

**STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

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

EIB No. 20-21(A)

AND

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

EIB No. 20-33(A)

**XTO ENERGY INC.'S SUPPLEMENTAL STATEMENT OF INTENT
TO PRESENT TECHNICAL EVIDENCE**

Applicant XTO Energy Inc. ("XTO"), pursuant to the Scheduling Order, submits this Supplemental Statement of Intent to Present Technical Evidence for the Environmental Improvement Board's September 24, 2020 hearing on this matter.

In its Statement of Intent, filed August 3, 2020, XTO stated that it would offer the technical testimony of Randy Parmley of DiSorbo Consulting, LLC and submitted a copy of Mr. Parmley's written direct testimony. XTO now submits Mr. Parmley's written rebuttal testimony.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By: _____


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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, a true and correct copy of the foregoing *XTO Energy Inc.'s Supplemental Statement of Intent to Present Technical Evidence* was served via electronic mail to the following:

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**REBUTTAL TESTIMONY OF RANDY PARMLEY, P.E.,
ON BEHALF OF XTO ENERGY INC., IN SUPPORT
OF GENERAL CONSTRUCTION PERMIT, OIL AND GAS
REGISTRATION NOS. 8729 AND 8730**

SEPTEMBER 2, 2020

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1 I. REBUTTAL TESTIMONY OVERVIEW

2
3 Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

4 A. Randy Parmley, 1001 Louisiana Street, Houston, Texas 77002.

5 Q. WHAT IS YOUR INVOLVEMENT IN THIS PROCEEDING?

6 A. I have been retained by Montgomery & Andrews, P.A. to provide direct and rebuttal
7 testimony regarding the establishment of ozone nonattainment areas, State Implementation
8 Plan (“SIP”) development considerations for ozone nonattainment areas, and new source
9 review permitting in the context of the New Mexico Environment Department’s
10 (“NMED”) issuance of General Construction Permit (“GCP”) Oil and Gas Registration
11 Nos. 8729 and 8730.

12 Q. DID YOU PREVIOUSLY PROVIDE DIRECT TESTIMONY IN THIS PROCEEDING?

13 A. Yes. My direct testimony was filed with the Environmental Improvement Board on August
14 3, 2020.

15 Q. HAVE YOU REVIEWED OTHER DIRECT TESTIMONY FILED ON AUGUST 3,
16 2020?

17 A: Yes, I reviewed the WildEarth Guardian’s Notice of Intent to Present Technical and Non-
18 Technical Testimony, which included the Expert Report by Dr. Ranajit Sahu; the New
19 Mexico Environment Department’s Statement of Intent to Present Direct Technical
20 Testimony, which included the Direct Technical Testimony of Sufi Mustafa and Elizabeth
21 Bisbey-Kuehn; the 3 Bear Delaware Operating-NM, LLC’s Statement of Intent to Present
22 Direct Technical Testimony, and the associated Direct Technical Testimony of Jeffrey
23 Bennet, P.E., and Lori Marquez; and the Spur Energy Partners, LLC’s Statement of Intent

1 to Provide Technical and Nontechnical Testimony, which included the Direct Testimony
2 and Exhibits of Adam Erenstine.

3 Q. WHAT TESTIMONY ARE YOU ADDRESSING IN THIS TECHNICAL REBUTTAL?

4 A. I am providing rebuttal testimony to Dr. Sahu’s Expert Report submitted by the Petitioner
5 WildEarth Guardians.

6 Q: HAVE YOU FORMED AN OPINION REGARDING DR. SAHU’S REPORT?

7 A: Yes; I disagree with several of the observations and all of the conclusions offered by Dr.
8 Sahu. Additionally, I believe that much of the information offered in his report is simply
9 NOT relevant to the petition submitted by WEG that the GCP Oil and Gas Registration
10 Nos. 8729 and 8730 do not meet the requirements of the NMAC and GCP with regard to
11 the prohibition from GCP registration for a facility located in a nonattainment area.

12 **II. REBUTTAL TESTIMONY ISSUES**

13 Q: DOES DR. SAHU’S REPORT RECOGNIZE THE EPA DESIGNATION PROCESS?

14 A: Dr. Sahu’s testimony acknowledges that “EPA has not yet formally designated the
15 southeastern New Mexico area as non-attainment”¹, but quickly dismisses the regulatory
16 framework for designation of a nonattainment area, on the basis of “these monitors
17 demonstrate non-attainment” and “therefore should be considered to be in a state of actual
18 non-attainment with the ozone standard.”²

19 Q: DOES DR. SAHU PROPOSE AN AREA OR OFFER A BOUNDARY FOR THE “STATE
20 OF ACTUAL NONATTAINMENT WITH THE OZONE STANDARD”?

¹ Sahu direct testimony at page 2.

² Ibid

1 A: No. In fact his testimony recognizes that the timing, severity classification, and
2 geographical extent of the nonattainment area are yet to be determined when he states, “it
3 is my professional opinion that it is simply a matter of when and not if such a designation
4 will occur, what its severity will be, and what the geographical extent of the non-attainment
5 area will be.”³ This statement reveals several key points that Dr. Sahu seems to understand,
6 but neglects to present in his direct testimony, including:

7 1) The phrase “when and not if a designation will occur” indicates the recognition of the
8 importance of a point in time associated with a designation process. This is an
9 extremely important concept for developing a State Implementation Plan (SIP) and a
10 Nonattainment New Source (NNSR) permitting program;

11 2) The phrase, “what its severity will be” is also an important parameter for implementing
12 a SIP and NNSR program; and

13 3) The phrase “and what the geographical extent of the non-attainment area will be”
14 recognizes the importance of establishing a very specific boundary area based on
15 sophisticated photochemical modeling, taking into account ozone transport, mobile
16 sources, and natural sources, much like what was done in the Sunland Park area, as an
17 integral part of a complex nonattainment area designation process. It seems
18 contradictory to presume an area is “in a state of actual non-attainment,” and then
19 concede that the area in question is not defined.

20 Q. WHY IS THE SEVERITY OF THE OZONE NONATTAINMENT AREA
21 DESIGNATION IMPORTANT??

³ Ibid

1 A. As I mentioned in my direct testimony, EPA designates nonattainment areas ranging from
2 marginal, moderate, serious, severe, to an extreme classification. The EPA nonattainment
3 classification determines the amount of time a SIP has to implement the strategies and
4 emission control measures to bring a nonattainment area back to attainment with the
5 NAAQS. States are allowed from 3 years with a marginal classification up to 20 years for
6 an extreme classification to demonstrate compliance with the NAAQS.

7 In addition to these ozone planning and control issues, the classification designated by EPA
8 also sets the emission thresholds for several key permitting parameters, including:

- 9 1) The major stationary source thresholds for NNSR permitting. The major stationary
10 source definitions are the emission levels triggering Federal NNSR, ranging from 100
11 tons per year of NO_x for a marginal classification to 10 tons per year of NO_x or VOC
12 for an extreme classification⁴;
- 13 2) The significant emission rate increase thresholds triggering nonattainment permitting
14 for modifications to an existing facility, ranging from 40 tons per year for a marginal
15 classification to 0 tons per year for an extreme classification;⁵
- 16 3) The contemporaneous netting thresholds for which an applicant must consider
17 emission increases over the past minimum of 5 years to determine applicability for
18 Federal NNSR permitting;⁶ and
- 19 4) The required emission offset ratios for a major source or major modification in a
20 designated nonattainment area. Depending on the ozone nonattainment classification

⁴ 20.2.79.7.V NMAC for the definition of “Major Stationary Source.”
⁵ 20.2.79.7.AM & AN NMAC for the definitions of “significant” and “significant emissions increase,” respectively.
⁶ 20.2.79.7.V NMAC for the definition of net emissions increase.

1 designation, the applicant is required to purchase and retire 1.1 ton of VOC or NOx
2 for every ton authorized to 1.5 tons for every ton authorized.⁷

3 In short, without a classification associated with a nonattainment area designation, there is
4 not a framework for establishing SIP control measure planning, an emission banking and
5 trading program, or for permitting new or modified facilities consistent with emission
6 threshold changes established in the CAA as discussed above.

7 Q: WHY IS THE RECOGNITION OF A POINT IN TIME ASSOCIATED WITH A
8 DESIGNATION PROCESS IMPORTANT?

9 A: The exact or effective date of a nonattainment designation by EPA is the precise moment
10 when the nonattainment area permitting changes mentioned above are implemented.
11 Before the effective date, because the area is designated in attainment, the PSD rules apply
12 for major source permitting. On and after the date listed by EPA in the Federal Register
13 as the effective date of the nonattainment designation, the NNSR permitting revisions
14 apply, with different applicability criteria, control requirements, and notice requirements.
15 It is essential that an effective date is established to avoid arbitrary and inconsistent
16 implementation of these permitting requirements.

17 Q: CAN YOU PROVIDE AN EXAMPLE OF HOW OTHER STATES HAVE DEALT
18 WITH OZONE NONATTAINMENT AREA EFFECTIVE DATES?

19 A: Yes. EPA revised of the ozone NAAQS from 0.075 ppm to 0.070 ppm on October 1, 2015.
20 This is the standard of issue in this matter, and the revised standard affected Texas and
21 many other states, as well as New Mexico. After a public comment period, the Texas
22 Commission on Environmental Quality (TCEQ) approved designation recommendations

⁷ Subsection J of 20.2.79.109 NMAC regarding emission offset requirements.

1 to EPA on August 3, 2016. This designation request was updated on August 23, 2017, to
2 remove several counties from the recommended nonattainment designation list based on
3 changes to the design value once the monitoring data for 2016 was available and results
4 from the exceptional event evaluations. On June 4, 2018, the EPA designated all Texas
5 counties as either attainment/unclassifiable or nonattainment, except the 8 counties in the
6 San Antonio metropolitan area (later all but one county of the eight was designated as
7 attainment). These designations had an effective date of August 3, 2018. This is the exact
8 date upon which TCEQ transitioned the permitting requirements noted above. Permits
9 issued prior to this August 3, 2018 were issued under the rules governing attainment areas.
10 Permits issued on or after August 3, 2018 were evaluated under the nonattainment
11 definitions for major source, major modification thresholds for the specific nonattainment
12 area, and netting thresholds for the specific nonattainment area. If subject to nonattainment
13 permitting, additional requirements for utilizing the lowest achievable emission rate⁸
14 (LAER) control technology and obtaining emission offsets, known as emission reduction
15 credits (ERCs) at a ratio prescribed for the ozone nonattainment area classification were
16 also mandated.

17 The attainment NSR rules applied before August 3, 2018 and the NNSR rules applied on
18 and after August 3, 2018. The regulated community and the TCEQ knew exactly when

⁸ 20.2.79.7.T NMAC defines "Lowest achievable emission rate" as, "for any source, the more stringent rate of emissions based on the following:

(1) the most stringent emissions limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(2) the most stringent emissions limitation which is achieved in practice by such class or category of stationary source; this limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within the stationary source; in no event shall the application of this term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under an applicable new source standard of performance."

1 program transitions would occur and could plan accordingly. Numerous permits already
2 under review at TCEQ were issued prior to the August 3, 2018 date. Other applications
3 under review, not issued prior to August 3, were processed under the nonattainment rules.
4 Some of these applications were submitted as minor NSR applications and became major
5 NNSR applications as a result of the change in the major source definition, major
6 modification thresholds, or netting requirements associated with NNSR. Some projects
7 became subject to a LAER control technology evaluation and were required to purchase
8 ERCs to satisfy the NNSR offset requirements. Some applications were withdrawn.

9 The point of this discussion is to emphasize that the transition from attainment area status
10 to nonattainment area status is complex and needs to be executed under an established
11 process with known and exact transition dates to ensure impartial execution of permit
12 issuance. The CAA and EPA specifically designed this process, involving public
13 participation, that has to be followed to assess whether an area is in attainment or not—
14 otherwise, the statute and regulations could have simply required that any monitoring result
15 or even design value exceeding a standard causes an area to immediately be nonattainment.
16 As stated in my direct testimony, clearly, that is not the case.

17 Q: WHY IS IT IMPORTANT TO ESTABLISH A GEOGRAPHICAL BOUNDARY AS
18 PART OF THE NONATTAINMENT AREA DESIGNATION PROCESS?

19 A: An area is defined as “the surface included within a set of lines.”⁹ A boundary is
20 fundamental to any understanding of an area. This is especially true in the context of a
21 nonattainment area, where different control and permitting requirements are triggered
22 depending on whether the site is within the set of lines, or boundary, established by the

⁹ “Area.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/area>.

1 EPA designation. As mentioned in my direct testimony at page 9 line 4, EPA evaluates
2 five factors in determining the boundary for a potential nonattainment area, including air
3 quality data; emissions and emissions-related data; meteorological data; geography/
4 topography; and jurisdictional boundaries.¹⁰ This analysis is illustrated with EPA's
5 approach for evaluating the Sunland Park area, which concluded that "the majority of
6 emissions impacting the violating monitor at Desert View can be attributed to nearby areas
7 in Mexico."¹¹ And, therefore, only the Sunland Park area was designed as a marginal ozone
8 nonattainment area, while the remaining part of Dona Ana County was designated as
9 attainment/unclassifiable.¹²

10 A monitoring data value design value above 0.070 ppm does not establish a nonattainment
11 area boundary, as Dr. Sahu seems to suggest. The methodology and EPA policies for
12 establishing a nonattainment boundary are well-established and provide consideration of
13 many factors other than a single location monitor over the design value. An evaluation of
14 the five factor EPA criterion, at a minimum, vetted through the public participation process,
15 is essential for determining any nonattainment area boundary.

16 Q: YOU MENTIONED EARLIER THAT THE TECHNICAL INFORMATION OFFERED
17 IN DR. SAHU'S REPORT IS NOT RELEVANT TO THE ISSUE AT HAND. CAN YOU
18 ELLOBORATE ON THIS STATEMENT?

19 A: Yes. The New Mexico Environmental Improvement Board's Procedural Order dictates the
20 limitations on scope of testimony to issues concerning the nonattainment designation
21 process in New Mexico and the contention that "the Department was required to deny the

¹⁰ EPA website at <https://www.epa.gov/sites/production/files/2016-02/documents/ozone-designations-guidance-2015.pdf>; Attachment 3 of this document describes the five factor evaluation used by EPA.

¹¹ EPA website at https://www.epa.gov/sites/production/files/2018-05/documents/nm_tsd_final.pdf

¹² EPA website at https://www.epa.gov/sites/production/files/2018-05/documents/nm_tsd_final.pdf.

1 Registration under A100 of the GCP-oil & Gas.”¹³ While Dr. Sahu dedicated a significant
2 amount of the report to describing the basics of ozone formation, descriptions of the
3 southern New Mexico area, air quality monitoring data summaries, studies analyzing trends
4 and projections into the future (2025), and providing his evaluation the oil and gas industry,
5 as a whole, with regard to ozone contributions, he does not address anything specific to the
6 Registration (i.e., the XTO GCP Oil and Gas Registration Nos. 8729 and 8730). Although
7 his observations on these matters are peppered with statements I do not agree with, they
8 are simply not relevant to the issues stated in the Procedural Order for consideration in this
9 matter.

10 Q: ARE THERE OTHER AREAS OF DR. SAHU’S REPORT THAT ARE NOT
11 RELEVANT?

12 A: Yes. Dr. Sahu states that, with regard to determining ozone impacts from specific sources,
13 “Agencies have been making ozone determinations from individual sources as well as from
14 regional sources (which is what the collection of oil and gas sources in Eddy and Lea
15 counties represent) since the early 1980’s.”¹⁴ He then goes on to cite the antiquated EKMA
16 model, and the more recent Modeled Emission Rates for Precursors (MERPs) approach for
17 this purpose. There are several important points to consider with regard to Dr. Sahu’s
18 position:

- 19 1) Impact evaluations for GCP’s and for other minor NSR registration programs
20 (like the permit streamlining program under 20.2.72.300 – 306 NMAC) are
21 conducted at the time of permit issuance or rulemaking under public notice and

¹³ State of New Mexico Environmental Improvement Board Procedural Order at III. Limitation on Scope of Testimony, dated July 20, 2020.

¹⁴ Sahu at page 14.

1 participation, not on a case by case basis upon registration. This is what make
2 a General Construction Permit different from a case by case NSR review. This
3 is common practice in many states.

4 2) Consistent with other State requirements and policy, ozone MERP evaluations
5 are not conducted for sources with less than 100 tons per year of precursor
6 emissions;¹⁵

7 3) The direct testimony of Sufi Mustafa stated that “an individual facility would
8 have to emit more than 250 tons per year of both NO_x and VOC to cause ozone
9 concentrations to increase more than a significant amount (the SIL) of ozone.”¹⁶

10 The ozone SIL is 0.001 ppm (1/70th of the 2015 ozone NAAQS of 0.070 ppm).

11 The XTO facilities are authorized at a maximum allowable NO_x or VOC
12 emission rate corresponding to less than 42% of the emission rate needed to
13 have even a significant impact on the NAAQS.¹⁷

14 4) The evaluation of whether the facilities authorized by Registrations Nos. 8729
15 and 8730 cause or contribute to a violation of the ozone NAAQS is solely

¹⁵ EPA guidance does not require single source ozone modeling for minor sources (40 CFR Part 51 Appendix W and EPA guidance (EPA Draft Guidance for Ozone and Fine Particulate Matter Permit Modeling, February 10, 2020, page 7). States typically adopt guidance consistent with this EPA policy. For example, Colorado, Texas, and Oklahoma are neighboring states with significant oil and gas production, and each of these states has adopted policy consistent with EPA guidance, which does not require ozone analysis for minor source permits. Colorado guidance is found in the May 18, Colorado Modeling Guideline for Air Quality Permits page 13, May 18. Oklahoma also follows EPA guidance as evidenced by the OK Air Dispersion Guidance § 2.4.7.4, which directly requires following EPA MERP guidance. Texas clearly limits an ozone impact analysis to a major PSD application for a project which will emit 100 tons per year or more of VOC or NO_x (Air Quality Modeling Guidelines (APDG 6232v4, November, 2019 Appendix Q, page 96). The New Mexico guidance limiting ozone analyses to major sources is consistent with EPA policy, and with these neighboring states having significant oil and gas production facilities.

¹⁶ The New Mexico Environment Department’s Statement of Intent to Present Direct Technical Testimony, Exhibit 1 – Direct Technical Testimony of Sufi Mustafa, page 9.

¹⁷ The highest allowable ozone precursor emission rate for either XTO GCP registration is 103 tons VOC per year (92.31 tons per year without fugitives) represented in the XTO Energy Corral Canyon 23 Tank Battery, Eddy County, New Mexico GCP Oil and Gas Permit Application Registration on Table 2-E.). 103 tons per year is 41.2% of the conservative 250 tons per year emission rate required to produce a de minimis contribution equal to the ozone SIL from this facility.

1 determined by the specific emission limits and emission limit calculations in
2 these registrations, which testimony is expressly prohibited from acceptance in
3 this proceeding.¹⁸

4 **III. REBUTTAL CONCLUSIONS REGARDING PETITION FOR**
5 **RESCISSION OF GENERAL PERMITS IN QUESTION**
6

7 Q: AFTER REVIEWING THE DIRECT TESTIMONY FILINGS ON AUGUST 3, 2020,
8 DO YOU HAVE AN OPINION REGARDING THE WILDEARTH GUARDIAN'S
9 REQUEST FOR RESCISSION OF GENERAL CONSTRUCTION PERMIT (GCP) OIL
10 AND GAS REGISTRATION NOS. 8729 AND 8730?

11 A: Yes. After reviewing the direct testimonies filed on August 3, 2020 including the
12 WildEarth Guardian's Notice of Intent to Present Technical and Non-Technical Testimony,
13 which included the Expert Report by Dr. Ranajit Sahu, I have reaffirmed the conclusions
14 reached in my direct testimony, namely that the sources authorized by General
15 Construction Permit (GCP) Oil and Gas Registration Nos. 8729 and 8730 are in locations
16 currently designated as in attainment with the 2015 Ozone NAAQS, NMED's GCP Oil
17 and Gas reference to nonattainment areas must be read consistent with NMED application
18 here to only apply to nonattainment areas designated by EPA under the federal Clean Air
19 Act, and as a result, the Board should affirm NMED's approval of GCP registrations for
20 XTO's GCP Oil and Gas Registration Nos. 8729 and 8730.

21 Adhering to the statutory framework for EPA designation of an area to nonattainment as
22 prescribed in Section 107(d)(3) of the Clean Air Act, 42 U.S.C. §7407(d)(3) and in the

¹⁸ State of New Mexico Environmental Improvement Board Procedural Order at III. Limitation on Scope of Testimony, dated July 20, 2020. Part III of the limitation on Scope of Testimony states "The Parties have agreed that the specific emission limits, emission limit calculations, and permit conditions of the GCP-Oil and Gas and the Registrations are not at issue in this appeal, and therefore testimony will not be accepted challenging those emission limits or emission limit calculations."

1 New Mexico nonattainment area definitions referring to these rules, provides a framework
2 for essential planning and transition challenges facing the NMED and the regulated
3 community. The WEG proposal, expressed in Dr. Sahu's report, would effectively
4 mandate that the NMED develop an alternate nonattainment designation process to assure
5 that GCP registrants are aware of the attainment status of the area where they propose to
6 locate a facility, since the GCP process precludes site-specific air quality impact analyses.
7 Such a process, which is not specified by State Law, would not be subject to the constraints
8 and public participation requirements of the federal designation process. Moreover, in my
9 view, such an alternate program would be inconsistent with the New Mexico Legislature's
10 direction that the nonattainment program be "no more stringent" than the federal
11 nonattainment program. I am not aware of any state regulating an area designated as
12 attainment as if it were nonattainment in the absence of an EPA nonattainment designation.
13 In my opinion, the position offered by Dr. Sahu does not provide any plausible justification
14 for the petition made by WEG that the GCP Oil and Gas Registration Nos. 8729 and 8730
15 do not meet the requirements of the NMAC and GCP rules with regard to the prohibition
16 from GCP registration for a facility located in a nonattainment area. His report simply does
17 not address the established prerequisite that an area is not a nonattainment area until
18 designated as such by the EPA.

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AFFIDAVIT OF RANDY PARMLEY

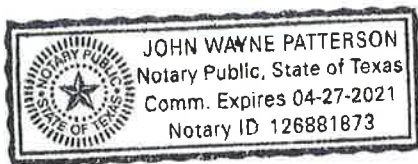
STATE OF TEXAS)
) ss.
COUNTY OF HARRIS)


Randy Parmley, being first duly sworn, deposes and states that the foregoing Rebuttal Testimony of Randy Parmley constitutes my prepared rebuttal testimony in this proceeding, my answers to the questions posed therein are true and correct to the best of my knowledge, information, and belief, and the exhibits attached thereto were prepared or compiled by me or under my direction and supervision.



Randy Parmley

SWORN TO AND SUBSCRIBED before me on the 1 day of September, 2020.





Notary Public