May 10, 2019

*Comments and exhibits submitted via email*

U.S. Bureau of Land Management
Royal Gorge Field Office
Attn. Sharon Sales
3028 E. Main St.
Canon City, CO 81212
ssales@blm.gov

**Re: Comments on the Colorado BLM's Leases Under the Rights of Way Act of 1930, DOI-BLM-CO-F020-2019-0030-EA**

Dear Ms. Sales,

WildEarth Guardians submits the following comments on the U.S. Bureau of Land Management's ("BLM's") proposal under the Rights of Way Act of 1930 to lease four federally-owned mineral parcels within the Royal Gorge Field Office and the Denver Metro-North Front Range area.[1]

Guardians is a nonprofit environmental advocacy organization dedicated to protecting the wildlife, wild places, wild rivers, and health of the American West. On behalf of our members in Colorado and across the West, Guardians has an interest in ensuring the BLM fully protects public lands and resources as oversees the oil and gas industry's plans to lease publicly-owned minerals. More specifically, Guardians has an interest in ensuring the BLM meaningfully and genuinely takes into account the air, water, and climate implications of its oil and gas decisions, including objectively and robustly weighing the costs and benefits of authorizing the release of more greenhouse gas emissions known to contribute to global warming.

As detailed below, Guardians is concerned about the impacts these proposed leases will have on public health and air quality within the Denver Metro-North Front Range area. Thus, we request that BLM refrain from offering all the parcels up for lease under the Right-of-Way Act of 1930 unless and until the agency complies with the requirements of the National Environmental Policy Act of 1976 ("NEPA"), 42 U.S.C. §§ 4321–4370h; NEPA regulations promulgated thereunder by the White House Council on Environmental Quality ("CEQ"), 40 C.F.R. § 1500, et seq.; the Clean Air Act, 42 U.S.C. §§ 7401–7671q; and the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701–1787.

[1] BLM's ePlanning page for the proposed lease parcels is available at: https://eplanning.blm.gov/epl-front-office/eplanning/projectSummary.do?methodName=renderDefaultProjectSummary&projectId=120733. Although BLM posted a map of the proposed leases, BLM has not released any draft NEPA documents for review.

## I. Legal Background

### A. Right-of-Way Act of 1930

The Right-of-Way Act of 1930, 30 U.S.C. §§ 301–306 (hereinafter "30 Act"), grants the Secretary of Interior the power "to lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States" "[w]henever the Secretary of the Interior shall deem it to be consistent with the public interest[.]" 30 U.S.C. § 301. BLM has promulgated regulations to enact these provisions. *See* 43 C.F.R. Subpart 3109. Under these, BLM is required to make a finding that leasing is in the public interest before proceeding. *See* 43 C.F.R. § 3109.1-3; Exhibit 1, *Klamath-Siskiyou Wildlands Center*, IBLA 2019-75 at 6 (Apr. 29, 2019) (deciding that BLM's presumption that a right-of-way for logging was in the public interest was in error). BLM may not presume that the leases are in the public interest. Although neither Congress nor BLM have defined the term "public interest" in this context, courts have made clear under the Mineral Leasing Act, BLM does not have a mandate to lease lands. In fact, the Ninth Circuit has held that the MLA "allows the Secretary to lease such lands, but does not require him to do so. . . . [T]he Secretary has discretion to refuse to issue any lease at all on a given tract . . . we affirm the district court's holding that the agencies failed to give the no action alternative meaningful consideration and thereby violated NEPA." *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1229-30 (9th Cir. 1988) (internal citations omitted).

### B. NEPA

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

NEPA regulations explain that:

> Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

*Id.*

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. *Id.* § 1502.16(d); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (holding that NEPA imposes "action forcing procedures . . . requir[ing] that agencies take a *hard look* at environmental consequences"). To this end, the agency must analyze the "direct," "indirect," and "cumulative" effects of its actions, and assess their significance. *Id.* §§ 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." *Id.* § 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.* § 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. *Id.* § 1508.7.

Generally, an agency may prepare an EA to analyze the effects of its actions and assess the significance of impacts. *See id.* § 1508.9; *see also* 43 C.F.R. § 46.300. Where impacts are not significant, an agency may issue a Finding of No Significant Impact ("FONSI") and implement its action. *See* 40 C.F.R. § 1508.13; *see also* 43 C.F.R. § 46.325(2). But, where effects are significant, an agency must prepare an Environmental Impact Statement ("EIS"). *See* 40 C.F.R. § 1502.3.

Federal agencies determine whether direct, indirect, or cumulative impacts are significant by accounting for both the "context" and "intensity" of those impacts. *Id.* § 1508.27. Context "means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality" and "varies with the setting of the proposed action." *Id.* § 1508.27(a). Intensity "refers to the severity of the impact" and is evaluated according to several additional elements, including: the unique characteristics of the geographic area such as ecologically critical areas; the degree to which the effects are likely to be highly controversial; the degree to which the possible effects are highly uncertain or involve unique or unknown risks; and whether the action has cumulatively significant impacts. *Id.* §§ 1508.27(b)(3), (4), (5), (7).

Within an EA or EIS, the scope of the analysis must include "[c]umulative actions" and "[s]imilar actions." *Id.* §§ 1508.25(a)(2) and (3). Cumulative actions include action that, "when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id.* § 1508.25(a)(2). Similar actions include actions that, "when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together." *Id.* § 1508.25(a)(3). Key indicators of similarities between actions include "common timing or geography." *Id.*

### C. Clean Air Act

The Clean Air Act requires EPA to set National Ambient Air Quality Standards ("NAAQS") to protect public health and welfare. 42 U.S.C. § 7409. After EPA designates NAAQS, states then develop State Implementation Plans ("SIPs") in order to implement, maintain, and enforce the NAAQS. *Id.* § 7410(a)(1).

Federal agency actions must comply with SIPs. Specifically, under the Clean Air Act's "general conformity rules" "[n]o 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 SIP. 42 U.S.C. § 7506(c)(1). "The assurance of conformity . . . shall be an affirmative responsibility of the head of such . . . agency." *Id.* Thus, federal agency actions must not 1) "cause or contribute to any new

violation of any [air quality] standard," 2) "increase the frequency or severity of any existing violation of any standard in any area," 3) or "delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." *Id.* § 7506(c)(1)(B).

EPA has designated parts of the Denver Metro-North Front Range area, including part of Adams County where the project is located, *see* EA at 2, as in nonattainment with both the 2008[2] and 2015[3] NAAQS for ozone. Ozone is a compound harmful to human health that is created when volatile organic compounds ("VOCs") and nitrogen oxides ("NOx") react with sunlight.[4] As a result of EPA's designation, the State of Colorado has enacted a SIP which includes provisions to control ozone formation within the Denver Metro-North Front Range 8-hour Ozone Non-Attainment Area.[5] Thus, for each activity permitted by a federal agency within the Denver Metro-North Front Range ozone nonattainment area, BLM must complete an "applicability analysis" to determine if a formal conformity determination is needed. *See* 40 C.F.R. § 93.152 (defining applicability analysis).

In a moderate nonattainment area,[6] any activity which has direct and indirect emissions of VOCs or NOx that equal or exceed 100 tons/year requires a formal conformity determination. *Id.* § 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. *Id.* § 93.152. 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. *Id.*

Notwithstanding these provisions, EPA's conformity regulations exempt from emissions calculations "[t]he 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 [Clean Air] Act) or the [Clean Air Act's] prevention of significant deterioration program (title I, part C of the Act)." *Id.* § 93.153(d)(1) (hereinafter "NSR exemption"). EPA has interpreted this exemption narrowly. *See* EPA, Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 63,214, 63,232 (Nov. 30, 1993) (explaining in response to a request to expand activities subject

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[2] EPA, Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas for the 2008 Ozone National Ambient Air Quality Standards, 81 Fed. Reg. 26,697, 26,700 (May 4, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-05-04/pdf/2016-09729.pdf#page=1 (hereinafter "2016 Reclassification").

[3] EPA, Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards, 83 Fed. Reg. 25,776, 25,792, https://www.gpo.gov/fdsys/pkg/FR-2018-06-04/pdf/2018-11838.pdf#page=1.

[4] EPA, *Ozone Pollution*, https://www.epa.gov/ozone-pollution, (last visited Apr. 23, 2019).

[5] Colorado's entire SIP is available online at 5 Colo. Code Regs. §§ 1001-01–06, 08, 09, 12–14, 18, 20 (2018), https://www.sos.state.co.us/CCR/NumericalCCRDocList.do?deptID=16&agencyID=7; *see also EPA Approved Statutes and Regulations in the Colorado SIP*, https://www.epa.gov/sips-co/epa-approved-statutes-and-regulations-colorado-sip (last visited Apr. 15, 2019). The provisions applicable to the 8-hour ozone nonattainment area are found at 5 Colo. Code Regs. § 1001-09 XII, XVI (2018), https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=7774&fileName=5%20CCR%201001-9.

[6] EPA designated the Denver Metro-North Front Range 8-hour Non-attainment Area as in moderate nonattainment with the 2008 standards on May 4, 2016. EPA, 2016 Reclassification, *supra*, at 26,699.

the NSR exemption to those where an air quality analysis occurs, that "an air quality analysis is not adequate by itself to justify an exemption from the conformity rules since it does not sure that actions would be prohibited, as necessary to prevent a NAAQS violation"); *see also* Exhibit 2, EPA Comments on the Normally Pressured Lance Natural Gas Development Project Draft Environmental Impact Statement (concluding that the NSR exemption only applies to stationary emissions sources permitted under a federally-approved state permitting program and that drill rigs did not count as stationary sources).

EPA's general conformity provisions require federal agencies to involve the public in their conformity decisions. Specifically, "[u]pon request by any person regarding a specific Federal action, a Federal agency must make available, subject to the limitation in paragraph (e) of this section, for review its draft conformity determination under § 93.154 with supporting materials which describe the analytical methods and conclusions relied upon in making *the applicability analysis* and draft conformity determination." *Id.* § 93.156(a) (emphasis added).

## II. Arguments

### A. BLM Must Hold a Public Comment Period and Protest Period.

To start, we object to BLM's proposal to lease the 30 Act lands without the full public participation required under NEPA and FLPMA. NEPA regulations mandate that agencies "shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in the decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(d). Indeed, "NEPA procedures must insure that environmental information is available to public officials and citizens *before decisions are made and before actions are taken* . . . . Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *Id.* § 1500.1(b) (emphasis added); *see also id*. § 1501.4(b) (Agencies must "involve . . . the public, to the extent practicable"); *id*. § 1506.6 ("Agencies shall: . . . (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures").

FLPMA similarly requires meaningful public participation in public lands management decisions. 43 U.S.C. § 1739(e). Under it, BLM is required to "establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and *execution of plans* and programs for, and the management of, the public lands." *Id.* (emphasis added).

BLM frequently allows for 30-day comment periods on draft NEPA documents for its quarterly lease sales held under the Mineral Leasing Act ("MLA"). Clearly, holding a comment period here is practicable. Indeed, NEPA arguably mandates a comment period. A federal court in Idaho recently held that "[i]t is well-settled that public involvement in oil and gas leasing is required under FLPMA and NEPA." *Western Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1235 (D. Idaho 2018). Thus, we request that BLM hold a 30-day comment period after it issues its draft EA. We also request that BLM hold a protest period as it does for quarterly lease sales under the MLA. *See* 40 C.F.R. § 3120.1-3. Again, such a process is practicable and arguably mandated by NEPA and FLMPA.

### B. The Leases Are Not In the Public Interest.

As noted above, under the 30 Act, BLM is required to make a finding as to whether the proposed leases are in the public interest. *See* 43 CFR § 3109.1-3. We believe that numerous factors make it clear that these leases are not in the public interest.

Colorado is undergoing a transformation. Population is growing at the same time that oil and gas development extraction is occurring closer and closer to homes. To date, there are approximately 20,000 active oil and gas wells in the Denver Metro area.

Oil and gas is the largest polluter in the Denver Metro-North Front Range area in terms of ozone precursors.[7] The Denver Metro-North Front Range area has been exceeding federal air quality standards for ozone for almost a decade.

Development on 30 Act lands significant and accounts for 24% of BLM well spuds in the Denver Metro area.[8] BLM admits in its recent addendum to the Royal Gorge Field Office's Reasonably Foreseeable Development Scenario ("RFDS"), that the agency has not fully accounted for all of the wells drilled within federal rights-of-way under the 1930 Act, and that development on these lands could result in up to 496 new wells.[9] No current NEPA document analyzes the full impacts of these wells on air quality.

Thus, unless and until Denver's ozone levels are in compliance with federal ozone, additional leasing for oil and gas will harm public health and welfare and ultimately not in the public interest.

Finally, BLM must consider the state legislature's recent actions to lessen the impacts of oil and gas in the area and give local communities more control over development through the passage of Senate Bill 19-181.[10] SB 19-181 will result in significant rulemaking before both the Colorado Oil and Gas Conservation Commission ("COGCC") and the Colorado Department of Public Health and Environment ("CDPHE"). Indeed, the COGCC has proposed draft criteria to evaluate which drilling permits to postpone while it engages in rulemaking.[11] One of the proposed criteria is whether the permit is within the nonattainment area.[12] BLM's continuing

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[7] Exhibit 2, Colorado Dep't of Public Health & Environ., PowerPoint Presentation by Chris Colclasure, Deputy Director of the Air Pollution Control Division: Air Quality & Ozone in Colorado (Aug. 15, 2018).

[8] *See* Exhibit 3, BLM, 2018 Addendum to the 2012 RFDS for Oil and Gas, Royal Gorge Field Office at 5, https://eplanning.blm.gov/epl-front-office/projects/lup/39877/160710/196486/RGFO_RFD__addendum.pdf.

[9] *See id.* at 5, 6.

[10] Exhibit 4, SB19-181, Protect Public Welfare Oil and Gas Operations, https://leg.colorado.gov/sites/default/files/2019a_181_signed.pdf.

[11] Exhibit 5, COGCC, Draft Director's Objective Criteria (Apr. 19, 2019) https://cogcc.state.co.us/documents/reg/SB_19_181/COGCC_Directors_Draft_Objective_Criteria_20190419.pdf.

[12] *Id.* at 2, criteria # 14.

actions to approve oil and gas development will undermine the State's purpose in enacting SB 19-181.

More importantly, the proposed leases are in close proximity to the towns of Brighton and Thornton.[13] SB 19-181 will give these communities the opportunity to impose a moratorium while they development local rules to control development. Indeed, on March 20, 2019, the Adams County Commissioners imposed a six-month moratorium on new oil and gas permits.[14] Both Brighton and Thornton are within Adams County. The BLM should not interfere with local control by leasing more lands for oil and gas development directly underneath these communities. Consequently, BLM must find that the proposed leases are not in the public interest at this time.

### C. BLM Must Complete a Conformity Analysis.

Similarly, because all of the proposed lease parcels within the boundary of the Denver Metro–North Front Range 8-hour Ozone Non-Attainment Area, BLM must also assess whether leasing these parcels complies with the Clean Air Act's conformity provisions.

As noted above, EPA has designated parts of the Denver Metro-North Front Range area, including part of Weld County where leasing is proposed, as in nonattainment with the 2008 and 2015 National Ambient Air Quality Standards ("NAAQS") for ozone.[15] Oil and gas development is a direct cause of the worsening air quality.[16] As a result of EPA's designation, the State of Colorado has enacted a state implementation plan ("SIP") which includes provisions to control ozone formation within the Denver Metro-North Front Range 8-hour Ozone Non-Attainment Area.[17]

Thus, BLM is required to conduct an "applicability analysis" to determine whether its actions comply with the SIP. Specifically, the BLM must calculate whether the proposed leases have direct and indirect emissions of volatile organic compounds ("VOCs") or nitrogen oxides

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[13] BLM, Overview Map, 30 Act Parcels for 2019 Leasing, https://eplanning.blm.gov/epl-front-office/projects/nepa/120733/170510/207135/30_Act_Overview_Map_2019.jpg.

[14] Exhibit 6, Adams County, Colorado, Board of Commissioners Approves Temporary Moratorium on Oil & Gas Applications, http://www.adcogov.org/news/board-commissioners-approves-temporary-moratorium-oil-and-gas-applications (last visited May 10, 2019).

[15] EPA, *8-Hour Ozone (2008) Nonattainment Areas by State/County/Area*, https://www3.epa.gov/airquality/greenbook/hnp.html#Ozone_8-hr.2008.Denver (last visited Sept. 11, 2018); EPA, *8-Hour Ozone (2015) Nonattainment Areas Partial County Descriptions*, https://www3.epa.gov/airquality/greenbook/jnp.html#Ozone_8-hr.2015.Denver (last visited Sept. 11, 2018).

[16] Erin E. McDuffie et al., *Influence of Oil and Gas Emission on Summertime Ozone in the Colorado North Front Range*, J. of Geophysical Res.: Atmospheres 8,712, 8,723–24 (2016) https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1002/2016JD025265.

[17] *See* Colorado SIP at 5 Colo. Code Regs. § 1001-09 (2017), https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=7381&fileName=5%20CCR%201001-9.

("NOx") that equal or exceed 100 tons/year. 40 C.F.R. § 93.153(b)(1).[18] "A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart *before* the action is taken." *Id.* § 93.150(b) (emphasis added). EPA recommends that a federal agency complete this analysis in conjunction with a NEPA analysis. *See id.* § 93.156.

In the past, BLM has fails to properly complete an applicability analysis at the leasing stage. BLM has argued that "leasing does not authorize emissions generating activities, and therefore does not directly result in an emissions increase."[19] But, courts are clear that it is at the oil and gas lease sale stage where an agency irretrievably commits to development. Thus, BLM is required to complete a full impacts analysis at this stage because after this point, BLM cannot completely deny development on the leased parcels. *See WildEarth Guardians v. Zinke*, No. CV 16-1724 (RC) 2019 WL 1273181, at *12 (D.D.C. Mar. 19, 2019).

Second, BLM has also argued that emissions are not reasonably foreseeable. But, there is no doubt that Weld County is heavily developed (50,000+ wells drilled, 20,000 active wells), and BLM has the tools to assess emissions. BLM's RFDS estimates how many wells will be drilled in the future, thereby admitting that development is reasonably foreseeable. Thus, a conformity analysis is required.

Perhaps more importantly, there is no doubt that even if BLM considers leasing to not be the direct source of emissions, it is an indirect source of emissions and a conformity analysis is required nonetheless. According to EPA's regulations reasonably foreseeable emissions includes all "direct *and indirect emissions*." 40 C.F.R. § 93.152 (emphasis added). Direct emissions include all emissions that are caused or initiated by a federal action. Indirect emissions include all emissions that are:

1. Caused or initiated by the federal action, but occur at a different time or place as the action;
2. Reasonably foreseeable;
3. Practically controllable by the BLM; and
4. Are subject to continuing program responsibility by the BLM.

*Id*. Here, the agency cannot deny emissions produced as a result of developing the leases, would, at a minimum, be considered indirect emissions as they would be caused or initiated by BLM's action, would be reasonably foreseeable, would be practically controllable by the BLM by virtue of the agency's authority to impose lease stipulations now and conditions of approval at the APD stage.

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[18] *See also* U.S. Dep't of the Interior, BLM, *Instruction Memorandum No. 2013-025:Guidance for Conducting Air Quality General Conformity Determinations* (December 4, 2012), https://www.blm.gov/policy/im-2013-025.

[19] BLM, June 2019 Environmental Assessment for the June 2019 Competitive Oil & Gas Lease Sale, DOI-BLM-CO-F020-2019-0015-EA at 93 (Mar. 2019), https://eplanning.blm.gov/epl-front-office/projects/nepa/119130/168512/205049/RGFO_EA_Comment_June2019.pdf.

Finally, BLM has argued that emissions are not reasonably foreseeable because "[a]n onshore lease sale is analogous to the example provided in 40 C.F.R. § 93.153(c)(3)(i), [exempting] 'Initial Outer Continental Shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level.'" EA at 26. But, onshore oil and gas lease sales are not made on a broad scale, programmatic scale like Outer Continental Shelf ("OCS") lease sales. *See Ctr. for Biol. Diversity v. U.S. Dept. of the Interior*, 563 F.3d 466, 473 (D.C. Cir. 2009) (describing the OCS process). Instead, it is the RMP process that is comparable to the OCS exemption.

We look forward to BLM's completion of a full applicability analysis in compliance with the Clean Air Act.

### D. BLM Cannot Lease the Proposed Parcels Until it Finalizes the Eastern Colorado Resource Management Plan.

Similarly, because BLM's resource management plan and accompanying environmental impact statement for the Royal Gorge Field Office does not address air quality issues and conformity, BLM cannot lease the proposed parcels until it finalizes the Eastern Colorado Resource Management Plan.

"In the development and revision of land use plans," BLM is required to "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards." 43 U.S.C. § 1712(c)(8). The applicable land use plan for the proposed action is the Northeast Resource Management Plan (1986) as amended by the Colorado Oil and Gas Final EIS and Record of Decision (1991) ("NE RMP").[20] The BLM is in the process of updating its RMP for the Royal Gorge FO but the agency has not yet issued a final decision.[21]

Unfortunately, no provision in the NE RMP ensures compliance with the Clean Air Act's conformity provisions. Indeed, as the BLM admits in its analysis of the current management plans within the Royal Gorge FO, the NE RMP does not include *any* current planning decision with regards to air resources.[22] In fact, the NE RMP wrongly provides, contrary to reality, that "[a]ll public lands are in the 'General (22A) (attainment or unclassified areas) category. . . ."[23] Furthermore, the BLM admits in its analysis of the RMP that it "must comply with the Clean Air Act General Conformity (40 C.F.R. § 93.153(b)) requirements for actions taking place within any area designated as either nonattainment . . . within the RGFO boundaries." *Id.* BLM is

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[20] The NE RMP and FEIS and the 1991 Oil and Gas Amendment are available on the BLM's website at: https://eplanning.blm.gov/epl-front-office/eplanning/docset_view.do?projectId=68393&currentPageId=99527&documentId=88461.

[21] Notice of Intent to Prepare the Eastern Colorado Resource Management Plan and an Associated Environmental Impact Statement for the Royal Gorge Field Office, Colorado, 80 Fed. Reg. 31,063 (June 1, 2015), https://www.fws.gov/policy/library/2015/2015-13089.pdf.

[22] *See* BLM, *Analysis of the Management Situation for the Eastern Colorado Resource Management Plan* 278 (June 2015), https://eplanning.blm.gov/epl-front-office/projects/lup/39877/59426/64617/AMS_for_Eastern_CO_RMP.4.pdf.

[23] *Id.* at 18.

essentially acknowledging that the "current" NE RMP fails to ensure compliance with federal conformity requirements in violation of FLPMA's mandate. As a result, the existing NE RMP cannot support approval of the proposed action because it does not provide for compliance with the Clean Air Act's conformity provisions. *See* 43 U.S.C. § 1712(c)(8).

Although the BLM is currently in the process of revising the applicable RMP (the new RMP is called the "Eastern Colorado RMP"), this process is not complete. Consequently, the proposed Eastern Colorado RMP also cannot provide for compliance with the Clean Air Act and FLPMA.

Put simply, neither the NE RMP or the proposed Eastern Colorado RMP provide for compliance with the Clean Air Act's conformity provision. BLM is thus violating 43 U.S.C. § 1712(c)(8) of FLPMA and must postpone the approval of any projects within the Denver Metro/North Front Range 8-hour Ozone Nonattainment Area until a RMP which provides for compliance with the Clean Air Act's conformity provision is complete or the BLM conducts a full, site-specific EIS for each project.

The agency's Land Use Planning Handbook underscores the BLM's ability and need to postpone approval of projects where the underlying RMP is incomplete and under revision.

> During the amendment or revision process, the BLM should review all proposed implementation actions through the NEPA process to determine whether approval of a proposed action would harm resource values so as to limit the choice of reasonable alternative actions relative to the land use plan decisions being reexamined. Even though the current land use plan may allow an action, the BLM manager has the discretion to defer or modify proposed implementation-level actions and require appropriate conditions of approval, stipulations, relocations, or redesigns to reduce the effect of the action on the values being considered through the amendment or revision process. The appropriate modification to the proposed action is subject to valid existing rights and program-specific regulations. *A decision to temporarily defer an action could be made where a different land use or allocation is currently being considered in the preferred alternative of a draft or proposed RMP revision or amendment.*[24]

The need to postpone approval of the proposed action is underscored by a quick review of the proposed alternatives for the proposed Eastern Colorado RMP. BLM is considering an alternative, Alternative D (Human Ecoregion), which proposes that "[i]n areas designated as nonattainment or maintenance for the Colorado or National Ambient Air Quality Standards, the RGFO will require, where determined technically feasible by implementation-level analysis of the action(s), *no net increase of the pollutant(s) or its precursors above baseline levels*."[25]

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[24] BLM Land Use Planning Handbook, H-1601-1, at 47, https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1601-1.pdf (emphasis added).

[25] BLM, Preliminary Alternatives Report Eastern Colorado Resource Management Plan 32 (March 2017), https://eplanning.blm.gov/epl-front-office/projects/lup/39877/98740/119608/ECRMP_PrelimAltsReport.pdf (emphasis added).

Approval of these leases within the nonattainment area would directly undercut this proposed alternative. Unless BLM approves offsets as conditions of the proposed leases, the agency would be allowing a "net increase of pollutants" in the nonattainment area in direct contravention of proposed Alternative D.

### E. BLM Must Analyze the Direct, Indirect, and Cumulative Impacts that Will Result from the Proposed Leases.

Finally, BLM must also ensure that it fully analyzes direct, indirect and cumulative greenhouse gas emissions that would result from the projects in conjunction with past, present, and reasonably foreseeable future actions.

NEPA requires BLM to quantify and discuss the significance of the direct, indirect, and cumulative greenhouse gases generated by its proposed action. 40 C.F.R. §§ 1502.16 (outlining what is required in an impacts analysis), 1508.7 (defining cumulative impacts), 1508.8 (defining direct and indirect impacts); *Western Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, CV 16-21-GF-BMM, 2018 WL 1475470, (D. Mont. Mar. 26, 2018) (requiring quantification of indirect GHG emissions at the resource management plan stage); *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (requiring quantification of indirect GHG emissions burned as a result of a natural gas pipeline); *Center for Biological Diversity v. National Highway Traffic. Admin*., 538 F.3d 1172, 1215 (9th Cir. 2008) (requiring assessment of the cumulative impacts of climate change from a proposed rule); *San Juan Citizens All. v. United States Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1244 (D.N.M. 2018) (requiring an analysis of the direct, indirect, and cumulative GHG emissions at the oil and gas lease sale stage); *WildEarth Guardians v. Zinke*, No. CV 16-1724 (RC) 2019 WL 1273181 (D.D.C Mar. 19, 2019) (requiring a robust analysis of the direct and indirect climate impacts from nine lease sales as well a quantitative, regional and national cumulative impacts analysis of reasonably foreseeable actions such as BLM lease sales).

BLM has the tools[26] to analyze direct, indirect, and cumulative impacts from greenhouse gas emissions and must do so here. Specifically we request that BLM estimate the number of proposed wells that will result, calculate both direct and indirect greenhouse gas emissions on an annual basis as well as for the lifespan of the proposed wells, assess the significance of such emissions using the proper metrics (such as the social cost of carbon and/or carbon budgeting),[27] and assess the cumulative impacts of the proposed leases in conjunction with past, present, and

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[26] Exhibit 7, URS Group Inc., Draft Oil and Gas Air Emissions Inventory Report for Seven Lease Parcels in the BLM Royal Gorge Field Office (2013) (prepared for BLM, Colorado State Office and Royal Gorge Field Office); Exhibit 8, Kleinfelder, Air Emissions Inventory Estimates For A Representative Oil And Gas Well In The Western United States 1, 2 (2013) (prepared for BLM National Operations Center).

[27] *WildEarth Guardians v. Zinke*, No. CV 16-1724 (RC) 2019 WL 1273181, at 50 n.31 (D.D.C Mar. 19, 2019) ("[O]n remand, BLM must reassess whether the social cost of carbon or another methodology for quantifying climate change may contribute to informed decisionmaking. "Accurate scientific analysis" is "essential to implementing NEPA." 40 C.F.R. § 1500.1(b). And NEPA requires an agency to ensure "scientific integrity" in its environmental assessments. *Id.* § 1502.24. BLM may not forgo using the social cost of carbon simply because courts have thus far been reluctant to mandate it. Given that the Department of Energy and other agencies consider the social cost of carbon reliable enough to support rulemakings, *see Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677 (7th Cir. 2016), the protocol may one day soon be a necessary component of NEPA analyses.").

reasonably foreseeable emissions from BLM lease sales and other proposed actions within the region and nation. *WildEarth Guardians v. Zinke*, No. CV 16-1724 (RC) 2019 WL 1273181 (D.D.C Mar. 19, 2019).

## III. Conclusion

In sum, because of the deficiencies discussed above, Guardians respectfully requests that the BLM postpone the proposed 30 Act leases unless and until the agency fully complies with NEPA, the Clean Air Act, and FLPMA.

Sincerely,

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