

BEFORE THE APPEAL DECIDING OFFICER
USDA FOREST SERVICE, SOUTHWEST REGION

WILDEARTH GUARDIANS,)	
)	
Appellant,)	Appeal of the Record of Decision
)	for Oil and Gas Leasing in the
v.)	Santa Fe National Forest
)	(August 15, 2008)
DANIEL J. JIRON, Supervisor,)	
Santa Fe National Forest,)	
)	
Deciding Official.)	
)	

NOTICE OF APPEAL, STATEMENT OF REASONS, AND REQUEST FOR RELIEF

Submitted via email and certified U.S. Mail, November 3, 2008
Certified Receipt No. 7005 2570 0000 7729 2805

DECISION APPEALED

Pursuant to 36 C.F.R. § 217 and 5 U.S.C. § 555(b), WildEarth Guardians hereby appeals the August 15, 2008 Record of Decision (“ROD”) signed by Santa Fe National Forest Supervisor Daniel Jiron adopting Alternative 2, as analyzed and assessed the associated Final Environmental Impact Statement (“FEIS”), approving ramped up oil and gas leasing in the Santa Fe National Forest of northern New Mexico. This appeal is timely filed in duplicate pursuant to 36 C.F.R. § 217. Notice of the ROD was published in the Albuquerque Journal on September 18, 2008.

APPELLANT

WildEarth Guardians is a Santa Fe, New Mexico-based nonprofit organization with offices in Denver and members throughout the American West. WildEarth Guardians is dedicated to protecting and restoring the wildlife, wild places, and wild rivers of the American West, and to safeguarding the Earth’s climate. WildEarth Guardians has members throughout the American West, including New Mexico, that utilize the region that will be affected by the proposed decision to allow oil and gas leasing in the Santa Fe National Forest. WildEarth Guardians, formerly known as Forest Guardians, first submitted comments on the proposed decision to lease oil and gas on the Santa Fe National Forest on October 20, 2004. Pursuant to 36 CFR § 217.9, Appellant’s contact information is as follows:

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STATEMENT OF REASONS

INTRODUCTION

The oil and gas leasing ROD for the Santa Fe National Forest authorizes actions that pose potentially significant environmental impacts. Indeed, the ROD sets forth stipulations that must be adhered to if the Bureau of Land Management (“BLM”) issues further leases. The leasing of oil and gas resources confers a right to develop a lease. *See* 43 CFR § 3101.1-2. Consequently, the ROD is an explicit approval of the right of oil and gas leases to be developed within the Santa Fe National Forest and an explicit approval of the attendant environmental impacts.

Therefore, contrary to the Forest Supervisor’s assertion that his “decision does not authorize or solicit oil-gas exploration or development activities” (ROD at 3), the ROD represents a site-specific commitment of resources that authorizes oil and gas leasing to proceed. Indeed, the FEIS clearly explains:

When the Forest Service authorizes the BLM to proceed with issuing an oil-gas lease on National Forest System lands, it is considered a Federal action subject to NEPA, since it involves a commitment of resources in which the lease grants access rights to the subsurface resource within the lease area.

FEIS at 14. Thus, in authorizing the BLM to proceed with oil and gas leasing on the Santa Fe National Forest, the Forest Supervisor has conceded discretion to limit or otherwise mitigate the right to develop oil and gas leases. Put simply, in limiting his discretion to constrain future oil and gas leasing, the Forest Supervisor has made an irreversible commitment of resources.

It is therefore troubling that in issuing his ROD, the Forest Supervisor claims that a full environmental analysis of the impacts of oil and gas development, as well as mitigation measures and monitoring requirements, are not necessary. *See*, ROD at 3. This is a flatly erroneous position and renders the Supervisor's ROD and the FEIS fatally flawed in their entirety.

Authorizing lands to be leased for oil and gas development is, by itself, a significant action that requires in-depth and site-specific analysis, as required by NEPA. The Forest Service seems to have affirmed this conclusion, at least in part, by preparing an FEIS to support the ROD.¹ It is at the time of leasing, or in this case approval of future leasing, not with the issuance of an Application for Permit to Drill ("APD"), that federal agencies must analyze potential impacts from oil and gas development.

The requirement that an agency undertake appropriate environmental analysis prior to the issuance of mineral leases was addressed comprehensively in *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), which dealt with a similar Forest Service decision. There, the Sierra Club challenged the decision of the Forest Service and the BLM to issue oil and gas leases on lands within the Targhee and Bridger-Teton national forests of Idaho and Wyoming, without requiring preparation of an EIS. The Forest Service had conducted a programmatic NEPA analysis, then recommended granting lease applications with stipulations based upon broad characterizations as to whether the land was considered environmentally sensitive. Because the Forest Service determined that issuance of the leases with the recommended stipulations would not result in significant adverse impacts to the environment, the agency decided that, with respect to the entire area, no EIS was required at the leasing stage. *Id.* at 1410. The D.C. Circuit rejected the Service's approach as failing to comply with NEPA. The Court held:

Even assuming, *arguendo*, that all lease stipulations are fully enforceable, once the land is leased the Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose "mitigation" measures upon a lessee . . . Thus, with respect to the [leases where surface occupancy is not precluded] the decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated.

Id., at 1414. The court explained that the appropriate time for preparing an EIS to analyze and

¹ An FEIS is required only when significant environmental impact will occur as a result of a major federal action. *See* 40 CFR § 1502.3.

assess potentially significant impacts of oil and gas development is prior to a decision, “when the decision-maker retains a maximum range of options;” that is, before the agency makes “‘irreversible and irretrievable commitments of resources’ to an action which will affect the environment...” *Id.*, citing *Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2nd Cir. 1977).

The D.C. Circuit specifically rejected the argument that the act of leasing was a mere paper transaction requiring no site-specific analysis of environmental impacts. Rather, it concluded that where the agency could not completely preclude all surface disturbances through the issuance of non-surface occupancy (“NSO”) leases, the “critical time” before which full NEPA analysis must occur is prior to “the point of leasing” *Id.* at 1414.

The goal of a NEPA analysis is to ensure that agency decisionmakers identify, evaluate, and take into account the environmental costs and benefits of all reasonable approaches to a particular proposal prior to choosing a course of action, and in this way to foster better decisionmaking. To that end, federal courts have repeatedly affirmed that NEPA is forward-looking, and that it applies prospectively to ensure that decisions are not made until decisionmakers and the public have had a chance to evaluate a proposal's likely site-specific effects. *See e.g. Robertson v. Methow Valley Citizens*, 109 S.Ct. 1835, 1845 (1989) (NEPA's goals achieved during period when agency is “contemplating a major action,” rather than “after the resources have been committed or the die otherwise cast.”); *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952-53 (1st Cir. 1983) (“Once large bureaucracies are committed to a course of action, it is difficult to change that course -- even if new, or more thorough, NEPA statements are prepared and the agency is told to ‘re-decide.’”) (enjoining agency action for procedural NEPA violation); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983) (appropriate time for NEPA compliance is “prior to a decision, when the decisionmaker retains a maximum range of options.” *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 852-53 (9th Cir. 1979).

Unless the Forest Service mandates a complete “no surface occupancy” stipulation on the Santa Fe National Forest or sufficient mitigations in authorizing lands to be leased by the BLM, NEPA documentation must include a full discussion of alternatives and potential impacts, as well as set forth mitigation measures and monitoring requirements. The Ninth Circuit reiterated this position in *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1227 (9th Cir. 1988), stating that: “It is clear from our decision in *Conner* that sale of the Deep Creek leases required preparation of an EIS unless the lease ‘absolutely prohibits surface disturbance in the absence of specific government approval.’”

The Interior Board of Land Appeals (“IBLA”) has followed the approach of the *Sierra Club* line of cases. In *Union Oil Co. of California*, 102 IBLA 187 (1988), the IBLA stated:

Peterson makes clear that the validity of BLM’s decision not to prepare an EIS prior to issuing mineral leases depends upon whether there has been an “irreversible, irretrievable commitment of resources.” ***If the BLM or Forest Service has not retained the authority to preclude all surface disturbance activity, then the decision to lease is itself the point of “irreversible, irretrievable commitment of resources” mandating the preparation of an EIS.***

Id. at 189. *See also Sierra Club, The Mono Lake Committee*, 79 IBLA 240, 248 (1984) (“precluding surface disturbing activities would allow deferral of environmental review, but ... only reserving the authority to impose reasonable mitigation measures would not”); *Union Oil Co. of California*, 99 IBLA 95 (1987) (holding that later analysis serves no purpose if by time an EIS is finally prepared, some options are no longer available); *Sierra Club, the Mono Lake Committee*, 84 IBLA 175 (1984) (same); *Sierra Club, Oregon Chapter*, 87 IBLA 1 (1985) (same).

The recent decision in *New Mexico v. BLM*, No. CIV 05-0460 BB/RHS, slip op. (D. N.M. September 27, 2006) reiterates and clarifies that the Forest Service must conduct a sufficiently site-specific NEPA analysis before authorizing the BLM to lease oil and gas resources on the Santa Fe National Forest. In that case, the BLM relied upon a “Documentation of Plan Conformance and NEPA Adequacy” (“DNA”), claiming that the required environmental analysis had already been performed in an FEIS, and therefore did not perform any site-specific analysis of potential impacts of issuing lease parcels. The court held this a violation of BLM’s duties under NEPA and held that “some type of site-specific environmental analysis must be performed before the BRU [Bennett Ranch Unit] lease may be executed.” *Id.* at 20-21. The court clarified that the programmatic EIS for the Resource Management Plan did not and could not provide this site-specific analysis:

The Court has purposely used the phrase “some type of environmental analysis,” as the Court need not decide at this time whether an EA would be sufficient or whether an EIS is necessary. To the extent any party might argue that the PRMF/FEIS is sufficient to satisfy the requirement of an environmental analysis, the Court would disagree. The FEIS contains no information about the particular BRU lease parcel, and merely discusses the Otero Mesa area in general. Similarly, the FEIS does not address the question of how much development might be expected on this particular parcel, and where it might be located (to the extent BLM might or might not be able to predict that, given the geology and environment on the parcel). The habitat fragmentation discussion in the FEIS is not specifically tailored to the BRU lease parcel. No other examples are necessary; the FEIS is simply not site-specific enough to allow BLM to decide whether this particular 1600-acre parcel should be leased or should not be leased, and is therefore not adequate to satisfy the site-specificity requirements of NEPA. *See Pennaco*.

Id. at 21, n. 12. Similar to that case, the Forest Service here cannot authorize oil and gas leasing on the Santa Fe National Forest without preparing a site-specific environmental analysis and setting forth mitigation measures and monitoring requirements.

Although the Forest Supervisor claims that mitigation measures “...would be developed during the second-level, site-specific NEPA analysis of the application for permit to drill (APD)” (ROD at 4), as explained, this approach to mitigating the potentially significant impacts of oil and gas leasing is fundamentally flawed. This is due to the fact that once the Forest Service authorizes oil and gas leasing rights to be conferred, the agency limits its discretion to mitigate the potentially significant impacts of oil and gas drilling. By committing to consent to the rights of oil and gas leasing, the Forest Service has committed an irretrievable and irreversible

commitment of resources. Any “second-level” environmental analysis and decision would be limited only by the stipulations set forth in the current ROD. To the extent mitigation measures could be developed upon issuance of an APD, these mitigations measures would be constrained so as to not interfere with the rights of an oil and gas leaseholder.

In sum, the Forest Service’s oil and gas leasing ROD and FEIS for the Santa Fe National Forest is fundamentally flawed because it inappropriately defers any site-specific analysis of the potentially significant environmental impacts of oil and gas development, fails to set forth mitigation measures that would adequately protect natural resources and ensure compliance with relevant laws and regulations, and fails to set forth monitoring requirements that would provide any assurance that oil and gas development would not irreversibly and irretrievably degrade natural resources within and near the Santa Fe National Forest. As explained below, the effects of this fundamental flaw are exemplified in regards to the potentially significant air quality, water quality, and endangered species impacts of ramped up oil and gas development.

I. THE ROD FAILS TO ENSURE PROTECTION OF AIR QUALITY

a. The ROD and FEIS Fail to Adequately Protect Air Quality in Class I Areas, Particularly the San Pedro Parks Wilderness, in Accordance with the Forest Plan.

The San Pedro Parks Wilderness, which is located within the project area, as well as other nearby Wilderness Areas, National Parks, and National Monuments, receive special protection under the Clean Air Act as a Class I area.² Not only do Class I areas receive stronger protection in regards to visibility, but the Clean Air Act imposes more stringent Prevention of Significant Deterioration (“PSD”) increments to maintain high air quality. Furthermore, the Forest Service has an affirmative duty to protect air quality in Class I areas. As the FEIS states, “Under the Clean Air Act, they [the federal land managers] are charged with ‘...an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a Class I area.’” FEIS at 90.

In furtherance of its affirmative responsibility to protect the air quality values within a Class I area, the Forest Service adopted standards to protect the San Pedro Parks Wilderness. The 1987 Santa Fe National Forest Land and Resource Management Plan (“LRMP”) states that the Forest Service will “Protect air quality related values in Class I wilderness areas.” LRMP at 19. Furthermore, not only does the LRMP require the Forest Service to plan management activities “...so that air quality will meet applicable Federal, state, and local regulations,” but the LRMP specifically states that the “Impacts of air pollution generating activities [to Class I areas] will be predicted using current modeling techniques.” LRMP at 80 and 128.

Unfortunately, the FEIS and ROD entirely fail to ensure that air quality in the San Pedro Parks Wilderness Area, as well as other Class I areas, will be protected from oil and gas

² Nearby Class I areas include the Pecos Wilderness Area, also located on the Santa Fe National Forest, Bandelier National Monument located south of San Pedro Parks Wilderness Area, Wheeler Peak Wilderness Area located on the neighboring Carson National Forest, the Weminuche Wilderness Area located in Colorado, and Mesa Verde National Park also located in Colorado.

development, both in accordance with the Forest Service's "affirmative responsibility" under the Clean Air Act and standards in the 1987 Santa Fe National Forest LRMP.

To begin with, nowhere in the FEIS is it evident that the Forest Service predicted the impacts of oil and gas development to Class I areas, in particular the San Pedro Parks Wilderness Area, using "current modeling techniques" in accordance with the LRMP. This is a significant oversight, especially in light of the fact that the FEIS qualitatively discloses that air quality related values in Class I areas will be adversely affected.

Indeed, the FEIS discloses that, "Emissions from oil and gas well operation sources could disperse for long distances downwind and contribute to cumulative visibility impacts in PSD Class I areas[.]" FEIS at 93. More significantly, while the FEIS claims that "the contribution of [air quality] impacts would be small and less than significant within the study area," the FEIS admits that, "the impact would be considered significant on a cumulative basis if it would cause or add to a new or existing problem of visibility degradation[.]" *Id.*

Despite the potential for significant direct, indirect, and cumulative impacts to Class I areas, including the San Pedro Parks Wilderness Area, nowhere is it apparent that the Forest Service predicted impacts using "current modeling techniques" in accordance with the LRMP. As a result, the ROD fails to protect air quality related values in Class I areas and fails to assure air quality will meet applicable Federal and state air quality standards, including standards related to visibility and PSD increments.

Although the FEIS cites modeling conducted by the Carson National Forest (*see* FEIS at 93), reliance on this modeling is wholly inappropriate. To begin with, this modeling was prepared in 2003, five years ago, and cannot possibly represent "current" modeling as required by the LRMP. Second, this modeling was prepared only to analyze the impacts of oil and gas development on the Jicarilla Ranger District of the Carson National Forest and did not address the potentially significant direct, indirect, and cumulative impacts of oil and gas drilling on the Santa Fe National Forest. Third, the modeling prepared by the Carson National Forest did not even assess impacts to Class I areas, including the San Pedro Parks Wilderness Area. This modeling cannot possibly be relied upon to assert that air quality related values, such as visibility, in Class I areas within the Santa Fe National Forest will be adequately protected from oil and gas development.

The failure to analyze impacts to Class I areas in accordance with the LRMP is especially of concern in relation to visibility in the San Pedro Parks Wilderness Area, which is located in the project area. According to data from the New Mexico Environment Department ("NMED"), visibility in the San Pedro Parks Wilderness Area is expected to worsen by 2018, even with current air quality rules and regulations. According to the State of New Mexico's most recent Revision to the New Mexico State Implementation Plan for Regional Haze, the average 20% worst days' visibility is expected to worsen from an average of 10.70 deciviews to 11.71 deciviews by 2018 even under the best case scenario.³ Even more disturbing is that the average 20% best days' visibility is expected to worsen from an average of 4.00 deciviews to 5.36

³ *See Exhibit 1* to this Appeal, excerpt from New Mexico Air Quality Bureau, "Revision to the New Mexico State Implementation Plan for Regional Haze" (December 31, 2003) at 5. Available online at http://www.nmenv.state.nm.us/aqb/reghaz/Final/NMRHSIP_123103_noappx.pdf.

deciviews by 2018 even under the best case scenario.⁴ ***In other words, even on the best days, visibility in the San Pedro Parks Wilderness Area is expected to degrade by over 25% by 2018.***

While the Forest Service has a duty to adhere to its LRMP and predict the impacts of management activities to Class I areas using current modeling techniques regardless of current conditions in Class I areas, the failure to adhere to the LRMP in this instance is particularly troublesome given the predicted visibility degradation in the San Pedro Parks Wilderness Area. The Forest Service itself concedes that oil and gas development in the Santa Fe National Forest “would be considered significant on a cumulative basis if it would cause or add to a new or existing problem of visibility degradation[.]” FEIS at 93. The failure to perform the requisite analysis required by the LRMP means the Forest Service has further failed to demonstrate that impacts from oil and gas development would not be significant, or that such impacts would not otherwise undermine the Forest Service’s affirmative responsibility to protect air quality related values in Class I areas.

The FEIS fails to analyze impacts to Class I areas as required by the 1987 Santa Fe National Forest LRMP. Consequently, the ROD cannot possibly assert that air quality values will be adequately protected in Class I areas as required by the 1987 Santa Fe National Forest LRMP.

b. The ROD and FEIS Fail to Ensure Compliance with National Ambient Air Quality Standards for Ozone.

As the ROD states, the Forest Service is required by National Forest Management Act (“NFMA”) regulations at 36 CFR § 219.27 to “Maintain air quality at a level that is adequate for the protection and use of NFS [National Forest System] resources and that meets or exceeds applicable Federal, State and/or local standards or regulations.” ROD at 10. The 1987 Santa Fe National Forest LRMP further requires that management activities be planned “...so that air quality will meet applicable Federal, state, and local regulations.” LRMP at 80.

Unfortunately the FEIS entirely fails to adequately analyze the impacts of oil and gas development to ozone concentrations within the region and consequently, the ROD fails to ensure compliance with both NFMA regulations and the LRMP. This, despite the fact that volatile organic compound (“VOC”) and nitrogen oxide (“NOx”) pollution from oil and gas development is sure to fuel the rise of ozone air pollution in the region.⁵

To begin with, the FEIS is utterly deficient because it fails to analyze impacts to the current National Ambient Air Quality Standards (“NAAQS”) for ozone. On March 27, 2008, the U.S. Environmental Protection Agency (“EPA”) announced that it had revised the NAAQS for ozone, setting a new standard of 0.075 parts per million over an eight-hour period. *See* 73 Fed. Reg. 16436-16514.⁶ This new standard became effective May 27, 2008 and effectively superseded the prior ozone NAAQS, which was set at 0.08 parts per million over an eight-hour

⁴ *Supra* at 6.

⁵ As the FEIS notes on page 85, VOC and NOx pollution reacts with sunlight to form ozone. As such, they are considered ozone “precursors.”

⁶ *See Exhibit 2* to this Appeal, EPA, “National Ambient Air Quality Standards for Ozone: Final Rule” (March 27, 2008).

period. An area will violate the new ozone NAAQS if the three-year average of the annual fourth highest eight-hour ozone concentration is 0.076 parts per million or higher at any one monitor. *See* 73 Fed. Reg. 16511.

The FEIS entirely fails to mention the current ozone NAAQS. The discussion of ozone air pollution on pages 87-88 centers entirely around the old ozone NAAQS, which has been officially superseded by rulemaking. Table OG-19 in the FEIS for example states that the “Limiting Standard” for ozone is 0.084 parts per million, rather than 0.075 parts per million as required by the current ozone NAAQS. *See* FEIS at 88 (*see also*, Table OG-18, FEIS at 85).

The reliance on an obsolete air quality standard is seriously problematic. For one thing, the FEIS asserts that the region is currently in compliance with the ozone NAAQS and the ROD further asserts that all air quality standards will be met. *See e.g.* ROD at 10. Sadly, this is untrue. Although the FEIS presents ozone monitoring data only for the years 2000-2004, the data presented in Table OG-19 shows that ozone concentrations have exceeded the current NAAQS on a number of occasions. The FEIS however, does not disclose this nor acknowledge the troubling implications of this data.⁷

Even more troubling is that current data shows that the region is currently in violation of the ozone NAAQS. Most recently, ozone concentrations soared above the NAAQS, triggering a violation at the Navajo Lake ozone monitor located in neighboring San Juan County, New Mexico. During the week of October 12, 2008, ozone air pollution levels in San Juan County, New Mexico soared above federal health standards. Ozone levels peaked above the NAAQS on October 15th, 17th, and 18th. As a result, it appears that the region has for certain triggered a violation of the NAAQS. At the Navajo Lake ozone monitor in San Juan County, the 2006-2008 average of the annual fourth highest measured ozone concentration is now at 0.077 parts per million.⁸ In a recent article in the Farmington Daily Times, a representative with NMED stated, “[I]t does appear that we have exceeded the National Ambient Air Quality Standard for 8-hour ozone.”⁹ Although this violation happened in San Juan County, the FEIS notes, “[T]he overall air quality of the region can be conservatively represented by data measured at the Bloomfield and Farmington stations in nearby San Juan County to the west[.]” FEIS at 87.

Not only does the FEIS fail to recognize the current ozone NAAQS, the FEIS does not even mention or disclose the most recent ozone monitoring data and the violation of the current NAAQS. In fact, the FEIS only presents ozone monitoring data from 2004 at the latest, which is questionable given that ozone monitoring data from all of New Mexico is readily available from the EPA online. *See e.g.* Ozone monitoring data from New Mexico, 2005-2008,

⁷ Amazingly, an EIS prepared by the Carson National Forest for oil and gas leasing on the Jicarilla Ranger District actually analyzes air quality impacts on the context of the current ozone NAAQS of 0.075 parts per million, further calling into question the validity and accuracy of the Santa Fe National Forest’s FEIS. *See* FEIS for Surface Management of Gas Leasing and Development, Jicarilla Ranger District, Carson National Forest, Chapter 3, available online at http://www.fs.fed.us/r3/carson/plans/jicarilla_oil_gas/feis/ch3_affected%20Environment_environmental_consequences.pdf.

⁸ *See Exhibit 3* attached to this Appeal, spreadsheet showing ozone measurements from 2008 and three-year average, based on EPA and New Mexico Environment Department ozone monitoring data.

⁹ *See Exhibit 4* attached to this Appeal, De Bruin, C, “Local air fails test: San Juan County must improve air quality or face limits on new development,” article in *Farmington Daily Times* (October 21, 2008).

<http://iaspub.epa.gov/airsdata/adaqs.monvals?geotype=st&geocode=NM&geoinfo=st~NM~New+Mexico&pol=O3&year=2008+2007+2006+2005&fld=monid&fld=siteid&fld=address&fld=city&fld=county&fld=stabbr&fld=regnr&rpp=25>.

This is a major oversight. As the Forest Service states in the FEIS, “Even though the contribution of impacts would be small and less than significant within the study area, the impact would be considered significant on a cumulative basis if it would cause or add to a new or existing problem of visibility degradation or ozone nonattainment.” FEIS at 94. Clearly there is an existing ozone air pollution problem. Consequently, in authorizing ramped up oil and gas leasing on the Santa Fe National Forest, ***there will be significant air quality impacts***. The Forest Service has not only failed to address these significant environmental impacts, but in turn failed to demonstrate that Federal and state air quality standards will be met in accordance with NFMA regulations and the 1987 Santa Fe National Forest LRMP.

Worse yet, by failing to adequately analyze and assess ozone air quality impacts, the Forest Service has jeopardized public health in the region. According to the EPA, ozone is especially harmful to children, seniors, those with asthma and other respiratory conditions, and even active adults. *See* U.S. EPA, “Smog—Who Does it Hurt? What You Need to Know About Ozone and Your Health,” EPA-452/K-99-001 (July 1999).¹⁰ The pollutant is linked to asthma attacks, can aggravate lung disease, can send children and seniors to the emergency room, cause heart attacks, and even premature death. *Id.* By failing to meet Federal and state air quality standards for ozone, the Forest Service has further failed to adequately safeguard public health.

c. The ROD and FEIS Fail to Ensure Compliance with Federal PSD Increments.

Prevention of significant deterioration increment standards are similar ambient air quality standards, although the goal of increments is to preserve high air quality in clean air areas. PSD increments for Class I areas are stronger than those in Class II areas. The FEIS discloses the applicable PSD increment standards at Table OG-20.

Unfortunately, nowhere does the FEIS assess whether PSD increments will remain protected as a result of authorizing ramped up oil and gas leasing. Once again, the Forest Service has failed to ensure that Federal and state air quality standards will be met in accordance with NFMA regulations and the 1987 Santa Fe National Forest LRMP.

The failure to analyze impacts to PSD increments is especially problematic in regards to PSD increments for Class I areas, such as the San Pedro Parks Wilderness Area. As already explained, the 1987 Santa Fe National Forest LRMP requires the Forest Service to predict the impacts of air pollution generating activities to air quality related values in Class I areas. *See* LRMP at 128. The failure to assess the impacts of oil and gas development to PSD increments in Class I areas is clearly in contravention of LRMP requirement.

¹⁰ *See* U.S. EPA, “Smog—Who Does it Hurt? What You Need to Know About Ozone and Your Health,” EPA-452/K-99-001 (July 1999). Available online at <http://www.epa.gov/airnow/health/smog.pdf>.

d. The Air Quality Analysis Relies on a Outdated and Inaccurate Emission Inventory.

Undermining the Forest Service's overall air quality analysis, as well as any determination that Federal and state air quality standards will be met, is the fact that the FEIS relies on a wholly outdated and inaccurate emission inventory for the region, particularly in relation to oil and gas development emissions.

Indeed, the emission inventory presented on pages 92-93 for Rio Arriba and Sandoval Counties were prepared in 1999, nearly 10 years ago. Since that time, new inventories have been prepared showing that oil and gas operations are a much larger source of air emissions than previously reported. Most recently, a 2006 report prepared for NMED by ENVIRON revealed that area sources of emissions related to **oil and gas development alone released 14,528 tons of NOx and 48,894 tons of VOCs in Rio Arriba County.**¹¹ Conversely, the FEIS reports that total NOx emissions in Rio Arriba County amount to only 5,725 tons of NOx and 5,429 tons of VOCs. In other words, more recent inventories show that oil and gas operations alone release nearly three times as much NOx as nearly 10 times as much VOC pollution as the FEIS discloses.

Clearly the Forest Service significantly underestimated the air quality impacts of oil and gas leasing. Indeed, the Forest Service seems to have made no effort whatsoever to ensure that current and high quality information was used in the FEIS when analyzing and assessing potentially significant air quality impacts.

The failure to accurately analyze and assess the air quality impacts of ramped up oil and gas leasing on the Santa Fe National Forest is underscored by the failure of the Forest Service to utilize accurate and up-to-date emission inventory data. Indeed, without accurate emission inventory data, the Forest Service has no basis for concluding that the cumulative air quality impacts of oil and gas leasing will maintain Federal and state air quality standards in accordance with NFMA regulations and the LRMP.

e. The ROD and FEIS Point to no Mitigation Measures that Would Ensure Protection of Air Quality.

Further demonstrating that the Forest Service has failed to protect air quality is the fact that both the ROD and FEIS not only fail to point to any mitigation measure that would ensure oil and gas development would adequately protect air quality, but actually admit that no mitigation measures are being prescribed to address potentially significant air quality impacts. *See e.g.*, ROD at 24.

Instead, the ROD points to speculative, yet-to-be specified measures that may nor may not ever affect oil and gas development on the Santa Fe National Forest. For instance, the FEIS states, "Federal land managers (BLM and Forest Service) are currently considering a range of small wellhead engine and other mitigation strategies to reduced the magnitude and extent of

¹¹ *See Exhibit 5* attached to this Appeal, Pollack, A, J. Rusell, J. Grant, R. Friesen, P. Fields, and M. Wolf, "Final Report: Ozone Precursors Emission Inventory for San Juan and Rio Arriba Counties, New Mexico," prepared for New Mexico Environment Department (August 31, 2006) at 2-22.

adverse cumulative air quality impacts in the region.” FEIS at 94. The ROD also states:

The Proposed Action does not include any conditions of approval (COA) or mitigation measures, which are developed and applied during second level NEPA site-specific analysis of the APD surface use plans of operations. At that time, the Forest Service would ensure that applicable COAs are consistent with established BLM and Forest Service policies in the San Juan Basin for managing noise and air quality.

ROD at 15. As already explained, the Forest Service cannot defer mitigating the potentially significant impacts of oil and gas development when authorizing oil and gas leasing on the Santa Fe National Forest. Because consent to leasing surrenders the Forest Service’s discretion to constrain the right to develop leases, the Forest Service was required to prescribe mitigation measures to protect air quality through the ROD to meet its substantive duties to protect air quality. Regardless of any “consideration” of future mitigation measures or any “second level” environmental analysis that may or may not occur, the Forest Service was obligated to prescribe air quality mitigation measures. The failure to do so renders the ROD fatally flawed and in violation of the Forest Service’s duties under NFMA regulations and the LRMP to protect air quality.

f. The ROD and FEIS Cannot Reasonably Rely on NMED Air Quality Rules and Regulations.

Finally, although the Forest Service may claim that NMED air quality regulations will adequately protect air quality, this claim is unfounded and ignores a key problem associated with the ability of NMED air quality regulations to protect air quality in the face of oil and gas development. That problem is that many, if not all, sources of air pollution associated with oil and gas development fall under regulatory thresholds established in NMED air quality regulations. For example, NMED air quality regulations only require that a source of air pollution obtain a construction permit if a source emits more than 25 tons/year or 10 pounds/hour of any criteria air pollutant. *See* 20.2.72 New Mexico Administrative Code (“NMAC”). However, while a number of sources related to oil and gas development will release air pollution, including dehydrators, well testing and completions, engines (including drill rig engines and compressor engines), and separators, many, if not all, of these sources do not emit more than 25 tons/year or 10 pounds per hour of any criteria air pollutant. Furthermore, there are no NMED air quality regulations that explicitly limit emissions from sources of air pollution related to oil and gas development. Thus, even if sources, such as compressor engines and drill rig engines, would be required to obtain construction permits, these sources would not be required to limit emissions in any way.

Regardless, despite NMED air quality regulations, air quality standards are obviously not being maintained within the region. As already discussed, not only is visibility being degraded in the San Pedro Parks Wilderness Area, but ozone NAAQS have been violated in nearby San Juan County. The Forest Service cannot reasonably rely on NMED air quality regulations to assert that air quality will be protected, or to demonstrate that Federal and state air quality standards will be met in accordance with NFMA regulations and the 1987 Santa Fe National Forest LRMP.

II. THE ROD AND FEIS FAIL TO MAINTAIN WATER QUALITY TO MEET OR EXCEED STATE WATER QUALITY STANDARDS

The 1987 Santa Fe National Forest LRMP requires the Forest Service to “Maintain water quality to meet or exceed state water quality standards.” LRMP at 20. This requirement is echoed at 36 CFR § 219.23(d) and is further bolstered by the Clean Water Act, which requires all federal agencies to comply with state water quality laws, regulations, and standards. *See* 33 USC § 1323(a).

Unfortunately, the FEIS and ROD fail to ensure compliance with State of New Mexico water quality standards. Of particular concern is that the ROD fails to prescribe leasing stipulations to ensure that water quality standards in impaired stream reaches on the Santa Fe National Forest will be protected as a result of any oil and gas development. Indeed, the FEIS discloses that within the area projected to be impacted by oil and gas development, there are 13 impaired stream reaches. *See* FEIS at 82. The FEIS discloses that, “Most of these impaired waters have turbidity, stream bottom deposits, and/or temperature listed as causes of impairment.” FEIS at 70.

Neither the FEIS nor the ROD point to any proposed stipulation to specifically ensure that water quality within impaired stream reaches will not be further jeopardized as a result of ramped up oil and gas leasing. Indeed, while the FEIS references various NSO stipulations, such as NSO stipulations for steep slopes, there is no indication that such stipulations will ensure that water quality will be protected within impaired stream reaches in accordance with NFMA regulations, the LRMP, and the Clean Water Act. The analysis of water quality impacts on pages 76-84 presents no analysis or assessment of whether the proposed NSO stipulations will actually protect water quality within impaired stream reaches.

Although the Forest Service may claim that best management practices (“BMPs”) will be followed and that state and federal permitting requirements would apply to any oil and gas development, it is unclear how BMPs or state and federal permitting requirements would adequately protect water quality in impaired stream reaches. By all measures, BMPs and state and federal permitting requirements have failed to adequately protect water quality within the 13 impaired stream reaches that may be affected by oil and gas development on the Santa Fe National Forest. It is unclear how reliance on failed BMPs and state and federal permitting requirements will sufficiently maintain water quality to meet or exceed state water quality standards within impaired stream reaches.

Regardless, the Forest Service has an affirmative and independent duty to ensure its actions maintain water quality to meet or exceed state water quality standards. The ROD fails to provide stipulations to ensure that water quality in impaired stream reaches will be protected in accordance with NFMA regulations, the 1987 LRMP, and the Clean Water Act, and therefore must be overturned.

III. THE ROD VIOLATES THE ENDANGERED SPECIES ACT

The ROD for authorizing ramped up oil and gas leasing on the Santa Fe National Forest violates Section 7 of the Endangered Species Act, 16 USC § 1536, because it fails to appropriately analyze and assess potentially significant impacts to Mexican spotted owl and its habitat.

Indeed, the Forest Service claims that implementation of the ROD “would not adversely affect MSO [Mexican spotted owl] populations on the Santa Fe National Forest.” FEIS at 119. As a result, the Forest Service did not undertake consultation with the U.S. Fish and Wildlife Service. *See* ROD at 9. The Forest Service’s position is based on the assertion that timing stipulations set forth in the ROD would adequately protect the Mexican spotted owl and its habitat. However, the ROD explicitly provides that an “exception, modification, or waiver” to timing stipulations meant to protect Mexican spotted owl can be granted—in other words, proposed stipulations meant to protect Mexican spotted owl may not even be implemented. *See* ROD at 21.

Thus, contrary to the Forest Service’s assertion otherwise, the Mexican spotted owl may be affected because the ROD explicitly provides that proposed timing stipulations may be excepted, modified, or waived. If the Forest Service is to rely on these stipulations to support a “no effect” determination and therefore a determination that consultation under Section 7 of the Endangered Species Act is not necessary, then any potential exception, modification, or waiver to these stipulations would necessarily invalidate any “no effect” determination. Consequently, prior to the issuance of the ROD, the Forest Service was required to consult with the U.S. Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act to address potential adverse effects that may occur to Mexican spotted owl and its habitat in the event that timing stipulations are excepted, waived, or modified. The failure to consult therefore renders the ROD in violation of the Endangered Species Act.

REQUEST FOR RELIEF

Based on the foregoing Statement of Reasons, WildEarth Guardians hereby requests the following relief:

1. That Santa Fe National Forest Supervisor Daniel J. Jiron’s ROD authorizing expanded oil and gas leasing on the Santa Fe National Forest be vacated and set aside.
2. If the Forest Service intends to authorize additional oil and gas leasing on the Santa Fe National Forest, that the Supervisor be instructed to prepare a full site-specific analysis of the potentially significant impacts of oil and gas development, including the site-specific air and water quality impacts, and prescribe mitigation measures and monitoring requirements.
3. If the Forest Service intends to authorize additional oil and gas leasing on the Santa Fe National Forest, that the Supervisor be instructed to either consult with the U.S.

Fish and Wildlife Service regarding the potential adverse impacts to Mexican spotted owl and its habitat or otherwise ensure that timing stipulations meant to protect the Mexican spotted owl and its habitat are not excepted, modified, or waived.

4. If the Forest Service intends to authorize additional oil and gas leasing on the Santa Fe National Forest, that the Supervisor be instructed to ensure compliance with all applicable laws, regulations, and LRMP requirements related to the protection of air and water quality.
5. That any additional oil and gas leasing on the Santa Fe National Forest be stayed pending the completion of additional environmental analysis and a new decision.

Finally, pursuant to 36 CFR § 217.12, we request a meeting with the Deciding Officer to discuss this appeal and explore opportunities to resolve issues by means other than review and decision on this appeal.

Respectfully submitted November 3, 2008,

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TABLE OF EXHIBITS

- Exhibit 1. Excerpt from New Mexico Air Quality Bureau, “Revision to the New Mexico State Implementation Plan for Regional Haze” (December 31, 2003)
- Exhibit 2. EPA, “National Ambient Air Quality Standards for Ozone: Final Rule” (March 27, 2008)
- Exhibit 3. Spreadsheet showing ozone measurements from 2008 and three-year average, based on EPA and New Mexico Environment Department ozone monitoring data
- Exhibit 4. De Bruin, C, “Local air fails test: San Juan County must improve air quality or face limits on new development,” article in *Farmington Daily Times* (October 21, 2008)
- Exhibit 5. Pollack, A, J. Rusell, J. Grant, R. Friesen, P. Fields, and M. Wolf, “Final Report: Ozone Precursors Emission Inventory for San Juan and Rio Arriba Counties, New Mexico,” prepared for New Mexico Environment Department (August 31, 2006)