WILDEARTH GUARDIANS
A FORCE FOR NATURE

March 16, 2015

Via Hand Delivery

Ruth Welch
State Director
U.S. Bureau of Land Management
Colorado State Office
2850 Youngfield St.
Lakewood, CO 80215

Re: Protest of May 2015 Competitive Oil and Gas Lease Sale

Dear Ms. Welch:

Pursuant to 43 C.F.R. § 3120.1-3, WildEarth Guardians hereby protests the Bureau of Land Management's ("BLM's") proposal to offer 86 publicly owned oil and gas lease parcels covering 36,195.218 acres of land in the Royal Gorge Field Office of Colorado for competitive sale on May 14, 2015. These parcels include lands underlying the Pawnee National Grassland, which is managed by the U.S. Forest Service ("USFS"), as well as other publicly owned lands along the Front Range of Colorado. The specific parcels being protested include the following, as identified by the BLM's in its Final May 2015 Oil and Gas Sale List:[1]

Lease Serial Number	Acres	County	Surface Ownership
COC76913	156.94	Weld	Private/BLM
COC76914	320	Adams	Private/BLM
COC76915	320	Arapahoe	Private/BLM
COC76916	480	Adams	Private/BLM
COC76917	309.04	Adams	Private/BLM
COC76918	160	Adams	Private/BLM
COC76919	160	Arapahoe	Private/BLM
COC76920	320	Morgan	Private/BLM
COC76921	640	Logan	Private/BLM
COC76922	160	Weld	Private/BLM

[1] This list, which was made available on February 13, 2015, is on the BLM's website at http://www.blm.gov/style/medialib/blm/co/programs/oil_and_gas/Lease_Sale/2015/may_2015.Par.97980.File.dat/BLM_FS_May_2015_Sale_Notice.pdf.

COC76923	160	Weld	Private/BLM
COC76924	320	Morgan	Private/BLM
COC76925	320	Weld	Private/BLM
COC76926	361.56	Weld	Private/BLM
COC76927	160	Weld	Private/BLM
COC76928	120	Weld	Private/BLM
COC76929	200	Adams	Private/BLM
COC76930	157	Arapahoe	Private/BLM
COC76931	160	Adams	Private/BLM
COC76932	120	Adams	Private/BLM
COC76933	160	Adams	Private/BLM
COC76934	320	Adams	Private/BLM
COC76935	120	Logan	Private/BLM
COC76936	320	Logan	Private/BLM
COC76937	641.3	Logan	Private/BLM
COC76938	260.08	Weld	Private/BLM
COC76939	40	Weld	Private/BLM
COC76940	400	Weld	Private/BLM
COC76941	35.85	Morgan	Private/BLM
COC76942	40	Weld	Private/BLM
COC76943	80	Weld	Private/BLM
COC76944	83.1	Morgan	Private/BLM
COC76945	80	Weld	Private/BLM
COC76946	437.1	Weld	Private/BLM
COC76947	271.75	Weld	Private/BLM
COC76948	585.01	Weld	BLM, Private/BLM
COC76949	40	Weld	Private/BLM
COC76950	32.968	Weld	Private/BLM
COC76951	160	Weld	Private/BLM
COC76952	428	Weld	Private/BLM
COC76953	1020.24	Weld	Private/BLM
COC76954	320	Weld	Private/BLM
COC76955	1647.59	Weld	USFS
COC76956	1949.09	Weld	USFS
COC76957	874.3	Weld	USFS
COC76958	1172.1	Weld	USFS
COC76959	480.85	Weld	USFS
COC76960	834.03	Weld	USFS
COC76961	320	Weld	USFS
COC76962	2281.14	Weld	USFS
COC76963	960	Weld	USFS
COC76964	320.15	Weld	USFS
COC76965	1919.4	Weld	USFS

COC76966	2240	Weld	USFS
COC76967	1920	Weld	USFS
COC76968	320	Weld	USFS
COC76969	175.03	Weld	USFS
COC76970	524.28	Weld	USFS
COC76971	40	Weld	USFS
COC76972	98.03	Weld	USFS
COC76973	320	Weld	USFS
COC76974	160	Weld	USFS
COC76975	320	Weld	USFS
COC76976	320	Weld	USFS
COC76977	480	Weld	USFS
COC76978	960	Weld	USFS
COC76979	665.13	Weld	USFS
COC76980	480	Weld	USFS
COC76981	160	Weld	USFS
COC76982	320	Weld	USFS
COC76983	80	Weld	USFS
COC76984	120	Weld	USFS
COC76985	80	Weld	USFS
COC76986	287	Weld	USFS
COC76987	477.57	Weld	USFS
COC76988	40	Weld	USFS
COC76989	80.44	Weld	USFS
COC76990	200	Weld	USFS
COC76991	200	Weld	USFS
COC76992	360.78	Weld	USFS
COC76993	480	Weld	USFS
COC76994	92.22	Weld	USFS
COC76995	160	Weld	USFS
COC76996	122.79	Weld	USFS
COC76997	13.25	Weld	USFS
COC77027	160	Weld	USFS

Furthermore, we also hereby protest the BLM's proposal to reinstate seven oil and gas lease parcels comprising 2,000.48 acres of public lands that were terminated as a result of nonpayment in 2010.[2] These parcels include the following:

[2] It is unclear what BLM appeal provisions apply to a decision to reinstate previously issued competitive oil and gas leases. Thus, in an abundance of caution, we are hereby protesting the inclusion of these seven lease parcels in the agency's decision to offer competitive lease parcels for sale and issuance in May of 2015 pursuant to 43 C.F.R. § 3120.1-3.

Lease Serial Number	Acres	County	Surface Ownership
COC73423	320	Morgan	Private/BLM
COC73424	320	Weld	Private/BLM
COC73440	880.48	Morgan	Private/BLM
COC73441	120	Morgan	Private/BLM
COC73442	80	Weld	Private/BLM
COC73443	120	Weld	Private/BLM
COC73444	160	Weld	Private/BLM

In support of its proposal to issues leases underlying the Pawnee National Grassland, the BLM adopted an Environmental Impact Statement ("EIS") prepared by the USFS. The adoption of this EIS is documented in a "Determination of NEPA [National Environmental Policy Act] Adequacy" ("DNA"), DOI-BLM-CO-F020-005DN. In support of its proposal to issue leases outside of the Pawnee National Grassland, as well as to reinstate seven lease parcels, the agency prepared an "Environmental Assessment" ("EA"), DOI-BLM-CO-F02-2014-049-EA.

As will be explained, the BLM's overall proposal to lease and reinstate leases falls short of ensuring compliance with applicable environmental protection laws and is not based on sufficient analysis and assessment of key environmental impacts under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331, *et seq*. The agency's EA, as well as its DNA, are therefore deficient and fail to provide sufficient justification for its proposed action and its proposal to make a Finding of No Significant Impact ("FONSI") under NEPA. For the reason below, we therefore request the BLM refrain from offering the 86 proposed lease parcels for sale and issuance, and refrain from reinstating the seven lease parcels.[3]

STATEMENT OF INTEREST

WildEarth Guardians is a nonprofit environmental advocacy organization dedicated to protecting the wildlife, wild places, wild rivers, and health of the American West. WildEarth Guardians is headquartered in Santa Fe, New Mexico, but has offices and staff throughout the western United States, including in Denver. On behalf of our members, Guardians has an interest in ensuring the BLM fully protects public lands and resources as it conveys the right for the oil and gas industry to develop publicly owned minerals. More specifically, Guardians has an interest in ensuring the BLM meaningfully and genuinely takes into account the climate, and clean air, and other environmental impacts of its oil and gas leasing decisions and objectively and robustly weighs the costs and benefits of more fossil fuel production. We also have an interest in ensuring the BLM reduces greenhouse gas emissions from direct and indirect activities pursuant to Executive Order 13,514, issued by President Obama on October 5, 2009,

[3] For purposes of this protest, we hereby incorporate by reference comments, objections, and attachments thereto submitted by WildEarth Guardians in response to the BLM's Draft EA, as well as the USFS's Draft and Final EIS. These documents should be a part of the BLM's record supporting its EA and DNA.

and other related policies and Executive mandates, as well as meets other substantive environmental obligations under federal law, regulation, and policy.

The mailing address for WildEarth Guardians to which correspondence regarding this protest should be directed is as follows:

WildEarth Guardians
1536 Wynkoop, Suite 310
Denver, CO 80202

STATEMENT OF REASONS

WildEarth Guardians protests the May 14, 2015 oil and gas lease sale over the BLM's failure to:

1. Comply with NEPA requirements, including that the agency: (a) Failed to adequately analyze and assess the impacts of horizontal drilling and fracking on a programmatic and/or cumulative scale; (b) Failed to adequately analyze and assess greenhouse gas emissions; and (c) Failed to adequately analyze and assess other air quality impacts.

2. Comply with General Conformity requirements under the Clean Air Act, including that the agency: (a) Failed to ensure conformity in relation to the reasonably foreseeable development of the proposed lease parcels and (b) Failed to ensure conformity with regards to the programmatic and/or cumulative impacts of approving oil and gas development under the revised reasonably foreseeable development scenario for the Royal Gorge Field Office; and

3. Comply with Section 7 consultation requirements under the Endangered Species Act in relation to the projected water withdrawals that would result from the reasonably foreseeable development of the proposed leases.

For the following reasons, we request the BLM suspend the offering of the aforementioned lease parcels and/or that the Assistant Secretary for Land and Minerals Management suspend the May 14, 2015 lease sale.

1. The BLM Failed to Comply with NEPA

The BLM failed to adequately analyze and assess impacts under NEPA, 42 U.S.C. § 4331, *et seq*., and regulations promulgated thereunder by the White House Council on Environmental Quality ("CEQ"), 40 C.F.R. § 1500, *et seq*.

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The law requires federal agencies to fully consider the environmental implications of their actions, taking into account "high quality" information, "accurate scientific analysis," "expert agency comments," and "public scrutiny," prior to making decisions. *Id*. at 1500.1(b).

This consideration is meant to "foster excellent action," meaning decisions that are well informed and that "protect, restore, and enhance the environment." *Id*. at 1500.1(c).

To fulfill the goals of NEPA, federal agencies are required to analyze the "effects," or impacts, of their actions to the human environment prior to undertaking their actions. 40 C.F.R. § 1502.16(d). To this end, the agency must analyze the "direct," "indirect," and "cumulative" effects of its actions, and assess their significance. 40 C.F.R. §§ 1502.16(a), (b), and (d). Direct effects include all impacts that are "caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. at § 1508.8(b). Cumulative effects include the impacts of all past, present, and reasonably foreseeable actions, regardless of what entity or entities undertake the actions. 40 C.F.R. § 1508.7.

An agency may prepare an environmental assessment ("EA") to analyze the effects of its actions and assess the significance of impacts. *See* 40 C.F.R. § 1508.9; *see also* 43 C.F.R. § 46.300. Where effects are significant, an EIS must be prepared. *See* 40 C.F.R. § 1502.3. Where significant impacts are not significant, an agency may issue a FONSI and implement its action. *See* 40 C.F.R. § 1508.13; *see also* 43 C.F.R. § 46.325(2).

Here, the BLM fell short of complying with NEPA with regards to analyzing and assessing the potentially significant direct, indirect, and cumulative impacts of reasonably foreseeable oil and gas development associate with issuing the proposed leases. An analysis of such reasonably foreseeable impacts must take place at the lease stage and cannot be deferred until after receiving applications to drill. *See New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 717-18 (10th Cir. 2009); *Conner v. Burford,* 848 F.2d 1441 (9th Cir.1988); *Bob Marshall Alliance v. Hodel,* 852 F.2d 1223, 1227 (9th Cir.1988). The failure to adequately analyze and assess impacts means that there is no support for the agency's proposed FONSI and the BLM must either prepare an EIS or not proceed with offering the proposed lease parcels for sale and issuance. Below, we detail BLM's shortcomings under NEPA.

a. The BLM Failed to Analyze and Assess the Cumulative Impacts of Horizontal Drilling and Fracking

In comments on the BLM's draft EA, WildEarth Guardians pointed to the fact that underlying EISs for the Royal Gorge Resource Management Plan ("RMP") and 1991 Oil and Gas EIS tiered to by the BLM have not analyzed or assessed the cumulative impacts of horizontal drilling and fracking, undermining the agency's assertion that this new form of oil and gas extraction does not pose significant impacts to the human environment. In response, the BLM conceded that, "[T]he RMP [and] the Oil and Gas EIS do not specifically analyze fracking and horizontal drilling[.]" EA at 161. The BLM nevertheless asserts that these underlying EISs do not "preclude such technologies being analyzed[.]" *Id*. BLM misses the point entirely. The issue here is not whether the agency is allowed to approve or analyze the impacts of horizontal drilling and fracking, the issue is whether the BLM has sufficiently analyzed and assessed the cumulative impacts of this new extraction technique such that it can justify a FONSI. Here, no such cumulative analysis or assessment has been completed.

In spite of the BLM's assertion that the potential impacts of horizontal drilling and fracking have been analyzed in the EA, as well as the USFS's Final EIS, neither address the cumulative impacts of horizontal drilling and fracking in the Royal Gorge Field Office. In particular, as WildEarth Guardians explained at length in comments on the draft EA, there is no analysis and assessment of the agency's updated 2012 reasonably foreseeable development scenario ("RFDS") to water quantity, water quality, air quality, greenhouse gas emissions and climate. For instance, neither the EA nor the USFS's EIS disclose, analyze, or assess the cumulative water depletions that will result from the BLM's RFDS. Further, Neither the EA nor the USFS's analyze or assess cumulative impacts to water quality.

With regards to air quality, the EA and the EIS actually disclose some cumulative analysis showing massive increases in emissions and that oil and gas development will contribute to future violations of National Ambient Air Quality Standards ("NAAQS"), including the ozone NAAQS. *See* EA at 26 and 29; *see also* Colorado Air Resources Management Modeling Study report cited in USFS EIS and EA. The BLM dismisses such cumulative impacts as insignificant, yet there is no explanation as to how the agency determined cumulative contributions to violations of the NAAQS would not be significant. The EA discloses, for example, that the contribution to the annual fourth maximum 8-hour ozone concentration from oil and gas development in the Royal Gorge Field Office could be as high as 0.9 parts per billion. Although this represents 1.2% of the current NAAQS, the EPA has determined that sources contributing 1% or more to a nonattainment or maintenance problem represent "significant" contributors. *See* 76 Fed. Reg. 48,208, 48,236 (Aug. 11, 2011). For ozone, this would mean any source contributing 0.75 parts per billion to a region's nonattainment would be considered significant.

The failure to adequately analyze and assess cumulative ozone impacts is especially troublesome because the EPA has proposed to lower the current NAAQS from 0.075 parts per billion to potentially as low as 0.060 parts per million. *See* 79 Fed. Reg. 75,234 (Dec. 17, 2014). Given that the NAAQS are set based solely on what is necessary to protect public health (*see Am. Trucking Ass'n v. Whitman*, 531 U.S. 457 (2001)), this indicates the cumulative impacts to public health from air pollution would be more severe than the BLM has acknowledged, further underscoring the lack of support for a FONSI.

The BLM asserts that cumulative air quality impacts will apparently be more robustly addressed at a later time, and that additional analysis and decisions will be made at some undetermined point in the future. *See* EA at 29. While this may be the case, the fact that BLM may conduct additional analysis at a later point in time does not serve to demonstrate that the impacts of leasing the aforementioned lease parcels are not significant under NEPA. In fact, nowhere in the definition of "significantly" under the CEQ's NEPA regulations is it apparent that an assessment of significance can be based on a promise of future analysis. 40 C.F.R. § 1508.27.

The BLM's "kicking the can down the road" approach to air quality is all the more egregious given that the agency has not proposed to impose any stipulations that would allow the denial of future development on the basis of air quality considerations or even to require any future air quality analysis. The only stipulation proposed is CO-56, which simply states that additional air quality analysis "may be" required. EA at 142. This does not serve to ensure the

BLM retains any meaningful discretion to mitigate future impacts such that the reasonably foreseeable cumulative impacts of leasing would not be significant under NEPA.

The BLM has only three valid and reasonable options for addressing the failure of the EISs to which the agency tiers to address the potentially significant impacts of horizontal drilling and fracking: (1) The BLM must revise or supplement the underlying EISs prior to issuing any of the aforementioned lease parcels; (2) The BLM must prepare a stand-alone EIS for the proposed lease parcels; or (3) The BLM must refrain from offering for sale and issuance the proposed lease parcels. The agency has proposed to do neither of these three options, rendering its proposed action, including its proposed FONSI, wholly deficient under NEPA.

b. The BLM Failed to Analyze and Assess the Greenhouse Gas and Climate Impacts of the Proposed Leasing

The BLM rejected both analyzing and assessing the greenhouse gas emissions that would result from reasonably foreseeable greenhouse gas development, as well as failed to analyze and assess the costs of carbon dioxide emissions that would result. On the former issue, the agency asserted that it is not appropriate to conduct an analysis of greenhouse gas emissions at the leasing stage. On the latter issue, the agency asserted that carbon costs would be "negligible" because of its assertion that greenhouse gas emission would be similarly "negligible." The agency's claims are not supported and fail to demonstrate that the greenhouse gas emissions and climate impacts resulting from the impacts of reasonably foreseeable oil and gas development would not be significant.

It is first critical to point out that the BLM's position in the Royal Gorge Field Office is completely inconsistent with the agency's actions elsewhere in the western U.S. Other Field Offices, including, but not limited to, the Four Rivers Field Office in Idaho, the Billings Field Office in Montana, the Miles City Field Office in Montana, and even other Field Offices in Colorado have estimated reasonably foreseeable greenhouse gas emissions associated with the development of oil and gas leases. Further, in many cases, the BLM has even quantified costs of these emissions using the federal government's social cost of carbon protocol.

In the Four Rivers Field Office of Idaho, the BLM utilized an emission calculator developed by air quality specialists at the BLM National Operations Center in Denver to estimate likely greenhouse gases that would result from leasing five parcels. *See* Exhibit 1, BLM, "Little Willow Creek Protective Oil and Gas Leasing," EA No. DOI-BLM-ID-B010-2014-0036-EA (February 10, 2015) at 41, available online at https://www.blm.gov/epl-front-office/projects/nepa/39064/55133/59825/DOI-BLM-ID-B010-2014-0036-EA_UPDATED_02272015.pdf (last accessed March 16, 2015). Relying on a report prepared in 2014 for the BLM by Kleinfelder Inc., which estimated oil and gas well emissions throughout the western United States, the agency estimated that 2,893.7 tons of carbon dioxide equivalent ("CO_2e") would be released per well. *Id*. at 35.[4] Based on the analyzed alternatives, which

[4] The Kleinfelder report cited by BLM in the EA for the Idaho oil and gas lease sale is referenced by the agency as follows:

projected between 5 and 25 new wells, the BLM estimated that total greenhouse gas emissions would be between 14,468.5 tons and 72,342.5 tons annually. *Id*. The BLM further utilized the social cost of carbon protocol to analyze and assess the costs of oil and gas leasing. Using a 3% average discount rate and year 2020 values, the agency estimated the cost of carbon to be $51 per ton of annual CO_2e increase. *See Id*. at 81. Based on this estimate, the agency calculated the total carbon cost of developing 25 wells on five lease parcels to be $3,689,442 annually. *Id*. at 83.

In both the Billings and Miles City Field Offices of Montana, the BLM also estimated likely greenhouse gas emissions from development of oil and gas leases. To do so, the agency first calculated annual greenhouse gas emissions from oil and gas activity within the Field Offices. *See* Exhibit 2, BLM, "Environmental Assessment for October 21, 2014 Oil and Gas Lease Sale," DOI-BLM-MT-C020-2014-0091-EA (May 19, 2014) at 51, available online at http://www.blm.gov/style/medialib/blm/mt/blm_programs/energy/oil_and_gas/leasing/lease_sales/2014/oct__21_2014/july23posting.Par.88257.File.dat/BiFO%20Oct%202014%20EA.pdf (last accessed March 16, 2015) and Exhibit 3, BLM, "Environmental Assessment for October 21, 2014 Oil and Gas lease Sale," DOI-BLM-MT-0010-2014-0011-EA (May 19, 2014) at 47, available online at http://www.blm.gov/style/medialib/blm/mt/blm_programs/energy/oil_and_gas/leasing/lease_sales/2014/oct__21_2014/july23posting.Par.25990.File.dat/MCFO%20EA%20October%202014%20Sale_Post%20with%20Sale%20(1).pdf (last accessed March 16, 2015). The BLM then calculated total greenhouse gases by assuming that the percentage of acres to be leased within the federal mineral estate of the Field Offices would equal the percentage of emissions. *Id*. Although we have concerns over the validity of this approach to estimate emissions (an "acre-based" estimate of emissions is akin to estimating automobile emissions by including junked cars, which has the misleading effect of reducing the overall "per car" emissions), nevertheless it demonstrates that the BLM has the ability to estimate reasonably foreseeable greenhouse gas emissions associated with oil and gas leasing and that such estimates are valuable for ensuring a well-informed decision.[5] To boot, the BLM further estimated "the annual SCC [social cost of carbon] associated with potential development on lease sale parcels." Exhibit 3 at 76. In conducting its analysis, the BLM used a "3 percent average discount rate and year 2020 values," presuming social costs of carbon to be $46 per metric ton. *Id*. Based on its estimate of greenhouse gas emissions, the agency estimated total carbon costs to be "$38,499 (in 2011 dollars)." *Id*.

> Kleinfelder, Inc., and Environ International Corporation. 2014. Air emissions inventory for a representative oil and gas well in the western United States. Developed under contract with the Bureau of Land Management, updated March 21, Littleton, CO.

Exhibit 1 at 90. Despite requests to Idaho BLM, this report has not yet been provided to WildEarth Guardians. The BLM explains that the Kleinfelder report, "provides detailed emission estimates of criteria pollutants, greenhouse gases (GHG), and key hazardous air pollutants (HAPs) anticipated to be released during each phase of oil and gas development for a representative oil and gas well in the United States." *Id*. at 113.

[5] In addition to the Billings and Miles City Field Offices, the BLM estimated greenhouse gas emissions associated with oil and gas leasing in the Butte and Dillon Field Offices.

Although the BLM may assert that such greenhouse gas data information is not useful because of its perceived "speculative" nature, there is no basis for such a claim (particularly given that other BLM Field Office's clearly do not agree). Using the agency's own logic, this would mean that any analysis of future environmental impacts would be of "no value" because future predictions are inherently uncertain. Of course, this would completely undermine NEPA's mandate that significance be based on "uncertain[ty]." 40 C.F.R. § 1508.27(b)(5). Indeed, if the climate impacts of oil and gas leasing are, as the BLM asserts, so uncertain, then an EIS is justified. As CEQ states, whether or not impacts are significant, and therefore trigger the need to prepare an EIS, are based on whether impacts are "highly uncertain or involve unique or unknown risks." *Id*. The BLM cannot summarily dismiss significant issues, such as climate change, on the basis of uncertainty without assessing whether this uncertainty necessitates preparation of an EIS.

Overall, the BLM appears to believe that analyzing and assessing greenhouse gas emissions from the reasonably foreseeable impacts of oil and gas development is too speculative, and therefore not warranted. At the same time, in the USFS's EIS, likely emissions of non-greenhouse gases, including nitrogen oxides ("NO_x") and volatile organic compounds ("VOCs"), are actually analyzed. *See* EIS at 156. The BLM cannot assert that it was reasonable or appropriate to estimate these emissions, yet not reasonable or appropriate to estimate greenhouse gas emissions.

Adding to the shortcomings in the EA and EIS is that the BLM failed to analyze the cumulative impacts of greenhouse gas emissions from past, present, and reasonably foreseeable oil and gas development. This is particularly troubling because the BLM has been analyzing reasonably foreseeable cumulative greenhouse gas emissions in other Colorado Field Offices. In the Little Snake Field Office, for example, the BLM estimated reasonably foreseeable carbon dioxide emissions from oil and gas development to be up to 828,987 tons per year. *See* Exhibit 4, BLM, "Environmental Assessment for the Little Snake Field Office February 2015 Competitive Oil & Gas Lease Sale," DOI-BLM-CO-N010-2014-0031-EA (August 2014) at 23, available online at http://www.blm.gov/style/medialib/blm/co/programs/oil_and_gas/Lease_Sale/2015/february_2015.Par.91717.File.dat/Feb_2015_EA_Final.pdf (last accessed March 16, 2015). It is unclear why the BLM could not present similar estimates of reasonably foreseeable greenhouse gas emissions, particularly given that the agency relied on the Colorado Air Resources Management Modeling Study, or CARMMS report in the Little Snake EA, the same CARMMS report referenced in the agency's current EA and the USFS's EIS.[6]

With regards to carbon costs, the agency summarily dismissed conducting any such assessment, variously claiming that it would be "challenging," would not be useful, would be "misleading" and that future climate impacts would be "negligible." EA at 169-171. The

[6] WildEarth Guardians has attempted to obtain the greenhouse gas inventory prepared for the Royal Gorge Field Office as part of the CARMMS report. Thus far, the agency has not been able to provide this data, indicating that it was not utilized by the BLM as part of its analysis of the proposed lease parcels. *See* Exhibit 5, E-mail String Between Jeremy Nichols, WildEarth Guardians, and Chad Meister, BLM (indicating greenhouse gas inventory data would not be made available until mid-April).

USFS's EIS similarly dismisses conducting any such assessment of carbon costs. *See* EIS at 316-318. These claims are not supported. The BLM already conducted social cost of carbon analyses in the context of oil and gas leasing, indicating the analysis is not challenging, useful, not misleading, and that it provides data that is important for ensuring a well-informed decision under NEPA. Furthermore, the burgeoning body of scientific and government data, which WildEarth Guardians provided to both the BLM and the USFS, do not support these claims. The agency's refusal to quantify carbon costs is therefore contrary to NEPA.

c. The BLM Failed to Analyze and Assess Other Air Quality Impacts

The BLM failed to adequately analyze and assess the air quality impacts that would result from reasonably foreseeable oil and gas development. We are particularly concerned as it appears no actual analysis and assessment of impacts to the 1-hour nitrogen dioxide NAAQS, the 24-hour particulate matter ("$PM_{2.5}$") NAAQS (including secondary $PM_{2.5}$ impacts formed from $PM_{2.5}$ precursors NOx and sulfur dioxide), and the annual $PM_{2.5}$ NAAQS.

Again, the BLM appears to assert that development is speculative and that no analysis is required. However, emissions of pollutants that cause or contribute to nitrogen dioxide and $PM_{2.5}$ are a reasonably foreseeable consequence of issuing the proposed leases and thus an actual analysis and assessment of air quality impacts is required to support any FONSI under NEPA. The need to conduct such an analysis at the leasing stage is underscored by the fact that no stipulations have been proposed to actually limit air quality impacts or to require any actual future analysis. As explained, the only stipulation proposed is CO-56, which simply states that additional air quality analysis "may be" required. EA at 142. This does not serve to ensure the BLM retains any meaningful discretion to mitigate future effects such that the reasonably foreseeable air pollution impacts of leasing would not be significant under NEPA.

2. The BLM Failed to Comply With General Conformity Requirements Under the Clean Air Act

Although many of the proposed lease parcels are located in the Denver Metro/North Front Range ozone nonattainment area, the BLM asserts it is not obliged to comply with the Clean Air Act's requirement that federal actions conform to the applicable state implementation plan ("SIP"). *See* 42 U.S.C. § 7506. Its position, however, is based on erroneous interpretations of the Clean Air Act and its underlying regulations, and indicates that the BLM's proposed leasing will continue to fuel dangerous levels of ozone pollution in the region, jeopardizing public health.

The Clean Air Act states that, "No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity" that does not conform to an approved state air quality implementation plan. 42 U.S.C. § 7506(c)(1). "The assurance of conformity . . . shall be an affirmative responsibility of the head of such . . . agency." To ensure conformity, agency actions must not "cause or contribute to any new violation of any [air quality] standard" or "increase the

frequency or severity of any existing violation of any standard in any area." *Id.* § 7506(c)(1)(B). This statute is very broadly applicable.

Pursuant to Clean Air Act regulations and the Colorado SIP the BLM is prohibited from undertaking any activity in a nonattainment area that does not conform to an applicable SIP. *See* 40 C.F.R. § 93.150(a); *see also* Colorado SIP at Air Quality Control Commission Regulation No. 10, Part A (*see also* 64 Fed. Reg. 63,206 (Nov. 19, 1999), approving Colorado SIP incorporating 40 C.F.R. § 51, Subpart W (1994)). Specifically, the BLM must make a general conformity determination for any activity authorized in an ozone nonattainment area that has direct and indirect emissions of VOCs or NOx that exceed 100 tons/year. *See* 40 CFR § 93.153(b)(1). Direct emissions are defined as those emissions that are caused or initiated by the Federal action and occur at the same time and place as the action. Indirect emissions are defined as those emissions that are caused by the Federal action, but may occur later in time or distance, and are reasonably foreseeable, and which the Federal agency can practically control and will maintain control over. *See* 40 C.F.R. § 93.152. To demonstrate conformity, the agency must follow the procedures at 40 CFR §§ 93.158 and 93.159. *See* 40 CFR §§ 93.150(b).

In the EA, BLM recognizes that it "must demonstrate that the proposed action meets the requirements of the General Conformity rule." EA at 15. BLM further recognizes that the future development of leases offered as a result of the proposed action "will result in emissions of [ozone forming pollutants]." *Id.* at 21. Unfortunately, BLM then asserts that it will not analyze whether the proposed action is in conformity with the SIP, instead promising to do so in subsequent analyses.

The basis for kicking the can down the road appears to be that the BLM believes leasing "would not result in any direct emissions of air pollutants." EA at 21. As BLM must know, however, direct emissions alone are not the basis for a requirement to perform a conformity determination. A general conformity determination is required if indirect emissions would exceed 100 tons per year of target pollutants. 40 CFR § 93.153(b)(1). Indirect emissions are defined as those:

> (1) That are caused or initiated by the Federal action and originate in the same nonattainment or maintenance area but occur at a different time or place as the action;
> (2) That are reasonably foreseeable;
> (3) That the agency can practically control; and
> (4) For which the agency has continuing program responsibility.

40 C.F.R. § 93.152. Leasing is clearly a cause of future project emissions—if there are no leases, there are no new emissions. Those emissions are caused and initiated by the proposed action. They originate in the same nonattainment area, but simply at a later time. They are reasonably foreseeable as BLM acknowledges in the EA. BLM can practically control those emissions in a number of ways including, but not limited to, by choosing not to lease certain areas or by including stipulations that require limits on emissions or emitting practices. The agency has continuing program responsibility for those emissions, both through subsequent permit actions and ongoing inspection and enforcement oversight.

All evidence supports the fact that the proposed leasing is a federal action that will produce—whether directly or indirectly—NOx and/or VOC emissions that are likely to exceed *de minimis* thresholds. To this end, the agency must provide an accurate emissions inventory to the public and the decisionmaker and perform a conformity determination. The preferred alternative will certainly show an emissions level above *de minimis*, requiring a general conformity determination. The proposed leasing cannot proceed until this occurs.

The requirement to perform a conformity determination at the time of leasing is not only supported by the plain language of the Clean Air Act, but is in perfect synch with the spirit of that law. Congress intended a very broad application of the conformity provision to prevent the federal government from undermining states when it came to attainment of air quality standards. The law very clearly states that no agency, including the BLM, "shall engage in [or] support in any way . . . any activity" that does not conform to a SIP. 42 U.S.C. § 7506(c)(1). Further, meeting this requirement requires an "assurance of conformity" which is "the affirmative responsibility" of the BLM. *Id*. Leasing public minerals for development is surely engaging in an activity or supporting an activity that will lead to an increase in emissions of ozone precursors.

Further, it seems clear that it was not Congress' intent that BLM could forego analysis of ozone emissions in a nonattainment area until the last possible moment, then carve up those emissions inventories by reducing analyses to a well-by-well basis. The end result of such a process could be that no one well ever exceeded *de minimis* levels, but the tens of thousands in the nonattainment area, with thousands more being approved every year, could make attainment of the ozone standard by the State of Colorado simply impossible.

BLM offers various excuses for avoiding its Clean Air Act obligations, none of which have any merit. First, the BLM argues because the proposed action is "similar to" an exempted action, the proposed action is also exempt. EA at 23. That argument is incorrect on its face. An action is exempt if it meets the definition for exemption, not if it is "similar to" an exempted action. The exemption in question is for "[t]ransfers of ownership, interests, and titles in land, facilities, and real and personal properties, regardless of the form or method of the transfer." 40 C.F.R. § 93.153(c)(2)(xiv). Of course, the problem BLM faces with this argument is that the proposed action does not result in the transfer or ownership of anything to anyone. A lease does not convey ownership, interest, or title. A lease simply conveys a right to use publicly owned oil and gas and the right of the lessee to occupy and develop oil and gas. The United States of America retains ownership, interest, and title in the minerals at issue, and therefore leasing does not meet the exemption set forth at 40 C.F.R. § 93.153(c)(2)(xiv).

BLM's second attempt at sidestepping conformity responsibilities comes through the claim that future indirect emissions are not reasonably foreseeable. *See* EA at 24. The agency claims that if or how lease parcels will be developed is so speculative that it is impossible to determine whether emissions might exceed *de minimis* levels. Therefore, according to BLM, a reasonably foreseeable emission inventory cannot be produced. Evidence to the contrary is abundant.

First, the very basis of this lease sale is that potential buyers have gone to the trouble of assessing these very parcels for sale and have nominated them with that intent. There is no incentive to do so unless they intend to develop these parcels. Further, BLM has produced a document whose very name underlies any claim of unforeseeability. On March 12, 2012, BLM published a its RFDS for the Royal Gorge Field Office. The document has divided the Royal Gorge area into eight different categories of oil drilling potential based on the number of wells per township that any given area could support. *See* RFDS at 26. This system allows BLM to project a future number of wells to be developed with what the agency demonstrates is a high level of precision—12,355 wells over the next 20 years. *Id*. at 27. Further, BLM is then able to break down its estimate for the number of wells to be drilled inside and outside of the air quality non-attainment area. *Id*. at 28-29. A similar break out is provided for lands managed by BLM and by the USFS. *Id*. at 29. Not just well numbers, but specific production numbers are also found to be reasonably foreseeable. Even the BLM has been able to utilize this data to project reasonably foreseeable future VOC and NOx emissions through the CARMMS report. BLM offers no rationale as to why specific detailed emissions estimates are reasonably foreseeable for all development in the Royal Gorge Field Office, yet not for the proposed lease parcels.

The third attempt to support a lack of reasonable foreseeability is based on BLM's claim that the proposed action is "similar to" Initial Outer Continental Shelf ("OCS") lease sales. This is a specific activity defined by regulation to involve potential emissions that are not reasonably foreseeable. 40 C.F.R. § 93.153(c)(3). There is no basis for BLM to assert that this exemption shields the proposed leases at issue here. For one thing, EPA could have included all lease sales in the exemption—not just outer continental shelf lease sales—when writing its regulations, but did not. Clearly, onshore oil and gas leases were not included. Finally, the regulation expressly states that the exemption applies only to OCS lease sales "which are made on a broad scale." The proposed leases have not been made on a "broad scale," but rather are explicitly identified parcels with potential oil and gas development. The exemption at 40 C.F.R. § 93.153(c)(3) has no applicability to the proposed leases.

The final of BLM's three arguments claiming exemption from the conformity requirements is based on 40 C.F.R. § 93.153(d)(1), which states:

> Notwithstanding the other requirements of this subpart, a conformity determination is not required for the following Federal actions (or portion thereof):
>
> (1) The portion of an action that includes major or minor new or modified stationary sources that require a permit under the new source review (NSR) program (Section 110(a)(2)(c) and Section 173 of the Act) or the prevention of significant deterioration program (title I, part C of the Act).

From the face of the regulation it is clear that this exemption only applies to those portions of the proposed action that will require a NSR or prevention of significant deterioration permit. Be that as it may, a number of activities related to the development of oil and gas are not subject to NSR or prevention of significant deterioration permitting requirements, including fugitive emission sources (e.g., equipment leaks, well completions, etc.), stationary sources subject to state-only air quality rules, and non-road mobile sources, including drilling rigs. The BLM does not identify

these sources of emissions or otherwise explain why a conformity determination is not required in light of the fact that its decision will authorize actions that will not be subject to permitting.

Even if it could possibly be correct that the BLM could be allowed to avoid Clean Air Act general conformity obligations at the leasing stage, then the agency would still run afoul of the Clean Air Act because it has never assured that ongoing implementation of the Royal Gorge RMP, particularly implementation of RMP-level oil and gas decisions within the Denver Metro/North Front Range ozone nonattainment area, conforms to the Colorado SIP. This is incredibly disconcerting as both the RMP and the 1991 oil and gas decision for the Royal Gorge Field Office clearly constitute federal actions that are subject to conformity requirements. For one thing, both the RMP and the 1991 oil and gas decision constitute an "activity" engaged in by the BLM. Furthermore, both decisions are clearly leading to indirect emissions in the Denver Metro/North Front Range ozone nonattainment area. Not only have these decisions "caused or initiated" activities that are producing or will produce reasonably foreseeable air emissions, namely the proposed leasing and other related site-specific oil and gas development, but the emissions are a "reasonably foreseeable" consequence of the decisions, they can be "practically control[led]," and the BLM has "continuing program responsibility." 40 C.F.R. § 93.152.

Thus, if BLM may be correct that under the Clean Air Act, it can avoid general conformity obligations when leasing, the agency is still barred from offering for sale and issuance leases in the Denver Metro/North Front Range ozone nonattainment area unless and until it assures that its programmatic decisions conform to the Clean Air Act. The need for the BLM to assure conformity at the programmatic level is underscored by the fact that the agency itself discloses that reasonably foreseeable oil and gas development in the Royal Gorge Field Office will increase VOC emissions by 119,674 tons per year and NOx emissions by 32,546 tons per year. *See* EA at 26. Clearly these emissions are not only reasonably foreseeable, but above *de minimis* thresholds of 100 tons per year.

3. The BLM Has Failed to Comply With Section 7 of the Endangered Species Act

The EA and USFS's EIS fail to demonstrate that the BLM will ensure compliance with Section 7 of the Endangered Species Act if the aforementioned oil and gas lease parcels are issued. Section 7 requires federal agencies to "consult" with the U.S. Fish and Wildlife Service to ensure "any action authorized, funded, or carried out by such [agencies]" does not jeopardize the existence of or destroy or adversely modify the critical habitat of species listed under the Endangered Species Act. 16 U.S.C. § 1536(a)(2). To this end, "formal consultation" is required for "any action [that] may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Of particular concern is that the BLM has not consulted over the impacts of its leasing decision to threatened and endangered species that inhabit the Platte River drainage downstream of where the lease parcels are located, including the pallid sturgeon, whooping crane, piping plover, and least tern, even though these species will be "affected" by the reasonably foreseeable development of all of the proposed lease parcels.

Here, there appears to be no question that the act of leasing, or conveying the right for the oil and gas industry to develop federally managed minerals, "may affect" the pallid sturgeon,

whooping crane, piping plover, and least tern through reasonably foreseeable water depletions in the Platte River drainage. The USFS's EIS expressly discloses that water depletions "may affect and [are] likely to adversely affect" the whooping crane, piping plover, and least tern. EIS at 122-123. Although the EIS asserts that "[a]ctual effects determinations to pallid sturgeon have not been made" (EIS at 111), the fact that the whooping crane, piping plover, and least tern are likely to be adversely affected indicates the pallid sturgeon will be similarly affected as all species depend on water flows in the Platte River drainage. It is notable that the EIS discloses that "[a]dditional water withdrawn from the South Platte River would cause adverse impacts to the Pallid Sturgeon[.]" EIS at 99. In light of this, the duty to enter into formal consultation in accordance with 50 C.F.R. § 402.14 is crystal clear.

The BLM, however, clearly disagrees. In response to comments on this issue, the agency asserted that formal consultation is not required because its action "does not result in any water depletion" and because consultation will be completed "before any APD [application for permit to drill]" is approved. EIS at 332; *see also* EA at 172. These assertions, however, do not serve to absolve the agency from its duty to consult under section 7.

Although the BLM may believe it is not obligated to consult under section 7 at the leasing stage, this belief is misplaced. Federal agencies must consult whenever their actions "may affect" a listed species. "Action" is broadly defined to include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies" and includes "the granting of [] leases" or "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. Here, the decision to lease clearly constitutes an action under the Endangered Species Act. Further, while leasing itself may not lead to direct effects, the USFS's EIS readily acknowledges that the reasonably foreseeable consequence of leasing will be 7,140 acre-feet or more of water depletions that are likely to adversely affect threatened and endangered species in the Platte River downstream of the Pawnee.

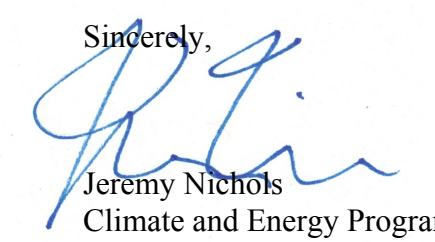
As to postponing consultation until the APD stage, nothing in the Endangered Species Act suggests that an agency can forego formal consultation where its decision "may affect" listed species and their habitats. Indeed, agencies are required to review their actions "at the earliest possible time to determine whether any action may affect listed species or critical habitat." *Id*. § 402.14(a). Given this, there is no basis for the agency to defer consultation at this time. Indeed, it is this very "earliest possible time" obligation that prompted the U.S. District Court for the District of Colorado to hold that an agency's decision to make lands available for oil and gas leasing constitutes federal action triggering section 7 obligations. *See Wilderness Society v. Wisely*, 524 F. Supp.2d 1285, 1302 (D. Colo. 2007) (finding "earliest possible time" requirement triggered section 7 duties over BLM decision to make lands available for oil and gas leasing). Here, the BLM is not making lands available for leasing, but is actually moving to lease. The need to consult is all the more imperative.

The duty to consult at this time is underscored by the fact that the BLM currently has ample information to analyze and assess the impacts of projected water depletions to downstream species and that the agency has authority to limit water depletions. Indeed, leasing is a discretionary act. *See* 30 U.S.C. § 226(a) (lands "may be leased" by the Secretary of the Department of the Interior). The BLM could decide not to lease, thereby preventing impacts that

would otherwise occur. Further, the BLM has authority and discretion to impose stipulations to govern future development of leases such that affects to threatened and endangered species could be reduced or otherwise prevented.

Unless and until the BLM formally consults with the U.S. Fish and Wildlife Service, the agency cannot proceed to offer for sale and issuance the aforementioned lease parcels.

Sincerely,



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