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**STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF THE APPEAL
OF AIR QUALITY PERMIT NO. 7482-M1
ISSUED TO 3 BEAR DELAWARE
OPERATING – NM LLC.**

EIB No. 20-21 (A)

NEW MEXICO ENVIRONMENT DEPARTMENT'S ANSWER

Pursuant to 20.1.2.202.C(3) NMAC, the New Mexico Environment Department (the “Department”) files this Answer to the Petition for Hearing (the “Petition”) filed by WildEarth Guardians (“Petitioner”) in this matter. The Department responds to the allegations in the Petition as follows:

1. The Department does not dispute the allegations in Section A on page 1 of the Petition regarding the timely filing of the Petition with the Environmental Improvement Board (the “Board”).

2. In response to Petitioner’s allegations in Section C on pages 2-3 of the Petition, the Department states as follows:

- a. The Department does not dispute that Petitioner submitted substantive written comments regarding the Permit No. 7482-M1 (the “Permit”) on January 17, 2020 and March 27, 2020.
- b. The Department is without sufficient knowledge or information to respond to the allegations regarding Petitioner’s organization, its mission, and its membership.
- c. The Department neither admits nor denies the remaining allegations in Section C, and affirmatively states that it does not intend to challenge Petitioner’s standing in this matter.

3. In response to Petitioner’s allegations in Section E on pages 3 and 4 of the Petition, the Department states as follows:

- a. The Department denies that it issued the Permit for the 3-Bear Gas Plant (the “Facility”) without considering impacts on air quality and public health.
- b. The Department admits that the Permit authorizes emissions in specified amounts, as set forth in Sections A106 and A107 of the Permit.
- c. The Department does not dispute that design values calculated based on data from air quality monitors in Hobbs and Carlsbad in 2017, 2018, and 2019 show levels of ozone above the federal 2015 National Ambient Air Quality Standard (“NAAQS”). The Department affirmatively states that the area where the Facility is located is currently designated by EPA as being in “Attainment” status for the federal 2015 ozone NAAQS.
- d. The Department denies that it failed to consider the impacts of the permitted emissions on ambient air quality in the region. The Department affirmatively states that it does not have authority to deny a permit for an individual facility located in an area designated as in attainment of the ozone NAAQS on the sole basis that the facility will emit ozone precursors such as volatile organic compounds (“VOCs”) and oxides of nitrogen (“NOx”). Unlike the other “criteria pollutants” for which the U.S. Environmental Protection Agency has promulgated a NAAQS under the federal Clean Air Act, ozone is not emitted directly into the atmosphere from anthropogenic sources. Rather, it is a “secondary pollutant” formed by a complex series of photochemical reactions between VOCs and NOx in the presence of sunlight. These reactions do not take place instantaneously, but instead can take

hours or days. Further, ozone levels at a particular location can result from VOC and NOx emissions that occurred hundreds or even thousands of miles away.

- e. The Department denies that it failed to perform air quality modeling or other technical analysis to assess the impact of the permitted activities at the Facility on ambient levels of criteria pollutants in the area. The Department affirmatively states that it conducts source-specific modeling for all the other criteria pollutants under the Clean Air Act and did so for this Permit. However, it is not possible to do such source-specific modeling for ozone given the complex nature of its formation in the atmosphere and the fact that it is not emitted directly from anthropogenic sources. Ozone modeling has to be done on a regional basis and is technically complex and extremely costly. The Department is currently conducting such modeling in connection with its Ozone Attainment Initiative, and expects that modeling to be completed in the fall of 2020. The modeling will provide the scientific basis for rulemaking and enforcement efforts aimed at preventing the areas of the State that are registering design values near or above the current ozone NAAQS from being designated as “Non-Attainment”.
- f. The Department denies that the permitted activities at the Facility can be deemed to “cause or contribute” to exceedances of the ozone NAAQS. The Department affirmatively states that, given the many contributing sources to ozone formation in New Mexico – including natural sources such as biogenic emissions, stratospheric intrusions, lightning, and wildfires, as well as transportation, and interstate and international transport from other states such as Texas and other countries such as Mexico – it is impossible to make a finding in a particular

permitting action that a single source emitting relatively miniscule amounts of ozone precursors is “causing or contributing” to monitored exceedances of the NAAQS.

- g. The Department denies that its conclusion that the permitted activities will not “cause or contribute” to air contaminant levels in excess of a NAAQS was arbitrary and capricious, and denies that issuance of the Permit was unlawful. The Department affirmatively states that to interpret the New Mexico Air Quality Control Act and the corresponding Air Quality Regulations in the manner suggested by Petitioner would mean that the Department would be required to deny all permit applications for sources emitting any quantity of VOCs or NO_x whenever monitors in the region where the sources are located are registering ozone levels at or near the NAAQS. This would be the case even in the absence of modeling showing what sources were contributing to the ozone levels in the region and the percentage contribution of those sources. In fact, Petitioners’ interpretation would require denial of all such permits, and thus the shutdown of all related economic activity, even if comprehensive regional modeling existed showing that the industrial sectors to which the sources belonged, or indeed all anthropogenic sources of ozone precursors in the entire region combined, were responsible for only a small fraction of ozone levels, with the larger portion being attributable to natural causes and/or transport from sources outside New Mexico. These examples illustrate why regulation of ozone is done on a regional, as opposed to a source-by-source, basis, and must be founded upon comprehensive regional modeling. The Department is in the process of conducting such modeling and developing regulations to address

the State's ozone issues, including in the area where the Facility is located. Such regulations will address emissions of ozone precursors from various sectors, such as oil and gas and transportation.

4. In response to Petitioner's allegations in Section G on page 5 of the Petition, the Department states as follows:

- a. The Department opposes Petitioner's request for rescission of the Permit.
- b. The Department opposes Petitioner's proposal that a permit should not be issued for the Facility until a formal plan, including regulations, are developed to reduce ozone precursors in the area.
- c. The Department opposes Petitioner's proposal that a permit should not be issued for the facility until the Department demonstrates that additional emissions of ozone precursors from any new permit issued for the Facility will not "cause or contribute" to violations of the ozone NAAQS.
- d. The Department affirmatively states that, in the absence of comprehensive regional modeling, the denial of this or any other individual permit application would be arbitrary and capricious, as it would lack scientific evidence that the source is contributing to the exceedance.

CONCLUSION

The instant permit appeal is based on a flawed understanding of the nature of ozone pollution, how it is formed, how it is regulated, and the extent of the Department's regulatory authority. While perhaps well-intentioned, litigation of this nature serves primarily to divert the Department's limited resources away from critical initiatives that are already underway and that, once achieved, will have actual, meaningful impacts in terms of improving air quality and

protecting public health. For the reasons stated above, the Board should affirm the Department's issuance of the permit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Environmental Improvement Board Administrator and was served on the following on June 15, 2020:

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