinct purposes, and is subject to distinct rules, policies, and procedures.

42. In the first phase, BLM prepares a Resource Management Plan ("RMP") in accordance with 43 C.F.R. §§ 1601-1610.8. The RMP broadly assesses the entire BLM resource area to determine, with respect to oil and gas development, which lands should be open to leasing, which lands must or should be closed to leasing, and which lands are open to leasing

subject to certain constraints such as timing and surface use restrictions. The basis for such land designations is the detailed analysis of the direct, indirect, and cumulative impacts to the human environment from predicted implementation-stage development in the RMP's corresponding Environmental Impact Statement. BLM does not identify specific leases for sale at the RMP stage.

43. A reasonably foreseeable development scenario ("RFDS") underlies BLM's assumptions regarding the pace and scope of fluid minerals development within the RMP planning area. An RFDS does not include any analysis of environmental impacts from oil and gas development.

44. In the second phase, BLM identifies the boundaries of lands to be offered for sale and proceeds to sell and execute those leases through a lease sale and issuance. Oil and gas companies nominate the leases offered for sale through the submission of an "Expression of Interest." 43 C.F.R. § 3120.3-1. BLM then proceeds by preparing a list of oil and gas lease parcels to be offered for actual sale. BLM solicits bids on a specific sale day and, based on those bids, BLM awards and issues leases for the identified sale parcels. At this stage, BLM retains discretion to include or exclude specific lands from the lease sale, even when those lands are identified as "open" for leasing pursuant to an RMP. While BLM state offices manage lease sales, it is at the BLM field offices where specific lease parcels are located that conduct a review of environmental impacts pursuant to the National Environmental Policy Act, solicit public comment, and apply appropriate site-specific leasing stipulations.

45. Prior to the point BLM sells a lease, BLM may refuse to lease public lands, even if public lands were made available for leasing pursuant to the RMP. *Udall v. Tallman*, 85 S.Ct. 792, 795 (1965).

46. Prior to a BLM lease sale, BLM has the authority to subject leases to terms and conditions, which can serve as "stipulations" to protect the environment. 43 C.F.R. § 3101.1-3. Once BLM issues leases, it may impose conditions of approval that are delimited by the terms and conditions of the lease. 43 C.F.R. § 3101.1-2.

47. The Secretary of the Interior has the authority to cancel leases that have been "improperly issued." 43 C.F.R. § 3108.3(d).

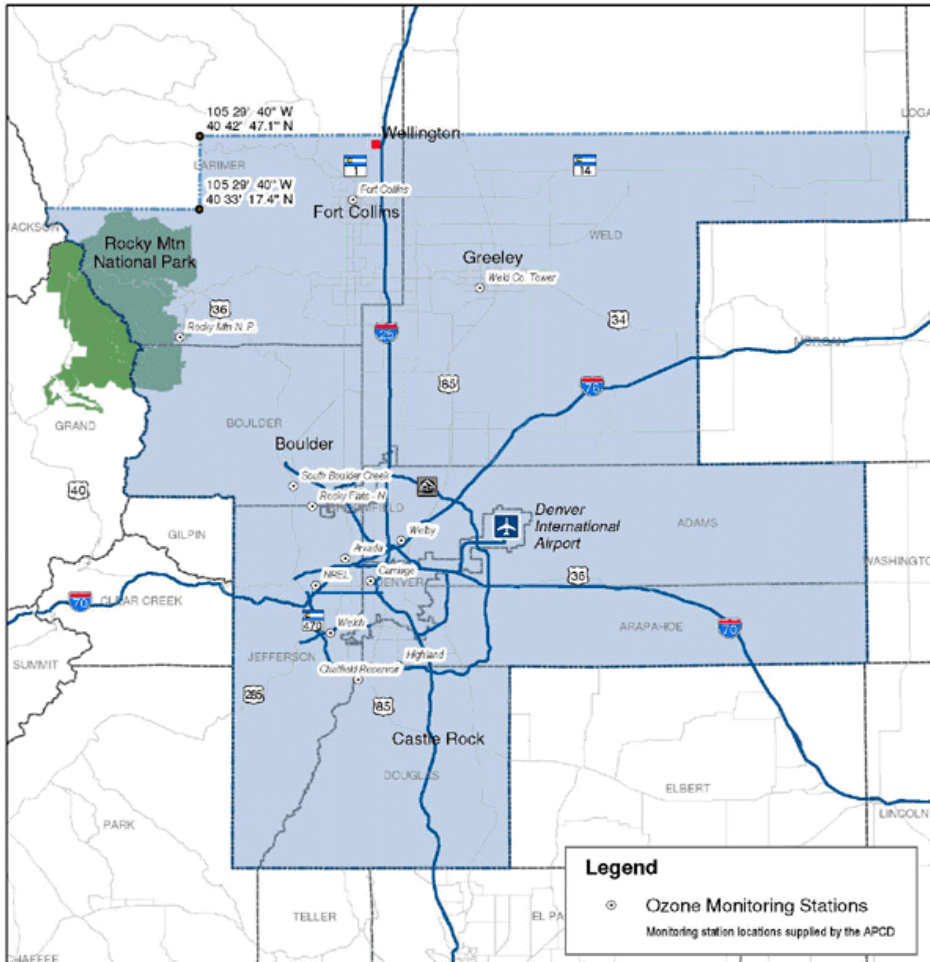
48. Once a lease is issued, in the third stage of the oil and gas development process the lessee must submit an application for permit to drill ("APD") to BLM prior to commencing drilling. 43 C.F.R. § 3162.3-1(c). Prior to submitting an APD, BLM requires the lessee to obtain all necessary right-of-way permits. In addition, the lessee must include details in the APD about access to, and development of, proposed well sites. At this stage, BLM may condition the approval of the APD on the lessees' adoption of "reasonable measures" whose scope is delimited by the lease and the lessees' surface use rights. 43 C.F.R. § 3101.1-2.

49. This case concerns the second stage of BLM's leasing process, and the implications of decisions made at this stage on the subsequent permitting stage. Specifically, this case involves the consequences of issuing a binding mineral lease before making a Clean Air Act conformity determination and the agency's subsequent inability to prohibit all energy development (and the subsequent air emissions) within that lease parcel regardless of the air quality and other environmental impacts that flow from lease development.

III. The Denver Nonattainment Area, Colorado SIP Requirements, and Ozone Precursor Emissions from Oil and Gas Activity

50. The Denver Nonattainment Area was initially designated in November 2007 after the region violated the 1997 ozone NAAQS. *See* 40 C.F.R. § 81.306. The Denver Nonattainment Area includes the Denver Metro Area and the Northern Front Range region,

including much of Larimer and Weld Counties. According to State and federal regulations, all of Weld County south of 40 degrees, 42 minutes, 47.1 seconds north latitude, which generally includes all of Weld County south of the town of Nunn, is within the designated nonattainment area. *Id.*, 5 CCR 1001-14 § III.M, and figure below.[1]



Denver-Boulder-Greeley-Fort Collins, Colorado
Eight-Hour Ozone Control Area

[1] Denver Metropolitan/North Front Range 8-hour ozone NAAQS nonattainment area, available online at https://www.colorado.gov/pacific/sites/default/files/AP_PO_ozone-nonattainment-area-map.pdf (last visited Nov. 8, 2016).

51. In 2012, EPA designated this same region as nonattainment over violations of the 2008 ozone NAAQS. 77 Fed. Reg. 30,088, 30,110 (May 21, 2012). In 2016, EPA reclassified the Denver Nonattainment Area as a "moderate" nonattainment area due to the failure of the region to attain the 2008 ozone NAAQS by 2015. 81 Fed. Reg. 26,697, 26,714 (May 4, 2016). EPA's reclassification to "moderate" effectually "bumped up" the Denver Nonattainment Area so that the State of Colorado is now required to revise its SIP and impose more stringent emission reductions in order to restore healthy air in accordance with the Clean Air Act. EPA will not approve a new SIP until 2018.

52. Most recently, the State of Colorado recommended that this same area also be designated nonattainment due to violations of the 2015 ozone NAAQS.[2] This designation will become final in 2017.

53. In November 1999, EPA approved a revision to the Colorado SIP that incorporated by reference the Clean Air Act's general conformity rule. 64 Fed. Reg. 63,206 (Nov. 19, 1999). This action made the federal conformity requirement part of the Colorado Air Quality Control Commission regulations. *See* 5 CCR 1001-12, Part A.

54. Therefore, Colorado's SIP includes the regulatory structure that prohibits a federal agency from undertaking any activity in a nonattainment area that does not conform to an applicable SIP. 5 CCR 1001-12, Part A, 40 C.F.R. § 93.150(a).

55. Oil and gas development has been identified as a significant source of the ozone precursor emissions VOCs and NOx in the Denver Nonattainment Area. Recent inventories show that within the Area, stationary sources of air pollution related to oil and gas development

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[2] *See* State of Colorado, "Draft Technical Support Document For Recommended 8-Hour Ozone Designations" (July 18, 2016), available online at https://www.colorado.gov/pacific/sites/default/files/091516-OzoneDesignations-materials.pdf (last accessed Nov. 8, 2016).

operations release more than 50 percent of all VOC emissions and 30 percent of all NOx emissions in the Denver Nonattainment Area.[3] The State of Colorado estimates that by 2017 stationary sources of air pollution associated with oil and gas development will release 44 percent of all VOC emissions and 28 percent of all NOx emissions in the Denver Nonattainment Area. *Id*.

IV. BLM's 2015 Oil and Gas Lease Sales

56. BLM's oil and gas leasing authorizations at issue in this Petition for Review occurred in the Royal Gorge Field Office. Leasing in the Royal Gorge Field Office falls under the purview of the 1996 Royal Gorge Resource Management Plan ("RMP") and the 1986 Northeast RMP. As part of those RMPs, BLM made decisions as to which lands are open for leasing and what stipulations can be placed on those leases during that land use planning process.

57. The planning area for the 1996 Royal Gorge RMP consists of the southern half of the Royal Gorge Resource Area, which encompasses all of eastern Colorado east of the Continental Divide, except the San Luis Valley. The planning area for the 1986 Northeast RMP consists of the northern half of the Royal Gorge Resource Area. The Denver Nonattainment Area and the leasing authorizations challenged herein are located in the northern half of the Royal Gorge Resource Area, and are governed by the 1986 Northeast RMP.

58. On May 15, 2015, BLM sold 73 oil and gas leases in the Royal Gorge Field Office. Of these leases, 31 are located within the Denver Nonattainment Area.[4] On November

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[3] *See* State of Colorado, "Moderate Area Ozone SIP for the Denver Metro and North Front Range Nonattainment Area" at ES-3, available online at https://www.colorado.gov/pacific/sites/default/files/072116-OzoneSIP-materials.pdf (last accessed Nov. 8, 2016).

[4] *See* Exhibit A attached to this Petition for a list of lease parcels from the May 2015 lease sale that are located in the Denver Nonattainment Area.

12, 2015, BLM sold 106 oil and gas leases in the Royal Gorge Field Office. Of these lease, 36 are located within the Denver Nonattainment Area.[5]

59. In the Environmental Assessments ("EAs") for the May and November 2015 lease sales, BLM recognized that, as a federal agency, it "must demonstrate that it has complied with the requirements of the General Conformity Rule," but concluded that a conformity determination was not required. In both EAs, BLM argued that "[l]easing does not authorize emissions generating activities," that leasing is similar to exempt transfers of interest in land, that emissions from the leasing were not "reasonably foreseeable," and that the Clean Air Act new source review program exemption would likely apply to several features of any subsequent development.

60. Guardians filed timely protests of each lease sale on March 16, 2015, and September 11, 2015, respectively. In each protest, Guardians alleged that BLM had specifically failed to demonstrate compliance with the Clean Air Act's general conformity requirements.

61. In each protest, Guardians provided detailed responses to BLM's arguments in the EAs as to why the agency was not required to make a conformity determination for each lease sale.

62. On May 13, 2015, Acting Deputy State Director John D. Beck dismissed Guardians' protest of the May 2015 lease sale. In the dismissal, BLM reiterated its conformity arguments from the EA by claiming that leasing does not authorize emission-generating activities, that leasing is similar to other exempted federal activities, and that emissions are not "reasonably foreseeable" at the sale stage. On November 12, 2015 Deputy State Director Lonny R. Bagley dismissed Guardians protest of the November 2015 lease sale for the same reasons.

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[5] *See* Exhibit B attached to this Petition for a list of parcels from the November 2015 lease

63. On May 14, 2015 the Colorado State Office of the BLM sold 73 oil and gas lease parcels in the Royal Gorge Field Office, including 31 leases in the Denver Nonattainment Area. These 31 leases total 10,973.608 acres. BLM issued all of these leases between June 3 and June 30, 2015.

64. On November 12, 2015, the Colorado State office of the BLM sold 106 oil and gas lease parcels in the Royal Gorge Field Office, including 36 leases in the Denver Nonattainment Area. These 36 leases total 25,258.71 acres. BLM issued all of these leases on December 15, 2015.

V. Emissions Estimates for Ozone Precursors from Wells on the Challenged Leases

65. To meet the requirements of a settlement agreement between Guardians and BLM in a previous lawsuit, in 2013 BLM created an Oil and Gas Air Emissions Inventory Report predicting future oil and gas air emissions for seven lease parcels within the Denver Nonattainment Area. The Emissions Report, prepared by the consulting firm URS Group, Inc., projects per-well emission levels for ten different air pollutants, including NOx and VOCs, and estimates emissions for high and low development scenarios for the years 2011-2030. The report relies on projected oil and gas development scenarios analyzed in a 2012 RFDS for the Royal Gorge Field Office.

66. According to the Emissions Report, one oil well would result in 21.75 tons per year ("tpy") of NOx and 21.72 tpy of VOCs. One natural gas well would result in 15.73 tpy of NOx and 34.06 tpy of VOCs.

67. The Emissions Report predicts minimum emissions levels using the above figures based on the minimum one well per lease requirement.

68. BLM's May 2015 lease sale included 31 leases located within the Denver Nonattainment Area. Assuming one well per lease, the lease sale would, at a minimum, result in 31 new wells. Multiplying the per well emissions estimates for NOx and VOCs by 31 new wells results in: (1) 674.25 tpy of NOx and 673.32 tpy of VOCs for oil wells, and (2) 487.63 tpy of NOx and 1,055.86 tpy of VOCs for gas wells. Estimated NOx and VOC emissions from the May 2015 lease sale exceed the Clean Air Act's 100 tpy emission threshold for a conformity determination.

69. BLM's November 2015 lease sale included 36 leases located within the Denver Nonattainment Area. Assuming one well per lease, the lease sale would, at a minimum, result in 36 new wells. Multiplying the per well emissions estimates for NOx and VOCs by 36 new wells results in: (1) 783 tpy of NOx and 781.92 tpy of VOCs for oil wells, and (2) 566.28 tpy of NOx and 1,226.16 tpy of VOCs for gas wells. Estimated NOx and VOC emissions from the November 2015 lease sale exceed the Clean Air Act's 100 tpy emission threshold for a conformity determination.

70. These emissions estimates are likely conservative. BLM's 2012 RFDS for the Royal Gorge Field Office indicates that within the Denver Nonattainment Area, development of federal oil and gas leases will largely occur in areas with high to very high development potential. This means that the number of projected oil and gas wells will average from 35 to up to 200 per township (i.e., from approximately one well per square mile (or 640 acres) to more than 5 wells per square mile). With 36,232 acres leased in the Denver Nonattainment Area in 2015, this could lead to the development of up to 283 new oil and gas wells in total. BLM estimates in its RFDS that within the Denver Nonattainment Area, nearly 500 new oil and gas wells will be developed to tap federal oil and gas leases by 2030.

71. Guardians is forced to estimate the emission figures provided in paragraphs 68 and 69 above because BLM did not estimate combined NOx and VOC emission levels from each lease sale either through a Clean Air Act conformity determination or as part of the NEPA process for the lease sales. Guardians used BLM's data provided in the leasing EAs to make the estimates in the preceding paragraphs.

CLAIM FOR RELIEF

Violation of the APA and Clean Air Act – Failure to Make a Conformity Determination Before Authorizing Leasing in an Ozone Nonattainment Area

72. Plaintiff incorporates by reference the allegations in all preceding paragraphs of this Petition for Review.

73. The Clean Air Act prohibits any federal agency from authorizing activities that do not conform to the appropriate SIP. *See* 42 U.S.C. § 7506(c)(1).

74. In November 1999, the Colorado SIP incorporated by reference the Clean Air Act's general conformity rule. 64 Fed. Reg. 63,206 (Nov. 19, 1999); 5 CCR 1001-12, Part A.

75. EPA designated the Denver Nonattainment Area in 2007 after the region violated the 1997 ozone NAAQS. *See* 40 C.F.R. § 81.306. EPA again designated the region as nonattainment in 2012 after violating the 2008 ozone NAAQS.

76. In May and November 2015, BLM held lease sales in which it sold and issued a total of 67 oil and gas leases covering 36,232 acres in the Denver Nonattainment Area. The specific leases are listed in Exhibits A and B attached to this Petition.

77. Oil and gas development and production on the leases located in the Denver Nonattainment Area listed in Exhibits AQ and B will collectively result in the release of more than 100 tpy of the ozone precursors NOx and VOCs.

78. Pursuant to the Clean Air Act and its implementing regulations, BLM was required to make conformity determinations for ozone prior to authorizing the May and November 2015 lease sales because the total of direct and indirect emissions from lease development in the Denver Nonattainment Area resulting from each sale will exceed 100 tpy. 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 93.150(b).

79. BLM violated the conformity requirement of the Clean Air Act and its implementing regulations when the agency authorized, sold, and issued 67 leases within the Denver Nonattainment Area as part of the May and November 2015 lease sales without making the required determination that leasing activities would conform with the requirements of the Colorado SIP. 42 U.S.C. § 7506(c)(1), 40 C.F.R. § 93.150(b).

80. All of BLM's reasons for failing to both ensure conformity with the Colorado SIP and Clean Air Act and perform conformity determinations prior to the May and November 2015 lease sales are arbitrary. 5 U.S.C. § 706(2).

81. BLM's failure to ensure conformity with the Colorado SIP and the Clean Air Act prior to authorizing the sale of 67 oil and gas leases in the Denver Nonattainment Area in the May and November 2015 lease sales constitutes agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1), and was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, under the APA. 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, Petitioner WildEarth Guardians respectfully requests that the Court:

A. Declare that BLM violated the Colorado SIP and the Clean Air Act by authorizing, selling, and issuing the 67 oil and gas lease parcels in the Denver Nonattainment

Area without ensuring conformity with the Colorado SIP and performing conformity determinations prior to the May and November 2015 lease sales;

B. Declare that BLM's rationale for not ensuring conformity with the Colorado SIP and performing conformity determinations with regards to its May and November 2015 oil and gas lease sales was arbitrary and capricious, in violation of the APA;

C. Vacate and remand BLM's authorizations of the 67 lease parcels in the Denver Nonattainment Area and order the leases to be canceled;

D. Order that if BLM decides to reauthorize, resell, and reissue the 67 leases, that the agency demonstrate conformity with the Colorado SIP and Clean Air Act including, but not limited to, preparing a conformity determination for collective development of all 67 leases;

E. Award WildEarth Guardians its reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and any other applicable statutes; and

F. Grant such additional and further relief as the Court may deem just and appropriate.

Respectfully submitted on this 21st day of December 2016,

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Exhibit A

On May 14, 2015, BLM sold the following leases in the Denver Metro/North Front Range 8-hour Ozone Nonattainment Area. These leases are in Weld and Adams Counties.

1. COC076913 (Weld)
2. COC076914 (Adams)
3. COC076917 (Adams)
4. COC076922 (Weld)
5. COC076925 (Weld)
6. COC076926 (Weld)
7. COC076927 (Weld)
8. COC076928 (Weld)
9. COC076934 (Adams)
10. COC076938 (Weld)
11. COC076942 (Weld)
12. COC076943 (Weld)
13. COC076945 (Weld)
14. COC076946 (Weld)
15. COC076947 (Weld)
16. COC076948 (Weld)
17. COC076949 (Weld)
18. COC076950 (Weld)
19. COC076951 (Weld)
20. COC076952 (Weld)
21. COC076953 (Weld)
22. COC076954 (Weld)
23. COC076960 (Weld)
24. COC076964 (Weld)
25. COC076965 (Weld)
26. COC076969 (Weld)
27. COC076970 (Weld)
28. COC076972 (Weld)
29. COC076977 (Weld)
30. COC076980 (Weld)
31. COC076981 (Weld)

Exhibit B

On November 12, 2015, BLM sold the following leases in the Denver Metro/North Front Range 8-hour Ozone Nonattainment Area. These leases are all in Weld County.

1. COC077269
2. COC077272
3. COC077277
4. COC077278
5. COC077279
6. COC077280
7. COC077286
8. COC077289
9. COC077290
10. COC077291
11. COC077292
12. COC077293
13. COC077295
14. COC077296
15. COC077300
16. COC077301
17. COC077302
18. COC077313
19. COC077314
20. COC077316
21. COC077317
22. COC077318
23. COC077319
24. COC077323
25. COC077331
26. COC077332
27. COC077337
28. COC077348
29. COC077349
30. COC077356
31. COC077357
32. COC077360
33. COC077364
34. COC077365
35. COC077366
36. COC077367