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STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF:

PROPOSED AMENDMENTS TO 20.2.79 NMAC -
PERMITS - NONATTAINMENT AREAS: No. EIB 21-07(R)
PETITION FOR REGULATORY CHANGE

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 25 day of June,
2021, the above-entitled matter came on for hearing before
the New Mexico Environmental Improvement Board, taken via
Zoom Video Conference, commencing at 9:20 a.m.

REPORTED BY: THERESA E. DUBOIS, RPR, CCR #29
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A P P E A R A N C E S

For the New Mexico Environmental Improvement Board:

PHOEBE SUINA, Chairperson
AMANDA TRUJILLO DAVIS, Hearing Officer
J. BARRY BITZER, Board Member
KARL CATES, Board Member
WILLIAM HONKER, Board Member
KAREN GARCIA, Board Member

PAMELA JONES, Board Administrator

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MARKED/ADMITTED

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1 CHAIRPERSON SUINA: The next item is the
2 public hearing, EIB 21-07, in the matter of Proposed
3 Amendments to 20.2.79 NMAC, Permits, Nonattainment Areas:
4 Petition for Regulatory Change. And so at this point of
5 time, I believe it's time for me to turn it over to Vice
6 chair -- I think it's -- yes, Amanda Trujillo Davis is the
7 hearing officer.

8 MS. SOLORIA: I'll just check our reporter is
9 ready to go. She's indicated she's ready to go.

10 HEARING OFFICER TRUJILLO-DAVIS: So a quick
11 question here. I can't see on my Zoom when people raise
12 their hand or anything like that. My screen isn't showing
13 me that. Is that all right?

14 MS. SOLORIA: Can you see their faces or is
15 it you don't see a raised hand function?

16 HEARING OFFICER TRUJILLO-DAVIS: No, I see a
17 raised-hand function. I just only see four people at a
18 time and I have to slide over to see the other people. So
19 if somebody is raising their hand, I can't -- I can't see
20 them unless there's a different view.

21 MS. SOLORIA: Member Trujillo-Davis, if you
22 click on "view" which is on the right-hand -- top
23 right-hand corner of the application and switch to gallery
24 view you're able to see more thumbnails.

25 CHAIRPERSON SUINA: Member Trujillo-Davis,

1 are you on your phone or on your computer?

2 HEARING OFFICER TRUJILLO-DAVIS: I am on an
3 iPad.

4 CHAIRPERSON SUINA: Oh, okay. Yeah.

5 HEARING OFFICER TRUJILLO-DAVIS: I wonder if
6 that's why.

7 CHAIRPERSON SUINA: I believe so.

8 HEARING OFFICER TRUJILLO-DAVIS: I can switch
9 it over to my laptop. I was just keeping it open for all
10 my documents that we have going today. Yeah, I can switch
11 it over real quick if you don't mind me taking a couple of
12 minutes to do that.

13 CHAIRPERSON SUINA: That will be fine. I
14 think it would be helpful.

15 HEARING OFFICER TRUJILLO-DAVIS: Okay.

16 CHAIRPERSON SUINA: If you're only seeing
17 four at a time here, because I think we have 30
18 participants right now.

19 HEARING OFFICER TRUJILLO-DAVIS: Okay. Can
20 everybody hear me all right? All right. Well, fixed
21 that. Thank you.

22 Okay. This hearing will come to order.
23 Today is June 25th, 2021. The time is now 9:23 a.m. My
24 name is Amanda Trujillo-Davis; I have been designated by
25 the board to serve as hearing officer and I will be

1 advised by the board counsel from this -- from the Office
2 of the Attorney General, Karla Soloria.

3 May we have a roll call of the board?

4 ADMINISTRATOR JONES: Yes. Member Bitzer,
5 are you present?

6 BOARD MEMBER BITZER: I am indeed.

7 ADMINISTRATOR JONES: Member Cates?

8 BOARD MEMBER CATES: Yes, I am.

9 ADMINISTRATOR JONES: Member Duval?
10 Member Garcia?

11 BOARD MEMBER GARCIA: Here.

12 ADMINISTRATOR JONES: Member Honker?

13 BOARD MEMBER HONKER: Yes, I'm here.

14 ADMINISTRATOR JONES: Member Suina?

15 CHAIRPERSON SUINA: Here.

16 ADMINISTRATOR JONES: And Member

17 Trujillo-Davis?

18 HEARING OFFICER TRUJILLO-DAVIS: Here.

19 ADMINISTRATOR JONES: You have a quorum.

20 HEARING OFFICER TRUJILLO-DAVIS: Thank you,
21 Ms. Jones.

22 Okay. This is a hearing in EIB 21-07(R), to
23 consider the Proposed Amendments to 20.2.79 NMAC, Permits,
24 Nonattainment Areas. Due to the COVID-19 pandemic -- or
25 COVID-19 Public Health Emergency declared by the Governor,

1 the following guidelines for public gatherings set out by
2 the Department of Health, this hearing is being held
3 online via Zoom platform.

4 20.1.1.306 NMAC does allow for participation via
5 conference, telephone or other similar device, given all
6 participants are able to hear. If any -- if at any point
7 during the hearing, technical difficulties arise, please
8 bring them to the attention and efforts will be made to
9 remedy the situation.

10 The petitioner in this matter is the New Mexico
11 Environmental Department, Air Quality Bureau. WildEarth
12 Guardians filed a notice of appearance and is party to
13 this proceeding, but did not file a Notice of Intent to
14 present technical testimony.

15 WildEarth Guardians will not offer any technical
16 or nontechnical witnesses. There will be designated time
17 for any member of the general public to present
18 nontechnical testimony. This hearing will be conducted in
19 correspondence with the Open Meetings Act and State Rules
20 Act, the Environmental Improvement Act, the Air Quality
21 Control Act, and with this board's rulemaking procedures.

22 This hearing is being recorded by Ms. Theresa
23 DuBois, from Albuquerque Court Reporting Services.
24 Parties interested in obtaining a copy of the transcript
25 may contact the court reporter directly at the conclusion

1 of the hearing.

2 Copies of the proposed amendments have been
3 available on the department's website and at the
4 department's office as well as an interested party, upon
5 request. The hearing will be conducted in a fair,
6 impartial manner to assure that the relevant facts are
7 fully elicited and provided a reasonable opportunity for
8 all persons to be heard without making our hearing
9 unreasonably lengthy or burdening the record with
10 unnecessary repetition.

11 The Rules of Civil Procedure and Evidence shall
12 not apply in this hearing. As hearing officer, I will
13 make such orders as may be necessary to preserve decorum
14 and to protect the orderly hearing process. To that end,
15 I ask that all persons in this hearing be silent -- or
16 hearing please silence their cell phones during the
17 hearing, please be sure to mute yourself until you wish to
18 speak to help minimize the background noise.

19 All hearings shall proceed as follows: the
20 board's staff will present prefiled exhibits. Exhibits
21 admitted into evidence are available for review by the
22 public. Two, all testimony will be taken under oath.
23 Three, as hearing officer, I will rule on any objections
24 to evidence and will admit any relevant evidence unless I
25 determine the evidence is incompetent or unruly -- or

1 unduly repetitious.

2 Any persons offering an exhibit shall provide an
3 original to the board administrator and a copy to each of
4 the board members and to its legal counsel, and shall also
5 provide additional copies to persons attending the
6 hearing. If visual aids are used, legible copies must be
7 submitted for inclusion in the record. Please know that
8 the board will not make copies of any exhibits used at
9 this hearing.

10 Any person who wishes to make a brief opening
11 statement before presentation of his or her direct
12 testimony, may do so. The petitioner will present its
13 direct testimony on the proposed amendments and
14 petitioner's witnesses will stand for cross-examination by
15 WildEarth Guardians, the board, and any other person in
16 attendance.

17 WildEarth Guardians will have an opportunity to
18 present an opening statement. If any other persons,
19 including members of the public, wish to present
20 nontechnical testimony about the proposed amendments, they
21 will testify as called upon.

22 If you are a member of the public, please email
23 the board administrator at Pamela.jones@state.nm.us to
24 notify us that you intend to present nontechnical
25 testimony and include any exhibits being offered.

1 Because this hearing is being transcribed, please
2 remember that only one person may speak at any time.
3 Please direct your testimony and answers and questions to
4 the board members. Any person who testifies is subject to
5 cross-examination on the subject matter of his or her
6 testimony and on matters affecting his or her credibility.

7 The petitioner has the option of presenting its
8 witness as a panel for purposes of cross-examination.
9 Cross-examination by the other party will be conducted at
10 the conclusion of each presentation, followed by
11 cross-examination by the board members and the hearing
12 officer, following -- followed by cross-examination by the
13 public.

14 Please remember to direct all testimony and
15 answers to questions to the board itself, even if someone
16 other than a board member has asked the witness a
17 question. Any person attending the hearing is entitled to
18 conduct whatever cross-examination is required for a full
19 and true disclosure of matters at issue in the hearing.

20 As hearing officer, I may limit cross-examination
21 to avoid harassment, intimidation, needless expenditure of
22 time, or undue repetition. At the petitioner's discretion
23 and if time permits, rebuttal testimony may be given at the
24 conclusion of the public testimony in the same order as
25 the direct testimony. Any person who wishes to make a

1 brief closing argument may do so at the conclusion of the
2 hearing, and at the same order as the direct testimony.

3 So, moving on to the evidence and testimony, we
4 will now proceed. Does the board's staff have any
5 exhibits to introduce as evidence?

6 ADMINISTRATOR JONES: I do, Madam Hearing
7 Officer.

8 Exhibit 1, which is the Petition to Amend 20.2.79
9 NMAC, Exhibit 2, WildEarth Guardians Entry of Appearance,
10 Exhibit 3, NMED's Notice of Intent to present Technical
11 Testimony with exhibits, and Exhibit 4, WildEarth
12 Guardians' Prehearing Statement with exhibits. That's
13 all.

14 HEARING OFFICER TRUJILLO-DAVIS: Thank you,
15 Ms. Jones.

16 Okay. Are there any questions from the board
17 members or objections, Exhibit 1 through -- oh, I'm sorry.
18 Are there any questions or objections? Okay. I don't see
19 anybody raising their hands or anything, so Exhibits 1
20 through 4 are admitted into the record.

21 (WildEarth Guardians' Exhibit Nos. 1-4
22 received into evidence at this time.)

23 HEARING OFFICER TRUJILLO-DAVIS: If there are
24 no other preliminary matters, we'll move to testimony by
25 the petitioner.

1 OPENING STATEMENT BY MR. KNIGHT

2 MR. KNIGHT: Good morning. Madam Chair,
3 Madam Hearing Officer, Members of the Board, my name is
4 Andrew Knight; I am assistant general counsel for the New
5 Mexico Environment Department. With me today are Mr. Neal
6 Butt, Dr. Kirby Olson, Mr. Michael Baca, and Mr. Kerwin
7 Singleton from the Department's Air Quality Bureau.

8 In recently reviewing our permitting rules for
9 nonattainment areas, the department determined that some
10 minor corrections and updating of language was required to
11 bring the rule more closely in conformance with the
12 federal regulations.

13 And so we have filed the petition to amend the
14 rule, and I would like to present our testimony to support
15 that -- those proposed amendments. Mr. Neal Butt will
16 present the department's testimony. The other witnesses
17 are here to answer questions as a panel, and they will not
18 provide any direct testimony. And with that, I would like
19 to have my -- well, we might as well have all of the
20 witnesses sworn in by the court reporter, if that's all
21 right.

22 HEARING OFFICER TRUJILLO-DAVIS: I think that
23 sounds reasonable. Ms. DuBois, do you have any objections
24 to that?

25 COURT REPORTER: No.

1 (Neal Butt, Kirby Olson, Kerwin Singleton,
2 Michael Baca all duly sworn at this time.)

3 MR. KNIGHT: With that, I would like to call
4 my first witness.

5 NEAL BUTT,
6 having been previously duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. KNIGHT:

9 Q. Having been sworn, could you -- Neal, could you
10 state your name for the record?

11 A. Yes. My name is Neal Butt, N-E-A-L, B-U-T-T.

12 Q. And where are you currently employed?

13 A. In the control strategy section of the New Mexico
14 Environment Department's Air Quality Bureau.

15 Q. And what do you do for the Air Quality Bureau?

16 A. I'm an environmental analyst. I develop air
17 quality regulations and state implementation plans, or
18 SIPs, to regulate air pollution emissions in New Mexico.
19 I also research assigned air pollution topics, analyze
20 data, prepare reports, and present summaries and
21 conclusions to management.

22 Q. How long have you held this position?

23 A. Since March of 2014.

24 Q. Okay. And what did you do before taking this
25 position with NMED?

1 A. I worked for the City of Albuquerque
2 Environmental Health Department for 17 years, the last 13
3 of which were as a environmental health scientist in the
4 air quality division. I served as the lead for
5 promulgating air quality regulations and SIPs governing
6 air quality inside Bernalillo County under the
7 jurisdiction of the Albuquerque/Bernalillo County air
8 quality control board.

9 Q. What is your educational background?

10 A. I hold a Master of Science degree in Biology,
11 from the University of North Dakota, a Bachelor of Science
12 degree in Biology and a Bachelor of Arts degree in
13 Environmental Planning and Design from UNM, and an
14 Associate's of Applied Science in Environmental Protection
15 Technology and an Associate of Applied Science in Criminal
16 Justice from CNM.

17 Q. Thank you. Did you provide written prefiled
18 technical testimony for inclusion in our Notice of Intent?

19 A. Yes, it was included as NMED Exhibit 2.

20 Q. And do you have any changes or corrections that
21 you would like to make to that testimony now?

22 A. No.

23 Q. And do you, therefore, adopt that prefiled
24 written testimony as your testimony under oath here today?

25 A. Yes.

1 Q. And let's see. Do you have a summary of your
2 written testimony that you would like to present to the
3 board?

4 A. Yes.

5 MR. KNIGHT: And Madam Hearing Officer,
6 again, before we forget, I would like to move that the
7 exhibits in our Notice of Intent be formally admitted into
8 the record at this time, if there is no objection.

9 HEARING OFFICER TRUJILLO-DAVIS: I believe we
10 already did that. Is that correct, Ms. Jones?

11 MR. KNIGHT: Well, the -- I know -- I guess
12 the board or the board administrator moved admission of
13 our Notice of Intent, but I just wanted to make sure that
14 the individual exhibits that are within our Notice of
15 Intent, I just wanted to make sure that those are part of
16 the administrative record for this hearing, in case
17 there's any ambiguity.

18 THE WITNESS: We also supplemented Exhibit
19 11, too.

20 MR. KNIGHT: That's true. We -- as Mr. Butt
21 pointed out, we did supplement our Exhibit 11 and I just
22 wanted to make sure that that is included in the record.

23 MS. SOLORIA: Would you identify -- (audio
24 cutting out.)

25 COURT REPORTER: I'm sorry, Ms. Soloria, we

1 can't hear you.

2 MS. SOLORIA: Can you hear me now?

3 HEARING OFFICER TRUJILLO-DAVIS: Yes.

4 MS. SOLORIA: I was asking Mr. Knight to just
5 state for the record the exhibits he is wanting to submit.
6 So you can identify them by number, you don't have to list
7 them all, but exhibits 1 through -- I believe it's 11.
8 And then Member Trujillo-Davis can ask if there are any
9 objections.

10 MR. KNIGHT: Right. Thank you. Yes, I would
11 like to formally move admission of the department's
12 exhibits 1 through 11 as included in our Notice of Intent
13 and also our Amended Exhibit 11, which was filed later on.

14 HEARING OFFICER TRUJILLO-DAVIS: I think we
15 can go ahead and do that. Do we need to -- do we need to
16 make a motion or do we need to vote?

17 MS. SOLORIA: No, so Counsel has asked to
18 move those into admission. You can ask if there are any
19 objections, and hearing none or addressing same, you can
20 admit them.

21 HEARING OFFICER TRUJILLO-DAVIS: Okay. So
22 are there any objections to admitting the identified
23 documents into the record?

24 MR. TIMMONS: No objection.

25 HEARING OFFICER TRUJILLO-DAVIS: Okay. Let's

1 go ahead and admit them, then.

2 (NMED's Exhibits 1 - 11 received into
3 evidence at this time.)

4 MR. KNIGHT: Thank you, Madam Hearing
5 Officer.

6 Q. (BY MR. KNIGHT) So Mr. Butt, could you please
7 summarize the reasons for the proposed amendments?

8 A. Thank you. Madam Hearing Officer, Madam Chair,
9 Members of the Board, I'm here to present the New Mexico
10 Environment Department Air Quality Bureau's proposed
11 amendments to 20.2.79 NMAC Permits, Nonattainment Areas,
12 which I will refer to as Part 79.

13 Attachment 2 of NMED Exhibit 1 shows the
14 department's proposed amendments to Part 79 in redline
15 strikeout format. The Air Quality Bureau of the New
16 Mexico Environment Department proposes to amend Part 79 to
17 make technical and administrative corrections to the rule
18 in connection with the United States Environmental
19 Protection Agency's designation of an area near Sunland
20 Park, New Mexico, as marginal nonattainment area for the
21 2015 National Ambient Air Quality Standard, or NAAQS, for
22 ozone.

23 Part 79 sets forth permitting requirements for
24 new major stationary sources or major modifications of
25 existing sources, if those sources will be, A, located

1 within a nonattainment area designated pursuant to section
2 107 of the Clean Air Act, and will emit a regulated
3 pollutant, for which it is major, in which the area is
4 designated nonattainment for, or B, located within an area
5 designated as attainment or unclassifiable pursuant to
6 section 107 of the Clean Air Act and will emit a regulated
7 pollutant, for which the source is major, and the ambient
8 impact of such pollutant would exceed any of the
9 significance levels identified in the table at Subsection
10 20.2.79.119.A NMAC, at any location that does not meet the
11 NAAQS for the same pollutant.

12 A source, subject to Part 79, must submit a
13 permit application to the department and cannot construct
14 or operate the new source or modification until it
15 receives a permit or a permit revision. On October 1st,
16 2015, the EPA revised the 8-hour ozone primary and
17 secondary NAAQS, downward, from 0.075 parts per million to
18 0.070 parts per million, to provide increased protection
19 of public health and the environment. The primary
20 standards are set to protect human health, while secondary
21 standards are set to protect the public welfare.

22 Upon promulgation of a new or revised NAAQS, EPA
23 is required to designate all areas of state, as either
24 attainment, unclassifiable, or attainment/unclassifiable
25 or nonattainment for the standards. Accordingly, an EPA

1 designated the southeastern part of Doña Ana County, known
2 as Sunland Park, as a marginal nonattainment area for the
3 2015 Ozone NAAQS on August 3rd, 2018.

4 In December of 2018, EPA promulgated the 2015
5 Ozone NAAQS implementation rule, which specifies
6 nonattainment area SIP requirements. This final rule,
7 referred to as the 2015 Ozone SIP Requirements Rule is
8 largely an update to the previous implementing regulations
9 promulgated for the 2008 Ozone NAAQS and does not contain
10 significant revisions from that previous rule.

11 The 2015 Ozone SIP Requirements Rule addresses a
12 range of nonattainment areas SIP requirements New Mexico
13 must meet for the implementation of the 2015 Ozone NAAQS,
14 including, transportation conformity, nonattainment new
15 source review, emissions inventories and emissions
16 statement, and timing of required SIP submissions and
17 compliance with emission control measures in the SIP.

18 The El Paso Metropolitan Planning Organization
19 submitted a transportation conformity demonstration on
20 behalf of the Sunland Park nonattainment area. They
21 received joint concurrence from the EPA and the Federal
22 Highway Administration by the deadline of August 3rd,
23 2019. The El Paso MPO is the federally-designated
24 transportation planning organization for this portion of
25 Doña Ana County.

1 Pursuant to the 2015 Ozone SIP Requirements Rule,
2 NMED submits -- submitted a baseline emissions inventory
3 and emissions statement to EPA by the specified deadline
4 of August 3rd, 2020. A determination of adequacy of Part
5 79 is due to the EPA by August 3rd of this year. If the
6 proposed amendments are adopted by the board, this will be
7 the department's final SIP submittal for the Sunland Park
8 area to fulfill the requirements of the 2015 Ozone SIP
9 Requirements Rule for a marginal nonattainment area.

10 As part of the effort to comply with the 2015
11 Ozone SIP Requirements Rule, the department analyzed Part
12 79 to determine if it was adequate to implement and
13 enforce the applicable portions of the 2015 Ozone SIP
14 Requirements Rule.

15 Part 79 was compared with the Federal Clean Air
16 Act regulations at 40 CFR Section 51.165, entitled Permit
17 Requirements, which is incorporated into Part 79, and
18 certain inconsistencies and errors were identified. The
19 majority of these are not substantive; however, some are.
20 A detailed explanation of each proposed amendment is shown
21 as NMED Exhibit 5. The proposed changes are intended to
22 bring Part 79 language more in line with federal
23 regulations. The nonsubstantive changes in the proposed
24 amendments include five cross-reference errors and two
25 text omissions.

1 The substantive changes include A, the revision
2 of the definition of "nonattainment area" at 20.2.7.AA
3 NMAC shown on page six of the public review draft. This
4 definition is obsolete. The language comes from the 1977
5 Clean Air Act, which was amended by the 1990 Clean Air
6 Act. The proposed amended language mirrors the current
7 Clean Air Act definition.

8 B, under the definition of "potential to emit,"
9 referred to as PTE, at 20.2.79.7.AE NMAC shown on page 7
10 of the public review draft, the addition of the sentence,
11 "Secondary emissions do not count in determining the PTE
12 of a stationary source." The language in this paragraph
13 is based on 40 CFR 51.165 (A) (1) (iii) which was in
14 effect at the time Part 79 was adopted. However, this
15 federal language was left out when this provision was
16 originally adopted into the New Mexico regulation.

17 Nonetheless, the definition of major source at
18 20,2.79.7.V(6) NMAC addresses this in determining the PTE
19 of a stationary source under this rule. For example, "A
20 stationary source shall not be a major stationary source
21 due to secondary emissions."

22 C, a revision to permit applicability language at
23 20.2.79.109.A(2) NMAC shown on page ten of the public
24 review draft. The language in this paragraph is derived
25 from 40 CFR 51.165 (B) (1) and (2) but is not verbatim.

1 The proposed amendment would harmonize Part 79 with the
2 CFR.

3 And D, a correction to the specifications for the
4 fugitive emissions source category "fossil fuel boiler" at
5 20.2.79.119.B(7) NMAC, on page 18 of the public review
6 draft. The value of "50 million BTU" cited in the current
7 rule is incorrect. It should be "250 million BTU."

8 You're on mute. You're on mute, Andrew.

9 Q. Thank you. Thank you for that summary of the
10 proposed amendments. What public notification and
11 outreach was provided for the proposed rule amendment?

12 A. Stakeholder outreach was initialed on January
13 29th of 2021, with the announcement of the availability of
14 a stakeholder review draft. Notice was sent via the Air
15 Quality Bureau's regulatory and SIP bulletin listserv to
16 potentially affected parties outlining the NMED proposal
17 and soliciting comments, shown as NMED Exhibit 4. No
18 comments were received during the informal 30-day comment
19 period.

20 Extensive public notice of this rulemaking
21 hearing was provided as shown in NMED Exhibit 6a through
22 6k. Public notice was designed with the purpose and the
23 intent to make as many interested persons, governments and
24 organizations as possible aware of this rulemaking.

25 For example, public notice for the hearing was

1 published in English and Spanish in the Albuquerque
2 Journal and the New Mexico Register, posted on NMED's
3 website, sent via the bureau's listserv and sent via
4 email, as well as being posted on the New Mexico Sunshine
5 Portal.

6 The department has also complied with the Small
7 Business Regulatory Relief Act, as shown by NMED Exhibit
8 8. The department does not foresee that the proposed
9 amendments to Part 79 will have any adverse impact on the
10 citizens or the businesses of New Mexico.

11 During the public comment period for the hearing,
12 the department received one comment from the public.
13 WildEarth Guardians submitted a comment to the Office of
14 General Counsel on May 5th of 2021, expressing concerns
15 regarding compliance with public notice requirements, with
16 a follow-up email on May 28, 2021, reiterating concerns
17 regarding public notice, along with comments regarding the
18 substance of the proposed rule and including attachments.

19 These comments submitted by WildEarth Guardians
20 and NMED's response are shown as NMED Exhibit 11 -- pardon
21 me -- as amended by the first amended NMED Exhibit 11.
22 WildEarth Guardians filed an entry of appearance with the
23 Environmental Improvement Board on April 27, 2021. And on
24 June 7th, 2021, WildEarth Guardians filed a prehearing
25 statement with the Environmental Improvement Board that

1 augmented their earlier comments.

2 WildEarth Guardians raised two objections, along
3 with providing proposed amendments to Part 79. First,
4 they allege that the Environmental Improvement Board did
5 not comply with public notice requirements under 20.1.1
6 NMAC entitled Rulemaking Procedures, Environmental
7 Improvement Board. Specifically, that WildEarth Guardians
8 was not directly notified, and that notice was not
9 provided on the Environmental Improvement Board's website.
10 Therefore, WildEarth Guardians argues that the hearing
11 should be postponed so that the hearing can be renoticed
12 and another 60-day comment period can be opened.

13 The Air Quality Bureau has complied with all
14 agency requirements for public notice and hearings,
15 stipulated by 20.1.1 NMAC and the State Rules Act at
16 14-4-1 NMSA 1979. Additional outreach was conducted as
17 outlined in the public involvement plan for the Sunland
18 Park nonattainment area.

19 As outlined in our first amended NMED Exhibit 11,
20 Mr. Timmons, representing WildEarth Guardians, was present
21 at the EIB meeting on March 26, 2021 where the Air Quality
22 Bureau requested and was granted a hearing date and time
23 regarding EIB 21-07(R). In addition, the listserv notice
24 was sent by the bureau to five members of WildEarth
25 Guardians, including Mr. Timmons and Mr. Nykiel.

1 The certification for adequacy for the Air
2 Quality Bureau's nonattainment new source review rule is
3 due to the EPA by August 3rd of this year. Any delay in
4 the hearing date will cause the Air Quality Bureau to miss
5 this deadline. The Air Quality Bureau opposed -- I'm
6 sorry -- the Air Quality Bureau opposes any postponement
7 of this hearing.

8 Second, WildEarth Guardians has raised concerns
9 that the proposed amended language at Section 20.2.79.109
10 NMAC could be misinterpreted as excluding ozone from the
11 "cause or contribute" analysis required by statute and
12 they want to modify the language of Part 79 in attempt to
13 address this concern.

14 The Air Quality Bureau opposes WildEarth
15 Guardians' proposed language for two main reasons: First,
16 the "cause or contribute" language already applies to the
17 ozone NAAQS both in the CFR and in Part 79 so no rule
18 change is needed. The permitting rules that are currently
19 in place are protective of air quality, including
20 environments resources located within ozone attainment and
21 nonattainment areas.

22 When considering ozone impacts, major sources and
23 major modifications, in other words, showing an increase
24 of 40 tons per year of VOCs or NOCs, in attainment,
25 unclassifiable or attainment/unclassifiable areas are

1 subject to PSD permitting rules under 20.2.74 NMAC,
2 entitled Permits, Prevention of Significant Deterioration,
3 or PSD, which I shall refer to as Part 74, and require an
4 ambient impact analysis pursuant to Section 303 of Part
5 74, using air quality -- I'm sorry, using air quality
6 modeling tools pursuant to Section 305 of Part 74.

7 Due to the nature of ozone formation, the EPA
8 does not set a significant impact level for ozone or for
9 secondary PM 2.5. They have provided guidance that
10 establishes a two-tiered screening approach for modeling
11 to address impacts.

12 Applicants and the Air Quality Bureau's
13 permitting and modeling groups use this guidance on a
14 case-by-case basis to determine impacts of a specific
15 project. If it is determined that the project causes or
16 contributes to the nonattainment violation, then the
17 permit shall be denied unless the permittee reduces their
18 emissions to compensate for their impact. If their impact
19 is on a designated nonattainment area, for example,
20 Sunland Park, the source would be subject to Part 79,
21 specifically Subsection 20.2.79.109.D NMAC.

22 Second, the language proposed by WildEarth
23 Guardians is outside the scope of legal advertisement of
24 this hearing and has not followed the rules and statutes
25 established for a proposed rule change. The proposed

1 language was not provided to the public for public notice
2 for a 60-day comment period, nor was it provided to the
3 Environmental Improvement Board in a timely manner.

4 If WildEarth Guardians believes a rule change is
5 necessary, they must follow the applicable state rules and
6 statutes for rulemaking. In addition, they would have to
7 submit the rule change to EPA to have the change, if
8 approved, included as part of the federally-enforceable
9 SIP.

10 The Air Quality Bureau submitted the proposed
11 amendments to EPA for review. EPA did not have any
12 negative comments and indicate that the proposed
13 amendments are adequate.

14 Q. Thank you. Let's see. Are there any additional
15 changes beyond those shown in the public review draft that
16 we are proposing to make to the -- to Part 79?

17 A. Yes. A review by the New Mexico State records
18 center found some nonsubstantive formatting errors that
19 need to be corrected. These are shown in yellow
20 highlights in NMED Exhibit 11 -- 7, I'm sorry, 7.

21 Q. Thank you. Have there been any -- well, let's
22 see. Yes, since we filed our Notice of Intent, have there
23 been any new developments in this rulemaking?

24 A. Yes. WildEarth Guardians has since filed a
25 prehearing statement on June 7th of 2021.

1 Q. Okay. And based on our review of that prehearing
2 statement, is the department recommending any changes to
3 the rule, as we proposed it, in the NOI?

4 A. No.

5 Q. Okay. And does our proposed amendment meet the
6 statutory burden in the Environmental Improvement Act?

7 A. Yes. The board has the authority -- I'm sorry,
8 go ahead.

9 Q. Just go ahead and explain how so.

10 A. Yes. The board has the authority to adopt the
11 proposed amendments pursuant to NMSA 78 Section 74-2-5 B
12 and C. The proposed amendments do not cause injury or
13 interfere with health, welfare, visibility or property, in
14 accordance with NMSA Section 74-2-5.E (1). In addition,
15 in accordance with NMSA Section 74-2-5.E (2), the public
16 interests will be served by implementation of the proposed
17 amendments by aligning the current state rule with the
18 federal language governing nonattainment area permitting.

19 Finally, the proposed amendments require no new
20 technology and with no cost associated with the
21 amendments, is economically reasonable, in accordance with
22 NMSA Section 74-2-5.E (3). The factors specified by NMSA
23 1979 Section 74-2-5.E all weigh in favor of adopting the
24 proposed amendments.

25 Hang on, I've got to change screens.

1 Thank you. Go ahead.

2 A. This concludes my testimony on the proposed
3 amendments of Part 79. I respectfully request that the
4 board adopt the proposed amendments and SIP revisions at
5 the conclusion of this hearing. Thank you.

6 MR. KNIGHT: Thank you. And for the record,
7 I misspoke earlier when I was referring to the
8 Environmental Improvement Act. My witness was actually
9 referring to the State's Air Quality Control Act.

10 And with that, my witness will stand for
11 questions from the board and following that for any
12 cross-examination. And, again, I offer all four of my
13 witnesses who have been sworn in, I offer them as a panel
14 to answer any questions that might go beyond Mr. Butt's
15 expertise.

16 HEARING OFFICER TRUJILLO-DAVIS: Thank you,
17 Mr. Butt, and thank you, Mr. Knight. I believe WildEarth
18 Guardians now has an opportunity to cross-examine the
19 witness.

20 MR. TIMMONS: Thank you, Madam Hearing
21 Officer.

22 CROSS-EXAMINATION

23 BY MR. TIMMONS:

24 Q. Good morning, Mr. Butt. My name is Daniel
25 Timmons, I'm counsel for WildEarth Guardians and have some

1 questions regarding your testimony, both prefiled and what
2 you sort of elaborated on today. So I'll just start --
3 start at the beginning here.

4 So the amendments proposed by the department
5 relate specifically to 20.2.79 NMAC, correct? I believe
6 you're on mute.

7 A. Yes, that is correct.

8 Q. Okay. And so we've been referring to that as
9 Part 79, right?

10 A. That's correct.

11 Q. And that's --

12 A. That's the vernacular.

13 Q. Part 79 is entitled "Permits - Nonattainment
14 Areas," correct?

15 A. Correct.

16 Q. And so Part 79 is primarily focused, not
17 surprisingly, with permit requirements applicable in
18 nonattainment areas, right?

19 A. That's correct.

20 Q. And so one of the proposed amendments to the
21 definition of nonattainment area, correct?

22 A. Madam Chair, Madam Hearing Officer, that's
23 correct.

24 Q. And you've described this change as a
25 "substantive" change, correct?

1 A. That's correct.

2 MR. TIMMONS: Do I have -- can I be granted
3 access to share my screen? I would like to walk through
4 some of the department's exhibit with the witness.

5 ADMINISTRATOR JONES: Yes, of course.
6 You should now have access.

7 MR. TIMMONS: Thank you. Okay.

8 Q. (BY MR. TIMMONS) Okay. So can you see what I've
9 pulled up, Mr. Butt?

10 A. Yes.

11 Q. And this is identified as what was prefiled as
12 NMED Exhibit 1, page 12; is that right?

13 A. That's correct.

14 Q. Okay. So looking at subsection A, I'm going to
15 read what the current regulatory language shows. And if
16 you could just make sure that I read this correctly, I
17 would appreciate it. The current regulatory language
18 defines nonattainment area as meaning, "for any air
19 pollutant, an area which is shown by monitored data or
20 which is calculated by air quality modeling or other
21 methods determined by the administrator to be reliable, to
22 exceed any national ambient air quality standard for such
23 pollutant. Such term includes any area identified under
24 subparagraphs A through C of section 107 D 1 of the
25 Federal Clean Air Act." Did I read that right?

1 A. Correct.

2 Q. So is that current definition of nonattainment
3 area limited solely to formally-designated nonattainment
4 areas?

5 A. Maybe a member of my panel might be better
6 equipped to answer that question. Perhaps Mr. Baca or
7 Dr. Olson.

8 MR. BACA: Sure. Madam Chair, Madam Hearing
9 Officer, Members of the Board, so this is Michael Baca.

10 COURT REPORTER: I'm sorry. Who is speaking?

11 MR. BACA: Can you repeat the question again?

12 COURT REPORTER: Who is speaking right now?
13 Who is speaking right now?

14 MR. BACA: Michael Baca, with the New Mexico
15 Environment Department.

16 MR. TIMMONS: Okay. The question is, is the
17 current definition of nonattainment area limited solely to
18 formerly-designated nonattainment areas?

19 MR. BACA: Well, I believe it does. It's
20 within -- it says any area identified under subparagraphs
21 A through C of section 107 D 1 of the Federal Clean Air
22 Act, which pertains to the designation of nonattainment
23 areas, the process.

24 MR. TIMMONS: Is it specifically limited to
25 those areas or does it simply include those areas?

1 MR. BACA: Madam Chair, Madam Hearing
2 Officer, you know, I'm -- I'm unsure of the question. I
3 don't think I have the answer for that, so if I may defer
4 to another member of the panel.

5 MR. TIMMONS: I'm happy to repeat the
6 question if there's someone on the department staff who
7 can help explain what that change is all about.

8 MR. SINGLETON: This is Kerwin Singleton,
9 Madam Chair, Madam Hearing Officer. Mr. Timmons, if you
10 could repeat the question, please.

11 MR. TIMMONS: Sure. With this current
12 definition -- under the current definition, would that
13 potentially include areas designated as attainment or
14 unclassifiable, but where monitored data shows ambient air
15 quality to exceed an applicable NAAQS?

16 MR. SINGLETON: Madam Hearing Officer, Madam
17 Chair, I believe that is correct. And Dr. Olson can
18 correct me if I'm wrong.

19 MR. TIMMONS: Thank you, Mr. Singleton. And
20 Mr. Singleton, maybe -- maybe you can stay on the line
21 here just for one -- a couple of follow-up questions on
22 this.

23 So the new definition changes that, correct, and
24 is limited specifically to formerly-designated
25 nonattainment areas; am I right?

1 MR. SINGLETON: Madam Hearing Officer, Madam
2 Chair, Members of the Board, yes, the new definition
3 mirrors the current language in the Federal Clean Air Act.

4 MR. TIMMONS: So an area could be designated
5 as attainment -- so just sort of as a matter of -- as a
6 matter of fact, I guess, an area could be designated as
7 attainment for a particular pollutant, but still have
8 monitored air pollution levels in excess of the NAAQS for
9 that pollutant; is that right?

10 MR. BUTT: My answer is yes.

11 MR. TIMMONS: Thank you. And under the
12 department's new definition, such an area designated
13 attainment, but with monitored levels exceeding the NAAQS,
14 would not be considered a nonattainment area; is that
15 right?

16 MR. BUTT: If it's stipulated as a
17 nonattainment area by the Clean Air Act, which is the
18 language we're accepting to adopt, then that area would be
19 nonattainment as ruled by EPA and it would not be a matter
20 of what the monitors are saying, per se.

21 MR. TIMMONS: Okay. So -- so I just want to
22 be really clear here. Under this new definition, if an
23 area had monitored air pollution levels in excess of the
24 NAAQS, but was still designated as attainment for that
25 pollutant, it would not fall under this definition of

1 nonattainment area?

2 MR. SINGLETON: Madam Chair, Madam Hearing
3 Officer -- go ahead, Mr. Baca.

4 MR. BACA: Madam Hearing Officer, Madam
5 Chair, that is correct. So a nonattainment area is only
6 an area that is designated by the EPA. They have to have
7 a formal rulemaking process to designate an area of
8 nonattainment. That is a nonattainment area.

9 An attainment area can still have monitored data
10 in excess of the NAAQS and be designated attainment.

11 MR. TIMMONS: Thank you, Mr. Baca. I'm going
12 to move on from this line of questioning. So I thank --
13 thank you all for that. I think probably turning back to
14 Mr. Butt.

15 Q. (BY MR. TIMMONS) I want to turn to next how the
16 proposed rule change addresses major sources of ozone
17 particularly in subsection 109, applicability. And so I'm
18 going to turn to page 15 of what was prefiled as NMED's
19 Exhibit 1.

20 Yeah. Okay. So it's 15 to 16. I got lost for a
21 second. So looking at this language, subsection A,
22 applies -- paragraphs 1 and 2 describe essentially two
23 different types of scenarios where a permit under Part 79
24 would be required; is that right?

25 A. That's correct.

1 Q. And so, paragraph 1 applies to major sources or
2 modifications located in designated nonattainment areas
3 where the source would be major for the specific
4 pollutants, for which that area has been designated as
5 nonattainment; is that right?

6 A. That's correct.

7 Q. And that paragraph is not changing, correct?

8 A. That's correct.

9 Q. So under NMED's proposed modifications, paragraph
10 2 would apply to major sources or modification in areas
11 designated as attainment or unclassifiable, but where the
12 new emissions would cause or contribute to a NAAQS
13 violation; is that right?

14 A. That's correct.

15 Q. So as a general matter, would you agree that it's
16 possible for a new source to be cited in an area
17 designated as attainment, but still cause or contribute to
18 a NAAQS violation?

19 A. If it's located in an attainment area and it has
20 a negative impact on a nonattainment area, it would be
21 subject to PSD and there would be restrictions on it to
22 compensate for that -- that effect.

23 Q. Is it possible for a source to be located in a
24 nonattainment area -- I'm sorry -- to a source located in
25 an attainment area, to cause or contribute to a NAAQS

1 violation in that attainment area?

2 A. My understanding is that there are safeguards in
3 place to keep that from happening.

4 Q. Okay. So it shouldn't happen, I appreciate that.

5 But if those safeguards were not followed, it's
6 my understanding that you could cause or contribute to a
7 NAAQS violation in an attainment area, in what I would say
8 is two basic ways: first, a designated attainment area
9 which already has ambient air quality in exceedance of the
10 NAAQS, and a new source would come in and make it worse;
11 is that possible absent safeguard?

12 A. I don't know. We're in hypotheticals, I don't
13 think I follow your line of reasoning.

14 Q. So looking at the second sentence of paragraph
15 2 -- the second sentence of paragraph 2 as proposed to be
16 modified defines the circumstances where a major source or
17 modification located in an area designated as attainment
18 would be considered to cause or contribute to a NAAQS
19 violation; is that right?

20 A. Correct.

21 Q. And that sentence reads, "A major source or major
22 modification will be considered to cause or contribute to
23 a violation of a National Ambient Air Quality Standard
24 when such source or modification would, at a minimum,
25 exceed any of the significance levels in subsection A of

1 20.2.79.119 NMAC -- NMAC at any location that does not or
2 would not meet the applicable national standard." Did I
3 read that correctly?

4 A. That's correct.

5 Q. And so, those significance levels are what is
6 referred to as significant ambient concentrations in
7 20.2.79.119A NMAC; is that right?

8 A. It's in the table. I'd have to pull the table
9 up, but, yes, the significant ambient concentrations are
10 in that table.

11 Q. Okay. So under this proposed language, Part 79
12 would apply to a new major source in a designated
13 attainment area, where emissions from the new source would
14 cause ambient air quality impacts above the significant
15 ambient concentrations in that table, at that location
16 where ambient air quality does -- does not or would not
17 meet the applicable NAAQS; is that right?

18 A. Sounds right.

19 Q. So, basically, to cause or contribute to a NAAQS
20 violation as described in paragraph 2 here, a new major
21 source would both need to exceed the significance levels
22 in Part 79, subsection 119 for a particular pollutant, and
23 also be located in an area that already is or would exceed
24 the NAAQS for that same pollutant, with the new emissions
25 from the proposed facility; is that right?

1 A. You're going to have to say that again. I didn't
2 catch that.

3 Q. Okay. So -- so to cause or contribute to a NAAQS
4 violation, as defined in paragraph 2, the new major source
5 would need to exceed the significance levels in that table
6 you described, and also be located in an area that
7 would -- that already is exceeding the NAAQS or would
8 exceed the NAAQS with those new emissions; is that
9 correct?

10 A. I think so.

11 Q. Okay. So I'm going to just -- I'm going to turn
12 now to that table and this is page 24 of NMED prefiled
13 Exhibit 1. I apologize for the scrolling. And this is
14 the Significant Ambient Concentration table that we were
15 just discussing, correct?

16 A. Right.

17 Q. So for the listed pollutants here, this table
18 establishes a numeric threshold for determining whether a
19 source located in an attainment area for that pollutant,
20 would be considered to cause or contribute to a NAAQS
21 violation; is that right?

22 A. That's correct.

23 Q. But there is no such significant ambient
24 concentration listed here for ozone; is that right?

25 A. That's correct. That table there is verbatim

1 from the CFR, and the EPA does not have -- they do not
2 list a value in the CFR for ozone.

3 Q. Okay. So I'm going to go back to subsection
4 109 -- it's apparently quite long -- and really focus in
5 on paragraph 2 here again.

6 Paragraph 2 doesn't address how the department is
7 to determine whether a new major source would cause or
8 contribute to an ozone violation; is that right?

9 A. Not -- not in that language, but as I mentioned
10 before, there's language in both Parts 79 and 74 which
11 addresses nonattainment area. If you have a specific
12 question I could direct it to one of my experts.

13 Q. We might get there. I just want to focus in on
14 paragraph 2 for now, since this is the change that the
15 department is making.

16 As a general matter, is it possible for a new
17 major source located in an area designated as
18 attainment -- attainment for ozone, is it possible for
19 that new major source to cause or contribute to the
20 violation of the ozone NAAQS?

21 A. Mike, do you want to take that?

22 MR. BACA: I can try. This is Michael Baca
23 with the New Mexico Environment Department again.

24 Madam Chair, Madam Hearing Officer, Members of
25 the Board, so your question, would you please repeat that

1 again?

2 MR. TIMMONS: Yeah. Is it -- and I'll even
3 say, is it physically possible for a new major source to
4 be located in an area designated as attainment for ozone,
5 and cause or contribute to a violation of the ozone NAAQS?

6 MR. BACA: Madam Chair, Madam Hearing
7 Officer, Members of the Board, hypothetically that is
8 possible.

9 MR. TIMMONS: Thank you.

10 MR. BACA: Are you talking about an existing
11 source or are you talking -- I mean, I think we would need
12 some clarification and context to what you're talking
13 about because -- so we can talk about the different
14 permitting programs that you're weaving in and out of with
15 your line of questioning. So, you're touching on
16 different permitting programs that need to be addressed in
17 a focused manner.

18 MR. TIMMONS: Mr. Baca, for a new major
19 source, major for ozone, located in an area designated as
20 attainment for ozone, would it be accurate to say that as
21 a matter of practice, the department would conduct a
22 case-by-case assessment to determine whether that source
23 would cause or contribute to an ozone violation?

24 MR. BACA: Madam Chair, Madam Hearing
25 Officer, Members of the Board, I believe that the

1 department would conduct that screening on a case-by-case
2 basis. And in an attainment area for a major source, they
3 would come in and they would be screened to see what
4 permitting program they would be under. And that could be
5 our, you know, any one of the MSR permit programs.

6 So we have our minor source MSR, we have the PSD
7 program, and those two would apply to attainment area.

8 MR. TIMMONS: Thank you. So in your opinion,
9 if a new major source for ozone were shown by that
10 case-by-case determination, to cause or contribute to an
11 ozone violation in an attainment area, would that source
12 be covered by paragraph 2?

13 MR. BACA: Yes.

14 MR. TIMMONS: Do you believe that is clear
15 from the language of paragraph 2?

16 MR. BACA: Yes.

17 MR. TIMMONS: Okay.

18 MR. BACA: I think one of the words that, you
19 know, it says -- so the second sentence that you read,
20 "When such a source or modification would, at a minimum,
21 exceed any of the significance levels." So it doesn't
22 mean that that's the only thing that we need to rely on.
23 That leaves the door open to other means of screening for
24 the department to make a determination.

25 MR. TIMMONS: Okay.

1 MR. BACA: I think Mr. Butt referred to this
2 in his testimony when he talked about the two-tiered
3 screening process and the modeled emission rates, guidance
4 that EPA provided.

5 MR. TIMMONS: And that EPA guidance is not
6 codified in the department's rules, correct?

7 MR. BACA: No, it's a guidance.

8 MR. TIMMONS: So I next kind of want to touch
9 briefly on why paragraph 2 matters. So I think I'll go
10 back to Mr. Butt to continue.

11 Q. (BY MR. TIMMONS) First, if I say paragraph 2
12 facilities, can I use that term to refer to meaning major
13 sources or modifications in areas designated as attainment
14 or unclassifiable, that would cause or contribute to
15 violations of the applicable NAAQS? Can I use that as
16 shorthand going forward?

17 A. I can remember that.

18 Q. Okay. So 20.2.79.109 D, I'll scroll down here
19 just a little bit, entitled "Other Requirements." That
20 describes the sections of Part 79 that would apply to
21 those paragraph 2 facilities, correct?

22 A. So if it's subject to paragraph 2, it's going to
23 have to also be subject to those five other restrictions
24 inside Part 79.

25 Q. And among those restrictions, is that paragraph 2

1 facilities would need to comply with emissions offset; is
2 that right?

3 A. That's right.

4 Q. And paragraph 2 facilities would also need to
5 provide a net air quality benefit in areas where the NAAQS
6 for that pollutant would be violated; is that right?

7 A. I think that's correct.

8 Q. And paragraph 2 facilities would also need to
9 comply with the Part 74 PSD permitting requirements that
10 you referred to earlier; is that right?

11 A. If it's major and it's cited in an attainment
12 area and it's going to affect a nonattainment area, it
13 could be subject to 74.

14 Q. So --

15 A. It's not an absolute. I'm not a permit engineer.
16 There's a finer point of 79 or 74 or 70 or 72, then I can
17 refer to my permit engineer.

18 Q. I don't think we need to get into much further
19 detail here. One last question on this point: Would you
20 agree as a general matter, that subsection 109 D imposes
21 additional requirements on paragraph 2 facilities, which
22 are major sources located in attainment areas that would
23 cause or contribute to a NAAQS exceedance, as compared to
24 major sources that would not cause or contribute to the
25 NAAQS violation?

1 A. We're getting into the weeds. I'll have to defer
2 to Dr. Olson on that one.

3 DR. OLSON: Could you repeat that question,
4 please, Mr. Timmons?

5 MR. TIMMONS: Sure. Dr. Olson, would you
6 agree just as a general matter, that subsection 109.D
7 imposes additional requirements on major sources that
8 would cause or contribute to NAAQS exceedances, those
9 paragraph 2 facilities, as compared to major sources that
10 would not cause or contribute to NAAQS exceedances?

11 DR. OLSON: Yes. The additional requirements
12 in those paragraphs, Madam Chair, Members of the Board,
13 the additional requirements in paragraph D would apply to
14 the facilities that are encompassed under paragraph 2.

15 MR. TIMMONS: Thank you. I think that's all
16 I have for you, Dr. Olson.

17 Q. (BY MR. TIMMONS) I'm going to turn back to you
18 for just a little bit more, Mr. Butt. Are you familiar
19 with NMED's Exhibit 11 as supplemented or amended?

20 A. Yes.

21 Q. I'm going to pull that up now. Do you see this
22 notice of substitution of exhibit?

23 A. Yes.

24 Q. Coming down to page 28 of NMED prefiled Exhibit
25 11, as amended, starting where my cursor is on line 4,

1 NMED stated, "If their impact" -- paraphrasing -- in other
2 words, a new source's impact is on a designated
3 nonattainment area, i.e., Sunland Park, the source would
4 be subject to 20.2.79 NMAC, specifically subsection
5 20.2.79.109.D NMAC. Did I read that correctly?

6 A. That's correct.

7 Q. And paragraph D was what we were just referring
8 to; is that correct?

9 A. That's correct.

10 Q. And that applies to the paragraph 2 facilities we
11 were just discussing, correct?

12 A. That's correct.

13 Q. Are paragraph 2 facilities located in
14 nonattainment areas or attainment areas?

15 A. Paragraph 2 facilities are in attainment areas.

16 Q. So, looking back at that sentence starting with
17 "if their impact," paragraph D here does not, in fact,
18 apply to facilities located in nonattainment areas,
19 correct?

20 A. I guess I'd have to defer to my panel on that
21 one.

22 MR. BACA: Madam Chair, Madam Hearing
23 Officer, I believe the answer is yes. It sounds like
24 he -- can you repeat that question so I can say yes or no
25 definitively?

1 MR. TIMMONS: Paragraph D does not, in fact,
2 apply to facilities located in designated nonattainment
3 areas, correct?

4 MR. BACA: Correct. I think paragraph --
5 we've clarified that paragraph D applies to paragraph 2
6 facilities, as you defined it previously.

7 Q. (By MR. TIMMONS) Okay. Thank you. So, going
8 down to the final sentence here, "NMED stated if the
9 source's impact is on a designated attainment area, the
10 source would not be subject to 20.2.79 NMAC." Did I read
11 that correctly?

12 A. That's right, it's stated.

13 Q. Do you agree with that statement?

14 A. I don't know.

15 Q. Okay. But you would agree that the requirements
16 of 20.2.79.109D listed here specifically apply to sources
17 in areas designated as attainment or unclassifiable,
18 correct?

19 A. Yes, paragraph 2 is for attainment citings.

20 Q. Thank you. I'm going to move on here. I'm
21 pulling up what has -- has been prefiled as WildEarth
22 Guardians Exhibit 3. And I believe admitted as part of
23 the overall Exhibit 4 and I may need to clarify that.

24 But are you familiar with Guardians' prefiled
25 Exhibit 3?

1 A. I'm familiar with the proposed language. I don't
2 know what the Exhibit No. is.

3 Q. And that is the redline modifications that
4 Guardians offered regarding NMED's proposal, correct?

5 A. Right, I'm familiar with that.

6 Q. Okay. So looking at the first edit, where we
7 inserted "other than the ozone standard," you stated
8 earlier that there is no established significance level
9 for ozone in the reference table; is that right?

10 A. That's correct.

11 Q. So NMED's proposed language in this section is
12 effectively silent on ozone; is that right?

13 A. I wouldn't say that. If it's major for VOC or
14 NOx, it's also major for ozone. Plus, as I stated in my
15 testimony, there is language in 79 and the CFR that
16 addresses ozone. So by putting this additional language
17 here, it's our opinion that this muddies the water and
18 does not make it more understandable; it makes it less
19 clear, and the language that we proposed without your
20 language, mirrors the CFR.

21 Q. But, again, there is no significant ambient
22 concentration listed in the table referred to in paragraph
23 2, correct?

24 A. That's correct, it's verbatim from the CFR.

25 Q. And, earlier, you did indicate that -- or perhaps

1 this was actually Mr. Baca indicated, but the department
2 has indicated that a case-by-case determination is needed
3 to evaluate whether a source causes or contributes to an
4 ozone violation; is that right?

5 A. That's my understanding.

6 Q. And this final sentence added by WildEarth
7 Guardians, basically says that, correct?

8 A. I'd need some additional help, without being
9 declared major for ozone. I'd defer that to my panel.

10 MR. SINGLETON: Madam Hearing Officer, Madam
11 Chair, Members of the Board, this is Kerwin Singleton. To
12 address Mr. Timmons' question, we did discuss the proposed
13 language with members of the Environmental Protection
14 Agency in region 6 and it was their opinion that this
15 language did not make the rule any better.

16 Also, the lack of an ozone cell in the table that
17 was previously referenced does not mean that the
18 department cannot make a determination of whether or not a
19 major source causes or contributes to a violation of the
20 standard. As Mr. Butt previously stated, for major
21 sources, a case-by-case determination is made by the
22 permitting section.

23 MR. TIMMONS: Thank you, Mr. Singleton. One
24 follow-up question on that. In your opinion, for a new
25 major source for ozone located in a designated attainment

1 area, is the department required to evaluate whether that
2 new source would cause or contribute to violation of the
3 ozone NAAQS?

4 MR. SINGLETON: Well, a new major source
5 modification, I believe, the modeling guidance would still
6 apply to determine whether or not that source would cause
7 or contribute to a violation of the ozone standard.

8 MR. TIMMONS: The modeling guidance would
9 apply. Does that mean that the department would be
10 required to make that assessment?

11 MR. SINGLETON: For a major source, yes.

12 MR. TIMMONS: Thank you.

13 Q. (BY MR. TIMMONS) So turning back to Mr. Butt,
14 just a few final questions regarding the time the board
15 has been essentially given to evaluate this proposal.
16 This rulemaking effort is essentially intended to align
17 the department's regulations with the EPA's regulations
18 that implement the 2015 Ozone NAAQS; is that right?

19 A. It's -- well, the way I phrase it is 2015 Ozone
20 SIP Requirements Rule stipulates that certain aspects of
21 the state's air program have to be shipshape, as I
22 mentioned. So, like the emission statements, emissions
23 inventory, and then also, you have to make sure your
24 nonattainment source review program is also shipshape.
25 And so the Federal Register does not dictate which words

1 to use in this rule. It does say that you need to make
2 sure that the -- your nonattainment new source review
3 program is adequate to enforce the new 2015 Ozone NAAQS.

4 And the way to find out if that is satisfactory,
5 the department took the CFR, where all of this language is
6 incorporated, and did a line-by-line comparison with the
7 CFR. And anywhere where there's mistakes or things that
8 are unclear, we made them more clear, if that answers your
9 question.

10 Q. Yeah. And so -- so this line-by-line analysis,
11 and aligning the language was done because of the
12 designation of the Sunland Park ozone nonattainment area,
13 right?

14 A. It's related to it. I don't know if I -- I don't
15 know about the causation you're saying, but maybe I'm
16 misunderstanding what you're saying.

17 Q. And so, the Sunland Park area was designated
18 nonattainment on August 3rd, 2018, right?

19 A. That sounds right.

20 Q. And the SIP requirements rule was promulgated by
21 the EPA on December 6th, 2018; is that right?

22 A. It sounds right. I'd have to go back to my
23 testimony if we're going to have to pin down dates, but
24 for the sake of argument, I'll accept it.

25 Q. And that's -- the SIP requirements rule was

1 included as NMED's Exhibit 9c in its prefiled Notice of
2 Intent?

3 A. Sounds right.

4 Q. And the state was given three years from the
5 Sunland Park designation to adopt conforming rules and
6 submit a determination SIP of adequacy to the EPA; is that
7 right?

8 A. That sounds right.

9 Q. And so, three years from August 3rd, 2018, is
10 August 3rd, 2021, correct?

11 A. That sounds right.

12 Q. So that's about a little over a month from now;
13 is that correct?

14 A. That's correct.

15 Q. And if the submission isn't made on time, EPA
16 could, it's referred to as "bump up" the Sunland Park area
17 from marginal to moderate nonattainment status, right?

18 A. I believe so.

19 Q. I'm going to go back to NMED's Exhibit 11. And
20 this is page 26. NMED states, starting where my cursor is
21 here, "Any delay in the hearing date will cause the AQB to
22 miss this deadline," correct?

23 A. That's correct.

24 Q. So this proposal has basically made it to the
25 board for its approval about two years and 11 months after

1 a three-year clock started ticking?

2 A. That sounds right.

3 Q. So there's not much opportunity for the board to
4 have substantive input into this proposal without risking
5 missing that three-year deadline, right?

6 A. I would disagree with that. They were provided a
7 minimum of 60-days' notice to consider the matter, plus,
8 more time for the petition and also the granting the
9 hearing. Many, many months they've had this proposal in
10 front of them.

11 Q. But today's the day where any changes would have
12 to be made, correct?

13 A. If they decide not to adopt it as proposed, we
14 will miss the deadline because it will take another at
15 least 90 days to renote, if there is any language that
16 varies from what's proposed.

17 Q. Okay. Just one more question. Are you aware
18 when the formal public notice for this hearing was finally
19 posted on the EIB's website?

20 A. No, I do not.

21 MR. TIMMONS: Thank you. I have no further
22 questions.

23 HEARING OFFICER TRUJILLO-DAVIS: Thank you,
24 Mr. Timmons -- excuse me. Thank you. I believe now we
25 can open up for questions from the board.

1 QUESTIONS FROM THE BOARD

2 HEARING OFFICER TRUJILLO-DAVIS: Member
3 Garcia, would you like to go?

4 MEMBER GARCIA: Yes, thank you, Madam Hearing
5 Officer. I have a question for Mr. Butt.

6 MR. BUTT: Madam Chair, Members of the Board,
7 I can barely hear you. I don't know if it's on my end.

8 MEMBER GARCIA: Oh, okay. I'll speak up.

9 MR. BUTT: There you go.

10 BOARD MEMBER GARCIA: Can you hear me now?

11 MR. BUTT: That's great. Thank you.

12 BOARD MEMBER GARCIA: Okay. So this question
13 is for Mr. Butt. Did EPA actually request that you make
14 these regulatory changes?

15 MR. BUTT: Madam Chair, Members of the Board,
16 Member Garcia, it's indicated by the Federal Register and
17 by the Ozone SIP Requirements Rule that we should evaluate
18 our program, along with those other requirements that I
19 mentioned: the emissions inventory and emission statement
20 and also the nonattainment source review program.

21 BOARD MEMBER GARCIA: Okay. Thank you. But
22 they didn't request these specific changes to the regs?

23 MR. BUTT: No.

24 BOARD MEMBER GARCIA: Okay. Thank you.

25 And a question for Mr. Timmons. With your

1 proposed language, I'm trying to understand the difference
2 that it makes. With your proposed language, would the --
3 do you feel that the department would have more
4 enforcement authority with your language? Would they be
5 able to enact enforcement where they can't with the other
6 language?

7 MR. TIMMONS: Thank you, Member Garcia. I
8 don't believe that it would create new enforcement
9 authority. We see this as a clarification of the existing
10 requirement, to assess whether a new source causes or
11 contributes to ozone violations, which we believe is left
12 ambiguous because it's not included in that significant
13 ambient concentration table.

14 BOARD MEMBER GARCIA: Okay. And one other
15 question for you, Mr. Timmons. The department is saying
16 that their language actually mirrors the Clean Air Act
17 language. Are you suggesting that they not mirror the
18 Clean Air Act language?

19 MR. TIMMONS: We are suggesting that they add
20 additional language just to make this clarification, which
21 I would also acknowledge that the ambiguity is also
22 generally present in the EPA's language as well.

23 BOARD MEMBER GARCIA: Also, Mr. Timmons, do
24 you -- could you cite an example where the ambiguity may
25 cause a problem with enforcement in the future?

1 MR. TIMMONS: I think the problem would be if
2 the -- the absence of language clarifying that an ozone
3 assessment is required, that there's a risk that the
4 department could issue major source permits, and not
5 conduct that analysis. So it's less of an enforcement
6 issue, as a -- as a permitting issue, I think.

7 BOARD MEMBER GARCIA: I understand. Thank
8 you.

9 HEARING OFFICER TRUJILLO-DAVIS: Member
10 Honker, did you have additional questions?

11 MEMBER HONKER: Yeah, just -- I think a
12 follow-up on Member Garcia's question to Mr. Timmons.
13 Could you -- could you kind of walk us through a specific
14 scenario with a new source, and what your concern would be
15 with the current wording of the rule change?

16 MR. TIMMONS: Thank you, Member Honker.
17 Madam Chair, Members of the Board, yes, the -- you know,
18 the specific concern relates again to those -- what I was
19 referring to as paragraph 2 facilities. And so these are
20 major sources in areas which are designated as attainment,
21 but still have emissions that would cause or contribute to
22 a NAAQS violation.

23 And so, if those -- if ozone is essentially
24 exempted from those -- that cause or contribute analysis
25 and it would not be considered a paragraph 2 facility,

1 then that type of facility would only be subject to the
2 part 74 PSD regulations, and would not be subject to those
3 Section 109 -- Part 79, Section 109 D requirements that we
4 discussed; particularly, including emissions offsets, and
5 the demonstration of the net air quality benefit. So
6 there would be essentially reduced requirements applicable
7 to these facilities, even though they -- because
8 essentially of that cause or contribute analysis, if it
9 was not conducted, and these facilities were not subject
10 to those particular sections of Part 79.

11 MEMBER HONKER: And -- and if I could now ask
12 the NMED staff to respond to that scenario, in terms of
13 how you would anticipate making decisions within the
14 regulatory process.

15 MR. BUTT: I would defer to one of my panel.

16 MR. BACA: Member Bitzer, [sic] Madam Hearing
17 Officer, Madam Chair, Members of the Board, so I believe
18 what he's describing right now is a situation in which the
19 facility would be subject to our permitting rules as a
20 whole. So he would -- what he's explaining is that the
21 permit we're talking about is the facility would be
22 subject to Part 74 and part 72, which also have provisions
23 that mirror the language in Part 79, regarding air quality
24 benefit and emissions reduction. So they would still be
25 subject to other permitting provisions, just not Part 79.

1 MR. KNIGHT: Madam -- I'm sorry. Madam
2 Hearing Officer and Members of the Board, while the
3 discussion is interesting and useful here, I would like to
4 just step in and caution the board that the --
5 procedurally, we should be asking questions of the witness
6 who testified. And I know Mr. Timmons can make legal
7 argument, but he's not a witness. He's not been sworn in,
8 and his statements cannot be considered as evidence in
9 this hearing.

10 With that, I'll -- you know, I'll leave it to the
11 hearing officer's discretion as to how to -- how to
12 address that issue.

13 HEARING OFFICER TRUJILLO-DAVIS: I'm going to
14 defer it to Mrs. -- yes, Ms. Soloria. I do believe there
15 is merit in Mr. Knight's statement, and I'm also
16 wondering, is this out of scope for our current hearing?
17 And I would love some input from our other board members
18 just to check ourselves before -- before moving forward.
19 And if we decide that it is within scope, then we'll go
20 ahead and move forward.

21 MS. SOLORIA: Madam Hearing Officer, I think
22 it's within the board's discretion and fact-finding duty
23 to ask, if they need clarification as to things that the
24 department's witnesses have actually testified to, then
25 that's -- that that's fair game for them to ask questions

1 of that. So, as you noted, we don't want to get too far
2 off afield, but if a fact was testified to in response to
3 one of WildEarth Guardians' questions, and a board member
4 desires clarification on that fact, I think that that's
5 appropriate.

6 I do think Mr. Knight's point is well taken that
7 we cannot consider counsel for WildEarth Guardians
8 witnesses themselves. So the board should really direct
9 its questions to things that were actually testified to by
10 the witness -- the witnesses themselves.

11 HEARING OFFICER TRUJILLO-DAVIS: Now, I
12 didn't -- I will come right back to you, Member Bitzer.

13 As far as I have seen so far, we are -- are
14 focusing on the information in the prefiled -- I'm sorry,
15 what was the -- the WildEarth Guardians' prefiled
16 statement? Yes, prehearing statement. Have we wandered
17 outside of that at this point?

18 MS. SOLORIA: I would -- I wasn't clear on
19 what the pending question was. I might need, to the
20 extent that you need to be advised on that, Madam Hearing
21 Officer. That's -- I mean, that's really your call to
22 keep the hearing on track. I do, as a general principle,
23 a fuller solicitation of the facts is the preference. And
24 it's once we become getting duplicative, then I think
25 you're within your discretion to more tailor the

1 discussion.

2 But at present, I would encourage to the extent
3 that, again, the board members have clarifying questions,
4 that we -- we permit those at this time.

5 HEARING OFFICER TRUJILLO-DAVIS: Okay. Thank
6 you. I will go ahead and kick that to the rest of my
7 board members and I will start with Member -- Member
8 Bitzer. And I guess, just advice to us all, to be
9 cognizant of maintaining our focus on what the issue at
10 hand is.

11 BOARD MEMBER BITZER: I will direct this
12 question to Mr. Butt and his team. I thought I heard in
13 the testimony somewhere that failure to act affirmatively
14 on the department's request here would move us potentially
15 from marginal nonattainment to some other category of
16 nonattainment, but I didn't hear the word moderate,
17 because I think that was the next level. It goes
18 marginal, moderate and then serious, severe or extreme, or
19 did I just mishear that?

20 MR. BUTT: Madam Chair, Member Bitzer, that's
21 what I was trying to convey. I don't know if I said it or
22 not, but it would -- there's a potential for bump up; it's
23 not a direct causal relationship, it's if you don't feel
24 that this is, you know, weighs enough evidence to go
25 affirmatively, we will not automatically be bumped up to

1 moderate tomorrow --

2 BOARD MEMBER BITZER: What was the --

3 MR. BUTT: -- but the sequence of events are
4 marginal to moderate, and we're trying to avoid the bump
5 up. And the one section of our efforts is what we're
6 doing today, which is evaluation of the nonattainment
7 source review program. And another separate section of
8 the bureau is working on a 179-B demonstration, which is
9 separate, that shows that, in our opinion, New Mexico and
10 Texas are contributing to the problem. And that also can
11 try to avoid the bump up. I don't know if I answered your
12 question at all.

13 BOARD MEMBER BITZER: You did, but what would
14 the -- what would the consequences be of getting -- of
15 getting bumped up to moderate?

16 MR. BUTT: As you step up, it becomes more
17 onerous, the regulations on facilities become more
18 onerous, and sometimes it can have, as I had in my written
19 testimony, not my oral, there can be sometimes business
20 consequences; the cost of business could possibly go up.
21 The people have to -- the facilities have to do more, are
22 under more scrutiny, like in California, where they're
23 regulating leaf blowers. So it can get extreme once you
24 start climbing those levels, things get more and more
25 extreme and things get more expensive and life gets more

1 difficult.

2 BOARD MEMBER BITZER: I hate leaf blowers, by
3 the way, but I'll keep that to my -- out of my
4 consideration. Thank you.

5 HEARING OFFICER TRUJILLO-DAVIS: Do any other
6 members have any questions? Member Suina, I think I
7 skipped you at one point.

8 CHAIRPERSON SUINA: Madam Hearing Officer, at
9 this point -- well, I had an earlier question, but some of
10 them have already been answered, so I'm good for right
11 now.

12 HEARING OFFICER TRUJILLO-DAVIS: Member
13 Garcia?

14 BOARD MEMBER GARCIA: Thank you, Madam
15 Hearing Officer. Just one more item to clarify for me.
16 Mr. Timmons, I think -- and correct me if I'm wrong -- is
17 suggesting that the reason that they are proposing
18 clarifying language is because you could have a major
19 source designated as attainment, but still cause or
20 contribute to the exceedance of NAAQS and not be subject
21 to section 109; is that -- is that your worry? I mean, I
22 don't mean for you to testify, I'm just trying to
23 understand.

24 MR. TIMMONS: Thank you -- thank you, Member
25 Garcia. Madam Chair, Members of the Board, yes, that's

1 essentially the concern. And I'll also note that I do
2 have an opening statement that I still haven't given, the
3 order of operations here is a little confusing. I was
4 expecting to give that before the testimony, so,
5 hopefully, that will sort of turn into more of a closing
6 argument, I think, at this point and hopefully we'll be
7 able to sum things up and clarify any questions.

8 BOARD MEMBER GARCIA: Okay. Thank you,
9 Mr. Timmons. So with that, then, I would turn around and
10 ask the department, any one of the witnesses, to answer
11 that concern then. Would it not be subject to 109 in that
12 scenario -- Section 109?

13 MR. SINGLETON: Member Garcia, I think that
14 question would best be answered by Dr. Olson.

15 DR. OLSON: Member Garcia, could you please
16 repeat that question?

17 BOARD MEMBER GARCIA: Yes. It seems that
18 WildEarth Guardians is proposing this clarifying language
19 because they're concerned that a major source in a --
20 designated as a non -- I mean designated as attainment,
21 could still cause or contribute to the exceedance of
22 NAAQS, would not be subject to Section 109. Would it, in
23 that scenario, be subject to Section 196789?

24 DR. OLSON: Member Garcia, Madam Chairman,
25 Members and Hearing Officer, yes, I believe that it would

1 be subject to 109.

2 BOARD MEMBER GARCIA: Thank you very much. I
3 appreciate that. That's all I have.

4 HEARING OFFICER TRUJILLO-DAVIS: I actually
5 have a follow-up question to that. Oh, I'm sorry, Member
6 Suina, would you like to go?

7 CHAIRPERSON SUINA: Yeah. Thank you for
8 that, Hearing -- Madam Hearing Officer. So to go a little
9 bit further off Member Garcia's line of questioning, I'm
10 trying to, you know, get my head around this, it's a lot
11 harder virtually to track everything.

12 So I guess one of the -- going back to some of
13 the testimony, I think, that was provided earlier by the
14 department, there was a statement -- I can't remember who
15 gave it -- about the safeguards that were in place to, you
16 know, address some of the concerns that Mr. Timmons
17 brought up. I just wanted to see if you guys -- if
18 somebody from the department could share with -- a couple
19 of examples of those safeguards and those issues that
20 Mr. Timmons brought up.

21 I think it was safeguards, basically, along the
22 same line of questioning Member Garcia had about a source
23 located in an attainment area, and either a new source or
24 an existing source regarding, I believe, the
25 considerations or concerns regarding that particular

1 source. And I don't know, I think it was under Mr. -- if
2 I have Mr. Baca or Mr. -- or the legal counsel that was
3 mentioning that. And I just wanted to clarify or get some
4 examples of what those safeguards are.

5 MR. BACA: Madam Chair, Members of the Board,
6 I believe I had mentioned that. And I think, you know,
7 what I was referring to is that our permitting regulations
8 work together. So we have different parts of our
9 regulations regulate for different scenarios. And I think
10 what I was referring to in the scenario described by
11 Mr. Timmons, that other parts of our regulations would
12 cover that. And I believe a lot of that language would
13 be, you know, depending on what program -- permitting
14 program that facility was in, but it would be still
15 subject to similar requirements. And Part 72 actually
16 refers to Part 79 offsets, and those sorts of emissions
17 reduction. So 72 27, a different part of our regulations,
18 also points to Part 79 for facilities to follow that
19 process in order to be permitted. And if they do not
20 follow that process, we are to deny that permit.

21 CHAIRPERSON SUINA: Thank you, Mr. Baca. As
22 another follow-up to that, and I guess a point of
23 clarification to Mr. Timmons, this question is, could you
24 share with us or explain further, one, the clarifying
25 language that I think was mentioned earlier? Could you go

1 over that and how that clarifying language may or may not
2 address some of the concerns?

3 MR. TIMMONS: Thank you, Chair Suina. Madam
4 Hearing Officer, Members of the Board, yes, if you'd like,
5 I can pull up that language on the screen and walk through
6 that with the screen-sharing capacity. I believe that you
7 should be able to see that language now. And so, there's
8 essentially two edits that we have made and both,
9 really --

10 HEARING OFFICER TRUJILLO-DAVIS: Mr. Timmons,
11 I don't believe we're all seeing your screen. Oh, there
12 it goes. Now we are.

13 MR. TIMMONS: Oh, is it not showing?

14 HEARING OFFICER TRUJILLO-DAVIS: Yeah, now it
15 popped up. Thank you.

16 MR. TIMMONS: Okay. I moved it, apparently.

17 And so, there's two separate edits here and
18 they're basically both trying to address what we believe
19 is the ambiguity caused by the absence of ozone in that
20 significant ambient concentration table. And so, the
21 first edit where we insert "other than the ozone standard"
22 is basically just to make it clear that exceeding the
23 significance levels in that table is not how one would
24 demonstrate or evaluate whether or not a major source of
25 ozone violates -- or causes or contributes to an ozone

1 violation, because there is no significant level for ozone
2 established in that rule.

3 So that is simply just trying to say that you
4 don't -- for evaluating contribution to an ozone
5 violation, the department doesn't look at that table
6 because that table says nothing about ozone. And so, then
7 the second -- the full sentence that we've added here,
8 "for any major stationary source or major -- modification
9 that is major for ozone, as defined in the applicable
10 regulations," which refer to being major for VOCs or NOx,
11 "and will be located within an area designated as
12 attainment or unclassifiable for ozone, a case-by-case
13 determination shall be made to determine whether it would
14 cause or contribute to the violation of the ozone
15 standards."

16 And that language, while not reflected in the
17 CFR, is reflected in the EPA SIL guidance -- the
18 significant impacts level guidance, that's been referred
19 to here, and which mandates that type of case-by-case
20 determination for evaluating whether or not a major source
21 for ozone causes or contributes to a violation of the
22 ozone NAAQS.

23 And so, that's what that language is attempting
24 to -- to insert and is referenced. And I will note that
25 the department's witnesses here today -- my understanding

1 is that this is, in fact, reflective of what the
2 department actually does. And so, we don't see this as,
3 again, a real substantive modification as opposed to a
4 clarification of what the department's practice and
5 requirement is.

6 CHAIRPERSON SUINA: Thank you for that,
7 Mr. Timmons. So I'd like to maybe have another question
8 and just clarity in my mind, with Mr. Baca or the legal
9 counsel on this. So would that language -- it seems to
10 me -- again, I'm trying to wrap my head around this. It's
11 really the issue with the ozone, but I understand, I think
12 in previous statements, earlier during this hearing, that
13 the difference between the CFRs and then the guidelines
14 was something, I think, Mr. Baca, you had referred to
15 earlier as a difference in how -- I guess it was being
16 looked at in terms of the ozone considerations. Is that
17 correct?

18 MR. BACA: Madam Chair, I believe that is
19 correct. I believe you classified that correctly. So EPA
20 themselves have not set a SIL for us to adopt, so we do
21 not have one proposed in that.

22 CHAIRPERSON SUINA: Okay. And so, given
23 that, let's look at ozone as an example; what are the
24 safeguards that you see would address that in other areas,
25 or in other permitting rules or regulations or processes

1 that the NMED has?

2 MR. BACA: So, for PSD permits, you know,
3 there's PSD increments that would also be taking a look
4 at. There's a whole air quality analysis that is dictated
5 by the PSD regulations. So we would have to undergo that
6 process. And under our NSR permitting program, under Part
7 72, there's also provisions in there that require us to do
8 an air quality screening analysis. And if there is shown
9 that there's nonattainment, there is provisions to either
10 reduce that -- for that facility to reduce their emissions
11 so that they no longer show an impact, or they do what's
12 required for permitting offsets in the Part 72. They
13 would be required to get enforceable, permanent emissions
14 offsets in order to operate in that area.

15 CHAIRPERSON SUINA: And in those cases --
16 Madam Hearing Officer, sorry about the lack of protocol
17 here. Madam Hearing Officer and Mr. Baca, in those cases,
18 is that, the issue of the lack of CFR regulations at the
19 federal level regarding ozone, versus a guidance, does
20 that -- those other permitting processes or rules or
21 requirements affect how ozone is -- the safeguards for
22 ozone in those other processes?

23 MR. BACA: I don't believe so. I think
24 Mr. Butt had stated earlier in his testimony that NMED
25 still believes that their permitting program is protective

1 of all of the NAAQS standards in every aspect, and that --
2 you know, one thing to point out is that all of our
3 programs as they are, are EPA-approved SIP programs. So
4 the language that they are proposing would also have to be
5 adopted by EPA into our SIP, and that would become
6 federally-enforceable language.

7 So, you know, I don't want to say how EPA would
8 view that, but inserting policy into regulation, I don't
9 know how that would play out with the EPA approving our
10 SIP adopted rule.

11 CHAIRPERSON SUINA: Okay. Thank you. Thank
12 you so much for that. I think that's all, Madam Hearing
13 Officer, for right now from me.

14 HEARING OFFICER TRUJILLO-DAVIS: Thank you,
15 Chair Suina. Mr. Cates, did you have a question?

16 BOARD MEMBER CATES: Yeah. Thank you. I
17 guess this would be for -- of the panel or Mr. Knight. So
18 just to follow on this theme that we've been on for a few
19 minutes here, just to boil it down in like a 30,000 foot
20 question: What would it hurt to give Mr. Timmons and
21 WildEarth Guardians what they -- what they want? What
22 harm would that do?

23 MR. BACA: Member Cates, Madam Hearing
24 Officer, other Members of the Board, I believe we put our
25 SIP in jeopardy for being EPA approved, so that could call

1 into question our primacy for permitting, for
2 nonattainment permitting programs. So I think it could
3 cause some issues with the state issuing our own permits.

4 BOARD MEMBER CATES: Well, and so -- and so,
5 to carry that a little further, and then what? It causes
6 trouble and then what?

7 MR. BACA: And then EPA -- we would have to
8 fix any deficiency in our SIP in order to reestablish
9 authority or primacy to implement that program. So that
10 would mean, most likely, that permitting would be
11 conducted out of Dallas, Texas, out of EPA Region 6, I
12 believe. I don't know if anyone else on the panel would
13 like to add to that for Member Cates.

14 BOARD MEMBER CATES: Okay. All right.
15 Thanks, that answers it. Thank you.

16 HEARING OFFICER TRUJILLO-DAVIS: Member
17 Garcia?

18 BOARD MEMBER GARCIA: I'd like go back to a
19 point that the department made early on, which was that --
20 that the WildEarth Guardians proposed language would not
21 follow rulemaking procedures, if our counsel, Ms. Soloria
22 could address that. Would that -- if that's true, would
23 that preclude the board from even considering their
24 language, if they didn't follow procedures for rulemaking
25 in public notice, et cetera?

1 MS. SOLORIA: Well, if there was an issue as
2 to whether the public notice was sent, then, yes, there
3 would be an issue with the board considering this.

4 I will, as a matter of procedure, you know, we've
5 opened the hearing, that issue was not argued at the top
6 of the hearing as to whether or not the record should
7 commence. So we're sort of stuck right now, in that a
8 record has been produced, the hearing has been proceeded,
9 and I guess to answer your question from a legal
10 jurisdiction, we could continue with the hearing, the
11 board could consider the rules, and, yes, if it's on
12 appeal that the public notice requirements were not met,
13 then that would be cause for a court, for example, to
14 throw that back to the board, and the process would have
15 to be repeated. But I don't want to testify. I,
16 obviously, don't want to testify on whether or not those
17 public notice requirements have been met in this case, but
18 that is sort of the legal landscape, Member Garcia.

19 BOARD MEMBER GARCIA: Thank you very much. I
20 appreciate that. That's all I have.

21 HEARING OFFICER TRUJILLO-DAVIS: Okay. Any
22 other questions from the board?

23 Oh, Member Suina?

24 CHAIRPERSON SUINA: Yes. Thank you, Madam
25 Hearing Officer. So to follow-up on that -- and maybe

1 this will be another question for Ms. Soloria is, so right
2 now we have the proposed rule changes from NMED. If there
3 were any amendments, whether or not it was from the
4 WildEarth Guardians, is there -- so, right now, I guess
5 I'm just trying to get my head around this -- either we
6 approve of the amended rule changes or not. We don't
7 change -- we don't amend the rule -- the proposed
8 amendments; is that -- is that correct?

9 MS. SOLORIA: Board Member Suina, it's within
10 the board's discretion whether or not to adopt the
11 amendments as proposed by the department, with or without
12 changes. So as we've -- if you recall, I think it might
13 be illustrative to use prior rule hearings that we've had.
14 Other -- there have been prior rule hearings where a
15 member of the public or a stakeholder has proposed an
16 additional remission to the amendment that has been
17 proposed by the department, or has opposed a particular
18 part of the amendment.

19 And so the board is within its discretion to
20 adopt those as well. So, bringing it back to this
21 particular proceeding, WildEarth Guardians has proposed
22 its own addition to the department's proffered amendments,
23 and so the board can adopt those along with the
24 department's proposed amendments or it can decline those.

25 CHAIRPERSON SUINA: Thank you for that

1 clarification. Thank you, Madam Hearing Officer.

2 HEARING OFFICER TRUJILLO-DAVIS: Okay. Does
3 anybody else have any questions? Okay. I'm going to ask
4 some questions now. So circling back, I'm going to circle
5 back a little bit. This question is either for Mr. Baca
6 or Mr. Butt, whoever feels more qualified to answer this.

7 But I wanted to kind of follow up on Mr. Timmons'
8 question about sources -- major sources in attainment
9 areas that could violate NAAQS. Are there any current
10 examples of that right now or is this a hypothetical
11 situation?

12 MR. BACA: Madam Hearing Officer, I believe
13 that kind of information would probably be best known by
14 Dr. Olson. I'm not sure if Mr. Timmons was referring to a
15 hypothetical situation or if he actually had something in
16 mind, but maybe our permitting section would be more
17 familiar with the types of permits that they -- the
18 applications that they receive.

19 DR. OLSON: Madam Chair, Members of the Board
20 and Hearing Officer, I am not, myself -- I am the program
21 manager for major sources permitting; I am not aware of
22 any of those circumstances, but the people who could
23 really describe that would actually be the individuals who
24 work in our modeling group.

25 HEARING OFFICER TRUJILLO-DAVIS: Thank you,

1 Mr. Baca and Ms. Olson. So, just to clarify, we, at this
2 time, do not know if there's actually any examples of that
3 situation or if this is hypothetical?

4 MR. SINGLETON: Madam Hearing Officer,
5 Members of the Board, if I could address that. New major
6 sources and major modifications in attainment or
7 unclassifiable areas are subject to the permitting
8 requirements in Part 74, the prevention of significant
9 deterioration requirements, so there -- we do have a rule
10 that addresses those sources.

11 HEARING OFFICER TRUJILLO-DAVIS: So,
12 Mr. Singleton, is it your opinion that this is not a
13 concern, that we should not be concerned about seeing
14 NAAQS violations in attainment areas for new major
15 sources?

16 MR. SINGLETON: That is correct, because EPA
17 does review permits for new major sources and major
18 modifications. So if their review of our permitting
19 record did not show that the permit was protective of the
20 NAAQS, then they would provide comments on that. So the
21 fact is, is that we have a rule to protect the NAAQS.

22 HEARING OFFICER TRUJILLO-DAVIS: And just for my
23 reference, what rule is that?

24 MR. SINGLETON: In part, what we're talking
25 about, new major sources and major modifications is

1 covered by Part 74, permits for prevention of significant
2 deterioration.

3 HEARING OFFICER TRUJILLO-DAVIS: Thank you,
4 Mr. Singleton, I appreciate that information.

5 And then my next question is actually, I believe,
6 for Mr. Knight. It seems that this is the second event
7 that we've had where we are coming up against a deadline
8 for the EPA, in which we run a risk of some sort of
9 enforcement by the EPA. Is there -- I have concerns about
10 that. We are, as a board, being kind of forced to make a
11 last-minute decision on -- on some of these.

12 Is there any particular reason why we're seeing
13 these at the last minute, right before they're due?

14 MR. KNIGHT: Madam Hearing Officer, Madam
15 Chair, Members of the Board, there are a variety of
16 reasons which -- you know, which include the public health
17 emergency, but that's -- I would say that's probably not
18 even the largest one. There was a lot of litigation over
19 the ozone standard at the time it was promulgated, which,
20 you know, wasn't resolved for the first couple of years.

21 And it was really hard for all states, really,
22 but particularly some of the western states like New
23 Mexico to really -- to know, you know, what we were going
24 to have to do until the whole issue of whether the ozone
25 standard was going to be upheld or not was resolved.

1 And, yeah, it took a long time, but once those
2 cases were resolved, you know, then the pandemic happened
3 kind of right on the heels of that. And, you know, not to
4 make excuses, but those are -- those are the reasons.
5 And, you know, in normal times, we would have had this
6 hearing a year ago, but that's -- you know, that's where
7 we are now.

8 HEARING OFFICER TRUJILLO-DAVIS: Thank you,
9 Mr. Knight. I understand it's a different time.

10 But, yeah, it's -- we would love to see some of
11 these a little bit earlier to make sure that we have an
12 opportunity to make any requests or changes or give
13 everything proper consideration.

14 And I'd like to also thank my board members for
15 such great questions and it kind of made my questioning a
16 little bit -- a little bit easier, so thank you. Okay.
17 So unless there's any more questions, I believe we can
18 move on to the next portion of this.

19 MS. SOLORIA: Madam Hearing Officer, we would
20 at this time give the members -- the public members an
21 opportunity to ask questions, as proposed by the rules.

22 So, our administrator, Ms. Jones, indicated to me
23 that there was only one caller in. Everyone else has, it
24 seems to be, logged into the computer.

25 Perhaps Ms. Jones, you could call upon the caller

1 and ask if they have any questions, and then everyone else
2 who wants to give -- who has a question can unmute
3 themselves and we'll go from there.

4 ADMINISTRATOR JONES: Certainly. Caller
5 (505)269-3862, do you wish to ask any questions or give
6 any nontechnical testimony at this time?

7 MS. SOLORIA: Pam, are they able -- are
8 participants able to unmute themselves?

9 ADMINISTRATOR JONES: Yes. Yes.

10 MS. SOLORIA: Okay.

11 ADMINISTRATOR JONES: Other members of the
12 public, if you wish to do the same, please unmute yourself
13 and speak up.

14 Madam Hearing Officer, Counsel Soloria, I don't
15 see any indication from the public that anyone wishes to
16 speak.

17 MS. SOLORIA: Thank you, Ms. Jones.

18 Madam Hearing Officer, I think you're set to move
19 on to the next portion. Thank you.

20 HEARING OFFICER TRUJILLO-DAVIS: Okay. Thank
21 you, Ms. Jones. Okay. Moving on -- and thank you for the
22 reminder. Okay. We'll now hear from WildEarth Guardians.
23 Does WildEarth Guardians wish to make an opening statement
24 or a closing statement as Mr. Timmons indicated?

25 OPENING STATEMENT BY MR. TIMMONS

1 MR. TIMMONS: Thank you, Madam Hearing
2 Officer. Yes, we would like to make a statement at this
3 time. I don't anticipate offering another one later on,
4 so we can call it an opening, if we'd like, to keep the
5 record clean.

6 So good morning Madam Chair, Madam Hearing
7 Officer, Members of the Board. Again, Daniel Timmons on
8 behalf of WildEarth Guardians, along with my co-counsel,
9 Matt Nykiel. WildEarth Guardians is here today to make
10 sure that this rulemaking process does not result in the
11 creation of a loophole that would exempt new sources of
12 ozone pollution from the required demonstration that new
13 emissions not cause or contribute to exceedances of
14 federal ozone standards, a loophole that would threaten
15 air quality and public health in New Mexico.

16 Because our concerns are essentially issues of
17 legal interpretation, we have not offered and will not be
18 offering technical or other additional witnesses. And so
19 I appreciate the opportunity to offer this statement to
20 explain our concerns with the department's proposal, which
21 should take less than 10 minutes.

22 The Clean Air Act requires major source
23 permittees to demonstrate that their emission will not
24 cause or contribute to air pollution in excess of any
25 national ambient air quality standard, or NAAQS, in any

1 air quality control region.

2 This requirement plainly applies to permits which
3 will cause or contribute to exceedances of the ozone
4 NAAQS. And from both the response to Guardians' comments
5 in this matter, as well as Mr. Singleton's testimony here
6 today, it is our understanding that the department also
7 recognizes that this basic cause or contribute standard
8 applies to the ozone NAAQS.

9 That said, however, we remain concerned that the
10 department's proposal could be misinterpreted as excluding
11 ozone precursor emissions from that cause or contribute
12 analysis required by the Clean Air Act. Specifically, the
13 proposed regulatory language ties the cause or contribute
14 threshold to specific significance levels contained in the
15 board's regulations. That was the table we looked at.
16 But, again, there is no significance level for ozone
17 established by the board's rules or by the EPA's rules.

18 So the proposed language could potentially be
19 read to imply that the cause or contribute standard does
20 not, in fact, apply to ozone. Such an interpretation, or
21 misinterpretation, would violate the Clean Air Act's cause
22 or contribute requirement as well as federal regulations
23 mandating that state implementation plans also require
24 that same demonstration that new major sources not cause
25 or contribute to NAAQS violations.

1 This would also conflict with the board's
2 existing rules, which require permits to be denied where a
3 new facility will cause or contribute to any NAAQS
4 exceedance, which includes ozone. If the proposed
5 regulatory languages were so interpreted to imply an ozone
6 exemption from the cause or contribute requirement, this
7 would violate the Clean Air Act, jeopardize EPA's approval
8 of the New Mexico SIP and threaten public health.

9 Guardians' concern regarding the potential for
10 misinterpretation of this proposed language is heightened
11 by the board's recent decision, indicating that the board
12 lacks the authority to deny minor source permits based on
13 ozone impacts. As the board stated in its final order in
14 EIB Case No. 20-21, "The department does not have
15 authority or discretion to deny a permit or require
16 offsets for an individual, new or modified minor source in
17 a designated attainment area on the basis that the
18 facility will cause or contribute to ozone levels above
19 the NAAQS." And that's included as WildEarth Guardians
20 prefiled Exhibit 1.

21 While that EIB decision related specifically to
22 minor source permits, not the major source permits at
23 issue in the current rulemaking, it still raises real
24 concerns that this new regulatory language could also be
25 interpreted in a similar manner and exclude major sources

1 of ozone from the cause or contribute analysis required by
2 the Clean Air Act.

3 Absent a significance level established by rule,
4 the department is required to make a case-by-case
5 determination whether a proposed new or modified major
6 source will cause or contribute to ozone violations. And
7 EPA has issued guidance regarding significant impact or
8 SILs to help permitting authorities, like New Mexico, in
9 assessing whether a proposed source would cause or
10 contribute to an ozone NAAQS violation. And that EPA
11 guidance is attached as WildEarth Guardians' prefiled
12 Exhibit 2.

13 While nonbinding, the EPA's SIL guidance makes
14 clear EPA's position that the cause or contribute standard
15 applies to ozone and that, "a determination that a
16 proposed source does not cause or contribute to a
17 violation can only be made by a permitting authority on a
18 permit-specific basis, after consideration of the permit
19 record."

20 Guardians redline modification, prefiled as
21 WildEarth Guardians' Exhibit 3, is intended to clarify
22 just that. Absent a significance level for ozone
23 established by rule, a case-by-case determination is
24 required to demonstrate that a new major source would not
25 cause or contribute to an ozone NAAQS violation. The

1 department's testimony here today appeared to indicate
2 that this case-by-case approach to assessing ambient ozone
3 impacts is, in fact, the department's practice for
4 evaluating major sources. So from Guardians' perspective,
5 the department's opposition to the proposed -- to our
6 proposed modifications appears to be based less on the
7 merits of that proposal than on its timing.

8 Particularly, given the impending August 3rd deadline for
9 the state to certify its updated state implementation
10 plan to the EPA, including the amendments currently before
11 the board.

12 As the department's response to Guardians'
13 proposal indicated, any delay in the hearing date will
14 cause the AQB to miss this deadline. So in light of that
15 deadline, just over a month out, Guardians recognizes the
16 difficult position in which the board now sits; being
17 essentially forced to choose between meeting this
18 mandatory deadline or taking the time that may be needed
19 to make sure that you get it right.

20 But taking a step back, it's important -- it's
21 critical to remember that under the Environmental
22 Improvement Act and the Air Quality Control Act, this
23 board is responsible for promulgating rules to manage air
24 quality in the state and ensure compliance with federal
25 air quality standards. While the board typically adopts

1 rules in response to proposals from the department, the
2 department, in fact, has no formal special powers or
3 authority in this rulemaking process.

4 This board, not the department, is the rulemaking
5 authority. And as the Environmental Improvement Act
6 states, the department proposes regulations "on the same
7 basis as any other person and may participate in
8 rulemaking proceedings on the same basis as any other
9 person," but shall not be given any special status over
10 any other party.

11 The statute is clear; this board is not, and is
12 not intended to be a rubber stamp. And yet, once again,
13 the department has waited until the proverbial 11th hour,
14 or more specifically, nearly two years and 11 months into
15 a three-year window, to finally get its proposal before
16 you.

17 And unfortunately, the department's delay has now
18 left the board with little room to move, little room to
19 insert its statutory authority over this rulemaking
20 process and to take the time needed to fully vet the
21 department's proposal and identify potential ways to
22 clarify and improve the proposed rule.

23 I'll also note that this delay meant that there
24 was really no chance to extend this hearing date, even
25 though the public notice required by the board's

1 regulations was not put up on the board's website 60 days
2 in advance of this hearing, as specifically required by
3 the board's rules and evidenced in NMED's Exhibit 11.

4 To conclude, Guardians request that the board
5 adopt our proposed redlines modifications to clarify that
6 these rulemaking amendments do not establish a loophole
7 for ozone. At minimum, however, we ask that the board
8 take a hard look at the department's proposed language and
9 Guardians' concerns regarding potential misinterpretation
10 of that proposal. And we ask that the board make clear on
11 the record here today, that this rule does not create an
12 ozone loophole and the department is still required to
13 assess whether in areas designated as attainment, new
14 major sources or major modifications would cause or
15 contribute to violations of the ozone NAAQS.

16 Thank you for your time and attention. And my
17 only final matter would be to make sure that WildEarth
18 Guardians' prefiled Exhibits 1, 2 and 3 have been admitted
19 to the record. I believe that they were included with our
20 prehearing statement in the earlier admission. Thank you.

21 HEARING OFFICER TRUJILLO-DAVIS: Thank you,
22 Mr. Timmons. As for the exhibits, I apologize, I lost my
23 place here on the script.

24 MS. SOLORIA: Madam Hearing Officer, you can
25 just ask if there are any objections to that admission,

1 and if not, you can call those admitted.

2 HEARING OFFICER TRUJILLO-DAVIS: Thank you.

3 Are there any objections to -- are there any
4 objections? Okay. We'll go ahead and admit those to the
5 record.

6 (WildEarth Guardians' Exhibits 1 - 4 received
7 into evidence.)

8 HEARING OFFICER TRUJILLO-DAVIS: Okay. Now
9 we'll hear any nontechnical testimony or take written
10 statements from members of the public. Any testimony must
11 be limited to the proposed amendments. The board is
12 unable to take any testimony unrelated to the proposed
13 amendments.

14 Ms. Jones, do we have anybody who's emailed or
15 messaged you for statements?

16 ADMINISTRATOR JONES: No. I have received no
17 email notifications of anyone wishing to make any kind of
18 a comment. And members of the public that are on the call
19 are free to unmute themselves.

20 Madam Hearing Officer, I don't see anyone
21 indicating that they wish to make any kind of a statement.

22 HEARING OFFICER TRUJILLO-DAVIS: Okay. Thank
23 you very much. Okay. Moving on. We're going to skip a
24 few bullet points here to get to --

25 MS. SOLORIA: I'll interject, Madam Hearing

1 Officer, we don't need to cover the portion of potential
2 rebuttal testimony because there was only testimony in
3 chief from the petitioner itself. So you could invite
4 closings at this time.

5 HEARING OFFICER TRUJILLO-DAVIS: Okay.
6 Great. So I would like to thank the board and everyone
7 for their participation today and their patience. I
8 understand how difficult it can be working on virtual
9 platform sometimes. A quorum of board members did --

10 MS. SOLORIA: Also -- sorry, I was not clear.
11 You could invite closing arguments

12 HEARING OFFICER TRUJILLO-DAVIS: Oh, okay.
13 Would anybody -- is it open to anybody? I'm
14 sorry, I seem to be going off script here.

15 MS. SOLORIA: That's okay. So the
16 department, in terms of order, it doesn't appear that
17 WildEarth Guardians will be offering another statement, as
18 indicated by Mr. Timmons.

19 HEARING OFFICER TRUJILLO-DAVIS: Great.

20 MS. SOLORIA: But we would invite Mr. Knight
21 to make a closing argument if he would like to elect to do
22 that.

23 HEARING OFFICER TRUJILLO-DAVIS: Mr. Knight,
24 would you like to make a closing argument?

25 MR. KNIGHT: I would.

1 HEARING OFFICER TRUJILLO-DAVIS: Thank you.
2 The floor is yours, sir.

3 CLOSING ARGUMENT BY MR. KNIGHT

4 MR. KNIGHT: WildEarth Guardians acts like
5 their proposal is important, and maybe it is important to
6 them, but to the rule it is not important. It is
7 superfluous, it is unnecessary and it adds nothing to the
8 rule. But what it does do is endanger the approval of our
9 SIP and risks losing primacy for our air quality
10 permitting program.

11 And the -- you know, WildEarth Guardians, their
12 argument really isn't with NMED, it seems like to me that
13 their argument is with EPA, and they would like, you know,
14 EPA to change their rules or they would like Congress to
15 change the Clean Air Act, but neither one of those things
16 is within the power of either NMED or this board.

17 And the proposal we put forward today complies
18 with federal law. It has -- EPA has indicated, as much as
19 they can, before it is formally submitted, that it -- that
20 it complies with their requirements and we are confident
21 that it will be approved by the EPA. We -- we cannot say
22 that about the language that WildEarth Guardians is
23 proposing.

24 It has not been subject to public comment, it has
25 not been part of the public notice for this rule, and the

1 risk of some other stakeholder challenging it and
2 successfully getting the whole rule amendment thrown out
3 is, in my opinion, pretty high. So, a completely
4 superfluous and unnecessary change, versus, you know, the
5 risk of, frankly, our whole permitting program. I don't
6 see, you know, how that makes sense at all.

7 The misinterpretation that WildEarth Guardians is
8 concerned about, you know, in terms of their arguments
9 about that, they're correct, it -- it would violate the
10 Clean Air Act, it would violate our own regulations and so
11 that's not something that the Air Quality Bureau is going
12 to do. And we've been clear in our testimony that these,
13 you know, major sources in attainment areas are regulated
14 by a separate part, Part 74, and there is no -- there is
15 no ozone loophole. There never has been and there isn't
16 going to be in the future.

17 I mean, the language that they are proposing, you
18 know, by itself, at worse, might be harmless, but it
19 doesn't add anything to the rule and it potentially
20 creates very significant problems which have very real
21 world consequences for New Mexico. So I would urge the
22 board not to -- not to create those risks unnecessarily.

23 And the proposal we've put forward today is
24 approvable and it complies with the requirements and
25 there's no reason to depart from it, in our opinion. So

1 with that, we urge the board to adopt our proposed
2 amendments as laid out in the NOI. And we thank you for
3 your time today.

4 HEARING OFFICER TRUJILLO-DAVIS: Thank you,
5 Mr. Knight.

6 Okay. Now onto the next portion here. Again, I
7 would like to thank everybody for their participation
8 today. A quorum of the board members did attend this
9 hearing. The hearing notice indicated that a decision
10 might be made at the conclusion of the hearing. The board
11 may immediately deliberate or decide on the proposed
12 regulatory change at the conclusion of this hearing. So
13 unless there are any other questions or issues, the record
14 of this public hearing will be closed. So, last
15 opportunity.

16 Okay. The record is now closed. Let the record
17 show that the hearing was adjourned at 11:50 a.m.

18 (Proceedings adjourned at 11:50 a.m.)

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STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

Case No. EIB-07(R)

REPORTER'S CERTIFICATE

I, THERESA E. DUBOIS, RPR, CSR #29, DO HEREBY
CERTIFY that on June 25, 2021, the Public Hearing of the
New Mexico Environmental Improvement Board, was taken
before me, that I did report in stenographic shorthand the
Proceedings set forth herein, and the foregoing pages are
a true and correct transcription to the best of my
ability.

I FURTHER CERTIFY that I am neither employed by
nor related to nor contracted with (unless excepted by the
rules) any of the parties or attorneys in this matter, and
that I have no interest whatsoever in the final
disposition of this matter.



THERESA E. DUBOIS, RPR
New Mexico CCR #29
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