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**STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD**

IN THE MATTER OF PROPOSED NEW REGULATION,

20.2.50 NMAC – *Oil and Gas Sector – Ozone Precursor Pollutants*

No. EIB 21-27(R)

**WILDEARTH GUARDIANS' NOTICE OF INTENT TO
PRESENT TECHNICAL TESTIMONY AND PRE-HEARING STATEMENT**

I. Introduction

WildEarth Guardians (Guardians) gives notice that it will present technical testimony at the hearing in this matter scheduled for September 20, 2021 before the New Mexico Environmental Improvement Board (Board or EIB). This Pre-Hearing Statement summarizes Guardians' recommended modifications to the New Mexico Environment Department's (Department or NMED) draft rule, identifies the witness (and his qualifications), who will testify on behalf of Guardians' proposals, and includes a copy of the direct technical testimony of Guardians' witness as well as the text of Guardians' recommended modifications that support and improve upon the Department's draft rule.

WildEarth Guardians is a nonprofit conservation organization whose mission is to protect and restore the wildlife, wild places, wild rivers, and health of the American West. Guardians was founded in Santa Fe in 1989 and hosts offices in Denver, Missoula, and Portland. The organization represents thousands of members and supporters throughout the west, many of whom call New Mexico home and care deeply about breathing clean air. Guardians has a long history of active participation in air quality matters in New Mexico, Colorado, and the western United States. Most recently Guardians participated before this Board in oil and gas air quality permit adjudications in September 2020, EIB Nos. 20-21(A), 20-33(A), as well as two air quality rulemakings earlier this year, involving NMED's nonattainment regulations and ozone transport

State Implementation Plan. EIB Nos. 21-05(R), 21-07(R). Guardians has a deep appreciation for the complexity of New Mexico's air quality laws and regulations and a practice-based understanding of the types of rules that can most effectively restore and protect New Mexico's air quality.

II. Discussion

a. The Board's Statutory Mandate and New Mexico Leadership

This Board is statutorily obligated to approve rules that will restore and protect air quality in New Mexico from ozone, and the citizens and legislature of New Mexico support robust rules to accomplish this critical objective, rather than relying on the minimum standards set by the federal government or New Mexico's neighbor states. Under New Mexico law, when the Board determines that emission sources cause or contribute to ozone concentrations in excess of 95% of the ozone NAAQS, the Board must adopt rules to control ozone precursor emissions to attain and maintain the NAAQS. 74-2-5C. NMSA (2021). To Guardians' knowledge, no other state has codified an air quality rule like this, which requires New Mexico to proactively exercise its responsibility to control air pollution before the federal standards are exceeded. This forward-looking law reflects New Mexicans' desire to address ozone before it becomes an unmanageable public health and economic problem.

In addition to public health, NMED has previously argued not addressing ozone precursors could result in non-attainment designations under section 107(d) of the Clean Air Act that carry potentially serious impacts for New Mexico businesses and economic development. An ozone nonattainment designation would likely require the state to implement a diverse portfolio of emission reduction measures, resulting in both direct and indirect costs to citizens

and businesses in the state. Emission reduction measures such as more stringent gasoline fuel standards and controls for industrial burners, boilers, and engines, annual vehicle inspections, and lengthy, resource-consuming permitting and compliance requirements would increase costs for New Mexican citizens, businesses, and government, as well as potentially dissuade future economic development and expansion in the state.

Complementing the Board's statutory mandate to address ozone before it becomes a problem, New Mexico's legislature also sent a clear message that they are not interested in half measures or watered-down rules, when it comes to ensuring that the people of this state breathe air that is clean and healthy. During the 2021 legislative session, the legislature passed a bill, which Governor Michelle Lujan Grisham signed into law, explicitly granting this Board new authority to approve air quality rules above and beyond the standards set by federal law. 74-2-5D. NMSA (2021). Accordingly, this Board is no longer hamstrung by a requirement that its rules meet, but not exceed, federal standards. Instead, this Board is fully empowered and directed to address ozone before it becomes an irreparable problem and to do so in a way that is not limited by the minimum standards set by federal law. Given this context, Guardians' testimony and proposed modifications to NMED's draft rule encourage this Board to show New Mexican leadership by approving robust rules commensurate to the challenges presented by the ozone crisis in the state.

b. New Mexico's Ozone Crisis and the Pace of Permit Issuance at NMED

As of the time of this filing, there have been more than 70 monitored exceedances of federal health standards for ozone throughout the state of New Mexico in this year alone. While federal health standards limit ozone concentrations in the air to no more than 0.070 parts per million over an eight-hour period, monitored ozone concentrations have climbed as high as 0.089

parts per million in 2021 already. For years, the state's major oil and gas producing regions, including the San Juan Basin of northwest New Mexico and Permian Basin of southeast New Mexico, monitors have regularly recorded levels of ozone in excess of federal health standards. But recent air quality monitoring data indicates that New Mexico air quality has never been worse. So far in 2021, exceedances have been recorded in Albuquerque, Santa Fe, Bernalillo, Las Cruces, Farmington, and Carlsbad. Carlsbad has experienced more days of excessive ozone than any other community in New Mexico. In fact, air quality at Carlsbad Caverns National Park, one of only two national parks in the state specially protected for unique and pristine natural resource values, has exceeded the ozone standard this year as well. And given ozone transport issues, ozone is most often a regional problem, such that each violation at a discreet monitoring site generally indicates high ozone levels across a broad surrounding area. In other words, New Mexicans throughout the state, as well as our downwind neighbors in states like Colorado, Texas, Utah, and Arizona, are also shouldering the consequences of the high ozone levels currently being recorded in seven New Mexico counties.

Despite these ozone violations and the ongoing harm to New Mexicans, the Environment Department is simultaneously continuing to issue new permits that authorize new and growing sources of ozone pollution in the oil and gas industry and that are likely contributing to this problem. Through permits for new and modified stationary sources of air pollution, the Department is approving massive new increases of ozone precursor pollutants, including volatile organic compound and nitrogen oxide emissions. As the Board considers adopting rules to address the parts of the state that exceed 95% of the ozone NAAQS, it is critical that the rules the Board approves address and account for both the current state of the ozone crisis in New Mexico

and the ongoing air quality impacts associated with the pace at which NMED is continuing to approve new permits authorizing growing oil and gas sources of ozone precursor emissions.

III. Guardians' Proposed Modifications

WildEarth Guardians' Exhibit 1 provides Guardians' redline proposed modifications to the draft NMED rule. Guardians' technical witness, Jeremy Nichols, will explain the basis for Guardians' proposed modifications.

IV. Guardians will present one technical witness in this Proceeding

a. Jeremy Nichols

As shown in his attached resume (WildEarth Guardians Exhibit 2), Mr. Nichols has served as WildEarth Guardians' Climate and Energy Program Director since 2008. Prior to Guardians, Mr. Nichols founded and directed a nonprofit clean air advocacy organization, Rocky Mountain Clean Air Action. And, prior to Rocky Mountain Clean Air Action, Mr. Nichols served as the program director of Biodiversity Conservation Alliance for five years, starting in 2000. As a result, Mr. Nichols has over 20 years of direct, hands-on experience weighing in on and scrutinizing air quality regulatory actions, including stationary source permitting, SIP revisions, state-only rulemakings, and enforcement. Mr. Nichols works closely with and provides consulting support for scientists, attorneys, elected officials, and the general public on air quality and air quality regulatory matters.

Mr. Nichols will address three proposed modifications to the Department's draft rule. First, Mr. Nichols will describe the history and current state of ozone exceedances in New Mexico. Mr. Nichols will, then, compare ozone conditions in New Mexico to ozone conditions

on Colorado's Front Range, including the regulatory strategies Colorado has implemented to address ozone exceedances on the Front Range. Following this comparison, Mr. Nichols will describe the tension between rules that improve air quality over time and rules that improve or protect air quality more immediately. Mr. Nichols will testify that Guardians does not view this tension as an either/or proposition but rather as both/and. Mr. Nichols' testimony will recommend the Board approve ozone precursor rules that both require emission controls that improve air quality over time but, importantly, also require immediate or near-term actions that address and improve the degraded state of air quality now. His testimony will explain why the Board should give serious consideration to approving a straight-forward rule that would require the Department deny all air quality permits that will cause or contribute to ozone levels in excess ninety-five percent of any primary National Ambient Air Quality Standard for ozone. As a matter of triage, a rule like this would "stop the bleeding," while other rules requiring time-intensive installation of new emission controls and monitoring systems would ensure the long-term recovery and stability of clean air in New Mexico. Importantly, approving a combination of short-term and long-term impact rules helps to balance the intergenerational equities between restoring the air for people in the future and restoring the air for people now.

Mr. Nichols' testimony will also recommend the Board approve rules that require owners and operators of oil and gas facilities to submit records of all monitoring events documenting deviations of this Part of NMED's regulations to the Department on a semi-annual basis beginning in January 1, 2022, in addition to excess emission reporting requirements pursuant to 20.2.7 NMAC. His testimony will explain how these reporting requirements are an essential prerequisite to ensuring transparency, accountability, and compliance with the proposed rules.

Finally, Mr. Nichols' testimony will recommend the Board approve rules that define "potential to emit (PTE)" as including non-mobile source emissions that may occur prior to the commencement of operation. Mr. Nichols will testify that pre-production processes at wellhead sites can account for a significant quantity of precursor emissions, and that failing to account for these emissions would limit New Mexico's ability to address air quality in the state that exceed ninety-five percent of the NAAQS for ozone.

V. Exhibits

Guardians' anticipates offering the following exhibits in its direct case, which are included with Guardians' Notice of Intent to Present Technical Testimony and Pre-Hearing Statement.

1. WildEarth Guardians' Proposed Redline Modifications to NMED's Proposed 20.2.50 NMAC.
2. Resume of Jeremy Nichols.
3. Direct Technical Testimony of Jeremy Nichols.
4. Prehearing Statement of the Clean Air, Climate, and Health Coalition in the Matter of Proposed Revisions, Regulations Numbers 3 and 7.
5. Pozzer, A., M.G. Schultz, D. Helmig, "Impact of U.S. Oil and Natural Gas Emission Increases on Surface Ozone is Most Pronounced in the Central United States," *Environ. Sci. Technol.* 2020, 54, 12423-12433.
6. Regional Air Quality Council, "Early Action Compact Ozone Action Plan, Proposed Revision to the State Implementation Plan, Draft" (Feb. 2004).
7. *Denver Post*, "Oil, gas industry may face tougher air quality rules" (April 2008)
8. "Air Quality Control Commission approves first phase of rules to reduce oil and gas emissions," Press Release (Dec. 2019).
9. Thuermer, A.M., "DEQ confirms ozone pollution violated federal standards," *Wyofile* (June 18, 2019).
10. U.S. EPA, "Final Area Designations for the 2015 Ozone National Ambient Air Quality Standards Technical Support Document."
11. 5 Colo. Code Regs. § 1001-9 (Colorado Dept. of Public Health Regulations for the Control of Ozone via Ozone Precursors and Control of Hydrocarbons via Oil and Gas Emissions (Emissions of Volatile Organic Compounds and Nitrogen Oxides)).
12. Utah Admin. Code r. R307-501 (Utah Dept. of Environmental Quality Air Quality Regulations for the Oil and Gas Industry).

13. 020.0002.3.02052018 Wyo. Code R (Wyoming Dept. of Environmental Quality Air Quality Regulations, General Emission Standards).
14. Hedden, A., “New Mexico’s oil and gas counties among the most air-polluted in the state amid recent boom,” *Carlsbad Current-Argus* (April 22, 2021).
15. WildEarth Guardians’ Petition to Designate Permian Basin of Southeast New Mexico a Nonattainment Area Due to Ongoing Violations of Ozone Health Standards; Petition to Find New Mexico’s State Implementation Plan is Failing to Attain and Maintain Ambient Air Quality Standards.
16. WildEarth Guardians’ Spreadsheet Listing Instances During Which New Mexico Air Quality Monitoring Sites Have Recorded Ozone Concentrations in Excess of 95% of the NAAQS in 2021.
17. Perry E. Sheffield et al., *Modeling of Regional Climate Change Effects on Ground-Level Ozone and Childhood Asthma*, 41 AM. J. PREV. MED. 252 (2011).
18. *Rising Temperatures, Worsening Ozone Pollution*, UNION OF CONCERNED SCIENTISTS (Aug. 2, 2011), <https://www.ucsusa.org/sites/default/files/2019-09/climate-change-and-ozone-pollution.pdf>.
19. *Confronting Climate Change in New Mexico*, UNION OF CONCERNED SCIENTISTS (May 2, 2016), <https://www.ucsusa.org/resources/confronting-climate-change-new-mexico>
20. *Fourth National Climate Assessment, Chapter 25: Southwest*, U.S. Global Change Research Program (2018), <https://nca2018.globalchange.gov/chapter/25/>.
21. UCLA Institute of the Environment and Sustainability, “Impacts of Oil and Gas Drilling on Indigenous Communities in New Mexico’s Greater Chaco Landscape,” (2020).

VI. Conclusion

Guardians appreciates the time and consideration the Department and Board have invested to address ozone pollution in New Mexico. Guardians supports the Department's proposed rule and the proposed modifications that improve the rule and ensure the timely and effective implementation of the rule.

On the basis of the testimony of its witness, Guardians urges the Board to adopt the modifications that Guardians has proposed (redline attached as WildEarth Guardians Exhibit 1) to the Department's proposed regulation.

Dated: July 28, 2021

/s/ Matthew A. Nykiel
Matthew A. Nykiel
3798 Marshal St., Ste. 8
Wheat Ridge, CO 80033
(303) 501-5763
mnykiel@wildearthguardians.org

/s/ Daniel L. Timmons
Daniel L. Timmons
WildEarth Guardians
301 N. Guadalupe Street, Ste. 201
Santa Fe, NM 87501
dtimmons@wildearthguardians.org

Counsel for WildEarth Guardians

CERTIFICATE OF SERVICE

I certify that on July 28, 2021 I filed and served the foregoing **WILDEARTH GUARDIANS' NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY AND PRE-HEARING STATEMENT** by electronic mail to the following:

Pamela Jones
pamela.jones@state.nm.us
Administrator, Environmental Improvement Board

Karla Soloria
ksoloria@nmag.gov
Counsel for the Environmental Improvement Board

Lara Katz
lara.katz@state.nm.us
Counsel for the New Mexico Environment Department

Eric L. Hiser
Brandon Curtis
Dalva L. Moellenberg
ehiser@jhjlawyers.com
bcurtis@jhjlawyers.com
DLM@gknet.com
Counsel for the New Mexico Oil and Gas Association

Elizabeth deLone Paranhos
elizabeth@delonelaw.com
Counsel for Environmental Defense Fund

Tannis Fox
David R. Baake
fox@westernlaw.org
david@baakelaw.com
Counsel for Conservation Voters New Mexico, Diné C.A.R.E., Earthworks, Natural Resource Defense Counsel, San Juan Citizen Alliance, Sierra Club, and 350 New Mexico

Ana Maria Gutierrez
Sandra Milena McCarthy
ana.gutierrez@hoganlovells.com
sandra.mccarthy@hoganlovells.com
Counsel for Kinder Morgan, Inc., El Paso Natural Gas Company, L.L.C. TransColorado Gas Transmission Co., LLC, and Natural Gas Pipeline Company of America, LLC

Christopher J. Neumann
Gregory R. Tan
Casey Shpall
neumannc@gtlaw.com
tangr@gtlaw.com
shpallc@gtlaw.com

Counsel for NGL Energy Partners LP, Solaris Water Midstream, LLC, OWL SWD Operating, LLC, and Goodnight Midstream LLC

Matthias L. Sayer
matthias.sayer@nglep.com
Counsel for NGL Energy Partners LP

J. Scott Janoe
scott.janoe@bakerbotts.com
Counsel for Oxy USA Inc.

Louis W. Rose
Kari Olson
Ricardo S. Gonzales
rose@montand.com
kolson@montand.com
rgonzales@montand.com
Counsel for Independent Petroleum Association of New Mexico

Charles de Saillan
cdesaillan@nmelc.org
Counsel for the New Mexico Environmental Law Center

Daniel Jaynes
Keifer Johnson
Gabriel Pacyniak
jaynesda@law.unm.edu
johnsoke@law.unm.edu
pacyniak@law.unm.edu
Counsel for Center for Civic Policy and NAVA Education Project

/s/ Matthew A. Nykiel
Matthew A. Nykiel