Date: October 1, 2014

A.) <u>EPA's Review of the BLM's draft General Conformity Exemption List</u>

Thank you for the opportunity to review and provide comments on the BLM Wyoming office's (BLM's) draft "Conformity Exemption List Based on 40 CFR 93 Section 153 June 2014(2).docx" (copy attached), that you provided with your email of July 29, 2014. Our initial (preliminary) comments are as provided below. Please note we appreciate the BLM's consideration of these comments, and we can provide additional comments if we are provided the opportunity to review this list after BLM considers and responds to our preliminary comments.

Our review of this draft exemption list considered Wyoming's WAQSR Chapter 8, Section 3(c)(iii) and 40 CFR 93.153(c)(2), both of which define categories of actions that are exempt from general conformity because the action results in either no emission increase or an increase in emissions that is clearly *de minimis*. Additionally, as discussed below we consulted the information, analysis and process used by the Federal Aviation Administration in developing similar lists.

1.) Based on the title of the subject document, EPA interprets this draft general conformity exemption list as to only apply to the Upper Green River Basin (UGRB) 8-hour Ozone National Ambient Air Quality Standard (NAAQS) nonattainment area of southwest Wyoming. Because an exemption list is area specific, if this list is to be more universal for national BLM activities that are outside of the UGRB area, please advise us so that we can review taking those additional areas into consideration and include other EPA offices as necessary.

2.) Some of the activities/categories that the BLM proposed to include on a general conformity exemption list do not appear in 40 CFR 93.153(c) or WAQSR Chapter 8, Section 3(c). In light of this, what process does BLM plan to use before finalizing the draft list of exempt activities? For example, will the BLM be publishing a proposed Notice and final Notice in the Federal Register for this list of "Exempt" activities? Or, will the BLM not be publishing the list of "Exempt" activities and instead, keep the list of "Exempt" activities on file in a BLM State and/or Field Office? Also, will the BLM consider including this general conformity exemption list of activities, as appropriate, as an appendix to a relevant NEPA document?

Please note that as a model for our review of BLM's general conformity exemption list of activities, we consulted the format used by the Federal Aviation Administration (FAA) for publishing, in the Federal Register, a list of exempt activities and additionally, those activities that are presumed to conform. The FAA followed this procedure, with consultation with EPA, with their proposed Notice (72 FR 6641, February 12, 2007) and final Notice (72 FR 41565, July 30, 2007). In both Notices, the FAA provided a list, description with discussion, and rationale of those activities that were considered exempt (please see the final Notice, "II Existing Exemptions", 72 FR 41567) before then proceeding with their presumed to conform list that also included associated discussion, data, and rationale. While there is no requirement to subject your list of exempt activities to notice and comment, we note that doing so can provide more certainty when relying on the list in carrying out general conformity obligations in the future.

3.) As EPA explained in promulgating the final general conformity rule "[i]n order to illustrate and clarify that the *de minimis* levels exempt certain types of Federal actions, several *de minimis* exemptions" were listed in the rule. 58 FR 63214, 63229 (Nov. 30, 1993). However, as noted in our comments below numbered 3a through 3f, several of the BLM categories proposed lack specificity in the description for us to evaluate whether the Federal actions under the proposed category would be "actions that would result

in no emissions increase or an increase in emissions that is clearly *de minimis*." (see WAQSR Chapter 8, Section 3(c)(iii) and 40 CFR 93.153(c)(2)).

3a.) Under the proposed category "Lands"; "Reviewing and Issuing Land Use Permits": For this proposed category BLM suggests that WAQSR Chapter 8, Section 3(c)(iii) and 40 CFR 93.153(c)(2) provide the authority to include this category. That exemption example covers "[a]dministration actions such as personnel actions, organizational changes, debt management or collection, cash management, internal agency audits, program budget proposals, and matters relating to the administration and collection of taxes, duties and fees." EPA notes that although the BLM's issuance of permits would be administrative in nature, it is not clear as to what would be permitted with Land Use Permits (e.g.; ROWs, construction, etc.) and whether those activities would fall under this example. Depending on the permitted activity, issuing of such permits could allow activities that may have substantial emissions, and emissions that are not *de minimis*. This "Lands" activity needs to be defined more clearly if it is included on this exemption list. Clarification could be added to state that the exemption would apply only to the administrative process of issuing permits; not the expected emissions that might arise from the permitted activity. We note this comment would also apply to the category of "Forests" and "Issuing Permits".

3b.) Under the proposed category "Oil & Gas"; "Oil and Gas Lease Sales": Similar to our comment above, EPA recommends that BLM oil and gas lease sales only appear on the general conformity exemption list if the exemption clarifies that it only applies to the administrative process of conducting leases; not the expected emissions that might arise as a result of the leases. If BLM intended the exemption to apply to more than the administrative process, EPA recommends that this exemption not appear on the exemption list. BLM's draft table for this category suggests that the basis for the exemption is that "[e]missions are not [r]easonably [f]oreseeable". We disagree that emissions from oil and gas lease sales are not reasonably foreseeable. There would have to be an evaluation done of the development of the leases and their potential resources, which would include associated emission estimates. Also, necessary emission data would have to be included in any NEPA document for the lease sale. As you may know, the Colorado BLM office is currently evaluating the amount of estimated emissions in the BLM's Colorado Air Resource Management Modeling Study (CARMMS) modeling for the oil and gas leasing information that will be included with the Pawnee National Grasslands oil/gas leasing DEIS. In addition, if the Wyoming BLM office hasn't already, we recommend a review of the Court Order and Stipulation (copy attached) which was entered by the Court on January 17, 2012, between the Colorado BLM office and WildEarth Guardians (Guardians). Under the terms of the Order, for certain leases BLM agreed that prior to making a decision on whether to grant reinstatement of those leases, BLM will perform an applicability analysis, and if necessary, a conformity determination. Order at Paragraph 2.

3c.) Under the proposed category "Oil & Gas"; "Oil & Gas Field Equipment and activities that have a WDEQ air quality permit issued through the NSR or PSD programs": The BLM suggests that 40 CFR 93.153(d)(1) and in WAQSR Chapter 8, Section 3(c)(iv)(A) apply to this proposed category. Those rules provides that:

(d) 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 the 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)(*emphasis added*).

The exemption in the general conformity rule covers *stationary* sources that are *required* under the NSR or PSD programs to obtain a permit. In this version of the BLM's exemption list, the BLM proposed exemption does not include the important qualifiers contained in the general conformity rules, and thus extends coverage of the exemption beyond that provided in those rules. Additionally, the proposed category does not list any type of equipment or activities or provide any further clarification. EPA has previously provided comments that this exemption should be applicable only to "stationary sources" that are required to obtain permits under the programs and that drill rigs would only qualify as a stationary sources if it is at the same location for more than 12 consecutive months. Here is an excerpt from Suzanne Bohan's (EPA,Region 8, NEPA Program) email to the BLM (Charis Tuers) dated June 11, 2013 that commented on an earlier draft of the BLM's exemption list and these EPA comments are still relevant now:

> **"1.)** BLM is proposing that many well/production activities would be considered exempt pursuant to the 40 CFR 93.153(d)(1) exemption for stationary sources which have a NSR or PSD permit as part of a SIP-approved permitting program. We recommend that the BLM verify that these activities meet the requirements of this exemption. Wyoming DEQ issues Chapter 6 air quality permits for sources that do not qualify as stationary sources for the purposes of the 40 CFR 93.153(d)(1) exemption.
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> **2.)** Also, we recommend that the BLM provide a rationale for determining how sources which are temporary in nature are considered stationary sources for the purposes of the exemption at 40 CFR 93.153(d)(1). It would be helpful to have a further description of certain oil and gas activities that appear temporary in nature such as workovers, blowdowns, and associated flaring. In addition, "Well Completions & Recompletions", "Stimulations", "Flowback", and "Flaring" are temporary and may all occur as a new well is being completed and put into to production. These would appear to be, at times, combined temporary activities and not a type of separate associated activity; however, we welcome further clarification from the BLM's perspective. We also recommend including more detailed descriptions of several sources which appear in the "Oil & Gas Production" category to clarify what exactly is being included (i.e., heater/treaters, dehy units, separators, etc.)."

This proposed category description does not provide any specifics as to what would be included under the proposed exemption. When the BLM included such information before, we expressed concerns regarding the use of WDEQ permits to exempt emissions from certain activities as they may not meet the appropriate Clean Air Act definition of a stationary source (please see our above comments). The submittal of additional documentation and clarification from the BLM, that we can review and provide further comments as necessary would be appreciated.

3d.) Under the proposed category "Range"; "Range Improvements (includes treatments such as mowing, aerating, chaining, spiking, and seeding"): For this proposed category BLM suggests that WAQSR Chapter 8, Section 3(c)(iii) and 40 CFR 91.153(c)(2) provide the authority to include this category. That exemption example covers "[r]outine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails and facilities". As a general matter, we note that similar to our comment above, the proposed exemption does not include an important qualification in the underlying rules – that the activities be "routine." In order to fully evaluate this proposed exemption, EPA needs to see information regarding

emissions from these types of activities (we did not see these specific activities included in the BLM's Excel spreadsheets), as it is unclear that these activities have *de minimis* emissions that would fit within the exemption. Also, we note that if BLM undertakes extensive range improvement operations over a significant amount of acres, it may be more appropriate to include the calculated emissions and consider this particular category for inclusion with the BLM's presumed to conform list.

3e.) Under the proposed category "Recreation"; "Routine Maintenance & Repair including Rehabilitation and Reclamation (Trails and other Recreational Sites)": For this proposed category BLM also suggests that WAQSR Chapter 8, Section 3(c)(iii) and 40 CFR 91.153(c)(2) provide the authority to include this category. That exemption example covers "[r]outine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails and facilities". In order to fully evaluate this proposed exemption, EPA needs to see information regarding emissions from these types of activities (we did not see these specific activities included in the BLM's Excel spreadsheets.) Also, we note that if BLM undertakes extensive recreation operations over a significant amount of acres, it may be more appropriate to include the calculated emissions and consider this particular category for inclusion with the BLM's presumed to conform list.

3f.) Under the proposed category "Misc. Activities"; "Road Maintenance & Upkeep": For this proposed category BLM also suggests that WAQSR Chapter 8, Section 3(c)(iii)(B)(IV) and 40 CFR 93.153(c)(2)(iv) provide the authority to include this category. That exemption example covers "[r]outine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails and facilities". EPA evaluated the emissions information provided for this particular activity as provided in the BLM's Excel spreadsheets. An annual hours cutoff (1486) and miles per year cutoff (8000) were provided with associated estimated emissions. As it is unclear whether the emissions associated with this activity (even with these cutoffs) are truly *de minimis* and the hours and miles may vary, we suggest that consideration be given to moving this category to the Presumed to Conform list.

B.) <u>EPA's Review of the BLM's draft General Conformity Presumed to Conform List</u>

Thank you for the opportunity to review and provide comments on the BLM's draft presumed to conform list entitled "BLM Upper Green River Basin – Presumed to Conform List (3rd DRAFT June 2014(1).pdf)" (copy attached), that you provided with your email of July 29, 2014. Our initial (preliminary) comments are provided below. Please note we appreciate the BLM's consideration of these comments, and we can provide additional comments when we are provided the opportunity to review this list after BLM considers and responds to our preliminary comments. We view this as an important iterative process in order to assist the BLM as it prepares the Presumed to Conform list for its eventual publication via a Notice action in the Federal Register.

EPA comments:

As you are aware, the general conformity rule allows Federal agencies to establish their own presumptions of conformity for specific federal actions through separate rulemaking actions (see 40 CFR 93.153(g) and (h) and WAQSR Chapter 8, Section 3(c)(vi) through (x)). Those rules specify that the activities on a proposed presumed to conform list must be supported by documentation demonstrating that the total emissions from the activities either (1) will not interfere with relevant air quality standards and state implementation plan (SIP), or (2) are below the applicable *de minimis* thresholds, or (3) are already

accounted for in the relevant SIP (see 40 CFR 93.153(g); WAQSR Chapter 8, Section 3(c)(vi) through (x)). which establish criteria and procedures for Federal agencies to develop additional categories of actions beyond the exemption list, which would then be presumed to conform. We also note that emissions from such actions are presumed to conform as a *general* matter, but "on a case-by-case basis, an action that is presumed to conform would be subject to a conformity determination where it is shown to the Federal agency that the *particular* action did not, in fact, conform." 58 FR 63232 (emphasis added). Please also see 40 CFR 93.153(j) and WAQSR Chapter 8 Section 3(c)(x).

Overall comment: In addition to the regulatory provisions references above, for reference, we also looked at the presumed to conform information that was generated by the FAA for airports, please see the weblink below:

http://www.faa.gov/airports/resources/publications/federal_register_notices/media/environmental_72fr41576.pdf

1.) EPA views the "Cultural Resources", "Range", "Recreation", "Wild Horses", and "Wildlife" categories of the BLM's proposed presumed to conform list, and the supporting analysis and documentation, as potentially qualifying to meet the intent of both EPA's and Wyoming DEQ's general conformity provisions for presumed to conform activities.

2.) EPA also views the other categories on this draft presumed to conform list as potentially qualifying to meet the intent of both EPA's and Wyoming DEQ's general conformity provisions for presumed to conform activities. However, we support the BLM's caveat language at the top of the draft presumed to conform table which cautions users of this table that individual projects may incorporate multiple activities and that "the emissions for each pollutant need to be summed across activities for that project to determine conformity." Therefore, it is an important consideration that all direct and indirect emissions from all the activities in a project must be evaluated for a general conformity analysis and, as appropriate, a conformity determination made. In other words, breaking up a large project into smaller components and using the presumed to conform list to address general conformity for each component would not meet the requirements of the Clean Air Act or the relevant regulations (see 42 USC 176(c), 40 CFR 93, Subpart B, and WAQSR Chapter 8, Section 3). We are concerned that the proposed categories of presumed to conform activities may result from segmentation of projects that fall below the applicable *de minimis* thresholds upon which presumed to conform activities are based. EPA has previously stated that agencies cannot segment projects in this way to avoid conformity obligations, so we want to make sure BLM is aware of the potential limited application of some of these presumed to conform categories. See General Conformity Guidance: Questions and Answers (July 13, 1994) at 16; available at http://www.epa.gov/airquality/genconform/documents/gcgqa_940713.pdf.

3.) EPA recommends that the information provided in the Excel spreadsheets' introduction section, which discuss the technical support information for the presumed to conform list, should also appear in the heading of the presumed to conform list itself. We have also provided suggested changes to this language as noted below in *italic* type:

> "The BLM Wyoming State Office Presumed-to-Conform list *addresses* projects proposed in the *Upper Green River Basin 8-hour ozone* nonattainment area that are required *to* demonstrate that their emissions would be less than the threshold levels given in *WAQSR Chapter 8, Section 3.* Projects that meet the criteria in the presumed-to-conform list would be considered to conform and would not be required to develop emission inventories or prepare a formal conformity determination. Unless rebutted as provided for in WAQSR Chapter 8, Section 3(c)(x).

For the presumed-to-conform criteria in the list, *categories* of oil and gas development *actions* that would result in emissions levels the *BLM has documented would be below the* applicable thresholds *are based on similar actions, within the Upper Green River Basin, taken over recent years.* For the Upper Green River Basin ozone nonattainment area the conformity *de minimis* thresholds are 100 tons per year of nitrogen oxides (NOx) or volatile organic compounds (VOC).

To develop the presumed-to-conform criteria, emissions data from the oil and gas industry were compiled and the total emissions for development and operations activity were expressed in terms of three units: emissions per well, per road-mile, or per pipeline-mile. From the results in this workbook the number of such units that could be developed in a single year without emissions exceeding the conformity thresholds can be calculated. For example, if development of 1 well were associated with the emission of 9 tons of NOx or VOC, then projects with up to 11 wells (i.e., 100/9 = 11.1) in a single year would be presumed to conform *where the project had no additional reasonably foreseeable or quantifiable indirect emissions.*

Emissions data were solicited from oil and gas operators for well development and operations, including associated infrastructure such as pipelines. Several datasets were received. In order to maintain confidentiality of the operators these datasets are referred to as Scenario A, Scenario B, etc. in the workbook. Emissions data from the scenarios were grouped according to typical major phases of development: construction, drilling, completion, operations/workovers, and reclamation. Within each phase the scenario data that showed the maximum emissions was selected. These data were then combined to form a composite scenario that represents a maximum emissions case. The composite scenario is the basis for the presumed-to-conform criterion. Use of this composite maximum emissions case assures that the presumed-to-conform criterion is set conservatively, i.e., at levels of development that are low enough to assure that their annual emissions will be less than the conformity thresholds."

4.) With regard to the "key assumptions" provided at the end of the draft presumed to conform list, EPA continues to express concern with the content, especially for drill rigs, of the fourth bulleted assumption which states:

> "For projects using NSR-permitted drill rigs, a higher number of wells may conform because NSR-permitted sources are exempt from conformity. The supporting Oil & Gas Workbook can be used to adjust the single well emission values by subtracting the drill rig emissions."

As we noted above, with our comments on the BLM's draft exemption list, we interpret this reference to NSR-permitted sources as to involve the NSR/PSD major and minor source permit exemption in 40 CFR 93.153(d)(1) and in WAQSR Chapter 8, Section 3(c)(iv)(A). EPA has previously provided comments that this exemption is only applicable to "<u>stationary sources</u>" and drill rigs would not qualify as a stationary sources (unless the drill rig is at the same location for more than 12 consecutive months). Therefore, in order to ensure that this presumption is only used in a way that meets the regulatory requirements, we recommend that the BLM specify that only those sources and/or activities that meet the definition of a stationary source (regardless of their permit status) can appropriately meet the requirements of this exemption. Please be advised that EPA continues to note that the Wyoming DEQ issues WAQSR Chapter 6 air quality permits for sources that do not qualify as stationary sources for the purposes of the 40 CFR 93.153(d)(1) and WAQSR Chapter 8, Section 3(c)(iv)(A) exemption.

5.) Presumed to conform list; requirement to publish and take comment. Although these requirements are

further along in the process, EPA wishes to remind the BLM of the requirement to publish a Notice in the Federal Register regarding the presumed to conform list. The Notice will need to identify those categories of activities listed as presumed to conform, provide supporting technical data in the electronic docket, and allow for public comment. The BLM will also need to notify the local EPA Regional Office, as well as other officials. After publishing the Notice and soliciting public comment, the BLM will need to publish a subsequent final Notice in the Federal Register which addresses all public comments. These requirements for the notice and comment procedures are further explained in 40 CFR 93.153(h)(1) through (h)(4) and in WAQSR Chapter 8, Section 3(c)(viii)(A) through (viii)(D). In addition, as was done by the FAA, EPA encourages the BLM to consider also publishing and soliciting comment on their exempt activities list in conjunction with the required publication of its presumed to conform list.