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)**

APPLICANT XTO ENERGY INC.'S CLOSING ARGUMENT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant XTO Energy Inc. ("XTO"), in accordance with the New Mexico Environmental Improvement Board's ("EIB" or "Board") Adjudicatory Procedures, 20.1.2.401 NMAC, and the September 18, 2020 Procedural Order, as modified by the November 30, 2020 Order Granting Extension of Time to File Post-Hearing Submittals, hereby submits its closing argument and proposed findings of fact and conclusions of law. XTO focuses on Petitioner Wild Earth Guardians' ("WEG") challenge to XTO's Registrations described below.

INTRODUCTION

This matter is before the EIB on WEG's Petition for a Hearing ("Petition") filed June 12, 2020. Pleading Log 1. WEG challenges the New Mexico Environment Department's ("NMED") approval of General Construction Permit for Oil and Gas Facilities ("GCP-Oil & Gas" or "Permit") Registration Nos. 8729 and 8730 for XTO's Corral Canyon 23 and Big Eddy Unit DI 38[1] (the

[1] The Petition also challenged approval of Registration No. 8733 for Spur Energy Partners LLC's Dorami 2H, 4H and 9H Federal Oil Tank Battery. Pleading Log 1 at 4, ¶ D. XTO's submittal generally addresses only its registrations; however, the basic position taken by XTO applies equally to the resolution of WEG's challenge to Registration No. 8733 as well as to the challenge of the consolidated matter, Air Quality Permit No. 7482-M1, issued to 3 Bear Delaware Operating – NM LLC.

"Registrations"). Pleading Log 1 at 4, ¶ D.[2] For the reasons stated below, WEG's position is unfounded, and the EIB should affirm NMED's issuance of the Registrations.

BACKGROUND

A. General Construction Permit for Oil and Gas Facilities

On April 27, 2018, after notice and public hearing, NMED issued GCP-Oil & Gas pursuant to the Air Quality Control Act and 20.2.72.220 NMAC. Pleading Log 1 at 13 (Petition Ex. A-GCP-Oil & Gas). That regulation provides in relevant part:

> A. Issuance of general construction permits:
>
> (1) The department may, after notice under Subsections A and B of 20.2.72.206 NMAC and a public hearing with opportunity for public participation under Subsection C of 20.2.72.206 NMAC issue one or more general construction permits, each covering numerous similar sources. Sources registered for coverage under a general permit shall be generally homogeneous in terms of operations, processes and emissions, subject to the same or substantially similar requirements, and not subject to case-by-case standards or requirements.
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> (2) Each general construction permit shall:
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> (a) Describe which sources may qualify to register under the general construction permit;
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> (b) Specify the contents of a complete application to register under the general construction permit. The department may, in the general construction permit, provide for applications which deviate from the requirements under 20.2.72.203 NMAC, provided that such applications include:
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> (i) All information necessary to determine qualification for, and to assure compliance with, the general construction permit; and
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> (ii) Applicant's public notice requirements including, at a minimum, a notice: a) published once in the legal notices section of a newspaper in general circulation in the county or counties in which the property on which the facility is proposed to be constructed or operated is located; and b) posted at the proposed or existing facility entrance in a publicly accessible and conspicuous place on the property on which the facility is, or is proposed to be, located, until the general permit registration is granted or denied;
>
> (c) Contain permit terms and conditions which apply to all sources registered under the general construction permit, and which include:
>
> (i) Sufficient terms and conditions to assure that all sources registered under and operating in accordance with the general construction permit will meet all applicable requirements under the federal act, the

[2] The portable document format ("PDF") page number is used for page references where the document does not have numbered pages.

New Mexico Air Quality Control Act and this chapter (Air Quality), including 20.2.74 NMAC (Prevention of Significant Deterioration), 20.2.77 NMAC (New Source Performance Standards), 20.2.78 NMAC (Emission Standards for Hazardous Air Pollutants), 20.2.79 NMAC (Permits - Nonattainment Areas), and 20.2.82 NMAC (Maximum Achievable Control Technology Standards for Source Categories of Hazardous Air Pollutants), and will not cause or contribute to air contaminant levels in excess of any national or New Mexico ambient air quality standard; and

(ii) Monitoring, record keeping and reporting requirements appropriate to the source and sufficient to ensure compliance with the general construction permit. At a minimum, the general permit shall specify where the records shall be maintained, how long the records shall be retained and that all records or reports shall be made available upon request by the department;

(iii) As appropriate, terms and conditions to address and report emissions occurring during upsets, startups and maintenance; and

(d) Specify that any document, including any application form, report, compliance certification and supporting data, submitted pursuant to this section (20.2.72.220 NMAC) shall contain a certification that meets the requirements of Paragraph 10 of Subsection A of 20.2.72.203 NMAC.

. . .

C. Registration under a General Construction Permit:

(1) The owner or operator of a source required to obtain a permit pursuant to this part and which qualifies to register under a general construction permit shall either:

(a) Apply to the department to register under the terms of the general construction permit; or

(b) Apply for a construction permit under 20.2.72.200 NMAC.

(2) Within thirty (30) days of receiving an application to register under a general construction permit, the department shall review the application for completeness and shall grant or deny the registration. The department shall not grant the registration until at least fifteen (15) days after the date the applicant's public notice was initiated. The department shall notify the applicant of its determination by certified mail. The department shall attach a copy of the general construction permit to registration approvals.

(3) The department shall grant registration under a general permit to a source only if:

(a) The application is complete and meets the requirements of this section (20.2.72.220 NMAC); and

(b) The source meets the terms and conditions of the general permit.

* * *

> (5) Administrative review under Sections 74-2-7.H through L NMSA 1978 shall be available for a determination made by the department of whether or not a source qualifies to register for coverage under a general construction permit. However, administrative review of a registration for coverage under a general construction permit shall not extend to administrative review of the general permit itself. Administrative review of the general construction permit shall be available under Sections 74-2-7.H through L NMSA 1978 only upon issuance or revision of the general permit as a permitting action.

20.2.72.220 NMAC.

The Permit authorizes construction and operation of certain oil and gas facilities in New Mexico (except those in Bernalillo County, tribal lands, non-attainment areas, and the City of Sunland Park). Pleading Log 1 at 16, A100.B (Petition Ex. A- GCP-Oil & Gas). Permit Condition A100.C states that "[a]n owner or operator that registers for and receives approval to construct under this Permit will have satisfied the State of New Mexico's requirement for obtaining an air quality permit prior to constructing … a source of air pollutants." *Id.* at A100.C. Permit Condition A100.G allows the owner or operator to apply for registration of a Facility under the Permit if "(1) The Facility can comply with all requirements of [the] Permit; and (2) The Facility includes any combination of the emissions units listed in Table 104 of the Permit". *Id.* at A100.G. Condition A100.H(6) states that NMED "shall deny" a Registration if, among other things, the "Facility is located in a nonattainment area [defined by 20.2.72.216 and 20.2.79 NMAC], Bernalillo County, or tribal lands." *Id.* at 16-17, A100.H. In its process to issue the Permit, NMED determined that "all facilities registered under and operating in accordance with this permit will meet all applicable requirements under the federal Clean Air Act, the New Mexico Air Quality Control Act, and Title 20, Chapter 2 NMAC . . ., and will not cause or contribute to air contaminant levels in excess of any national or New Mexico ambient air quality standard." *Id.* at 43, B100.

WEG and XTO (through the New Mexico Oil and Gas Association) participated in the hearing on GCP-Oil & Gas. The Permit was not appealed to the Board. The Permit is not challenged in this proceeding.

B. XTO Permit Registration Numbers 8729 and 8730

XTO proposed to construct and operate two new facilities: the Corral Canyon 23 facility (Registration Number 8729), located 10.2 miles Southeast of Malaga, in Eddy County, New Mexico, and the Big Eddy Unit DI 38 facility (Registration Number 8730), located 9 miles Northeast of Loving, in Eddy County, New Mexico. Pleading Log 1 at 9, 11 (Petition Ex. B GCP-Oil & Gas 8729, 8730). Both facilities are centralized production tank batteries, with typical oil and gas processing equipment associated with upstream operations. These batteries have separation equipment, heaters, storage tanks, vapor recovery units, and multiple emission control devices to minimize potential emissions at each location.[3] XTO submitted Registration Applications for the Corral Canyon 23 facility and the Big Eddy Unit DI 38 facility on February 24, 2020 (received by NMED on February 26, 2020). Pleading Log 1 at 9, 11 (Petition Ex. B GCP-Oil & Gas 8729, 8730).

NMED conducted a review of the information provided in the respective applications, found that "the information provided is sufficient to issue your permit in accordance with 20.2.72.220 NMAC and the GCP-O&G conditions," and issued approvals for the registrations for both applications on March 27, 2020. *Id*. NMED notified XTO of its approvals in letters dated

[3] The components and emissions of these facilities are not at issue in this proceeding; however, these facilities meet the conditions of the Permit and are the types of sources that NMED considered when it determined that "all facilities registered under and operating in accordance with this permit will meet all applicable requirements under the federal Clean Air Act, the New Mexico Air Quality Control Act, and Title 20, Chapter 2 NMAC…, and will not cause or contribute to air contaminant levels in excess of any national or New Mexico ambient air quality standard." Permit Condition B100, Pleading Log 1 at 43.

March 27, 2020, *id.*; it notified WEG of the approvals on May 12, 2020, Pleading Log 1 at 1, ¶ A (Petition).

C. Instant Proceedings

WEG filed its Petition on June 12, 2020. Pleading Log 1. WEG asserted that the registrations were not approvable under GCP-Oil & Gas because "the ambient air quality in the region surrounding the Facilities, as evidenced by monitoring data from NMED monitoring stations in Lea and Eddy Counties, is *already* exceeding the ozone NAAQS." *Id.* at 6, ¶ F. WEG sought "rescission of the Registrations under 20.2.72.220.C NMAC, 20.1.2 NMAC, and NMSA 1978, § 74-2-7" and prohibition on NMED approval of "any new registrations under the GCP-Oil & Gas for oil and gas facilities in Eddy and Lea Counties until NMED develops and implements a formal plan, including regulations, to reduce ozone precursors in the area and further demonstrates that additional emissions of ozone precursors from any new permit registrations will be able to fully comply with the ozone NAAQS." *Id.* at 7, ¶ G.

The EIB issued a Notice of Docketing on June 15, 2020, docketing the matter as EIB 20-33. Pleading Log 3. On July 13, 2020, NMED filed its Answer to WEG's Petition.[4] Pleading Log 6. In its Answer, NMED denied "that it approved the Registrations without considering impacts on air quality and public health" and affirmatively stated "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." *Id.* at 2, ¶ 3.a. Additionally, NMED stated that it did 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")," but asserted "that

[4] Only NMED is authorized to submit an answer or a response to a petition. 20.1.2.202.C NMAC.

the area where the registered facilities are located is currently designated by EPA as being in 'Attainment' status for the federal 2015 ozone NAAQS." *Id.* at ¶ 3.c.

NMED denied "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," and affirmatively stated 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." *Id.* at ¶ 3.e. Moreover, NMED stated:

> 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.'

Id. at 3-4, ¶ 3.e.

On July 20, 2020, the EIB issued an Order of Consolidation for Hearing, consolidating for purposes of hearing EIB 20-33, the appeal of Registration Nos 8720, 8730, and 8733, with EIB 20-21(A), the appeal of Air Quality Permit No. 7482-M1 issued to 3 Bear Delaware Operating-NM LLC ("3 Bear").[5] Pleading Log 8. Also on July 20, 2020, Chair Volkerding issued a Procedural Order which, in part, limited the scope of testimony stating "testimony will not be accepted challenging [the Registration] emission limits or emission limit calculations." Pleading Log 9 at 2, ¶ III. On August 3, 2020, Spur Energy Partners, LLC ("Spur"), 3 Bear, NMED, WEG,

[5] The 3 Bear permit was not a GCP. It was issued under 20.2.72 NMAC. To obtain its permit, 3-Bear was required to show that its emissions would not cause or contribute to concentrations of air contaminants in excess of applicable NAAQS and state ambient air quality standards. 20.2.72.208.D NMAC. XTO anticipates that NMED and 3 Bear will address any allegations specific to that petition.

and XTO filed Statements of Intent to Present Technical Testimony, including written direct testimony. Pleading Log 10-14. On August 21, 2020, EIB issued a Notice of Consolidated Public Hearings. Pleading Log 15. On September 2, 2020, 3 Bear, Spur, NMED, XTO, and WEG filed written rebuttal testimony. Pleading Log 16-20. A remote public hearing was held via Cisco Webex Meetings on September 23 and 24, 2020. *See generally* Transcript of Proceedings Sept. 23-24 (2020) ("Tr.").

CLOSING ARGUMENT

A. Standard of Decision

The EIB's review of the Registrations is governed by the Air Quality Control Act, NMSA 1978, § 74-2-7(I)-(K) (2013), the Board's pre-construction permitting rule, 20.2.72 NMAC, and the Board's adjudicatory procedures, 20.1.2 NMAC.

Specifically, Section 74-2-7 provides:

> I. If a timely petition for hearing is made, the environmental improvement board or the local board shall hold a hearing within sixty days after receipt of the petition. The environmental improvement board or the local board shall notify the petitioner and the applicant or permittee, if other than the petitioner, by certified mail of the date, time and place of the hearing. If the subject of the petition is a permitting action deemed by the environmental improvement board or the local board to substantially affect the public interest, the environmental improvement board or the local board shall ensure that the public receives notice of the date, time and place of the hearing. The public in such circumstances shall also be given a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any person submitting data, views or arguments orally or in writing shall be subject to examination at the hearing.
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> K. ***The burden of proof shall be upon the petitioner.*** Based upon the evidence presented at the hearing, the environmental improvement board or the local board shall sustain, modify or reverse the action of the department or the local agency respectively.

Section 74-2-7 (emphasis added).

The Board's permitting rules further provide in relevant part that:

> Any person who participated in a permitting action before the department and who is adversely affected by such permitting action may file a petition for hearing before the board. The petition shall be made in writing to the board within thirty (30) days from the date notice is given of the department's action and shall specify the portions of the permitting action to which the petitioner objects, certify that a copy of the petition has been mailed or hand-delivered as required by this paragraph, and attach a copy of the permitting action for which review is sought…. If a timely request for a hearing is made, the board shall hold a hearing within sixty (60) days of receipt of the petition in accordance with Section 74-2-7 of the New Mexico Air Quality Control Act, NMSA 1978.

20.2.72.207.F-.G NMAC.

Finally, the Board's adjudicatory procedures state the following with respect to the "burden of persuasion" in a petition hearing:

> In a petition hearing, the petitioner has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to justify the relief sought in the petition. Following the establishment of a prima facie case by the petitioner, any person opposed to the relief sought in the petition has the burden of going forward with any adverse evidence and showing why the relief should not be granted.

20.1.2.302 NMAC,

B. WEG Did Not Meet Its Burden of Proof

WEG's challenge is founded on GCP-Oil & Gas Condition A100.H(6), which requires NMED to "deny a Registration Form if: . . . The Facility is located in a ***nonattainment area*** [defined by 20.2.72.216 and 20.2.79 NMAC], Bernalillo County, or tribal lands." Pleading Log 1 at 16-17, A.100.H (emphasis added). WEG's argument fails: the evidence does not support finding that the Registrations are for facilities located "in a nonattainment area" within the meaning of the Permit.

First, 20.2.72.216 NMAC does not define "nonattainment area." It prohibits emissions where the "ambient impact of the contaminant would exceed the significant ambient concentration

in 20.2.72.500 NMAC (table 1) at any location that does not meet the national or New Mexico ambient air quality standard for the contaminant." 20.2.72.216.A NMAC. Importantly, 20.2.72.500 NMAC, table 1 does not include ozone. In 2001, when the regulation was approved, and in 2006, when the regulation was amended, NMED did not require source-specific ozone impact modeling. As a result, the nonattainment requirements of Part 72 were never intended to apply to ozone. 20.2.79 NMAC, the EIB's nonattainment permitting rule for major sources, defines "nonattainment area" as:

> for any air contaminant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the administrator to be reliable) to exceed any national or New Mexico ambient air quality standard for such contaminant. Such term includes any areas identified under Sub-paragraphs (A) through (C) of Section 107 (d)(1) of the federal act").

20.2.79.7.T NMAC. [6]

1. The Facilities Are Not Located in an Area Designated as a "Nonattainment Area" Under Section 107(d)(1) of the CAA

Under the federal Clean Air Act ("CAA"), a "nonattainment area" is an area that EPA designates as not meeting (i.e., not attaining) a NAAQS, in this case ground level ozone. CAA § 107(d)(1), 42 U.S.C. § 7407. A designation is the formal process under the CAA that EPA uses to assign an attainment, unclassified, or nonattainment status for a defined area for any of the six common air pollutants (criteria pollutants are SO2, Particulate matter (PM2.5 and PM10), NO2, CO, ground level ozone, and lead). Pleading Log 12 at 4:7-14 (NMED Ex. 5-Testimony of Elizabeth Bisbey-Kuehn). The CAA requires EPA to set primary NAAQS for these six air pollutants based on protection of public health and set secondary standards to prevent

[6] Similarly, 20.2.72.7.T NMAC defines "nonattainment area" as: "for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under Subparagraphs (A) through (C) of Section 107(d)(1) of the federal Clean Air Act."

environmental and property damage. CAA § 107, 42 USC § 7407; Pleading Log 12 at 3:13-20 (NMED Ex. 1- Testimony of Sufi Mustafa); Pleading Log 12 at 3:18-4:6 (NMED Ex. 5). After EPA establishes or revises primary and/or secondary NAAQS, the CAA requires EPA to designate areas as "attainment" (meeting), "nonattainment" (not meeting), or "unclassifiable" (insufficient data) after assessment of monitoring data collected by state, local and tribal governments. *Id.* Nonattainment designations are made solely by EPA. CAA § 107 (c), (d), 42 USC § 7407. Tr. 198:13-20. States can make recommendations, but each designation for attainment, unclassifiable, or nonattainment is made by EPA. *Id.*; Pleading Log 14 at 9:13-16, 15-16, Exhibit 3 at 2 (Direct Testimony of Randy Parmley).

There is no question that Eddy County, the location of the registered XTO facilities, is currently designated by EPA as in "attainment" with the 2015 ozone NAAQS. 40 C.F.R. § 81.332; 82 Fed. Reg. at 54,263-4 (Nov. 16, 2017); Pleading Log 19 at 11:14-16 (Rebuttal Testimony of Randy Parmley).

2. "Nonattainment Area" Under GCP-Oil & Gas Does Not Include Locations Designated By EPA As In "Attainment" with the 2015 Ozone NAAQS

Since the registered XTO facilities are located in areas currently designated in "attainment" for the ozone NAAQS, WEG's argument requires the EIB to interpret "nonattainment area" in the Permit to include locations where monitoring data alone *may indicate* exceedance of the 2015 ozone NAAQS, but have not been designated by EPA as "nonattainment." The EIB should reject the argument: WEG's interpretation is incorrect and inconsistent with the Air Quality Control Act and the NMED's long-standing interpretation of the term "nonattainment area" for ozone.

WEG asks the EIB to adopt an interpretation of "nonattainment area" that is inconsistent with the Air Quality Control Act, which defines "nonattainment area" as "for any air contaminant an area that is designated 'nonattainment' with respect to the contaminant within the meaning of

Section 107(d) of the federal [Clean Air Act]." NMSA 1978, § 74-2-2(N). The EIB does not have authority to adopt a regulation, including a definition of "nonattainment area," that is inconsistent with the Air Quality Control Act. NMSA 1978, § 74-2-5(B)(1) (authorizing EIB to "adopt…rules and standards consistent with the Air Quality Control Act…").

The Air Quality Control Act definition was amended in 1992 and is now substantively identical to the federal CAA and federal regulatory definition. *Compare* Section 74-2-2(N) ("nonattainment area" means for an air contaminant an area that is designated "nonattainment" with respect to that contaminant within the meaning of Section 107(d) of the federal act;) *with* 42 U.S.C. § 7501(2) ("The term 'nonattainment area' means, for any air pollutant, an area which is designated 'nonattainment' with respect to that pollutant within the meaning of section 7407(d) of this title"). NMED testified that the state regulations "must be read as to be consistent with [the federal Clean Air Act regulations]." Pleading Log 18 at 3:4-12 (NMED Ex. 11-Rebuttal Technical Testimony of Elizabeth Bisbey-Kuehn). As Ms. Bisbey-Kuehn further stated:

> If the Board were to find otherwise, not only would it run contrary to the stringency provisions in the New Mexico Air Quality Control Act, it would mean that the Department would have to conduct its own non-attainment designation process under state law. Neither the state Air Quality Control Act nor the Board's regulations provide for such a process and the Department does not have the resources to conduct such a process.

Id. at 3:15-18. In short, WEG's interpretation would expand state regulation to an area designated as attainment *as if it were nonattainment in the absence of an EPA designation*, in effect rendering the designation process meaningless. *See* Pleading Log 19 at 12.

Additionally, WEG's proposed interpretation would cause the EIB's permitting regulations to violate the Legislature's prohibition against adopting rules that are "more stringent" than required by federal law. *Id. See* Section 74-2-5(C); *Espinosa v. Roswell Tower, Inc.*, 1996-NMCA-006, ¶ 17, 121 N.M. 306, 910 P.2d 940. *Cf. State ex rel. Hanosh v. State ex rel. King*,

2009-NMSC-047, ¶ 12, 147 N.M. 87, 217 P.3d 100 ("hold[ing] a state agency accountable to statutory limitations [] imposed upon executive authority by the legislative branch… goes to the heart of constitutional separation of powers, just as it is the exclusive province of the judicial branch to ascertain what the law is and afford appropriate relief."). Specifically, Section 74-2-5(C), which authorizes the EIB to adopt regulations to achieve ambient air quality standards in nonattainment areas, limits those regulations to "be no more stringent than but at least as stringent as required by the federal act and federal regulations . . . pertaining to nonattainment areas; and shall be applicable only to sources subject to such regulation pursuant to the federal [Clean Air A]ct." Section 74-2-5(C)(1).

WEG's suggested interpretation of "nonattainment area," seeks to expand the coverage of the EIB's nonattainment permitting rule, 20.2.79 NMAC, to sources located in "attainment areas" and directly violates the stringency prohibition in the Air Quality Control Act. The EIB must reject this absurd interpretation which in effect renders its regulation unlawful. *See* NMSA 1978, § 12-2A-18(A)(3) (1997) (requiring a statute or rule to be "construed, if possible, … to avoid an unconstitutional, absurd or unachievable result"); *cf.*, *State v. Moya*, 2007-NMSC-027, 141 N.M. 817 ("…we must be cautious in applying the plain meaning rule. When the results would be absurd, unreasonable, or contrary to the spirit of the statute, we will not employ a formalistic and mechanical statutory construction. Instead, we give effect to the Legislature's intent by adopting a construction which will not render the statute's application absurd or unreasonable, and we construe the statute according to its obvious spirit or reason. When construing a statute according to its obvious spirit, courts may substitute, disregard or eliminate, or insert or add words to a statute.") (Internal quotation marks and citations omitted).

Further, WEG's interpretation of "nonattainment area" to include locations currently designated as in "attainment" with the 2015 Ozone NAAQS is inconsistent with NMED's long-standing interpretation of the term and is not supported by evidence in the record. As NMED's witnesses testified, NMED has never required sources subject to the permitting regulations and located in areas designated "attainment" to submit site-specific modeling evaluating the impacts of ozone precursor emissions on ambient ozone concentrations. Tr. 162-164, 207, 226-227. NMED's current modeling guidelines do not require such an analysis. Tr. 163; Pleading Log 18 at 5-6 (NMED Ex. 11). Moreover, as Ms. Bisbey-Kuehn testified, NMED never interpreted the definition of "nonattainment area" in the permitting regulations, 20.2.72 and 20.2.79 NMAC, to apply to areas where monitored or modeled concentrations exceed the ozone NAAQS. Tr. 198:21-199:4. NMED has not rejected any GCP-Oil & Gas registrations for Lea County or Eddy County based on the monitored concentrations. *Id*. NMED continues to approve registrations in those counties. Tr. 188.

As witnesses for both NMED and XTO testified, the differences in definition between the EIB regulations and the state and federal statutes is best explained by the fact that the regulatory definitions track a previous iteration of Section 171(2) of the federal CAA, 42 U.S.C. § 7501(2),[7] and have not yet been amended to conform to the current federal definition (since 1990) or state statutory definition. Tr. 204: 5-205:1, 219:25-220:4, 266:13-20. *See also* Pleading Log 14 at 11:29-12:18.

Finally, although NMED may place additional terms and conditions in the Permit that effectively act as prerequisites to qualifying for the Permit—*e.g.*, not being located in Bernalillo

[7] Prior to 1990, the Section 171 of the CAA defined "nonattainment area" as, "for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under subparagraphs (A) through (C) of section 7407(d)(1) of this title."

County—here Ms. Bisbey-Kuehn, the author of GCP-Oil & Gas, testified that the reference to 20.2.72 and 20.2.79 NMAC in the Permit was not such an effort. Tr. 251-252, 266; Pleading Log 18 (NMED Ex. 11) at 3. NMED is in the best position to interpret what it meant when it issued the Permit with those antiquated citations, and it clearly did not intend the Permit to prohibit registrations short of the formal designation of an area by EPA as "nonattainment."

C. WEG's Concerns Should Be Addressed Through Rulemaking

WEG's challenge to the Registrations and NSR permit at issue in this proceeding is really a challenge to New Mexico's implementation of the federal 2015 Ozone NAAQS and its regulation of Ozone precursor emissions, including emissions from oil and gas sources, in Lea and Eddy Counties. As XTO's Witness concluded:

> Ozone formation photochemistry is a complex process and ozone mitigation strategies leading to ozone reduction rulemaking needs to be based on the best available analyses possible. Without a robust ozone model, it is not known if the NOx and VOC precursors authorized by these oil and gas sources will have any impact on the days for which highest ozone monitoring values occurred. Ozone modeling must be done on a regional basis in order to address source-specific mitigation from industry sources, mobile sources, non-anthropogenic sources (fires, lightning, stratospheric intrusion), and ozone transport issues. Only through these complex studies can a regulator implement measures that will maintain ambient concentrations below the NAAQS.

Pleading Log 14 at 20:22-29

XTO understands that NMED is already implementing studies aimed at developing a comprehensive and meaningful plan and regulatory framework to assure attainment of the 2015 ozone NAAQS, as contemplated by the New Mexico Air Quality Control Act, Section 74-2-5.3. *See, e.g.*, Tr. 199-03. This established process should be allowed to continue, rather than making decisions aimed as specific GCPs in the absence of sound scientific investigation.

CONCLUSION

For the reasons stated, the EIB should affirm NMED's approval of (1) Registration Number 8729 for XTO's Corral Canyon 23 facility, located 10.2 miles Southeast of Malaga in Eddy County, and (2) Registration Number 8730 for Big Eddy Unit DI 38 facility, located 9 miles Northeast of Loving, in Eddy County, and deny WEG's Petition.

PROPOSED FINDINGS OF FACT

A. Background and Procedural History for Registration Numbers 8729 and 8730

1. On April 27, 2018, after notice and public hearing, NMED issued GCP-Oil & Gas authorizing the construction and operation of certain oil and gas facilities in New Mexico (except those in Bernalillo County, tribal lands, nonattainment areas, and the City of Sunland Park). Pleading Log 1 at 13.

2. On February 24, 2020 (received by NMED on February 26, 2020), XTO submitted the registration application for the Corral Canyon 23 facility (Registration Number 8729). Pleading Log 1 at 9.

3. XTO proposed to construct and operate the Corral Canyon 23 facility, a centralized production tank battery, with typical oil and gas storage and processing equipment associated with upstream operations, located 10.2 miles Southeast of Malaga, in Eddy County, New Mexico. *Id.*

4. As proposed, the Corral Canyon 23 facility has a potential emission rate greater than 10 pounds per hour or 25 tons per year, but less than 100 tons per year, of a regulated air contaminant. *Id.*

5. On March 27, 2020, NMED issued its approval of XTO's application for the Corral Canyon 23 facility. In issuing its approval of the registration application, NMED stated that "the

information provided [in the application] is sufficient to issue your permit in accordance with 20.2.72.220 NMAC and the GCP-O&G conditions." *Id.*

6. On February 24, 2020 (received by NMED on February 26, 2020), XTO submitted the registration application for the Big Eddy Unit DI 38 facility (Registration Number 8730). Pleading Log 1 at 11.

7. XTO proposed to construct and operate the Big Eddy Unit DI 38 facility, a centralized production tank battery, with typical oil and gas storage and processing equipment associated with upstream operations, located 9 miles Northeast of Loving, in Eddy County, New Mexico. *Id.*

8. As proposed, the Big Eddy Unit DI 38 facility has a potential emission rate greater than 10 pounds per hour or 25 tons per year, but less than 100 tons per year, of a regulated air contaminant. *Id.*

9. On March 27, 2020, NMED issued its approval of XTO's application for the Big Eddy Unit DI 38 facility. In issuing its approval of the registration application, NMED stated that "the information provided [in the application] is sufficient to issue your permit in accordance with 20.2.72.220 NMAC and the GCP-O&G conditions." *Id.*

10. On May 12, 2020, NMED notified WEG of the approval of Registrations 8729 and 8730. Pleading Log 1 at 1.

11. On June 12, 2020, WEG filed its Petition for a Hearing ("Petition") before the Board on Registrations 8729 and 8730, as well as Registration 8733, submitted by Spur Energy Partners, LLC. *Id.*

12. WEG stated its objections to Registrations 8279 and 8280 as follows:

> Under Section A103 of the GCP-Oil & Gas, 'the permittee shall comply with all applicable sections of the requirements in Table 103' Listed in Table 103

> is '40 CFR 50 National Ambient Air Quality Standard.' The 8-hour ozone NAAQS of 70 ppb is provided at 40 C.F.R. § 50.19(a), and is accordingly incorporated as a mandatory requirement for all GCP-Oil & Gas registrants.
>
> As Noted above, the ambient air quality in the region surrounding the Facilities, as evidenced by monitoring data from NMED monitoring stations in Lea and Eddy Counties, is *already* exceeding the ozone NAAQS. Accordingly, there is no way for the permittees to comply with the ozone NAAQS, as required for registration under the GCP-Oil & Gas. Accordingly, NMED's decision to approve the registrations – and thereby authorize additional emissions of ozone precursor pollutants in an area already exceeding the ozone NAAQS – was unlawful, arbitrary, and capricious.

Pleading Log 1 at 6, ¶ F.

13. WEG requested "rescission of the Registrations under 20.2.72.220 NMAC, 20.1.2 NMAC, and NMSA 1978, § 74-2-7. WEG further asserted that in light of the area's well-documented ozone pollution levels in exceedance of the ozone NAAQS, NMED should not approve any new registrations under the GCP-Oil & Gas for oil and gas facilities in Eddy and Lea Counties until NMED develops and implements a formal plan, including regulations, to reduce ozone precursors in the area and further demonstrates that additional emissions of ozone precursors form any new permit registrations will be able to fully comply with the ozone NAAQS." *Id.* at 7, ¶ G.

14. On July 20, 2020, the EIB issued an Order of Consolidation for Hearing, consolidating for purposes of hearing EIB 20-33, the appeal of Registration Nos 8720, 8730, and 8733, with EIB 20-21(A), the appeal of Air Quality Permit No. 7482-M1 issued to 3 Bear Delaware Operating-NM LLC ("3 Bear"). Pleading Log 8.

15. On July 20, 2020, Chair Volkerding issued a Procedural Order which, in part, limited the scope of testimony stating "The Petition in EIB 20-33(A) . . . contends that, irrespective of the formal attainment designation, the greater Carlsbad region where the facilities at issue are located is in a state of actual non-attainment with the National Ambient Air Quality Standard

(NAAQS) for ozone, as defined by the applicable regulations. Accordingly, Petitioner contends that the Department was required to deny the Registrations under A1090 of the GCP-Oil & Gas." Pleading Log 9 at 2, ¶ III.

16. August 3, 2020, Spur Energy Partners, LLC ("Spur"), 3 Bear, NMED, WEG, and XTO filed Statements of Intent to Present Technical Testimony, including written direct testimony. Pleading Log 10-14.

17. On August 21, 2020, EIB issued a Notice of Consolidated Public Hearings, notifying the public of the public hearing on the WEG Petitions. Pleading Log 15.

18. On September 2, 2020, 3 Bear, Spur, NMED, XTO, and WEG filed written rebuttal testimony. Pleading Log 16-20.

19. A remote public hearing was held via Cisco Webex Meetings on September 23 and 24, 2020.

B. WEG Testimony

20. In support of its position that the Registrations should be rescinded, WEG offered the technical direct and rebuttal testimony of Dr. Ranajit Sahu. Pleading Log 13, 20.

C. NMED Testimony

21. In support of its position that the Registrations should be affirmed, NMED offered the pre-filed written direct testimony of Dr. Sufi Mustafa and Elizabeth Bisbey-Kuehn Pleading Log 12 (NMED Ex. 1 Testimony of Sufi Mustafa, NMED Ex. 5 Testimony of Elizabeth Bisbey-Kuehn); and the pre-filed written rebuttal testimony of Elizabeth Bisbey Kuehn, Pleading Log 18 (NMED Ex. 11 Rebuttal Technical Testimony of Elizabeth Bisbey Kuehn).

22. Dr. Mustafa, the Manager of the Modeling and Emissions Inventory Unit in the Air Quality Bureau's Planning Section, testified that:

> Ozone is different from the other criteria pollutants in that it is not directly emitted from sources, but instead is primarily formed in the ambient air through chemical interactions between other precursor pollutants.
>
> …
>
> The potential complexity of photochemical modeling has led several organizations, including EPA and the Western Regional Air Partnership ("WRAP"), to develop modeling platforms that contain most of the information necessary for photochemical grid modeling exercises. Despite the development of these platforms, photochemical modeling exercises are still highly complex, and are mostly conducted by private specialists under contract with state and local air quality agencies. These specialized studies are far more costly then dispersion modeling; for instance, the photochemical modeling associated with the Department's Ozone Attainment Initiative is being performed by highly specialized contractors at a cost of over three-hundred thousand dollars. The NMED Modeling Guidelines recognize the cost and difficulty of ozone modeling, stating as follows:
>
> > In accordance with [EPA's MERPs Guidance], NMED performs ozone modeling on a regional scale as the need arises, rather than requiring permit applicants to quantify their contribution to a regional ozone concentration. Comprehensive ozone modeling is too resource intensive to attach this expense to a typical permit application, and screening modeling on an affordable scale currently cannot quantify a source's impacts to ambient ozone concentrations.

Pleading Log 12 (NMED Ex. 1) (Internal citations omitted).

23. Dr. Mustafa further testified that:

> The Bureau follows the EPA Modeling Guidance, which uses a two-tiered demonstration is included in the NMED Modeling Guidelines and is the basis for NMED's modeling requirements. Tier I is a screening tool under the PSD permitting program that uses Modeled Emission Rates for Precursors ("MERPs"), and Tier II requires the application of photochemical grid models to determine whether the source makes a significant impact on ozone and secondary PM2.5. MERPs provide a scaling factor for emissions at a subject facility based on photochemical modeling done for a 'representative facility'. These scaling factors allow precursor emissions to be converted to an estimated ozone concentration based on the atmospheric conditions in the area surrounding the representative facility. . . . The scaling factors from both representative facilities indicate that an individual facility would have to emit more than 250 tons per year of both NOX and VOCs to cause ozone concentrations to increase more than a significant amount (the SIL) of ozone.

Id. at 8-9.

24. Dr. Mustafa concluded that:

> It is my opinion that the both the NSR Permit and the GCP Registrations comply with the AQCA and the air quality rules. It is also my opinion that there is no scientific or technical evidence on which the Department could determine that the activities authorized by the NSR Permit or any of the Registrations would cause or contribute to violations of the ozone NAAQS. Therefore, the Board should uphold the Department's decision to approve the Permit and the Registrations.

Id. at 10.

25. Ms. Bisbey-Kuehn, Chief of NMED's Air Quality Bureau and author of GCP-Oil & Gas, testified that:

> The process of determining whether an area is in attainment or nonattainment of the ozone NAAQS is triggered when the "design value" for ozone is shown to be in excess of the standard. The design value is determined by calculating the three-year average of the annual fourth highest daily maximum 8-hour ozone concentration. It is important to note that readings from monitors showing design values that exceed the ozone NAAQS do not in themselves constitute a nonattainment designation or trigger changes to permitting or other actions on the part of the Department. Under the CAA, the AQCA, and the Regulations, an ozone "nonattainment area" means an area that has gone through the formal nonattainment designation process and has been designated as such by EPA.

Pleading Log 12 (NMED Ex. 5) at 4

26. Ms. Bisbey-Kuehn also testified that:

> Ozone monitoring data for 2017-2019 indicate that other areas of the state are approaching or violating the 2015 ozone NAAQS. In particular, the counties of Eddy, Lea, and the remainder of Doña Ana are monitoring ozone levels in violation of the standard, while San Juan, Rio Arriba, Sandoval and Valencia County are within 95% of it. The AQCA requires the State to plan for ozone mitigation in areas where monitors indicate ozone levels greater than or equal to 95% of the ozone standard. NMED is addressing these areas through the Ozone Attainment Initiative and 13 EPA's Ozone Advance program, as discussed below.

Pleading Log 12 (NMED Ex. 5) at 6:7-13.

27. Ms. Bisbey-Kuehn further testified that:

> Section 74-2-5.3 of the Air Quality Control Act "specifically mandates that the Board take action to control VOC and NOx emissions when the Board determines

> that emissions from sources within its jurisdiction cause or contribute to ozone concentrations in excess of ninety-five percent of the ozone NAAQS. Under this statutory provision, the Board is required to adopt a plan, including regulations, to control emissions of oxides of nitrogen, or NOX, and volatile organic compounds, or VOCs, to provide for the attainment and maintenance of the ozone standard for those areas that exceed 95% of the ozone standard.

Id. at 6:16-22. And that, pursuant to that provision:

> [T]he [Air Quality] Bureau has embarked upon the Ozone Attainment Initiative ("OAI") to develop a series of rules and voluntary measures to mitigate emissions of NOX and VOCs in the aforementioned counties. A proposed rule to control NOX and VOC emissions from various types of equipment related to the production of oil and gas in the South San Juan and Permian Basins has been developed, and the Bureau intends to bring this proposal to the Board for a hearing in December of this year. The Bureau has contracted with the Western States Air Resources Council and Ramboll to conduct photochemical grid modeling for ozone to support our rulemaking efforts. The results of this modeling will identify anthropogenic natural, and state and international contributions to the ozone concentrations monitored in the counties of concern. The results of this modeling effort are expected in October of 2020.

Id. at 7:14-23

28. Ms. Bisbey-Kuehn concluded that "The Board should uphold the Department's decision to approve the Permit and the Registrations and should await the upcoming rulemakings that will be brought before it shortly to address the issue of ozone pollution in the State." *Id.* at 10.

29. In her rebuttal testimony, Ms. Bisbey-Kuehn stated that Dr. Sahu's direct testimony "demonstrate a fundamental misunderstanding of the term 'nonattainment.' The monitors in Lea and Eddy Counties are registering ***exceedances*** of the ozone NAAQS in the surrounding ambient air; they are not 'demonstrating nonattainment.'" Pleading Log 18 at 1 (NMED Ex. 11).

30. She further testified that:

> [W]hile the Department does not dispute that the monitors in Hobbs and Carlsbad have been registering exceedances of the NAAQS in recent years, as calculated by the design values, there is no 'non-attainment' area at this time. Instead, Leas and Eddy County are currently designated as 'attainment', and EPA has proposed to

> retain that designation as of January 16, 2018. According to EPA's Ozone Advance guidance when an area that is designated as attainment has monitors that are showing violations of an existing ozone NAAQS (as opposed to a new or revised standard), EPA can consider measures being implemented by a state to address those monitored exceedance when deciding whether that area should be redesignated as nonattainment. Such measures are exactly what NMED is currently undertaking through the Ozone Attainment Initiative, and participation in EPA's Ozone Advance Program.

Id. at 4.

31. Ms. Bisbey-Kuehn recommended that the EIB "uphold the Department's decision to approve the permits at issue in these appeals." *Id.* at 11.

D. XTO Testimony

32. In support of its position that the Registrations were properly issued and should be affirmed, XTO offered the technical direct and rebuttal testimony of Randy Parmley of DiSorbo Consulting. Pleading Log 14, 19.

33. Mr. Parmley holds a Bachelor of Arts in Natural Science/Chemistry and a Bachelor of Science in Environmental Engineering from the University of Texas at Austin. He is a registered professional engineer in Texas. Pleading Log 14 Ex. 1.

34. Mr. Parmley has over 35 experience on air permitting and regulatory matters, and has prepared over 200 applications for case by case air quality permits and filed over 500 General permit registrations (mostly in Texas) for the oil and gas industry, terminals, and other process industry types. *Id.*, 6:19-7:6.

35. Mr. Parmley has worked on projects encompassing almost every aspect of air quality in the petroleum industry. Early in his career, he worked in the SIP Plan section of EPA Region VI, with rule development responsibilities in New Mexico. The majority of his current permitting expertise is serving clients in the Houston-Galveston-Brazoria ("HGB") ozone nonattainment area. Mr. Parmley has worked on numerous projects investigating potentially

applicable VOC and NOx control strategies to support SIP development aimed at getting nonattainment areas back to compliance with the NAAQS. He has conducted ozone modeling and published in that subject area. In addition to managing and conducting quality assurance for monitoring activities in the United States, he has helped design air quality monitoring networks in Mexico, Chile, Venezuela, Romania, and Thailand. He has worked with the oil and gas industry on many occasions in the areas or securing or establishing emission reduction credits necessary for establishing offsets for Nonattainment New Source Review permitting. He has conducted permitting and modeling seminars across the country and internationally. Mr. Parmley has broad knowledge of the role of monitoring data in the nonattainment process, ozone modeling experience and rule development. *Id.*

36. Mr. Parmley testified that "[u]nder the [federal] Clean Air Act, a nonattainment area is an area that EPA designates as not meeting (i.e., not attaining) a pollutant-specific NAAQS, in this case ground level ozone. A designation is the formal process EPA uses to assign an attainment, unclassified, or nonattainment status for a given area for any of the six common air pollutants (criteria pollutants – SO_2, Particulate matter - $PM_{2.5}$ and PM_{10}, NO_2, CO, ground level ozone, and lead)." *Id.* at 7:13-18. He also testified that "[n]onattainment designations are made solely by EPA. New Mexico can make recommendations, but each designation for attainment, unclassifiable, or nonattainment is made by EPA." *Id.* at 9:13-16.

37. Mr. Parmley gave the following explanation references to 20.2.72.216 NMAC and 20.2.79 NMAC in GCP-Oil & Gas Condition A100:

> The specific nonattainment reference in the GCP of 20.2.72.216 NMAC refers to Nonattainment Area Requirements, which are applicable to sources that "*would exceed the ambient concentration in Table 1*". These ambient concentrations are listed as Significant Ambient Concentrations. Since ozone is not included in Table 1, the EIB clearly intended these non-major rules and the non-major GCP

registration to be applicable to the pollutants listed on Table 1, which does not include ozone.

20.2.79 NMAC are the major source nonattainment area permitting rules. 20.2.79.7.AA NMAC defines "*Nonattainment area***"** as *"for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under Subparagraphs (A) through (C) of Section 107(d)(1) of the federal Clean Air Act*."

This nonattainment definition in 20.2.79.7.AA NMAC is identical to the Federal nonattainment definition found is Section 171(2) of the Clean Air Act, 42 U.S.C. §7501(2), as it existed prior to 1990.[8] It is important to note that the New Mexico Air Quality Control Act, section 74-2-5.C, provides that "rules adopted by the environmental improvement board or the local board may: (1) include rules . . . to achieve national ambient air quality standards in nonattainment areas; provided that such regulations: (a) shall be no more stringent than but at least as stringent as required by the federal act and federal regulations . . . pertaining to nonattainment areas." In my opinion, the inclusion of areas of modeled or monitored exceedance of a NAAQS that were not formally designated as nonattainment areas under the CAA would be more stringent than the current federal rules "pertaining to nonattainment areas," and thus, inconsistent with the New Mexico Air Quality Control Act.

Based on my reading of the Act, it is clear that the intent of the New Mexico Legislature to follow EPA's use of the term, even though the state's regulatory definition has not been updated to conform to the current federal definition. In my opinion, the 1990 Clean Air Act Amendments change, deleting that portion of the pre-1990 FCAA nonattainment definition referring to "*an area which is shown by monitored data or which is calculated by air quality modeling… to exceed any national ambient air quality standard for such pollutant,*" was done to remove any ambiguity so that nonattainment areas are defined solely on the basis of a designation of the nonattainment area.

id. at 11:16-12:18 (emphasis in original).

38. Mr. Parmley further testified that:

Section 107(d) outlines the framework for these nonattainment designations resulting from a new or revised NAAQS or redesignation under an existing NAAQS. It is important to note the distinction in the Clean Air Act between initial

[8] In 1990, Congress amended the definition to read as follows: *"The term 'nonattainment area' means for any pollutant, an area which is designated 'nonattainment' with respect to that pollutant within the meaning of Section 7470(d) of [Title 42]."*

designations under a new or revised NAAQS (CAA section 107(d)(1)(A)) and redesignation under an existing NAAQS (CAA section 107(d)(3)(A)). Since all portions of Lea and Eddy county were initially designated as attainment and continued to be designated as attainment for the 2015 revision of the ozone NAAQS, any change would be fall under the 107(d)(3)(A) as a redesignation. It is clear that EPA Administrator (and not New Mexico) determines the nonattainment status as evidenced by the wording in 107(d)(3)(A) which states: "…*on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any* State *that available information indicates that the designation of any area or portion of an area within the or interstate area should be revised. In issuing such notification, which shall be public, to the Governor,* the *Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.*"
Clearly, the EPA Administrator has not provided these notifications that would initiate the nonattainment designation process, but is working with New Mexico to initiate data to develop air control measures as mandated in the Air Quality Control Act, § 74-2-5.3, mentioned previously.

Id. at 12:20-13:10

39. Mr. Parmley additionally testified that:

EPA uses numerous rigorous steps in evaluating monitoring data for a design value determination, including quality assurance, exceptional events evaluation, and other procedures to ensure the reliability of a designation. Quality-assured monitoring data is a large part of a data validation effort, but other factors are also important. In order to designate a nonattainment area, there needs to be determination of boundaries for the nonattainment area. A monitoring data value design value above 0.070 ppm does not establish a nonattainment area boundary. Therefore, the Administrator would need to rely on an analysis using the EPA "5-factor" guidance for establishing a boundary for the nonattainment area, similar to the analysis discussed in my testimony earlier for limiting the existing ozone nonattainment area to Sunland Park.

Id. at 13:24-14:3.

40. Mr. Parmley explained the formal designation process for nonattainment areas under the federal CAA as follows:

The procedure for redesignating is outlined in Section 107(d)(3) of the Clean Air Act, 42 U.S.C. §7407(d)(3). The Clean Air Act states that the Administrator may at any time after consideration of the air quality data, planning and control considerations, or any other air quality-related considerations, notify the Governor

> of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised.
>
> It is important to understand that: 1) the Administrator retains the sole authority to approve or deny nonattainment area designation, not the State; 2) the Administrator considers not only air quality data, but also planning and control considerations or any other air quality-related consideration (like ozone transport from Texas or Mexico); and 3) the Administrator has the discretion to initiate this process "at any time" after the consideration of these factors. As discussed previously, the NMED is currently engaged in an Ozone Attainment Initiative (OAI) that is scheduled for completion in the fall of 2020 that will provide additional information for the EPA Administrator to consider prior to initiating a nonattainment designation process.
>
> Within 120 days after receiving the notification from the Administrator, the Governor is required to submit an area that the Governor considers appropriate for redesignation. Within 120 days after receiving this information from the Governor, the Administrator, after making modifications that the Administrator deems necessary, is required to promulgate the redesignation.

Id. at 15:31-16:20.

41. Mr. Parmley concluded that the Registrations were not for facilities located in a nonattainment area, and were thus, properly approved by NMED. Specifically, his conclusions are as follows:

1) The areas where the sources authorized by General Construction Permit (GCP) Oil and Gas Registration Nos. 8729, 8730, and 8733 are currently designated by EPA as being in attainment with the 2015 Ozone NAAQS. All requirements for use of the GCP are otherwise met with these registrations and it would improper to rescind a registration on the nonattainment allegation under consideration in this hearing.

2) Until such time as the EPA Administrator changes the current designations, the NMED should not deny or rescind a GCP based on anything less than a final nonattainment redesignation by EPA.

3) Ozone formation photochemistry is a complex process and ozone mitigation strategies leading to ozone reduction rulemaking needs to be based on the best available analyses possible. Without a robust ozone model, it is not known if the NOx and VOC precursors authorized by these oil and gas sources will have any impact on the days for which highest ozone monitoring values occurred. As such, it is not reasonable to conclude that these sources will be unable to comply with the GCP on the basis of these sources being located in a county where monitors are registering design values over the NAAQS.

4) Ozone modeling must be done on a regional basis in order to address source-specific mitigation from industry sources, mobile sources, nonanthropogenic sources (fires, lightning, stratospheric intrusion), and ozone transport issues. Only through these complex studies can a regulator implement measures that will maintain ambient concentrations below the NAAQS. It appears that the NMED is already implementing studies aimed at developing a comprehensive and meaningful regulatory framework. In my opinion, this established process should be allowed to continue, rather than making arbitrary decisions aimed at specific GCPs in the absence of sound scientific investigation.

Id. at 20-21.

42. Mr. Parmley confirmed in rebuttal testimony that he had "reviewed the WildEarth Guardian's Notice of Intent to Present Technical and Non-Technical Testimony, which included the Expert Report by Dr. Ranajit Sahu; the New Mexico Environment Department's Statement of Intent to Present Direct Technical Testimony, which included the Direct Technical Testimony of Sufi Mustafa and Elizabeth Bisbey-Kuehn; the 3 Bear Delaware Operating-NM, LLC's Statement of Intent to Present Direct Technical Testimony, and the associated Direct Technical Testimony of Jeffry Bennet, P.E., and Lori Marquez; and the Spur Energy Partners, LLC's Statement of Intent to Provide Technical and Nontechnical Testimony, which included the Direct Testimony and Exhibits of Adam Erenstine." Pleading Log 19 at 1:17-2:2.

43. With respect to Dr. Sahu's direct testimony, Mr. Parmley said that he "disagree[d] with several of the observations and all of the conclusions offered by Dr. Sahu" and that "that much of the information offered in [Dr. Sahu's] report is simply NOT relevant to the petition submitted by WEG that the GCP Oil and Gas Registration Nos. 8729 and 8730 do not meet the requirements of the NMAC and GCP with regard to the prohibition from GCP registration for a facility located in a nonattainment area." *Id.* at 2:4-11.

44. Mr. Parmley concluded:

> After reviewing the direct testimonies filed on August 3, 2020 including the WildEarth Guardian's Notice of Intent to Present Technical and Non-Technical Testimony, which included the Expert Report by Dr. Ranajit Sahu, I have reaffirmed the conclusions reached in my direct testimony, namely that the sources authorized by General Construction Permit (GCP) Oil and Gas Registration Nos. 8729 and 8730 are in locations currently designated as in attainment with the 2015 Ozone NAAQS, NMED's GCP Oil and Gas reference to nonattainment areas must be read consistent with NMED application here to only apply to nonattainment areas designated by EPA under the federal Clean Air Act, and as a result, the Board should affirm NMED's approval of GCP registrations for XTO's GCP Oil and Gas Registration Nos. 8729 and 8730.
>
> Adhering to the statutory framework for EPA designation of an area to nonattainment as prescribed in Section 107(d)(3) of the Clean Air Act, 42 U.S.C. §7407(d)(3) and in the New Mexico nonattainment area definitions referring to these rules, provides a framework for essential planning and transition challenges facing the NMED and the regulated community. The WEG proposal, expressed in Dr. Sahu's report, would effectively mandate that the NMED develop an alternate nonattainment designation process to assure that GCP registrants are aware of the attainment status of the area where they propose to locate a facility, since the GCP process precludes site-specific air quality impact analyses. Such a process, which is not specified by State Law, would not be subject to the constraints and public participation requirements of the federal designation process. Moreover, in my view, such an alternate program would be inconsistent with the New Mexico Legislature's direction that the nonattainment program be "no more stringent" than the federal nonattainment program. I am not aware of any state regulating an area designated as attainment as if it were nonattainment in the absence of an EPA nonattainment designation.
>
> In my opinion, the position offered by Dr. Sahu does not provide any plausible justification for the petition made by WEG that the GCP Oil and Gas Registration Nos. 8729 and 8730 do not meet the requirements of the NMAC and GCP rules with regard to the prohibition from GCP registration for a facility located in a nonattainment area. His report simply does not address the established prerequisite that an area is not a nonattainment area until designated as such by the EPA.

Id. at 11:11-12:18.

45. At hearing, Mr. Parmley reaffirmed his conclusion that Registrations 8729 and 8730 were properly approved by NMED. Tr. at 449.

PROPOSED CONCLUSIONS OF LAW

A. Statutory and Regulatory Framework

1. The Air Quality Control Act defines "nonattainment area" as "for any air contaminant an area that is designated 'nonattainment' with respect to the contaminant within the meaning of Section 107(d) of the federal [Clean Air Act]." Section 74-2-2(N).

2. The Air Quality Control Act, § 74-2-5(C)(1) authorizes the EIB to adopt rules "to achieve national ambient air quality standards in nonattainment areas; provided that such regulations: (a) shall be no more stringent than but at least as stringent as required by the federal [Clean Air] act and federal regulations . . . pertaining to nonattainment areas; and (b) shall be applicable only to sources subject to such regulation pursuant to the federal act."

3. The Air Quality Control Act further requires the EIB to adopt regulations requiring "a person intending to construct or modify any source, except as otherwise specifically provided by regulation, to obtain a construction permit from [NMED] prior to such construction or modification." Section 74-2-7(A)(1).

4. The EIB, pursuant to Section 74-2-7(A)(1) adopted 20.2.72 NMAC, which requires that "[a]ny person constructing a stationary source which has a potential emission rate greater than 10 pounds per hour or 25 tons per year of any regulated air contaminant for which there is a National or New Mexico Ambient Air Quality Standard" to obtain a permit from NMED prior to such construction or modification.

5. 20.2.72.220 NMAC authorizes NMED to issue general construction permits for certain similar sources. The regulation provides in relevant part:

> A. Issuance of general construction permits:
>
> **(1)** The department may, after notice under Subsections A and B of 20.2.72.206 NMAC and a public hearing with opportunity for public participation under Subsection C of 20.2.72.206 NMAC issue one or more general construction permits, each covering numerous similar sources. Sources registered for coverage under a general permit shall be generally homogeneous in terms of

operations, processes and emissions, subject to the same or substantially similar requirements, and not subject to case-by-case standards or requirements.

(2) Each general construction permit shall:

(a) Describe which sources may qualify to register under the general construction permit;

(b) Specify the contents of a complete application to register under the general construction permit. The department may, in the general construction permit, provide for applications which deviate from the requirements under 20.2.72.203 NMAC, provided that such applications include:

(i) All information necessary to determine qualification for, and to assure compliance with, the general construction permit; and

(ii) Applicant's public notice requirements including, at a minimum, a notice: a) published once in the legal notices section of a newspaper in general circulation in the county or counties in which the property on which the facility is proposed to be constructed or operated is located; and b) posted at the proposed or existing facility entrance in a publicly accessible and conspicuous place on the property on which the facility is, or is proposed to be, located, until the general permit registration is granted or denied;

(c) Contain permit terms and conditions which apply to all sources registered under the general construction permit, and which include:

(i) Sufficient terms and conditions to assure that all sources registered under and operating in accordance with the general construction permit will meet all applicable requirements under the federal act, the New Mexico Air Quality Control Act and this chapter (Air Quality), including 20.2.74 NMAC (Prevention of Significant Deterioration), 20.2.77 NMAC (New Source Performance Standards), 20.2.78 NMAC (Emission Standards for Hazardous Air Pollutants), 20.2.79 NMAC (Permits - Nonattainment Areas), and 20.2.82 NMAC (Maximum Achievable Control Technology Standards for Source Categories of Hazardous Air Pollutants), and will not cause or contribute to air contaminant levels in excess of any national or New Mexico ambient air quality standard; and

(ii) Monitoring, record keeping and reporting requirements appropriate to the source and sufficient to ensure compliance with the general construction permit. At a minimum, the general permit shall specify where the records shall be maintained, how long the records shall be retained and that all records or reports shall be made available upon request by the department;

(iii) As appropriate, terms and conditions to address and report emissions occurring during upsets, startups and maintenance; and

(d) Specify that any document, including any application form, report, compliance certification and supporting data, submitted pursuant to this section (20.2.72.220 NMAC) shall contain a certification that meets the requirements of Paragraph 10 of Subsection A of 20.2.72.203 NMAC.

* * *

C. Registration under a General Construction Permit:

(1) The owner or operator of a source required to obtain a permit pursuant to this part and which qualifies to register under a general construction permit shall either:

(a) Apply to the department to register under the terms of the general construction permit; or

(b) Apply for a construction permit under 20.2.72.200 NMAC.

(2) Within thirty (30) days of receiving an application to register under a general construction permit, the department shall review the application for completeness and shall grant or deny the registration. The department shall not grant the registration until at least fifteen (15) days after the date the applicant's public notice was initiated. The department shall notify the applicant of its determination by certified mail. The department shall attach a copy of the general construction permit to registration approvals.

(3) The department shall grant registration under a general permit to a source only if:

(a) The application is complete and meets the requirements of this section (20.2.72.220 NMAC); and

(b) The source meets the terms and conditions of the general permit.

6. NMED issued GCP-Oil & Gas pursuant to the Air Quality Control Act and 20.2.72.220 NMAC.

7. Construction and operation of Corral Canyon 23 and Big Eddy Unit DI 38 require a permit from NMED, pursuant to 20.2.72.200 NMAC, prior to construction.

B. Scope of Proceeding

8. The scope of this hearing is confined to issues involving the attainment status with the NAAQS for ozone at the facility locations.

9. The Parties have agreed that the specific emission limits and emission calculations of the GCP-Oil & Gas Registrations are not at issue in this appeal.

C. Standard of Decision

10. The EIB's review of the Registrations is governed by the Air Quality Control Act, NMSA 1978, § 74-2-7(I)-(K), and EIB's pre-construction permitting rule, 20.2.72 NMAC.

11. The Petitioner has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to justify the relief sought in the petition. Section 74-2-7(K); 20.1.2.302 NMAC.

12. Following the establishment of a prima facie case by the petitioner, any person opposed to the relief sought in the petition has the burden of going forward with any adverse evidence and showing why the relief should not be granted. 20.1.2.302 NMAC.

13. The areas where the sources authorized by GCP-Oil & Gas Registration Nos. 8729, 8730, and 8733 are currently designated by EPA as being in attainment with the 2015 Ozone NAAQS.

D. Decision on Challenged Registrations

14. WEG has not met its standard of proof that the NMED's approvals of the XTO Registrations were improper.

15. All requirements for use of the GCP were met with these Registrations and it is improper to rescind a registration on the nonattainment allegation under consideration in this hearing.

16. Until such time as the EPA Administrator changes the current designations, the EIB may not deny or rescind a GCP-Oil and Gas Registration based on anything less than a formal nonattainment redesignation by EPA.

17. Based on the evidence presented in this hearing, WEG's petition to rescind XTO's Registrations must be denied and the Registrations are affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2020, a true and correct copy of the foregoing ***XTO Energy Inc.'s Closing Arguments and Proposed Findings of Fact and Conclusions of Law*** was served via electronic mail to the following:

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