STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF THE APPEAL OF REGISTRATION NOS. 8270, 8730, AND 8733 UNDER THE GENERAL CONSTRUCTION PERMIT FOR OIL AND GAS FACILITIES **WildEarth Guardians,** ***Petitioner.***	**Case No. EIB 20-33(A)** **SPUR ENERGY PARTNERS CLOSING ARGUMENT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** **Hearing Date: September 23-24, 2020**

Pursuant to the Hearing Officer's September 18, 2020 Procedural Order and November 3, 2020 Order Granting Extension of Time to File Post-Hearing Submittals in this matter, as well as 20.1.2.401 NMAC, Respondent Spur Energy Partners LLC ("Spur") submits this Closing Argument and Proposed Findings of Fact and Conclusions of Law.

CLOSING ARGUMENT

WildEarth Guardians ("Guardians") submitted a Petition for a Hearing ("Petition") to the New Mexico Environmental Improvement Board ("Board") challenging the New Mexico Environment Department's ("NMED" or the "Department") approval three registrations (#8729, #8730, and #8733) (collectively, the "Registrations"), under the Air Quality Bureau General Construction Permit for Oil and Gas Facilities ("GCP-Oil & Gas" or the "Permit"). This included the GCP-Oil & Gas registration for Spur Energy Partner LLC's ("Spur's") Dorami 2H, 4H, and 9H Federal Tank Battery facility ("Dorami Facility" or "Facility").

The Dorami Facility is an oil and gas facility located in Eddy County, New Mexico, approximately 16 miles southeast of Artesia. *See* John Connolly Testimony, Spur Ex. 2 at 2. It supports the operations and production associated with three of Spur's wells, which were drilled between January and March 2020 and have been producing since June 2020. *Id*. at 1-2. To minimize emissions, the Facility relies on electricity to power certain equipment and, except for limited sales pipeline capacity that requires Spur to currently flare the associated gas, the emissions from the Facility would fall below the construction permit threshold levels. *Id*. at 4. Due to the third-party pipeline capacity issue, Spur registered the Facility under the GCP-Oil & Gas.

Guardians's appeal boils down to two arguments. First, Guardians attempts to argue that because of the monitored exceedances for ozone National Ambient Air Quality Standards ("NAAQS") in Lea and Eddy Counties, those areas are in "actual non-attainment" for ozone, and

therefore, otherwise eligible sources of ozone precursors cannot register under the GCP-Oil & Gas. Second, in a related argument, Guardians argues that because of the monitored ozone exceedances, the Dorami Facility (or any other facility) cannot comply with the terms of the GCP-Oil & Gas because it would be in violation of the ozone NAAQS.

As demonstrated below, Guardians's arguments are without merit, contrary to applicable law, regulation, and policy, and beyond the scope of the Board's review under 20.2.72.220(C)(5) NMAC. Accordingly, the Petitioner's requested remedy should be DENIED, and the Board should SUSTAIN the action of the Department.

I. The Board's review of a registration under a general construction permit is limited to whether the source qualifies to register.

Guardians, as 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." 20.1.2.302 NMAC. If the petitioner meets its initial prima facie burden, parties opposed to the petition have "the burden of going forward with any adverse evidence and showing why the relief should not be granted." 20.1.2.302 NMAC. Based upon the evidence presented at the hearing, the Board "shall sustain, modify or reverse the action of the department." NMSA 1978, § 74-2-7(K).

Under the Board's regulations, a petition for administrative review for registration under a general construction permit is limited to "whether or not a source *qualifies* to register for coverage under a general construction permit." 20.2.72.220(C)(5) NMAC (emphasis added). Review "shall not extend to administrative review of the general permit itself." *Id*. In other words, review of the underlying general permit, its terms, provisions, and assumptions, "shall be available . . . only upon issuance or revision of the general permitting action." *Id*.

II. Guardians is attempting circumvent the restriction on the scope of review and effectively force an administrative review of the general permit itself.

Rather than limit its challenge of Spur's specific registration to whether it qualifies for coverage under the GCP-Oil and Gas, Guardians instead broadens its challenge to attack the validity of the underlying Permit itself. Guardians contends that no oil and gas facility can be permitted to register under the GCP-Oil & Gas in Lea and Eddy Counties because all oil and gas facilities will fail to meet the ozone NAAQS standard. Because the GCP-Oil and Gas already made the determination that sources that meet the qualifications for the Permit will comply with all NAAQS standards, including the standard for ozone, Guardians' challenge is necessarily an impermissible attack on the Permit itself.

The GCP-Oil and Gas was issued by NMED pursuant to Section 220, Title 20, Chapter 2, Part 27 of the New Mexico Administrative Code. 20.2.72.220 NMAC. This regulation allows NMED to issue general construction permits to register similar sources that have similar operations, processes, and emissions and are "subject to the same or substantially similar requirements, and not subject to case-by-case standards or requirements." 20.2.72.220.A.(1)

NMAC. Overall, general construction permits offer a streamlined permitting avenue for similar sources if the source can meet the qualification criteria.

The Board mandated specific requirements for adoption of a general construction permit. 20.2.72.220.A.(2) NMAC. In particular, general construction permits must contain:

> 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 [the New Mexico Air Quality Regulations], [. . .] and will not cause or contribute to air contaminant levels in excess of any national or New Mexico ambient air quality standard.

20.2.72.220.A.(2)(c)(i) NMAC. To ensure compliance, the general construction permit must include monitoring, record keeping, and reporting requirements. 20.2.72.220.A.(2)(c)(ii) NMAC. Because sources that register for a general construction permit do not have facility-specific compliance requirements, the regulations require an analysis and determination *prior to* issuance of the general construction permit that a source's operation in compliance with the terms and conditions of the permit will meet the applicable requirements – including ambient standards.

NMED issued the GCP-Oil & Gas on April 27, 2018. Prior to issuance, NMED engaged in significant public outreach, including holding a hearing before an NMED hearing officer. Spur Ex. 3 at 3-4. As reflected in B100 of the Permit and as required per the regulations, NMED determined that all facilities registered under and operating in accordance with the terms of the GCP-Oil & Gas will meet the applicable statutory and regulatory requirements and will not cause or contribute to air contaminant levels in excess of any national or New Mexico ambient air quality standard. *See* Spur Ex. 5 at 31; *see also* testimony of Ms. Bisbey-Kuehn at Tr. 256:5-257:13.

Guardians chose not to participate in the public process for adoption of the GCP-Oil & Gas and now seeks to challenge NMED's application of the Permit through objections to individual source registrations. Guardians does not challenge any specific aspect of Spur's Facility or the registration, but brings a general challenge that relies on general allegations that would apply to any operator registering under the GCP-Oil & Gas in Lea and Eddy Counties. As stated in the Petition for Review, Guardians challenges:

> NMED's approval of the Registrations in their entirety without considering the cumulative impacts on air quality, and the subsequent impact on public health, from the new and additional emissions from the newly-approved oil and gas Facilities when added to emissions from existing oil and gas development, transmission, and processing, as well as other industrial facilities in the Greater Carlsbad region, including those in Lea and Eddy Counties.

Petition at 3-4.

Guardians is now raising issues that were specifically considered when the Permit was adopted and are outside consideration of whether a source meets the qualification requirements

of the permit. The challenge is not to any specific qualification of Spur's facility or its registration, but to all oil and gas facilities registering under the GCP-Oil and Gas. At bottom, the basis for the contest is that the GCP-Oil and Gas is no longer valid because the ozone NAAQS is not being met, so the Permit is no longer valid and no additional oil and gas facilities can be registered under it. That does not present a question of "whether or not a source *qualifies* to register for coverage" under the Permit, because it effectively seeks "administrative review of the general permit itself." *See* 20.2.72.220(C)(5) NMAC (emphasis added). Therefore, Guardians's challenge is the type *specifically prohibited* under the regulations as a review of the general permit itself.

Guardians's intent, as made clear in the requested relief, is to prohibit use of the GCP-Oil & Gas in Lea and Eddy Counties by any operator. As remedy, Guardians seeks rescission of the Registrations and an injunction prohibiting NMED from approving any additional GCP-Oil & Gas registrations 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." Guardians Petition at 6.

In pursuing these individual facility challenges, Petitioner is pursuing a back-door attack on the permit itself. This has inappropriately placed the responsibility to defend NMED's continued use of the GCP-Oil & Gas in Lea and Eddy Counties for the entire industry on two operators. Moreover, it improperly cuts off the public process that NMED is required to utilize to ensure that all stakeholders have a chance to be heard in these types of decisions and required per the regulations for a revision to a general construction permit. *See* 20.2.72.200.B. NMAC (requiring a public hearing, notice of the revision to affected facilities, and establishment of a transition schedule to comply when a general construction permit is revised). Based on the foregoing, Guardians is clearly seeking an administrative review of the GCP-Oil & Gas and the Board should dismiss Guardians's petition as an improper challenge to the GCP-Oil & Gas.

III. The Registrations qualify for registration under the terms of the GCP-Oil & Gas.

NMED was required to approve Spur's registration under the GCP-Oil & Gas because the application is complete, it meets the requirements of 20.2.72.220 NMAC, and it meets the terms and conditions of the general permit. *See* 20.2.72.220(C)(3) NMAC (stating "The department *shall* grant registration under a general permit" if the applicability criteria are met (emphasis added)).

The Dorami Facility meets the applicability criteria for registration. Spur submitted a General Construction Permit Registration Form for its Dorami Facility to NMED for approval on February 27, 2020. *See* AR 465. In response to NMED's requests for additional information and clarification, Spur submitted the information and updates. *See* AR 462-499. After reviewing the updates, NMED determined on March 23, 2020 that Spur's registration met all the qualifications and eligibility criteria to register the Dorami Facility under the GCP-Oil & Gas Permit and approved the registration. AR 660-661.

Specifically, NMED determined that the Dorami Facility meets the eligibility criteria for registration as follows:

- It is designed to "treat, process, store and/or transport gases and liquids associated with the production of oil and gas." *See* Spur Ex. 5 at 7(A102).
- The Facility is designated within the approved Standard Industrial Classification codes approved for registration under the Permit. AR 603; *see also* Spur Ex. 5 at 7 (A102).
- The source equipment at the Facility includes a combination of emission units authorized under the Permit. AR 603; *see also* Spur Ex. 2 (Tr. 2:25-3:14) ("This equipment is a combination of the emission units listed in Table 104 and authorized for use under A104A.A of the GCP-Oil & Gas").
- The Facility's total emissions levels are below the maximum emission rate of 95 tons per year, as required under Table 106 of the GCP-Oil & Gas. *See* AR 664; Spur Ex. 5 at 7.
- The Dorami Facility's equipment also complies with all the permit's location and setback parameters. *See* AR 603 (the facility equipment meets the terrain setback condition, and the setback requirements from NOx sources and Class I areas); *see also* Spur Ex. 5 at 30 (A212).
- The Facility is not located within a nonattainment area. AR 603; *see also* Spur Ex. 2 (Tr. 3:26-27) ("[T]he Facility [is] located in an area eligible for registration[.]").

Guardians does not challenge any of these threshold qualification criteria other than putting forward a strained argument that an ozone nonattainment area exists in Lea and Eddy Counties without a formal designation. Because the Facility meets the qualification criteria and, as demonstrated below, Lea and Eddy Counties are in an ozone attainment area, there is no basis for the Board to overturn NMED's action.

IV. The Facility is not located in an ozone nonattainment area.

Guardians contends that "*irrespective of 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[.]" *See* Procedural Order at 2, July 20, 2020 (emphasis added). Guardians argues that "actual non-attainment" exists as a result of monitored ozone levels in the area. Guardians insists that for this reason alone the Department was required to deny the Registrations under A100 of the GCP-Oil & Gas.

For Guardians to prevail, the Board must determine that simply recording ozone exceedances of the NAAQS at regional ozone monitors is sufficient to trigger legal nonattainment status under New Mexico law *and* that NMED incorrectly interpreted the meaning of "nonattainment" under its own GCP-Oil & Gas as it pertains to the threshold eligibility criteria required for registration. However, extensive testimony confirmed that ozone exceedances measured at regional monitors do not trigger nonattainment designation under New Mexico law, and that NMED correctly applied New Mexico law and interpreted the meaning of nonattainment under its own GCP-Oil & Gas.

a. Nonattainment status requires formal designation by the U.S. EPA.

Nonattainment is a legal status under New Mexico law that cannot be triggered simply by recording exceedances of the standard on ozone monitors. Guardians nevertheless contends that the Board's outdated regulatory definitions can override the governing New Mexico statute. Guardians argues that an ozone nonattainment area is simply "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 ozone. 20.2.79.7(AA) NMAC. But New Mexico's statute that controls the issue clearly states that New Mexico regulations addressing NAAQS cannot be more rigorous than federal law. Since the Board's regulations defining nonattainment were promulgated, federal law has been updated and *requires* U.S. EPA administrator approval to re-designate an area that was previously determined to be in attainment status.

Under New Mexico law, the Board's ozone regulations addressing NAAQS nonattainment "*shall be no more stringent than* but at least as stringent as required by *the federal act and federal regulations . . . pertaining to nonattainment areas*." NMSA 1978, § 74-2-5(C)(1)(a) (emphasis added). The federal Clean Air Act provides that air quality control areas are to be re-designated not just "on the basis of air quality data," but also on the basis of "planning and control considerations, or any other air quality-related considerations *the Administrator* deems appropriate[.]" 42 U.S.C. § 7407(d)(3)(A). While governors may submit proposed re-designations of any area within the state, the CAA provides that the U.S. EPA administrator "*shall approve or deny such redesignation*." 42 U.S.C. § 7407(d)(3)(D) (emphasis added); *see also* 42 U.S.C. § 7407(e)(1) (providing that governors are authorized to "redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management," but only "with the approval of the Administrator").

Federal law thus requires a formal process and approval by the U.S. EPA administrator for an area to be designated as an ozone nonattainment area. Air quality data, such as from regional ozone monitors, are not the only consideration in the determination. *See* 42 U.S.C. § 7407(d)(3)(D). Air quality data thus does not automatically trigger nonattainment designation under federal law. A ruling that ozone exceedances at regional monitors triggers ozone nonattainment for both Lea and Eddy Counties, without undergoing a formal designation process and without requiring approval from the U.S. EPA administrator, would be *less stringent* than federal law requires because it would allow re-designation to happen automatically.

That means ozone exceedances at regional monitors cannot trigger automatic re-designation to nonattainment status. Federal law does not make re-designation automatic. And under New Mexico law, re-designation of an area that was previously designated as being in attainment requires at least what federal law requires: consideration of other factors and formal designation by the U.S. EPA. That has not occurred. Until it does, notwithstanding measured exceedances in regional ozone monitors, the area where Spur's Dorami Facility is located remains in attainment for ozone NAAQS. New Mexico law requires this finding, despite the Board's outdated regulatory definition.

b. NMED correctly interpreted its own GCP-Oil & Gas Permit to require denial of registrations only in formally designated nonattainment areas.

NMED correctly applied this statutory limitation and controlling federal law to construe its own GCP-Oil and Gas's threshold criteria to require denial of oil and gas facility registrations *only* in areas that have been formally designated nonattainment areas by the U.S. EPA. Under Part A100 of the GCP-Oil & Gas, the permit states that NMED "shall 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[.]" Spur Ex. 5. Guardians contends NMED must literally apply the definitions in the cited regulation without regard to New Mexico's statutory constraints, discussed above, or applicable federal law. This is wrong.

Ms. Bisbey-Kuehn, NMED's Air Quality Bureau Chief, testified that while "the Board's regulations have not been updated" the "definition [of nonattainment] in the federal Clean Air Act changed[.]" NMED Ex. 11 (3:9-12). She testified that because the Board's regulations "are based on the federal Clean Air Act and the corresponding federal regulations," NMED's regulations "must be read to be consistent with those authorities." *Id.* For that reason, she explained 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," because under New Mexico law "an ozone 'nonattainment area' means an area that has gone through the formal nonattainment designation process and has been designated as such by EPA." *See* NMED Ex. 5 (4:18-23). Nonattainment "is a regulatory term of art" under federal law "that denotes an area that has gone through a process of being formally designated as nonattainment by EPA[.]" NMED Ex. 11 (2:1-2). "[I]t is always a formal regulatory process; it is never a physically existing or 'actual' state of ambient air quality." *Id.* (2:3-5).

For the Board to rule otherwise would be "contrary to the stringency provisions in the New Mexico Air Quality Control Act[.]" NMED Ex. 11 (Tr. 3:13-14). "The Department can only act within the parameters of its authority under federal and state statutes and regulations." *Id.* (Tr. 11:2-3). This is the same position NMED has taken on the applicability of federal law since the GCP-Oil & Gas was first proposed and approved more than three years ago.

In support of NMED's long-held position that only EPA can approve nonattainment designations and the general applicability of federal law over the designation process, Ms. Bisbey-Kuehn pointed out in her testimony that NMED does not even have a procedure to conduct its own attainment designation process under state law. *Id.* (3:15-17). If NMED or the Board had intended for NMED or the state to direct the process, regulations and procedures would have been enacted to do so; however, "[n]either the Air Quality Control Act nor the Board's regulations provide for such a process[.]" *Id.*

c. Establishing nonattainment areas based on ozone exceedances in a manner contrary to New Mexico's statutory "stringency" provision would result in substantial regulatory uncertainty and arbitrary permitting decisions.

To rule that regional ozone monitor readings can, by themselves, trigger re-designation of an area from attainment to nonattainment for ozone NAAQS would be not only contrary to governing New Mexico statute and federal law, but also would inject regulatory uncertainty across not just the oil and gas sector—the target of Guardians's petition—but across *all sectors* that emit ozone precursors.

Following Guardians's legal arguments to their logical conclusion would mean that NMED would be forced to automatically deny all registrations under all general construction permits for facilities located within Lea and Eddy Counties—not just oil and gas facility registrations. But if it were "to simply deny every single permit application or GCP registration, [NMED] would be acting outside its authority and without scientific or technical basis and would be subject to challenge on every single permit or registration" that it denies. NMED Ex. 5 (10:7-9).

As Spur's expert witness testified, such an arbitrary action by NMED, outside the proper and formal designation process under federal law, would create "significant uncertainty in permitting going forward." *See* Spur Ex. 3 (7:14-16). There would be no defined boundary for the nonattainment area—because there is not a technically or scientifically supportable basis to include all of Lea and Eddy Counties. *See* Spur Ex. 3 (7:16-18). The regulatory "level of nonattainment" and associated consequences and limitations on development and emissions would remain undetermined. *Id.* (7:18-20). And the timing of when the undefined area is in nonattainment "would be unclear and create chaos." *Id.* (7:20-21).

V. The Dorami Facility is not in violation of Condition A103 or Table 103.

Guardians incorrectly asserts that NMED cannot approve the Registrations "because the Facilities are unable to demonstrate that they will be able to comply with all applicable regulations and requirements of the GCP-Oil & Gas." *See* Petition at 5; Tr. 28:20-23. In particular, Guardians argues that the Registrations cannot comply with Table 103 and condition A103 of the GCP-Oil & Gas, without clarifying what the specific compliance requirements are or how exactly the Registrations are violating that requirement. Table 103 of the GCP-Oil & Gas sets forth applicable regulations and identifies the NAAQS generally as an applicable requirement and condition A103 requires compliance with the applicable sections of the applicable requirements listed in Table 103. Spur Ex. 5 at 5-6.

Guardians argues that Table 103 requires individual source compliance with the ozone NAAQS and, moreover, that the Dorami Facility cannot comply with the ozone NAAQS because of the measured exceedances of the standard in Lea and Eddy Counties. Through technical testimony, Guardians asserts that it is "technically reasonable" to conclude that the emissions from Spur's Facility are contributing to a violation of the ozone NAAQS. Guardians Ex. 1 at 16. In support, Guardians relies on regional modeling of ozone and modeled impacts from the oil

and gas industry as a whole, but offers no evidence that the Dorami Facility actually contributes to an ozone violation. *Id*. at 16-21.

Guardians's arguments are not legally supported and should not be adopted. First, Guardians inappropriately relies on the assumption that the emission of any ozone precursor – no matter how small – necessarily causes or contributes to a violation of the NAAQS. Guardians attempts to support its argument that the Dorami Facility is violating ozone NAAQS through consideration of regional ozone and industry-level impacts. In his direct written testimony, Dr. Sahu argues that: 1) ozone monitors in Lea and Eddy Counties have recorded ozone levels and associated design values that exceed the ozone NAAQS of 70 ppb; 2) in response, NMED has recognized the issue and taken action under NMSA § 74-2-5.3 to address ozone through the Ozone Attainment Initiative; 3) though not formally designated as nonattainment, the area around the monitors "should be considered to be in an a state of actual nonattainment"; 4) regional models and studies have identified the oil and gas industry on a regional scale as a potential contributor to the increasing ozone levels in the area; and 5) therefore, it is "technically reasonable" to conclude that the emissions from Spur's Facility are contributing to a violation of the ozone NAAQS. *See* Guardians Ex. 1.

Guardians's interpretation to conclude that it is "technically reasonable" that a source contributes to a violation of the ozone NAAQS is not supported and should not be adopted. In accord with applicable EPA guidance, NMED does not require that minor sources make an individual compliance demonstration with the ozone NAAQS. *See* NMED Ex. 1, Testimony of Sufi Mustafa, 8:14-20, Tr. 160:16-20. As a secondary pollutant that is not directly emitted by a source, modeling ozone impacts from a source is very costly and complicated. NMED, Ex. 1, 7:8-24. Accordingly, as detailed in the NMED Modeling Guidelines, ozone modeling is generally not required for individual permits and "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." NMED Ex. 3 at 24.

Although developed for Prevention of Significant Deterioration ("PSD") sources with emissions above 250 tons per year, the EPA guidance on determining Modeled Emission Rates for Precursors ("MERPs") can be utilized as a screening tool. Indeed, Guardians's own expert supports use of the MERPs. *See* Guardians Ex. 1 at 15. The MERPs relies on significant impact levels – or SILs – to help determine whether a source causes or contributes to a violation of a NAAQS. Nonetheless, Guardians attempts to argue that the NMED regulations do not provide for a "significance" threshold below which a source can be deemed to not cause or contribute to a violation. *See e.g.* Guardians Ex. 11 at 6. Taking this a step further, Dr. Sahu argues "that it is reasonable to presume that any additional emissions of VOCs or NOx in Eddy and Lea counties, such as from the particular facilities at issue in this matter, will contribute to violations of the ozone NAAQS in the area." Guardians Ex. 1 at 22.

Guardians's interpretation is not supported by EPA and New Mexico guidance and modeling guidelines. The concept of defining a "significance" level below which a source is deemed to not cause or contribute to a violation of the NAAQS is well accepted. As EPA states in its 2018 Guidance:

> The [federal Clean Air] Act does not define "cause" or "contribute." Reading these terms in context, the EPA has historically interpreted this provision … of the Act and associated regulation to mean that a source must have a "significant impact" on ambient air quality in order to cause or contribute to a violation.

Guardians Ex. 12 at 4. The NMED Modeling Guidelines also reflect the use of the SIL. NMED Ex. 3 at 24. Guardians cannot ignore EPA's and NMED's well accepted use of a significance level to determine whether a source causes or contributes to a violation.

Under the MERPs analysis, a minor source will not exceed the ozone SIL and only minor sources can register under the GCP-Oil & Gas. NMED Ex. 1 at 10:6-13; Spur Ex. 8 at 4 (applying the NMED Modeling Guidelines ozone SIL to GCP-O&G allowed VOC and NOx emissions). NMED relied on this determination when it adopted the GCP-Oil & Gas in 2018 when determining, as required by regulation, that the sources registering under the GP-Oil & Gas will not cause or contribute to a violation of the ozone NAAQS. Guardians's attack on NMED's rationale and reliance on the SIL is another demonstration of how its Petition is an improper collateral attack on the underlying Permit itself, rather than a challenge of the Facility's qualifications.

NMED's use of the SIL is reasonable and technically justified. As Dr. Mustafa stated, "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." NMED Ex. 1 at 10:17-20. Accordingly, the Dorami Facility does not cause or contribute to a violation of the ozone NAAQS and is not in violation of Table 103.

Finally, if the Board were to grant Guardians's Petition, minor sources would be required to make single source compliance demonstrations for ozone to obtain a permit. In response to questions from the Board regarding the impact of granting the petition and requiring source-by-source ozone compliance, Ms Bisbey-Kuehn stated that "that approach is so novel and extreme that … [it] has never been tested by any regulatory agency in the country." Tr. 317: 6-10. As Ms. Bisbey-Kuehn further stated, "there is no regulatory mechanism in EPA guidance or … the state Air Quality Control Act that contemplates that type of analysis." Tr. 317: 13-16. This outcome is extreme and not required, or event contemplated, by law.

VI. Conclusion

Overall, Guardians's challenge to the Registrations is a poorly veiled attempt to force NMED to revise its interpretation and use of the GCP-Oil & Gas for the entire industry through these individual permit challenges. As shown, its arguments fall outside the regulatory authority of this Board and constitute an improper collateral attack on the underlying Permit.

In stark contrast, NMED is required to take action to address ozone levels through the statutory mandates of NMSA § 74-2-5.3. NMED, through its Ozone Attainment Initiative, has proposed and is pursuing area modeling and industry-level regulations, including regulations for the oil and gas sector. *See* Spur Ex. 7. Therefore, pursuant to New Mexico statutes, NMED is

already taking action to address the rising levels around the state. As Elizabeth Bisbey-Kuehn stated, if NMED's efforts do not reduce ozone levels, then it is foreseeable that certain areas of the state may be re-designated as nonattainment pursuant to the formal designation process. NMED Ex. 5 at 9:12-22 – 10:1-2. This process, which entails significant public outreach and comment, is how the New Mexico statutes and the Board's regulations intended regulatory actions that will impact an entire industry to proceed.

Based on the foregoing, Spur Energy Partners LLC respectfully requests that Guardians's challenge be denied.

PROPOSED FINDINGS OF FACT and CONCLUSIONS OF LAW

FINDINGS OF FACT

I. Procedural and Permitting Background

1. This matter came before the New Mexico Environmental Improvement Board ("Board") on September 23 and 24, 2020 via video conference for a hearing regarding WildEarth Guardians's ("Petitioner") appeal of the New Mexico Environment Department's ("NMED") approval under the Air Quality Bureau General Construction Permit for Oil and Gas Facilities ("GCP-Oil & Gas") of Registration Nos. 8729, 8730, and 8733 (the "Registrations").

2. The hearing was combined with the hearing on Petitioner's Appeal of the Air Quality Permit No. 7482-M1 issued to 3-Bear Delaware Operating-NM LLC ("3-Bear), EIB No. 20-21(A). Chris Colclasure, Esq., Joby Rittenhouse, Esq., Jeffry D. Bennett, and Lori K. Marquez appeared on behalf of 3-Bear.

3. Daniel L. Timmons, Esq., Samantha-Ruscavage-Barz, Esq. and Dr. Ranjit (Ron) Sahu appeared on behalf of Petitioner.

4. Assistant General Counsel Lara Katz, Dr. Sufi Mustafa, Elizabeth Bisbey-Kuehn, Kerwin Singleton, Angela Raso, and Ted Schooley appeared on behalf of NMED.

5. Kyle Tisdel, Esq. appeared on behalf of the Western Environmental Law Center.

6. Louis Rose, Esq. and Randy Parmley, P.E. appeared on behalf of applicant XTO Energy Inc. (Registration Nos. 8729 and 8730).

7. Adam Rankin, Esq., Jill Van Noord, Esq., Todd Mucha, John Connolly, and Adam Erenstein appeared on behalf of applicant Spur Energy Partners LLC (Registration No. 8733).

8. Applicant Spur Energy Partners LLC ("Spur") owns and operates the Dorami 2H, 4H and 9H Federal Tank Battery, located in Eddy County, New Mexico.

9. Spur submitted an application for registration under the GCP-Oil & Gas for the Dorami 2H, 4H, & 9H Federal Tank Battery located in Eddy County, NM on February 10, 2020.

10. On March 11, 2020, Petitioner submitted comments to NMED objecting to sixteen applications to register under the GCP-Oil & Gas, including the applications at issue in this matter. Petitioner objected to the applications because, it argued, based on the current monitored ozone levels in Lea and Eddy Counties, NMED could not approve the sixteen identified applications or any additional GCP-Oil & Gas applications in those counties.

11. After review, communications with Spur's consultant, and requests for clarification and revision, NMED determined that the facility and application met the

requirements for registration under the GCP-Oil & Gas and approved the registration on March 23, 2020 under Registration No. 8733. *See* EIB 20-33(A) AR 0462-0671.

12. NMED provided Petitioner notice of approval the Registrations on May 12, 2020.

13. On June 12, 2020, Petitioner filed the Petition for a Hearing in EIB 20-33(A) pursuant to NMSA 1978, § 74-2-7.H, 20.1.2.202 NMAC, and 20.2.72.220.C(5) NMAC regarding NMED's Approval of the Registrations.

14. On July 20, 2020, the Hearing Officer entered a Procedural Order governing the submission of testimony and conduct of the hearing in the consolidated proceedings. As approved in the July 20, 2020 Procedural Order, the Parties agreed that the Petition "objects to NMED's approval of [the Registrations] in their entirety" and that "the specific emission limits and emission limit calculations of [the GCP Registrations] are not at issue in this appeal." Procedural Order at 2.

15. On August 3, 2020, NMED, Guardians, Spur, XTO, and 3-Bear filed written direct written testimony and, on September 2, 2020, filed written technical testimony.

16. On September 11, 2020, the parties filed a stipulation to Guardians's standing to bring the appeals.

17. On September 23-24, 2020, the Board held the consolidated hearing and heard technical testimony from witnesses from Guardians, NMED, 3-Bear, XTO, and Spur.

II. Qualification to Register Under the GCP-Oil & Gas

18. NMED issued the GCP-Oil & Gas on April 27, 2018. The GCP-Oil & Gas was developed to replace two previously issued general construction permits for oil and gas facilities: the GCP-1 (Level One Oil and Gas Installations) and the GCP-4 (Combustion Sources and Related Equipment). The GCP-Oil & Gas authorizes an owner or operator to construct, modify, and operate an oil and gas facility in New Mexico (excluding Bernalillo County, tribal lands, non-attainment areas, and City of Sunland Park). *See* GCP Oil & Gas A100.B.

19. NMED undertook a lengthy analysis and public comment process prior to issuing the GCP-Oil & Gas. NMED released the initial draft of the GCP-Oil & Gas for public comment in May 2017 and released a revised draft in December 2017, which incorporated revised modeling analyses and comments received. In January 2018, NMED published the completeness determination for the Permit, which initiated a formal 30-day comment period. After this, NMED held open houses on the permit for discussions on the draft permit. In February 2018, a hearing was held before an NMED hearing officer. The final Permit was issued on April 27, 2018.

20. Pursuant to the regulatory requirements, NMED concluded that if facilities are operated in accordance with the permit, they will not cause or contribute to air contaminant levels in excess of any national or New Mexico ambient air quality standard. *See* GCP-Oil & Gas, B100A.

21. For a facility to qualify for registration under the GCP-Oil & Gas, it must meet certain threshold requirements. NMED has summarized these requirements as follows:

- **Location:** The facility is not located in Bernalillo County, on tribal lands, or in a nonattainment area.
- **Source Type**: The function of the Facility is to treat, process, store and/or transport gases and liquids associated with the production of oil and gas, and/or inject those substances or their byproducts into the earth. [SIC 1311, 1321, 4619, and 4922].
- **Equipment**: The equipment at the Facility is a combination of the equipment listed in Table 104 of the Permit, and no others.
- **Emissions:** The emissions from the equipment will be less than the emissions listed in Table 106 of the Permit.
- **Stack Parameters**: The equipment meets the stack parameters in the Permit.
- **Position**: Equipment and/or facility meets the following criteria:
    - 100 meters away from any stack to terrain that is 5 or more meters above the top of stack.
    - 150 meters away from any source that emits over 25 tons per year of NOx.
    - 3 miles from any Class I area.

22. All sources that register under the GCP-Oil & Gas must comply with the maximum emission rates listed under in the permit, including limits of 95 tons per year of Nitrogen Oxides (NOx) and 95 tons per year of non-fugitive volatile organic compounds ("VOC"). GCP-Oil & Gas, Table 106. Based on the emission limits, eligible sources are categorized as minor sources.

III. National Ambient Air Quality Standards for Ozone and Non-Attainment Designation

23. Pursuant section 109 of the federal Clean Air Act (42 U.S.C. § 7409), the Environmental Protection Agency ("EPA") has set the primary national ambient air quality standard ("NAAQS") for ozone at 70 parts per billion ("ppb") in 2015. In August 2020, EPA proposed to retain the standard. *See* 85 Fed. Reg. 49830 (August 14, 2020).

24. Section 107(d)(1)(A) of the Clean Air Act requires states to submit to EPA recommendations on area designations no later than one year after the promulgation of a new or revised NAAQS. 42 U.S.C. § 7407(d)(1)(A). Areas are to be identified as attainment, nonattainment, or unclassifiable. Based on the severity of the exceedance, non-attainment areas are categorized as marginal, moderate, serious, severe, or extreme. 42 U.S.C. § 7511(a)(1). In response to a nonattainment area designation, states, local governments, or tribes are required to develop a state implementation plan or "SIP." 42 U.S.C. § 7511a.

25. After promulgation of the 2015 ozone standard, NMED submitted a nonattainment area recommendation for the Sunland Park area and recommended attainment or attainment/unclassifiable designations for the remainder of areas in New Mexico, including Lea and Eddy Counties. EPA concurred with the recommendations and finalized the area designations for New Mexico on August 3, 2018. NMED Ex. 5 at 5:9-15.

26. The federal Clean Air Act provides that air quality control areas are to be re-designated not just "on the basis of air quality data," but also on the basis of "planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate[.]" 42 U.S.C. § 7407(d)(3)(A).

27. Lea and Eddy Counties will remain designated as attainment until EPA revises the ozone NAAQS, EPA seeks re-designation, or the New Mexico Governor seeks re-designation. *See* 42 U.S.C. § 7407(d)(3); NMED Ex. 5 at 6:4-6.

IV. GCP-Oil and Gas and Ozone Non-Attainment Status

28. Under Part A100 of the GCP-Oil & Gas, the permit states that NMED "shall 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[.]"

29. 20.2.72.216 NMAC governs construction permits in nonattainment areas. The requirements apply to sources "that will emit a regulated air contaminant such that the ambient impact of the contaminant would exceed the significant ambient concentration in 20.2.72.500 NMAC, table 1 . . ." 20.2.72.216.A.(1) NMAC. Ozone is not included in Table 1 of 20.2.72.500 NMAC.

30. 20.2.79 NMAC governs major source nonattainment area permitting. 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 [EPA] 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.

31. The 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 the Clean Air Act amendments in 1990.

32. 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."

V. GCP-Oil and Gas and Ozone NAAQS

33. Condition A103 of the GCP-Oil & Gas requires that permittees comply "with all applicable sections of the requirements listed in Table 103." Table 103 identifies "40 CFR 50 National Ambient Air Quality Standards" as a requirement. GCP-Oil & Gas, Table 103.

34. The 2015 ozone NAAQS is set forth at 40 C.F.R. § 50.19(a).

35. The construction permitting regulations require that NMED deny an application for a permit if the emissions resulting from the permit "cause or contribute" to a violation of a NAAQS. *See* 20.2.72.208 NMAC.

36. "Cause or contribute" requires that a source's emission increase has a "significant impact" on ambient air quality. EPA states in its 2018 Guidance:

> The [federal Clean Air] Act does not define "cause" or "contribute." Reading these terms in context, the EPA has historically interpreted this provision … of the Act and associated regulation to mean that a source must have a "significant impact" on ambient air quality in order to cause or contribute to a violation.

EPA, Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program at 4 (April 17, 2018).

37. To determine whether a source "causes or contributes" has a significant impact, EPA has developed pollutant-specific concentration standards called "significant impact levels" or "SILs." If a source demonstrates that the impact from the proposed emissions increase would be below the SIL, then a source is deemed to not cause or contribute to a violation of the NAAQS. *See id* at 5.

38. Because ozone is not emitted directly from a source but is formed through chemical reactions in ambient air between ozone precursors, modeling is complex and costly. Accordingly, the photochemical modeling required to model ozone formation is conducted for regional compliance demonstrations and not individual air quality permits. NMED Air Quality Bureau's Air Dispersion Modeling Guidelines at 24 (June 6, 2019) ("NMED Modeling Guidelines").

39. For Prevention of Significant Deterioration ("PSD") sources with emissions of ozone precursors such as NOx or VOCs above 250 tons per year, EPA has developed modeling guidance to assess individual source impacts. The Guidance on the Development of Modeled Emission Rates for Precursors ("MERPs") utilized modeling to establish a rate below which a source will not cause an ambient impact in excess of the SIL.

40. EPA has neither developed similar guidance for nor does it require analysis for minor sources. Through application of the MERPs guidance, a minor source with emissions below 250 tons will not cause or contribute to a violation of the NAAQS.

41. NMED has adopted the use of SILs in its Modeling Guidelines and because EPA's modeling demonstrates that minor sources do cause impacts above the SIL for ozone, NMED does not require analysis of ozone impacts for minor sources. *See* NMED Modeling Guidelines at 24.

42. Only minor sources are eligible to register under the GCP O&G. *See* GCP-O&G, A106A, Table 106.

VI. Guardians's Challenge

43. Guardians asserted that of the monitored exceedances of the ozone NAAQS at the monitors Lea and Eddy Counties prohibit registration under the GCP-Oil & Gas. As remedy, Guardians requested that the Board rescind the GCP Registrations and prohibit NMED from approving any new registrations under the GCP-O&G in Lea and Eddy 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." Guardians Petition at 6.

44. Guardians objected to NMED's approval of the Registrations "because the Facilities are unable to demonstrate that they will be able to comply with all applicable regulations and requirements of the GCP-Oil & Gas." *See* Guardians Petition at 5. In support, Guardians pointed to Condition A103 of the GCP-Oil & Gas that requires compliance with applicable requirements in Table 103, including the general reference to the NAAQS.

45. Dr. Sahu testified that it is "technically reasonable" to conclude that the emissions from the Registrations are contributing to a violation of the ozone NAAQS. Guardians Ex. 1 at 16. In support, Dr. Sahu relied on regional modeling and studies of ozone that identified impacts from the oil and gas industry as a whole. Dr. Sahu did not conduct an analysis of the individual impacts of the Registrations.

46. In contradiction to Dr. Sahu's testimony, witnesses from NMED and 3-Bear testified that both EPA and NMED have historically interpreted "cause or contribute" to require that a source's emissions have a significant impact on ambient standards and without an exceedance of the significance threshold the impacts will not be considered to cause or contribute to a violation.

47. Witnesses for NMED and 3-Bear testified that under EPA's Guidance, EPA and NMED, in alignment with other states, do not require minor sources to analyze ozone contribution. The witnesses testified regarding EPA's guidance for PSD sources above 250 tons per year and that under that analysis, impacts from minor sources will always be below the significance level.

48. Witnesses for NMED and Spur testified that because sources that register under the GCP-Oil & Gas are minor sources, the emissions from these sources will not cause or contribute to a violation of the ozone NAAQS. NMED witnesses testified that NMED relied on this understanding when approving the GCP-Oil & Gas in 2018 and that sources registering under the GCP-Oil & Gas are not required to make any ozone analysis or other modeling as those have already been addressed during the adoption of the permit in 2018.

49. Guardians also argued that NMED cannot approve the Registrations because Condition A100H(6) of the GCP-O&G requires that NMED shall deny a registration under the permit if "[t]he Facility is located in a nonattainment area [defined by 20.2.72.216 and 20.2.79 NMAC] . . . . " Guardians argues that under the plain language of the regulations, the region where the facilities are located is in a state of "actual non-attainment."

50. Guardians argues that the "nonattainment area" definition in 20.2.27.7.AA includes not only areas formally designated as nonattainment by EPA, but also includes areas formally designated as attainment but where monitors measured exceedances of the NAAQS. Therefore, Guardians argues, the region around the monitors in Lea and Eddy Counties are in actual non-attainment even though EPA has not made such a designation.

51. Dr. Sahu testified that because the monitors in Lea and Eddy Counties are measuring exceedances of the 2015 ozone NAAQS, those counties are "actual nonattainment areas" to which permitting requirements for nonattainment areas must apply despite the lack of designation by EPA.

52. Witnesses for NMED and XTO testified that the definition of "nonattainment" in the Board's regulations reflects an outdated version of the federal Clean Air Act. The witnesses also contradicted Dr. Sahu's testimony that a nonattainment area can automatically exist after monitored exceedances or without a formal designation by EPA.

53. Witnesses for NMED, XTO and Spur also testified that if NMED interpreted the regulations to allow for an attainment area without a formal designation by EPA, there would be significant confusion and uncertainty in permitting in these areas. The witnesses pointed to the lack of clarity regarding the level of nonattainment and the timing of when the nonattainment area is legally enforceable and when, not if, the monitored levels drop below the standards as examples of the uncertainty.

54. NMED witnesses testified that it is pursuing actions to address the ozone levels in New Mexico through its Ozone Attainment Initiative pursuant to the provisions of NMSA 1978, § 74-2-5.3 and that this is the appropriate mechanism to address ozone levels in Lea and Eddy Counties.

CONCLUSIONS OF LAW

I. Standard of Board Review

1. In challenging a permit before the Board, 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." 20.1.2.302 NMAC. If the petitioner meets its initial prima facie burden, parties opposed to the petition have "the burden of going forward with any adverse evidence and showing why the relief should not be granted." 20.1.2.302 NMAC. Based upon the evidence presented at the hearing, the Board "shall sustain, modify or reverse the action of the department." NMSA 1978, § 74-2-7(K).

2. For review of a registration under a general construction permit, the review is limited to "whether or not a source qualifies to register for coverage under a general construction permit." 20.2.72.220(C)(5) NMAC. Review of registration "shall not extend to administrative review of the general permit itself." *Id*. Review of the underlying general permit, its terms, provisions, and assumptions, "shall be available . . . only upon issuance or revision of the general permitting action." *Id*.

II. GCP-Oil & Gas Registrations

a. Condition A103 and Table 103 of the GCP-Oil & Gas

3. NMED has developed threshold criteria for a source to qualify for registration under the GCP-Oil & Gas in accordance with the requirements of 20.2.72.220 NMAC.

4. 20.2.72.220(C)(3) NMAC requires that the Department shall not grant the registration unless a source submits a complete application, meets the requirements of 20.2.72.220 NMAC, and meets the terms and conditions of the general construction permit.

5. Condition A100H of the GCP-Oil & Gas requires NMED to deny registration under the GCP-Oil & Gas if any of the listed provisions apply.

6. Condition A103 of the GCP-Oil & Gas requires compliance with the applicable sections of the applicable requirements listed in Table 103. Table 103 identifies "40 CFR 50 National Ambient Air Quality Standards" as a requirement. GCP-Oil & Gas, Table 103. The 2015 ozone NAAQS is set forth at 40 C.F.R. § 50.19(a).

7. NMED adopted the GCP-Oil & Gas in 2018 pursuant to the Board's regulations at 20.2.72.220 NMAC. The Board's regulations required NMED to include permit terms and conditions in the GCP-Oil & Gas sufficient "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 [the New Mexico Air Quality Regulations], [. . .] and will not cause or contribute to air contaminant levels in excess of any national or New Mexico ambient air quality standard." *See* 20.2.72.220.A.(2)(c)(i) NMAC.

8. Individual sources do not individually comply with NAAQS standards, but in order to obtain certain permits must demonstrate that the proposed emissions increase will not "cause or contribute" to a violation of a NAAQS. *See e.g.* 20.2.72.208 NMAC.

9. EPA has historically required that for a source to be considered to "cause or contribute" to a violation of the NAAQS, a source's emissions must have a "significant impact" on ambient air quality. EPA, Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program at 4 (April 17, 2018).

10. EPA has developed SILs to define the significant impact below which a facility is deemed to not cause or contribute to a violation of the NAAQS, including the ozone NAAQS. *See id.* at 5. NMED has adopted this approach, as reflected in the NMED Modeling Guidelines.

11. Under EPA guidance, a source that emits less than 250 tons per year of ozone precursor emissions will not have impacts in excess of the SIL and will not cause or contribute to a violation of the ozone NAAQS. Therefore, under application of this guidance, sources in Lea and Eddy Counties with emissions of ozone precursor pollutants are below 250 tons per year will be below the SIL for ozone and deemed not to cause or contribute to a violation of the ozone NAAQS.

12. Sources that register under the GCP-Oil & Gas, consistent with permitting for minor sources, are not required to make an individual demonstration of impacts on ambient ozone concentrations.

13. NMED's adoption and use of the SIL to determine whether a source causes or contributes to a violation of the NAAQS is reasonable, technically supported, and within its discretion in implementing the permitting program.

14. Guardians's conclusion to conclude that it is "technically reasonable" that the Registrations contribute to a violation of the ozone NAAQS is not supported by the evidence.

15. The Registrations meet the threshold criteria to register under the GCP Oil & Gas.

16. The Registrations are not in violation of A103 or Table 103 of the GCP-Oil & Gas as to the ozone NAAQS.

b. Condition A100H(6) of the GCP-Oil & Gas and Nonattainment Area

17. Per the terms of the GCP-Oil & Gas, sources located in a non-attainment area are not eligible to register for the GCP-Oil & Gas.

18. The regulatory references in the GCP-Oil & Gas reference a definition of non-attainment area that mirrors a federal Clean Air Act definition that was replaced by the Clean Air Act amendments of 1990.

19. Under the federal Clean Air Act and the New Mexico Air Quality Control Act a "nonattainment area" is defined as an area designated "nonattainment" within the meaning of Section 107(d) of the federal act. *Compare* 42 U.S.C. § 7501(2) *with* NMSA 1978, § 74-2-2.N. Section 107(d) only allows for designation of an area by EPA. 42 U.S.C. § 7407(d).

20. Where the statute and regulation conflict or are inconsistent, the statute prevails. *See Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 10 (holding that "[w]here a statute and a regulation are inconsistent, the statute will prevail.").

21. It is within EPA's sole authority to identify the boundaries of an area and designate the attainment status of that area with respect to any NAAQS. NMED does not have the authority to consider a county or region to be a "nonattainment area" based on the data from monitors recording design values above the ozone NAAQS.

22. NMED's interpretation of the definition of "nonattainment area" in the Board's regulations as meaning only an area that has been formally designated as nonattainment by EPA is reasonable and consistent with the statutory definition at NMSA 1978, § 74-2-2.N.

23. Lea and Eddy Counties are designated as in attainment for ozone. The monitored exceedances of the ozone NAAQS in these counties have not created an "actual nonattainment area."

24. The Registrations are not located in a nonattainment area and NMED is not required to deny the Registrations under Condition A100H(6) of the GCP-Oil & Gas.

25. Guardians's challenge of the Registrations, NMED's reliance on and use of the SIL, and NMED's determination that facilities that meet the eligibility criteria for the GCP-Oil & Gas will not "cause or contribute" to a violation of the ozone NAAQS, is an attempt to seek administrative review of the underlying GCP-Oil & Gas, which is not permitted under 20.2.72.220(C)(5) NMAC.

26. Guardians has failed to establish by a preponderance of the evidence that the facts of this case justify the relief sought. Guardians has also failed to establish that the Registrations do not meet the qualification requirements for registration under the GCP-Oil & Gas.

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CERTIFICATE OF SERVICE

Pursuant to 20.1.2.112 NMAC, I hereby certify that a copy of the above Spur Energy Partners LLC's Closing Argument and Proposed Findings of Fact and Conclusions of Law was filed and served via electronic mail delivery to the persons listed below on November 30, 2020.

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