

**STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD**



**IN THE MATTER OF THE PETITION
FOR A HEARING REGARDING
REGISTRATIONS NOS. 8729, 8730, AND 8733
UNDER GENERAL CONSTRUCTION PERMIT
FOR OIL AND GAS FACILITIES**

No. EIB 20-33(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"). However, the Department disputes that this appeal qualifies for the limited review provided under the Board's regulations at 20.2.72.220.C(5) NMAC. Specifically, the Department affirmatively states that the Petitioner's appeal of Oil & Gas General Construction Permit Registration Nos. 8729, 8730, and 8733 (the "Registrations") does not challenge whether or not the sources qualify to register under a general construction permit, but rather amounts to an impermissible collateral attack on the terms and conditions of the GCP itself, which is prohibited under the above-cited regulation.

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 Registrations on March 11, 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 approved the Registrations without considering impacts on air quality and public health. The Department affirmatively states that consideration of such impacts would have taken place during the hearing on the GCP in February of 2018, and any issue regarding such impacts could and should have been raised at that time.
 - b. The Department admits that the Permit authorizes emissions in specified amounts, as set forth in Table 106 of the GCP.
 - 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 registered facilities are 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 GCP registrations for individual facilities

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 the registered facilities are automatically deemed unable to comply with the GCP simply because they are located in an area where monitors are registering design values in excess of the National Ambient Air Quality Standard for ozone. The Department affirmatively states that, while it conducts source-specific modeling for all the other criteria pollutants under the Clean Air Act, 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”. If those efforts are unsuccessful, the Department will have to go through the process of Non-Attainment designation under the oversight of the U.S. Environmental Protection Agency, which will entail determining the boundaries of the area, the level of non-attainment ranging from minimal to severe, and the degree to which natural occurrences or activities in other states are contributing to the problem. One consequence of an EPA reviewed non-attainment designation is that no general construction permits can be issued in the designated area.

- f. The Department denies that the ozone NAAQS is a direct, mandatory requirement of which individual GCP registrants can be deemed to be in violation. 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 the context of a particular GCP registration that a single source emitting relatively miniscule amounts of ozone precursors is violating the ozone NAAQS.
- g. The Department denies that its decision to approve the Registrations was arbitrary and capricious, or 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 GCP registrations 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 registrations, 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 registered facilities are 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 Registrations.
 - b. The Department opposes Petitioner's proposal that a registration should not be issued for the Facility until a formal plan, including regulations, are developed to reduce ozone precursors in the area.

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 July 13, 2020:

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