



EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

July 19, 2012

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Office of the Administrator  
Environmental Protection Agency  
Room 3000  
Ariel Rios Building  
1200 Pennsylvania Ave., NW  
Washington, DC 20460  
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BY FED-EX AND EMAIL

Re: Petition for Reconsideration of 2008 National Standards for Ozone and Petition  
for New Final Nonattainment Designation for the Uinta Basin, Utah

Dear Administrator Jackson,

The following organizations file this petition for reconsideration and petition for a new final rule pursuant to Clean Air Act § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B): WildEarth Guardians, 516 Alto Avenue, Santa Fe, NM 87501, (505) 988-9126; Southern Utah Wilderness Alliance (SUWA), 425 East 100 South, Salt Lake City, UT 84111, (801) 486-3161; and Utah Physicians for a Healthy Environment, 4091 Splendor Way, Salt Lake City, UT 84124, (801) 243-9089 (“Petitioners”). Petitioners request that you reconsider certain aspects of the final rule titled “Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards.” 77 Fed. Reg. 30,088 (May 21, 2012). Specifically, we ask the Environmental Protection Agency (EPA) to reconsider its decision to classify the Uinta Basin in Utah as “unclassifiable” and to issue a new final rule designating the area as “nonattainment.”

EPA must consider this petition for reconsideration because EPA did not provide a rationale for its failure to consider monitoring data from the Uinta Basin showing severe violations of the 2008 ozone standard as evidence of nonattainment until the response to public comments, which was published after the final rule. Additionally, there is new information that arose after the public comment period closed demonstrating there will be significant increases in ozone precursor emissions as a result of oil and gas development in the Uinta Basin, which will make the existing problem worse. It was impracticable for petitioners to raise objections to EPA’s rationale prior to the close of the public comment period or to comment on the new information, and these issues are of central relevance to the final rule. *See* 42 U.S.C. § 7607(d)(7)(B) (setting forth the standard for petition for reconsideration).

## BACKGROUND

The Uinta Basin in northeastern Utah is now home to some of the worst ground-level ozone pollution in the nation as a result of rampant oil and gas development and meteorological conditions. This 9,000 square mile basin includes lands under the jurisdiction of the federal government, the State of Utah, and the Ute Tribe.<sup>1</sup>

Ground-level ozone, or smog, forms from a chemical reaction between volatile organic compounds (“VOCs”) and nitrogen oxides (“NOx”) in the presence of sunlight. Ozone is a dangerous air pollutant that impairs breathing, aggravates asthma, sends thousands of people to emergency rooms and hospitals, and likely causes thousands of early deaths each year.<sup>2</sup> Children, the elderly, and people with existing respiratory conditions are the most at risk from ozone pollution.<sup>3</sup>

Ozone pollution has long been recognized as a big-city problem that peaks in the summertime, caused by VOC and NOx emissions from automobiles and industrial sources. It has only recently been recognized as a wintertime problem in rural areas with significant oil and gas development, such as the Uinta Basin and Sublette County, Wyoming.<sup>4</sup> In these areas, significant quantities of NOx and VOCs from oil and gas activities are trapped near the ground by stagnant air and converted to ozone by intense sunlight reflecting off snow.<sup>5</sup> When these conditions occur, these rural areas experience ozone levels that exceed those of the most heavily populated cities in the U.S.<sup>6</sup>

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<sup>1</sup> Bureau of Econ. Research, *The Structure and Economic Impact of Utah's Oil and Gas Exploration and Production Industry Phase I - The Uinta Basin 28-9* (2007). Copies of documents cited in this Petition are included in an Appendix.

<sup>2</sup> See 77 Fed. Reg. at 30,089–90.

<sup>3</sup> See *id.*; see also 75 Fed. Reg. 2938 (Jan. 19, 2010). EPA has recognized the adverse health effects that can occur at ozone levels even below the current federal standard of 0.075 ppm, especially for children and the elderly, leading to a proposal to lower the standard. See *id.* at 2944. A recent study confirms the dire consequences of ozone exposure, even at levels below the standard, estimating that a 0.005 ppm decrease from the current standard would avoid over 1,000 premature deaths per year. Jesse Berman et al., *Health Benefits from Large-Scale Ozone Reduction in the United States*, <http://dx.doi.org/10.1289/ehp.1104851> (published online July 18, 2012).

<sup>4</sup> See Energy Dynamics Lab. & Utah St. U. Research Foundation, *Uinta Basin Winter Ozone and Air Quality Study 15* (2011) (“*Uinta Basin Winter Ozone Study*”).

<sup>5</sup> EPA Region 8, *Wyoming Area Designations for the 2008 NAAQS Standards Technical Support Document*, Doc.# EPA-HQ-OAR-2008-0476-0652, at 4 (2011) (“*Wyoming TSD*”).

<sup>6</sup> Compare Uinta County Monitor Value Reports 2010 and 2011 with Los Angeles Monitor Value Reports 2010 and 2011, available at [http://www.epa.gov/airquality/airdata/ad\\_rep\\_mon.html](http://www.epa.gov/airquality/airdata/ad_rep_mon.html) (generated July 16, 2012) (Uinta County peak ozone concentrations are 0.123 ppm in 2010 and 0.139 ppm in 2011, while Los Angeles County peaks at 0.105 and 0.122).

The wintertime ozone violations were first recognized in 2005 in Wyoming.<sup>7</sup> By 2008, ozone values in Sublette County, Wyoming had increased over 20% from 2005 levels.<sup>8</sup> The “uncommon problem” of extreme wintertime ozone readings in rural valleys was attributed to emissions from the natural gas industry.<sup>9</sup> In response, Wyoming “move[d] forward to solve the problem,” recommending a nonattainment designation for the affected area.<sup>10</sup> EPA finalized this designation as part of the final rule at issue here.<sup>11</sup>

EPA has recognized the same wintertime ozone problem in the Uinta Basin. In response, EPA has undertaken efforts to gather additional data and impose controls on NO<sub>x</sub> and VOC emissions from oil and gas activities. Unlike in Wyoming, however, EPA has stopped short of designating the area nonattainment despite monitored exceedances of the 2008 standard. Through a series of consent decrees, EPA has required private companies to “fund, install, and operate ‘ambient air quality and meteorological monitoring stations’ in the Uinta Basin to gather data necessary for use in air quality monitoring under federal and state laws and regulations.”<sup>12</sup> The two monitors EPA required, known as the Redwash and Ouray monitors, have been monitoring ozone levels since 2009.

In that time, the monitors have measured numerous, severe violations of the 2008 ozone standard of 0.075 parts per million (ppm) established to protect public health and welfare.<sup>13</sup> In the first three months of 2010, the Redwash and Ouray monitors measured more than 68 exceedances of this standard. Between January and March 2011, there were 24 days with violations.<sup>14</sup> The highest daily 8-hour concentrations in 2010 and 2011 were 0.125 ppm and 0.139 ppm respectively—well above the federal standard set to protect public health and

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<sup>7</sup> See 2005 Sublette County, WY Monitor Value Reports, *available at* [http://www.epa.gov/airquality/airdata/ad\\_rep\\_mon.html](http://www.epa.gov/airquality/airdata/ad_rep_mon.html) (generated July 18, 2012).

<sup>8</sup> 2008 Sublette County, WY Monitor Value Reports, *available at* [http://www.epa.gov/airquality/airdata/ad\\_rep\\_mon.html](http://www.epa.gov/airquality/airdata/ad_rep_mon.html) (generated July 18, 2012).

<sup>9</sup> Letter from David Freudenthal, Governor, to Carol Rushin, EPA Regional Adm’r, Regarding Wyoming 8-Hour Ozone Designations (Mar. 12, 2009).

<sup>10</sup> *Id.*

<sup>11</sup> 77 Fed. Reg. at 30,157–58.

<sup>12</sup> The consent decrees resulted from a series of EPA enforcement actions against oil and gas companies operating in the Uinta Basin. In addition to the required monitoring, the consent decrees required emission reductions from certain oil and gas activities, such as compressors. See *U.S. v. Kerr-McGee Corp.*, No. 07-CV-01034-EWN-KMT, 2008 WL 863975, at \*2 (D. Colo. Mar. 26, 2008); see also *United States v. Kerr-McGee Corp.*, Case 1:07-cv-01034-EWN-KMT, ¶¶ 80–82 (D. Colo. May 17, 2007) (“KM Decree”); *United States v. Colo. Interstate Gas Co.*, Case 2:09-cv-00649-TS, ¶¶ 11–14 (D. Utah, July 23, 2009) (“CIG Decree”); *United States v. Miller, Dyer & Co., LLC*, Case 2:09-cv-00332-DAK, ¶ 42 (D. Utah, Sept. 23, 2009) (“MD Decree”).

<sup>13</sup> See 40 C.F.R. § 50.15(a).

<sup>14</sup> See Uinta County Monitor Value Reports 2010 and 2011.

welfare.<sup>15</sup> For comparison, the highest ozone levels monitored in Los Angeles County in 2010 and 2011 were 0.105 and 0.122 ppm respectively.<sup>16</sup>

EPA regulations also establish a method for determining when a particular monitoring station demonstrates a violation of the 0.075 ppm standard. To avoid reliance on anomalous high-level events, EPA determines compliance based on the three-year average of the annual fourth-highest daily maximum eight-hour average measured at the site.<sup>17</sup> Using the procedures established in 40 C.F.R. § 50, Appendix P, the Uinta Basin monitors demonstrate severe violations of the standard. The three-year average of the fourth-highest values from 2009 to 2011 for the Redwash monitor was 0.088 ppm and for the Ouray monitor was 0.100 ppm.<sup>18</sup> These three-year averages are both higher than the three-year average from the monitor in Sublette County (0.078 ppm), which the State of Wyoming and EPA relied upon to designate the county and portions of two others as “nonattainment” for ozone.<sup>19</sup>

A Utah Division of Air Quality (DAQ) study conducted between December 2010 and March 2011 confirmed the extreme ozone levels measured by the Redwash and Ouray monitors.<sup>20</sup> In conjunction with Utah State University and the Energy Dynamics Laboratory, the Utah DAQ compiled data from six existing monitors and installed ten new monitors throughout the Uinta Basin to determine the extent and severity of the ozone problem.<sup>21</sup> The study included data from the Redwash and Ouray monitors.<sup>22</sup> In total, the monitors measured 186 ozone exceedances.<sup>23</sup> With respect to the highest 8-hour concentrations, seven sites exceeded 0.115 ppm, with three of those sites measuring between 0.120 ppm and 0.134 ppm, and two sites exceeding 0.134 ppm. With respect to the fourth-highest, 8-hour concentrations, seven sites exceeded 0.100 ppm, with three sites exceeding 0.115 ppm, and one site exceeding 0.120 ppm.<sup>24</sup> According to the study, “the monitoring locations with the greatest number of nearby wells also tended to have the highest ozone concentrations . . . and the greatest number of NAAQS exceedances.”<sup>25</sup>

Data from a tribal monitor on Indian lands within the Uinta Basin and a National Park Service monitor within Dinosaur National Monument, which is just east of the Uinta Basin, also confirmed multiple violations of the federal ozone standard. In 2011, the Myton tribal monitor

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<sup>15</sup> *Id.*; see also BLM, Greater Natural Buttes Final Environmental Impact Statement, Chapter 3, at 3-6 (2012) (“Greater Natural Buttes FEIS”).

<sup>16</sup> See Los Angeles Monitor Value Reports 2010 and 2011.

<sup>17</sup> 40 C.F.R. § 50.15(b); see also 40 C.F.R. § 50, App. P.

<sup>18</sup> Comment by WildEarth Guardians to EPA Regarding Ozone Designation Recommendations for the 2008 Ozone NAAQS, Doc. # EPA-HQ-OAR-2008-0476-0440, at 14–16 (“WildEarth Guardians Comments”).

<sup>19</sup> Wyoming TSD, at 5.

<sup>20</sup> Uinta Basin Winter Ozone Study (2011).

<sup>21</sup> *Id.* at 19.

<sup>22</sup> *Id.*

<sup>23</sup> See *id.* at 42.

<sup>24</sup> *Id.* at 42, 97.

<sup>25</sup> *Id.* at 44.

recorded 19 exceedances, with a high value of 0.124 ppm and a fourth-highest value of 0.111 ppm.<sup>26</sup> Also in 2011, the Dinosaur National Monument monitor recorded eight exceedances of the ozone standard.<sup>27</sup> The highest value was 0.106 ppm, and the fourth-highest value was 0.090 ppm.<sup>28</sup> In sum, all available monitoring evidence points unambiguously to the fact that the Uinta Basin is in violation of the 2008 ozone standard.

Despite the considerable and uncontroverted evidence showing a serious ozone pollution problem that poses a threat to human health in the Uinta Basin, EPA failed to designate the Uinta Basin as a nonattainment area. Although EPA recognizes that the Redwash and Ouray monitors recorded ozone levels well-above the federal standard, EPA claims that it cannot use this data to support a nonattainment designation because the monitors are “non-regulatory.”<sup>29</sup> EPA did not explain why it considered the monitoring conducted pursuant to the consent decrees “non-regulatory” at any point during the designation process.

It was not until EPA published its response to public comments on or around May 17, 2012 that EPA provided its explanation of why the monitors are “non-regulatory.”<sup>30</sup> EPA was responding to Petitioner WildEarth Guardians’ comments demonstrating that the data from the Redwash and Ouray monitors supports a finding that the Uinta Basin is nonattainment under EPA’s own procedures found in 40 C.F.R. § 50, Appendix P (three-year average of the annual fourth-highest daily maximum).<sup>31</sup> Notably, EPA does not dispute that the data shows violations of the standard under 40 C.F.R. § 50, Appendix P. Moreover, EPA concedes that the monitors “meet the siting, methodology, and operational requirements” of EPA’s regulations. EPA also concedes that the monitoring data is being “collected in a manner reasonably calculated to meet the EPA’s quality assurance/quality control (‘QA/QC’) requirements.”<sup>32</sup> Despite these assurances, however, EPA claims that the data cannot be used for regulatory purposes because of three alleged quality assurance problems. As explained in more detail below, EPA’s arguments have no rational basis and are not supported by the record. Because EPA offered its rationale for the first time in response to comments, this Petition for Reconsideration is the first opportunity that Petitioners have had to respond.

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<sup>26</sup> 2011 Utah Air Monitor Report for Ozone 4, *available at* [http://www.epa.gov/airquality/airdata/ad\\_rep\\_mon.html](http://www.epa.gov/airquality/airdata/ad_rep_mon.html) (generated July 17, 2012).

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Id.*

<sup>29</sup> 77 Fed. Reg. 30,088, 30,089; *see also* Letter from James B. Martin, Region XIII Adm’r, EPA to Gary R. Herbert, Governor of Utah (Dec. 8, 2011), *available at* [http://www.epa.gov/ozonedesignations/2008standards/rec/eparesp/08\\_UT\\_resp.pdf](http://www.epa.gov/ozonedesignations/2008standards/rec/eparesp/08_UT_resp.pdf); Letter from James B. Martin, Region XIII Adm’r, EPA to Gary Hayes, Chairman, Ute Mountain Ute Tribe (Dec. 8, 2011), *available at* [http://www.epa.gov/ozonedesignations/2008standards/rec/eparesp/T\\_UteMountainUte\\_resp.pdf](http://www.epa.gov/ozonedesignations/2008standards/rec/eparesp/T_UteMountainUte_resp.pdf).

<sup>30</sup> EPA, Responses to Significant Comments on the State and Tribal Designation Recommendations for the 2008 Ozone NAAQS, Doc. # EPA-HQ-OAR-2008-0476-0675, at 72–73 (dated Apr. 30 2012; published May 17, 2012) (“RTC”).

<sup>31</sup> WildEarth Guardians Comments, at 14–16.

<sup>32</sup> RTC at 72–73; *see also* KM Decree ¶ 81; CIG Decree ¶ 12; MD Decree ¶ 42(b).

EPA's arbitrary decision to ignore the data from the Redwash and Ouray monitors has significant legal and health implications. Instead of finding nonattainment, as the data requires, EPA designated the Uinta Basin unclassifiable. This designation does not include any additional legal requirements to reduce pollution from that of an attainment area and will therefore do nothing to curb oil and gas pollution that currently threatens the public health.

## **ARGUMENT**

Data from the Redwash and Ouray monitors, corroborated by numerous sources, unequivocally demonstrates that the ambient air quality in the Uinta Basin is not meeting federal air quality standards and poses a threat to public health. On the basis of this data, EPA must reconsider its decision to designate the Uinta Basin unclassifiable, rather than nonattainment. EPA's rationale for failing to consider the Uinta Basin monitoring data, provided for the first time in response to public comments, violates the Clean Air Act and lacks a rational basis. EPA should also reconsider its decision because information that arose after the close of the public comment period demonstrates that the existing ozone pollution problem is likely to get worse.

### **I. EPA's Rationale For Failing to Consider the Uinta Basin Monitoring Data Violates the Clean Air Act and Lacks a Rational Basis**

Data from the Redwash and Ouray monitors, corroborated by numerous sources, unequivocally demonstrates that the ambient air quality in the Uinta Basin is not meeting federal air quality standards and poses a threat to public health. EPA claims that it cannot rely on this data to make a nonattainment designation because these are not "regulatory" monitors. However, that is not the standard provided by the Clean Air Act. The plain language and legislative history of the Act demonstrate that EPA must consider sound data that is available. In this case, EPA concedes that the data is "reliable and of good quality." Furthermore, EPA's three justifications for not considering the data lack a rational basis and have no support in the record. Finally, EPA's position is inconsistent with its interpretation of the Act in other circumstances and is therefore not entitled to deference.

#### **A. Under the Clean Air Act, EPA cannot disregard sound, reliable data.**

Under the Clean Air Act, EPA sets National Ambient Air Quality Standards (NAAQS) to protect public health and welfare. 42 U.S.C. § 7409(b). NAAQS designations are based on an assessment of whether the concentration of pollutants in the ambient air exceeds the standard set by EPA to protect public health and welfare. Non-attainment is defined as "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the [NAAQS] for that pollutant." *Id.* § 7407(d)(1)(A)(i). Attainment is defined as "any area . . . that meets the national primary or secondary ambient air quality standards for the pollutant." Unclassifiable is defined as "any area that cannot be classified on the basis of *available* information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant." *Id.* § 7407(d)(1)(A)(iii) (emphasis added).

The plain language of the Act demonstrates that Congress intended EPA to rely on “available information.” See *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (noting that statutory interpretation begins with “the assumption that the ordinary meaning of that language accurately expresses the legislative purpose”). As the Seventh Circuit has stated, “the only situation in which designation of an area as unclassifiable would be proper” is “if [] data [does] not exist.” *Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303, 1307 (7th Cir. 1983).

The legislative history of the 1990 Clean Air Act amendments confirms that Congress intended EPA to consider any “sound data that is available.” S. Rep. No. 101-228, at 15 (1989), 1990 U.S.C.C.A.N. 3385, 3401. Congress amended the Act in 1990, in part, to remedy the failure to achieve the carbon monoxide and ozone health standards established in 1977. The Senate Report notes that despite existing requirements, “150 million people still live in areas which exceed one or both of those standards.” *Id.* at 3397. To remedy this problem, Congress strengthened the designation process to provide EPA with “significant authority” to “respond to new information about pollution levels and control needs.” *Id.* at 3400. Congress required EPA to make designations within six months of modifying a federal standard and gave EPA broad authority to consider available information, subject only to the limitation that it be sound. *Id.* at 3401–02.

The Ninth Circuit recently confirmed that “the legislative history underlying the 1990 amendment clarifies that the EPA may rely on any ‘sound data’ that is available.” *Montana Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174, 1185 (9th Cir. 2012) (upholding EPA’s reliance on modeling conducted by private contractors to determine that Montana was in nonattainment for SO<sub>2</sub> after EPA had found that the existing regulatory monitoring network was inadequate). Likewise, the D.C. Circuit has upheld EPA’s designation of two counties as nonattainment for particulate matter because EPA relied on the “best available information,” including information other than regulatory monitoring such as projected population growth rates and data regarding wind speed and direction. *ATK Launch Sys., Inc. v. EPA*, 669 F.3d 330, 337, 340 (D.C. Cir. 2012) (quoting *Catawba County v. EPA*, 571 F.3d 20, 44 (D.C. Cir. 2009)).

In this case, EPA itself has repeatedly recognized that the available Uinta Basin monitoring data is sound. In its response to comments, EPA concedes that the monitors “meet the siting, methodology, and operational requirements of 40 C.F.R. Part 58” and that the data is being “collected in a manner reasonably calculated to meet the EPA’s quality assurance/quality control (‘QA/QC’) requirements of 40 C.F.R. Part 58, Appendix A.” RTC at 72–73. 40 C.F.R. Part 58 governs monitoring conducted by state and local agencies for a variety of purposes, including NAAQS compliance. As EPA recognizes, 40 C.F.R. Part 58 does not apply to private parties operating monitors through consent decrees. RTC at 73; see also 40 C.F.R. § 58, App. A, 3. Therefore, EPA mandated substantial compliance with Part 58 requirements in the consent decrees to ensure that the monitors were sited in the proper location, that the data was collected

through an appropriate methodology, and that the data was subject to quality assurance procedures.<sup>33</sup>

In urging the District of Utah to approve one of the consent decrees, EPA stated that the data being collected with the monitors was “*reliable and of good quality* and will be useful in assisting regulators to gauge the impact of future oil and natural gas exploration and development in the Uinta Basin.” Mem. In Support of Motion to Enter Consent Decree by United States in *U.S. v. Miller, Dyer & Co., LLC*, Case 2:09-cv-00332-DAK, at 24 (D. Utah Sept. 21, 2009) (emphasis added). EPA has offered no reasonable explanation for why this data is “useful” for gauging the impact of oil and gas development in the Uinta Basin, but cannot be used to support a nonattainment designation. Indeed, the primary purpose for ozone monitoring is to determine whether there is a violation of federal standards and a need to further protect the public health.

In fact, EPA has urged other federal agencies to rely on the monitoring data when assessing the air quality impacts of oil and gas development in the Uinta Basin. For example, in comments on the GASCO Energy Project, EPA notified BLM that “[m]easured ambient concentrations of ozone in the Uinta Basin during the period of January through March 2010 reached levels that are considerably above the NAAQS of 75 ppb for an eight-hour average.” Comments by EPA to BLM Regarding the GASCO Uinta Basin Natural Gas Development Project Draft EIS, CEQ # 20100386, at 3 (Jan. 7, 2011) (“EPA Gasco Comments”). EPA urged BLM to rely on these existing ambient air concentrations to determine whether the project would lead to violations of the NAAQS standard. *See id.* at 10.<sup>34</sup> EPA also worked closely with BLM to develop a supplemental air analysis for the Greater Natural Buttes oil and gas development project that incorporated the ozone data from the Redwash and Ouray monitors. BLM, Greater Natural Buttes Record of Decision 7-1 (May 2012) (“Greater Natural Buttes ROD”); BLM, Greater Natural Buttes FEIS, Appendices H–Q, at P-69. Likewise, in recent comments on a 400-well project on national forest lands in the Uinta Basin, EPA commented that the Forest Service needed to strengthen its analysis “given recent ambient concentrations of ozone measured in the project area, which exceed the NAAQS.” U.S. Forest Service, South Unit Oil and Gas Development Project Final EIS, Vol. 2, at E-8 to E-9 (Feb. 2012) (“South Unit FEIS”). EPA cannot rationally require other agencies to rely on the data and then refuse to do so itself.

In sum, although EPA refused to use the data to make a nonattainment designation, EPA has failed to demonstrate that the data is not sound. EPA has failed to identify a single problem with where the monitors were sited or the methods through which the data was collected. To the

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<sup>33</sup> In addition to meeting the siting, methodology, operational and quality assurance requirements stated above, the consent decrees also required EPA to approve the contractor selected to operate and maintain the monitors. MD Decree ¶ 42(a); CIG Decree ¶ 11. Additionally, the monitor operators were required to place the monitors in a representative location in the Uinta Basin approved by EPA. KM Decree ¶ 81; *see also* MD Decree ¶ 42(b); CIG Decree ¶ 12. The monitoring stations were also required to meet EPA’s requirements for the number of days the monitors need to operate within a year as set forth in 40 C.F.R. § 50. CIG Decree ¶ 12.

<sup>34</sup> This statement is found in EPA’s Detailed Comments for the Gasco Draft EIS, at 3, which is attached to EPA’s overall comments.



contrary, EPA's own statements and actions indicate that the agency relies on the data in other contexts and is also urging other federal agencies to do so. Furthermore, as discussed above, numerous other monitors in the Uinta Basin have confirmed the severe ozone violations in 2010 and 2011. Because sound monitoring data is available that demonstrates that the Uinta Basin is a nonattainment area under the 2008 ozone standard, EPA's designation of the area as unclassifiable violates the Clean Air Act.

**B. EPA's quality assurance arguments are unsupported in the record and fail to draw a rational connection between the facts found and the decision made**

EPA offers three reasons for its refusal to rely on the Redwash and Ouray monitoring data, all three related to quality assurance. First, EPA states that it has not approved the quality assurance plan that was developed by the contractor that operates the monitors. RTC at 72–73. Second, EPA claims that the plan does not comply with all of EPA's guidance for quality assurance plans. *Id.* The only deficiency EPA identifies, however, is that the plan does not include a mechanism that would allow EPA or another regulatory agency to “direct corrective actions should quality assurance issues be identified in the monitoring program.” *Id.* at 73. Third, EPA claims that although the “raw data” from most of 2010 and all of 2011—the time when the highest violations occurred—is currently reported in EPA's database, it cannot be considered “quality assured.” According to EPA, this means there is not three years of data available to make the comparison with the standard under Part 50, Appendix P. Each of these reasons suffers from numerous flaws and is insufficient to justify EPA's failure to rely on data that it concedes is “reliable and of good quality.”

**1. EPA's failure to approve the quality assurance plan does not call in question the validity of the monitoring data**

EPA objects to the use of the Redwash and Ouray monitoring data because EPA reviewed, but never approved, the quality assurance plan developed by the contractor. RTC at 73. EPA does not identify any regulation requiring EPA approval under the circumstances. EPA cites to monitoring regulations that apply to state and local agencies with delegated authority, which require that EPA approve a quality assurance plan before a monitor may begin operations. *See* 40 C.F.R. § 58, App. A, 2.1.2. As EPA recognizes, however, these requirements do not apply to private parties operating monitors pursuant to consent decrees. RTC at 73. Although there is no specific regulation that applies, EPA did ensure quality assurance of the Redwash and Ouray monitoring data through the consent decrees. *See, e.g.*, KM Decree ¶ 81; CIG Decree ¶ 12; MD Decree ¶ 42(b) (requiring that the data “be collected in a manner reasonably calculated to meet the EPA's quality assurance/quality control (‘QA/QC’) requirements of 40 C.F.R. Part 58, Appendix A”). EPA concedes that the data meets this standard, despite EPA's failure to approve the plan. RTC at 72–73. Given EPA's recognition that the data is sound and that it was collected in a manner reasonably calculated to meet EPA's quality assurance requirements, EPA's failure to approve the plan is nothing more than a technicality and does not provide an adequate justification for refusing to consider the data.

Moreover, the lack of approval is a problem of EPA's own making. The contractor appears to have complied with its quality assurance obligations by producing a quality assurance plan for EPA's review. Approval (or disapproval) of the plan was EPA's responsibility. EPA offers no explanation for its failure to approve the plan. EPA does not argue that it rejected the plan based on any identified deficiencies. Furthermore, even assuming there were deficiencies, EPA does not provide any evidence that it tried to work with the contractor to develop an adequate plan. Based on the record, it appears that EPA reviewed the plan and then did nothing. However, EPA cannot avoid its Clean Air Act responsibilities to protect the public from serious health threats by simply sitting on its hands.

**2. Pursuant to the consent decrees, EPA possesses significant authority to oversee the monitoring and direct corrective action if necessary**

The only specific deficiency cited by the EPA concerning the quality assurance program for the Redwash and Ouray monitors is the lack of "direct quality assurance oversight by any government agency." RTC at 72. Since 2009, private parties have operated these monitors pursuant to consent decrees, rather than as part of a monitoring network operated by a state or local agency with delegated authority under the Clean Air Act. EPA claims that "[t]he consent decrees . . . have not given EPA authority for oversight comparable to that authorized by the EPA through grant funding of state and local monitoring operations." RTC at 73. This claim is refuted by evidence in the record. *See Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 362 (D.C. Cir. 2002) (noting that EPA decisions must be supported by the record). In fact, EPA negotiated specific measures within the consent decree to ensure that the agency would have extensive control of the Uinta Basin monitoring, including the ability to direct corrective action, if required.

Since 2009, the relevant consent decrees have required private companies to "fund, install, and operate 'ambient air quality and meteorological monitoring stations' in the Uinta Basin to gather data necessary for use in air quality monitoring under federal and state laws and regulations." *U.S. v. Kerr-McGee Corp.*, 2008 WL 863975, at \*2. The operators were required to certify to EPA their compliance with all requirements of the consent decree, including the monitoring. *See* MD Decree ¶ 42(c); CIG Decree ¶ 13. The consent decrees also required the operators to provide substantial information to EPA regarding the monitoring operations, including the recorded data and an annual report describing all work and other activities performed under the decree. *See* KM Decree ¶ 110(a),(b); MD Decree ¶ 50(a),(b).<sup>35</sup> With limited exceptions, EPA was authorized to use any information provided by the operator to enforce the decrees. *See* KM Decree ¶ 114; MD Decree ¶ 54; CIG Decree ¶ 18.

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<sup>35</sup> The consent decree required all operators to include the following certification on all required reports and submissions to EPA: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete." KM Decree ¶ 112; MD Decree ¶ 52; CIG Decree ¶ 16.

EPA also had authority to enter any facility covered by the decrees for the purpose of monitoring compliance with any of their provisions, including monitoring the progress of required activities, inspecting equipment and facilities, and inspecting and copying documents or other information required to be maintained in accordance with the Decrees. KM Decree ¶ 140; MD Decree ¶ 79; CIG Decree ¶ 43. Accordingly, EPA had all the authority it needed to oversee the monitoring operations and ensure that they were producing sound, reliable data with adequate quality assurance.

Moreover, there is no question that EPA could have directed corrective action through a contempt proceeding if it had identified any problems with the monitoring. The consent decrees constitute final judgments. *See* KM Decree ¶ 175; MD Decree ¶ 114; CIG Decree ¶ 73; *see also Sinclair Oil Corp. v. Scherer*, 7 F.3d 191, 193 (10th Cir.1993) (“A consent decree is a negotiated agreement that is entered as a judgment of the court.”). As judgments, consent decrees can be enforced with the full range of enforcement tools, including contempt. *See* Fed. R. Civ. P. 70(e); *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 518 (1986). In fact, each of the courts that approved the consent decrees retained jurisdiction to effectuate and enforce the decrees. *See* KM Decree ¶ 163; MD Decree ¶ 102; CIG Decree ¶ 62. Given the extensive authority provided by the consent decrees, EPA’s claim that there is no oversight mechanism is incorrect.

### **3. EPA’s refusal to consider the wintertime data from 2010 and 2011 violates its own regulations**

EPA’s third stated reason for not using some of the Uinta Basin monitoring data is that “data from the monitors for 2010 and 2011 cannot be considered quality-assured data.” RTC at 72. According to EPA, “[i]n the case of the Uinta Basin data, raw data between August 2009 and September 2011 is current in [EPA’s ambient air quality database], but quality assurance data are only currently available for August 2009 through January 2010.” *Id.* at 73–74. This statement confirms that data from the monitors is quality-assured, even if EPA has not approved the quality assurance plan. Although not fully explained, EPA seems to be basing the date restriction on the fact that state and local agencies are not required to certify their data for the prior year until May 1 of the following year. *See* 40 C.F.R. § 58.15(a). Therefore, as of early December 2011, when EPA notified the states of any intended revisions to their recommended ozone designations, states had only certified data through the end of 2010. RTC at 7. Therefore, EPA limited the data available for consideration to the three year period from 2008 through the end of 2010, unless a state specifically requested consideration of data from 2011 and agreed to certify by February 29, 2012. *Id.* Notably, this date restriction would eliminate the severe ozone violations measured in the winters of 2010 and 2011.

EPA’s refusal to rely on 2010 and 2011 data is inconsistent with EPA’s own regulations, which require the three-year average to be determined “using the three most recent, consecutive calendar years of monitoring data.” 40 C.F.R. § 58, App. P, 2.2. Moreover, even under EPA’s interpretation, it is unclear why the Uinta Basin data for the winter of 2010 would not have been certified by EPA’s December 2011 deadline. Regardless, both the 2010 and 2011 data should

now be certified. Petitioners request that EPA reconsider the final rule based on the now “quality assured” data.

### **C. EPA’s Refusal to Rely on Information Other Than “Regulatory Monitoring” is Inconsistent with EPA’s Own Policies and Past Practice**

EPA takes the position that it is prohibited from relying on data that it required to be collected because EPA and the companies have not jumped through all of the hoops that would be required if the monitors were part of the official state or local monitoring network. Not only is EPA’s narrow view of “available” data inconsistent with the Clean Air Act, as discussed above, but it is also inconsistent with EPA’s own prior interpretations of the Act. *See Catawba County v. EPA*, 571 F.3d 20, 52 (D.C. Cir. 2009) (rejecting nonattainment designation based on “apparent inconsistency in EPA’s approach”); *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 521 (D.C. Cir. 2008) (giving EPA no deference for “an unexplained change of position”). EPA has repeatedly recognized that the official monitoring network is not the only source of valuable data for determining compliance with the NAAQS.

For example, EPA has taken a much broader view of available information in making SO<sub>2</sub> designations. When it adopted a new SO<sub>2</sub> standard, EPA recognized that the existing regulatory monitoring network was inadequate. 75 Fed. Reg. 35,520, 35,552 (June 22, 2010); *see also id.* at 35,525 (noting that there were no minimum regulatory monitoring network requirements at the time of the rule). Accordingly, EPA adopted a hybrid approach, utilizing both monitoring data and modeling to predict SO<sub>2</sub> concentrations. EPA decided whether to use modeling on a “case-by-case basis, informed by th[e] area’s factual record.” *Id.* at 35,552 n.22; *see also id.* at 35,553 (noting that EPA would make SO<sub>2</sub> designations “based on the record of information that will be before EPA regarding each area”). This site-specific approach stands in sharp contrast to the “one-size-fits-all” approach EPA adopted for ozone in the Uinta Basin.

The Ninth Circuit recently upheld EPA’s reliance on modeling conducted by private contractors to determine that the State of Montana was not assuring compliance with the SO<sub>2</sub> NAAQS, despite the lack of regulatory monitors showing any violations. *Montana Sulphur*, 666 F.3d 1174, 1184–85 (9th Cir. 2012); *see also PPG Industries, Inc. v. Costle*, 659 F.2d 1239, 1248 n.18 (D.C. Cir. 1981) (“EPA expressly prefers modeling over monitoring in many cases to make non-attainment designations. . . . This practice is permitted by the statute, and has been upheld by the courts.”). As discussed above, the court in *Montana Sulphur* relied on the fact that “the legislative history underlying the 1990 amendment clarifies that the EPA may rely on any ‘sound data’ that is available.” 666 F.3d at 1185. The court also relied on EPA’s finding that the monitoring network was inadequate. *Id.* at 1184–85.

In the case of wintertime ozone, just like for SO<sub>2</sub>, EPA has recognized that the regulatory monitoring network is inadequate because it focuses on monitoring in large urban areas in the

summertime.<sup>36</sup> EPA addressed the lack of a regulatory monitoring network in the Uinta Basin by requiring private parties to conduct ozone monitoring. But unlike SO<sub>2</sub>, where EPA was willing to base decisions on other reliable data, here EPA is ignoring sound, available data that it required to be collected. This inconsistency is arbitrary and capricious.

EPA also relies on information other than regulatory monitoring to determine boundaries for nonattainment areas, including air quality data, emissions data, meteorology, and topography (such as mountain ranges). Mem. from Robert J. Meyers, Principal Deputy Assistant Adm'r, to Regional Adm'rs Regarding Area Designations for the 2008 Revised Ozone National Ambient Air Quality Standards (Dec. 4, 2008). The courts have upheld this practice. *See ATK Launch Sys.*, 669 F.3d at 334. To determine the boundary of the Wyoming nonattainment area, EPA relied on monitors that did not yet have three years of data and that had not yet been certified by the state. Wyoming TSD, at 10-11. EPA has provided no rational basis to conclude that information that is adequate for determining nonattainment boundaries—which determine whether a particular location within an area is in or out of attainment—is somehow inadequate for determining whether the area as a whole is in attainment. Because EPA's approach to available information has been inconsistent, its current narrow view for ozone is not entitled to deference. *See Am. Farm Bureau Fed'n*, 559 F.3d at 521.

## **II. New Information Since the Close of the Public Comment Period Demonstrates that the Ozone Pollution in the Uinta Basin is Going to Get Worse**

EPA should reconsider its decision because information since the close of the public comment period shows that ozone levels in the Uinta Basin that are already well-above federal standards are only going to get worse as oil and gas development increases. BLM anticipates that “reasonably foreseeable” development in just the southern half of the Uinta Basin will include more than 21,000 wells. Greater Natural Buttes FEIS, Chapters 5-9, at 5-1, 5-9 (defining the cumulative impacts analysis area as the southern half of the Uinta Basin and estimating 21,293 wells as a result of “reasonable foreseeable projects”). Since the close of the public comment period in February 2012, federal land managers have approved more than 5,300 new wells. Development of these wells will exacerbate the ozone problem.

On May 8, 2012, BLM approved drilling of up to 3,675 oil and gas wells as part of Greater Natural Buttes Project. BLM, Greater Natural Buttes Record of Decision, at 3-1 (May

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<sup>36</sup> On July 16, 2009, EPA proposed to modify its ozone monitoring regulations to include new minimum monitoring requirements in rural areas and extend the length of the monitoring season (which is typically just the summer months) in some areas. 74 Fed. Reg. 34,525 (Jul. 16, 2009). On November 10, 2010, EPA published a notice identifying new data that further supported the proposed changes. *See* 75 Fed. Reg. 69,036, 69,036 (Nov. 10, 2010). The notice included data from the Redwash and Ouray monitors showing violations of the 2008 standard throughout the winter months. Redwash and Ouray Ozone Data, Doc. # EPA-HQ-OAR-2008-0338-0251 (posted Nov. 3, 2010) (monitor 490472002 is the Redwash monitor, and monitor 49072003 is the Ouray monitor). EPA never finalized the rule. As a result, EPA's existing regulations do not specifically require monitoring in rural areas like the Uinta Basin, nor do they require monitoring during the winter months.

2012). In the FEIS for the project, BLM relies on the data from the Redwash and Ouray monitors to establish the relevant ambient air quality background levels. Greater Natural Buttes FEIS, Chapter 3, at 3-6. BLM acknowledges that even under a “no action alternative,” “there likely would be continued observations of winter ozone concentrations above the NAAQS.” Greater Natural Buttes Final EIS, Chapter 4, at 4-9. As approved, the project is anticipated to increase NO<sub>x</sub> emissions by 2,213 tons per year and VOC emissions by 6,617 tons per year (representing emissions increases from existing levels of 22% and 4% respectively). *Id.* at 4-12. BLM modeled a predicted 2.4 ppb increase in ozone levels in the project area, although the model did not allow for predictions of extreme wintertime events. *Id.* at 4-9. Accordingly, as BLM concedes, this project standing alone will increase regional ozone levels. *Id.* at 4-12.

On June 18, 2012, BLM approved the drilling of as many as 1,298 new gas wells in the Uinta Basin as part of the GASCO Energy Uinta Basin Natural Gas Development Project. BLM, Record of Decision for the GASCO Energy Project 3 (Jun. 2012). As requested by EPA, BLM recognizes in the FEIS that the Ouray and Redwash monitors have recorded numerous exceedances of the ozone standard during the winter months. BLM, GASCO Final EIS, Chapter 3, at 3-14 (Jun. 2012). BLM states that the “data are considered viable and representative of the area.” *Id.* BLM also acknowledges that the likely dominant source of this pollution is oil and gas operations near the monitors. *Id.* The GASCO project will increase NO<sub>x</sub> emissions in the area by 1,931 tons per year and VOC emissions by 2,574 tons per year, making the existing ozone pollution worse. Gasco Final EIS, App. H, at H-2. Assuming mitigation measures are fully implemented, BLM predicts an increase of 0.4 ppb of ozone in the project area. Gasco Final EIS, Chapter 4, at 4-440 to 441.

On February 21, 2012, the Forest Service approved drilling of up to 356 new oil and gas wells on the Ashley National Forest in the Uinta Basin. U.S. Forest Service, South Unit Oil and Gas Development Project Record of Decision 5 (Feb. 2012). The final environmental impact statement acknowledged the wintertime violations of the ozone NAAQS in the Uinta Basin, as measured by the Redwash and Ouray monitors. South Unit Final EIS, Volume 1, at 54. The Forest Service also acknowledged that the project would increase ozone precursor emissions. Assuming mitigation measures are fully implemented, the project is estimate to emit 2,866 tons per year of VOCs and 189 tons per year of NO<sub>x</sub>. *Id.* at 77. In comments on the proposal, EPA stated that the project has the “potential to contribute significant impacts to ambient ozone concentrations.” South Unit Final EIS, Vol. 2, at E-8.

These projects provide additional evidence in support of a nonattainment finding. Given the high level of ozone being measured in the Uinta Basin and the additional emissions expected as a result of these projects, there is no question this development will make a bad situation much worse. Although EPA has provided comments to BLM on the high ozone values measured within the Uinta Basin, BLM is still proceeding to approve large numbers of wells. EPA has repeatedly stated “it is clear that the measured values are a concern for public health.” EPA Gasco Comments, at 3; Greater Natural Buttes FEIS, Appendices H–Q, at P-69. Under the Clean Air Act, EPA is charged with protecting the public health through the NAAQS and the designation process. *See* 42 U.S.C. § 7409(b)(1). EPA cannot continue to abdicate this responsibility in the Uinta Basin.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that EPA reconsider its decision to designate the Uinta Basin as an unclassifiable area under the 2008 ozone standard and issue a new final rule designating the area nonattainment. Reconsideration is necessary to fulfill EPA's legal responsibilities under the Clean Air Act and to provide adequate health protections to people living the Uinta Basin.

Sincerely,

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