

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

<p>WILDEARTH GUARDIANS, Petitioner,</p> <p>v.</p> <p>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.</p> <p>PUBLIC SERVICE COMPANY OF COLORADO, d/b/a Xcel Energy, Inc., et al., Respondent-Intervenors.</p> <hr/>	<p>No. 13-9520</p>
<p>NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioner,</p> <p>v.</p> <p>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents,</p> <p>COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION and PACIFICORP, Respondent-Intervenors.</p>	<hr/> <p>No. 13-9525</p>

**PETITIONER NPCA'S UNOPPOSED MOTION TO ABATE BRIEFING**

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Petitioner National Parks Conservation Association ("NPCA") respectfully  
moves without opposition for an order to abate the briefing in Docket No. 13-9525

in light of a Settlement Agreement that will become final after necessary but anticipated federal government approval and subsequent public notice process. NPCA's appeal in Docket No. 13-9525 challenges EPA's decision to approve Colorado's regional haze rule with respect to the Craig Station in Moffat County. The Settlement Agreement will resolve all issues in Docket No. 13-9525. The Settlement Agreement is attached hereto as Exhibit A.

This is a consolidated appeal that also includes Docket No. 13-9520. The Settlement Agreement also resolves all issues in Docket No. 13-9520 related to WildEarth Guardian's challenge of EPA's decision to approve Colorado's regional haze rule with respect to the Craig Station. Concurrent with this motion, therefore, WildEarth Guardians has filed a Motion to Proceed Separately and for a Revised Briefing Schedule in Docket No. 13-9520, but only on issues unrelated to the Craig Station. In other words, all issues related to the Craig Station in both appeals have been resolved by the Settlement Agreement.

Once the Settlement Agreement is finalized, after public notice is provided, the government intends to seek a voluntary remand of the challenged Colorado regional haze rule with respect to the Craig Station, and to endeavor to resolve NPCA's claim for litigation costs. NPCA anticipates that within six months Docket No. 13-9525 should be amenable to dismissal.

The undersigned has conferred with counsel for all parties to this appeal regarding this motion. The United States, and intervenors State of Colorado and Tri-State Generation and Transmission Association have no objection to the relief requested in this motion. Intervenor PacifiCorp states that it is not a party to the

settlement and takes no position on the motion.

Respectfully submitted on behalf of the NPCA,

Dated: July 10, 2014

s/ Reed Zars  
Reed Zars  
Attorney at Law  
910 Kearney Street  
Laramie, WY 82070  
307-760-6268

**CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that a copy of the foregoing **PETITIONER NPCA'S UNOPPOSED MOTION TO ABATE BRIEFING** as submitted in digital form via the Court's electronic case filing (ECF) system have been scanned for viruses with ClamXav and, according to the program, is free of viruses. In addition, I certify that all required privacy redactions have been made pursuant to 10th Cir. R. 25.5.

DATED this 10th day of July, 2014.

s/ Reed Zars  
Reed Zars  
Attorney at Law  
910 Kearney Street  
Laramie, WY 82070  
307-760-6268



## SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into by (a) WildEarth Guardians (“Guardians”), Petitioner in *WildEarth Guardians v. United States Environmental Protection Agency*, No. 13-9520 (10th Cir.) (“*Guardians v. EPA*”); (b) National Parks Conservation Association (“NPCA”), Petitioner in *National Parks Conservation Association v. United States Environmental Protection Agency*, No. 13-9525 (10th Cir.) (“*NPCA v. EPA*”); (c) the United States Environmental Protection Agency (“EPA”), Respondent in *Guardians v. EPA* and *NPCA v. EPA*; (d) the Colorado Department of Public Health and Environment (“CDPHE”), Intervenor-Respondent in *Guardians v. EPA* and in *NPCA v. EPA*; and (e) Tri-State Generation and Transmission Association, Inc. (“Tri-State”), Intervenor-Respondent in *Guardians v. EPA* and in *NPCA v. EPA*. Guardians, NPCA, EPA, CDPHE, and Tri-State are hereinafter collectively referred to as “the Parties” for purposes of this Agreement.

### RECITALS

A. On May 25, 2011, pursuant to Sections 169A and 169B of the Clean Air Act, 42 U.S.C. §§ 7491 and 7492, CDPHE submitted a revision to the Colorado state implementation plan (“SIP”) relating to regional haze to EPA for review and approval.

B. The Colorado SIP revision included provisions regarding NO<sub>x</sub> emissions from electric generating Units 1, 2, and 3 at the Craig Station in Northwest Colorado. Tri-State is the operator of Craig Station Units 1, 2, and 3, owner of Unit 3, and part owner of Units 1 and 2. Units 1 and 2 are “BART-eligible,” while Unit 3 is subject only to reasonable-progress requirements.

C. The Colorado SIP revision imposes the following NO<sub>x</sub> emission limit requirements on the three Craig Station Units: Craig Unit 1 is subject to a NO<sub>x</sub> requirement

of 0.28 lb/MMBtu, on a 30-day rolling average; Craig Unit 2 is subject to a NO<sub>x</sub> requirement of 0.08 lb/MMBtu, on a 30-day rolling average; and Craig Unit 3 is subject to a NO<sub>x</sub> requirement of 0.28 lb/MMBtu, on a 30-day rolling average.

D. On December 31, 2012, EPA issued a final rule entitled “Approval and Promulgation of Implementation Plans; State of Colorado; Regional Haze State Implementation Plan,” 77 Fed. Reg. 76,871 (“Final Rule”), approving the Colorado SIP revision in full, including the requirements as to Craig Units 1, 2, and 3.

E. On February 25, 2013, Guardians filed a petition for review (*Guardians v. EPA*) challenging EPA’s approval of the Colorado SIP revision as to Craig Units 1, 2, and 3, EPA’s approval of the SIP revision as to Units 1 and 2 of the Comanche Power Station (owned and operated by Public Service Company of Colorado, dba Xcel Energy, Inc. (“PSCo”), and EPA’s approval of the SIP revision regarding Boilers 4 and 5 of the Colorado Energy Nations Company, LLLP (“CENC”) facility at the Coors Brewery in Golden, Colorado (owned and operated by CENC). Guardians’ petition also challenged EPA’s approval of the time by which the Colorado SIP revision required BART emission limits to be met at the aforementioned facilities.

F. On March 1, 2013, NPCA filed a petition for review (*NPCA v. EPA*) challenging EPA’s approval of the NO<sub>x</sub> emission limits for Craig Units 1, 2, and 3.

G. By order filed by the Clerk of the Court on May 3, 2013, the *Guardians v. EPA* and *NPCA v. EPA* petitions for review were consolidated for purposes of briefing, record, and submission.

H. CDPHE, PSCo, Tri-State, PacifiCorp, and CENC were granted leave to intervene in *Guardians v. EPA*, and CDPHE, Tri-State, and PacifiCorp were granted leave to intervene in *NPCA v. EPA*.

I. Through this Agreement, the Parties wish to resolve those portions of the *Guardians v. EPA* and *NPCA v. EPA* petitions for review relating to the Craig Station. The Agreement will not affect the litigation of Guardians' claims regarding Comanche Units 1 and 2 and CENC Boilers 3 and 4 in *Guardians v. EPA*.

J. The Parties have negotiated this Agreement in good faith. If approved and implemented as set forth herein, this Agreement will resolve all issues presented in *NPCA v. EPA* and that portion of *Guardians v. EPA* relating to Craig Units 1, 2, and 3, with the exception of litigation fees and costs.

K. This Agreement will not impact any other provisions of the Final Rule except as specifically set forth herein.

### **AGREEMENT**

1. On or before the tenth business day after the last Party to this Agreement except EPA executes the Agreement ("Initial Effective Date"), NPCA will file a motion with the Court, seeking to hold the briefing of all of its claims in abeyance. Guardians will concurrently file a motion with the Court, seeking to proceed separately with *Guardians v. EPA*, with respect to the Comanche Power Station. Guardians' motion will inform the Court that in proceeding with *Guardians v. EPA*, Guardians will not pursue any issues related to Craig Units 1, 2, and 3, including any claim challenging the time by which the Colorado SIP Revision required BART emission limits to be met at Craig Station, except with regard



to fees and costs as described in Paragraph 13 below. All Parties to this Agreement agree not to oppose such motions.

2. On or before the 60th day after the Initial Effective Date, EPA shall provide notice of this Agreement in the Federal Register and an opportunity for public comment pursuant to 42 U.S.C. § 7413(g). After this Agreement has been made available for notice and comment, the Administrator of EPA or the United States Attorney General, as appropriate, shall promptly consider any written comments in determining whether to withdraw or withhold their consent to the Agreement, in accordance with 42 U.S.C. § 7413(g). If the United States elects not to withdraw or withhold its consent to this Agreement, EPA shall execute the agreement and provide written notice to the Parties as expeditiously as practicable. The Agreement shall become final and effective as to all Parties on the date that EPA executes the Agreement (“Final Effective Date”).

3. On or before the tenth business day after the Final Effective Date, EPA will file a motion with the Court, seeking a voluntary remand to EPA of those portions of the Final Rule regarding EPA’s approval of the Colorado SIP revision relating to Craig Unit 1. The motion for remand will also seek vacatur of those portions of the Final Rule regarding EPA’s approval of the Colorado SIP revision relating to Craig Unit 1. The motion for remand and vacatur will also seek a 45-day period in which NPCA and Guardians may move for their costs of litigation (including attorneys’ fees) if the motion is granted. All Parties to this Agreement agree not to oppose such motion for partial remand and vacatur.

4. After Petitioners’ claims for fees and costs are resolved by negotiation or litigation, NPCA will file a motion to dismiss *NPCA v. EPA* within ten business days of the resolution of the litigation-cost claim.

5. CDPHE will begin the State SIP revision process in 2014, with a proposal to revise its SIP to include a determination that the NO<sub>x</sub> BART emission limit for Craig Unit 1 is 0.07 lb/MMBtu, calculated on a 30 boiler-operating-day rolling average, and with a compliance deadline of August 31, 2021 (“Proposed SIP Revision”). The Proposed SIP Revision will not alter any emission limit or compliance deadline for Craig Unit 2 or 3. CDPHE intends to submit the Proposed SIP Revision to EPA no later than July 31, 2015. If CDPHE determines that it will not be able to submit the Proposed SIP Revision to EPA by July 31, 2015, or that the terms of the Proposed SIP Revision will not be in accordance with those set forth in this Paragraph, CDPHE shall notify the Parties as soon as possible after making such a determination.

6. EPA agrees that by December 31, 2016, it will either (a) take final action on the Proposed SIP Revision, or (b) to take final action on the remanded portion of the Colorado SIP revision if Colorado has not submitted the Proposed SIP Revision by December 31, 2015. If, however, CDPHE submits a Proposed SIP Revision that is in accordance with the terms of Paragraph 5 after December 31, 2015, EPA may, at its election, take final action on that submission by December 31, 2016, rather than taking final action on the remanded portion of the Colorado SIP revision as set forth in the preceding sentence.

7. While EPA anticipates that the Proposed SIP Revision submitted by CDPHE in accordance with Paragraph 5 would be approvable, EPA cannot guarantee that it will approve such Proposed SIP Revision. If EPA approves in full the Proposed SIP Revision or in the alternative takes final action on the remanded portion of the Colorado SIP revision by promulgating a federal implementation plan (“FIP”) in accordance with the

provisions of Paragraph 5, the Parties agree not to file petitions for judicial review or petitions for administrative reconsideration challenging such action.

8. The deadlines set forth in this Agreement may be extended by mutual written agreement between all Parties to this Agreement.

9. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to EPA or CDPHE by statute or by general principles of administrative law.

10. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that the United States or any of its departments or agencies obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.*, or in violation of any other statute, law, or regulation.

11. Nothing in this Agreement shall be construed to limit or modify the rights of any Party to the Agreement to seek reconsideration or judicial review of any altered, amended, or revised provisions of any final action that EPA or CDPHE may take that differs in any material respect from a full approval of the Proposed SIP Revision or promulgation of a FIP that is in accordance with the provisions of Paragraph 5. Subject to the provisions of the first sentence of Paragraph 7 above and to the provisions of Paragraph 9 above, all Parties agree to support, or not to oppose, the Craig Unit 1 NO<sub>x</sub> requirements set forth in Paragraph 5 above before the Colorado Air Quality Control Commission, the Colorado Legislature, and EPA.

12. Nothing in this Agreement diminishes the obligation and authority of EPA and CDPHE to timely comply with the requirements at 40 C.F.R. § 51.308(f), (g), and (h) with respect to the Craig Station, or limits any Party's rights (which are expressly preserved)

on any grounds, to challenge, defend, comment on, or otherwise participate in a rulemaking action or litigation as to any action or inaction by EPA or CDPHE regarding those requirements with respect to the Craig Station.

13. Assuming that the Court grants EPA's motion for partial voluntary remand and vacatur referenced in Paragraph 3, the deadline for filing any motion for fees and costs for activities performed up to and including the Final Effective Date of this Agreement is 45 days after such ruling. During this 45-day period, Guardians, NPCA, and EPA shall seek to informally resolve any claim for fees and costs, and if they cannot reach a resolution, Guardians and NPCA may seek such fees and costs from the Court. The Parties intend that the Court retain jurisdiction to resolve any request for fees and costs. Guardians and NPCA reserve their right to seek fees and costs for any work performed after the Final Effective Date.

14. All notices and other communications required to be given as provided in this Agreement shall be provided to the following:

Wildearth Guardians:

Ashley Wilmes, Esq.  
[awilmes@wildearthguardians.org](mailto:awilmes@wildearthguardians.org)  
(859) 312-4162

National Parks Conservation Association:

Reed Zars, Esq.  
[reedzars@gmail.com](mailto:reedzars@gmail.com)  
(307) 745-7979

EPA:

Daniel Pinkston  
[daniel.pinkston@usdoj.gov](mailto:daniel.pinkston@usdoj.gov)  
(303) 844-1804

Michael Boydston  
[boydston.michael@epa.gov](mailto:boydston.michael@epa.gov)  
(303) 312-7103

CDPHE:

Tom Roan  
[tom.roan@state.co.us](mailto:tom.roan@state.co.us)  
(720) 508-6268

Tri-State:

James Sanderson  
[j.sanderson@rcalaw.com](mailto:j.sanderson@rcalaw.com)  
(303) 863-7500

15. The undersigned hereby certify that they are duly authorized to bind the Party on whose behalf this Agreement is executed to the terms of this Agreement.

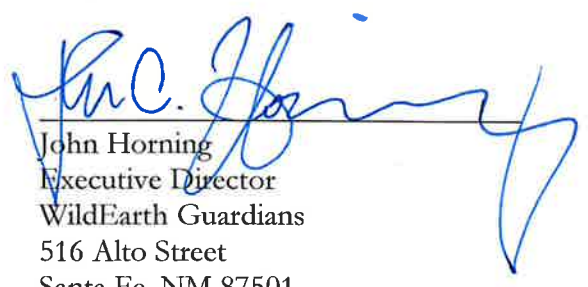
16. Subject to the provisions of Paragraph 2 as to EPA, the provisions of this Agreement shall apply to and be binding on the Parties, and their successors and assigns.

17. This Agreement may be signed in counterparts, and such counterpart signatures shall be given full force and effect.

APPROVED:

FOR WILDEARTH GUARDIANS:

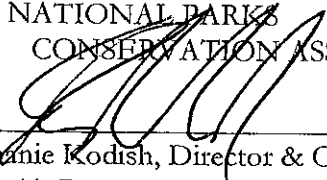
Dated: 7.9.14



John Horning  
Executive Director  
WildEarth Guardians  
516 Alto Street  
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(505) 988-9126

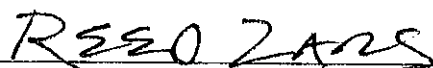
FOR NATIONAL PARKS  
CONSERVATION ASSOCIATION:

Dated: 6.24.14



Stephanie Kodish, Director & Counsel  
Clean Air Program  
National Parks Conservation Association  
706 Walnut Street, Suite 200  
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(865) 329-2424 x 28

Dated: 6/21/14



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FOR UNITED STATES  
ENVIRONMENTAL  
PROTECTION AGENCY:

[TO BE DETERMINED]



FOR COLORADO DEPARTMENT  
OF PUBLIC HEALTH AND  
ENVIRONMENT:

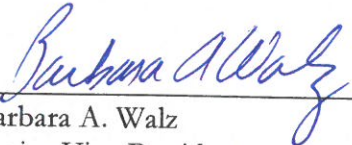
Dated: 20 June 2014



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FOR TRI-STATE GENERATION  
AND TRANSMISSION  
ASSOCIATION, INC.:

Dated: 7/8/14

  
\_\_\_\_\_  
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Policy and Compliance/Chief  
Compliance Officer  
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