**STATE OF NEW MEXICO**
**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

REGISTRATION NOS. 8720, 8730, AND 8733 UNDER GENERAL CONSTRUCTION PERMIT FOR OIL AND GAS FACILITIES — EIB No. 20-33(A)

WildEarth Guardians,
*Petitioner.*

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**WILDEARTH GUARDIANS' CONSOLIDATED REPLY TO RESPONSES TO MOTION FOR RECUSAL (AMENDED)**

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In its Motion for Recusal, filed December 3, 2020, WildEarth Guardians ("Guardians") requests the recusal of Member Trujillo Davis under 20.1.2.113.G NMAC, which requires the recusal of any board member from "any action in which his or her impartiality or fairness may reasonably be questioned." Guardians explained that Member Trujillo Davis's employer, Devon Energy, has multiple permits pending before the New Mexico Environment Department, which could potentially be affected by resolution of this matter. *See* Mot. for Recusal, at 4 & Ex. B. Permittees' arguments in response fail to show that it is unreasonable to question Member Trujillo Davis's impartiality or fairness in this matter, and so recusal remains appropriate.

**Argument**

Permittees' Joint Response first argues that because NMSA § 74-1-4(A) does not preclude Member Trujillo Davis from participating on the Environmental Improvement Board as a general matter based on her employment with Devon Energy, then "something more" must be

required for recusal to be warranted. Joint Resp. at 3-4. Guardians concurs. The Environmental Improvement Act may allow the appointment of members employed by private entities that appear before the Board generally on Clean Air Act issues. But it does not then follow that a board member can participate in decisions on issues that affect their employer.

The Governmental Conduct Act prohibits public officials from taking official acts "directly affecting his [or her] financial interest," NMSA 1978 § 10-16-4.B, with "financial interest" specifically defined to include "any employment." NMSA 1978 § 10-16-2.F(2). Yet Permittees would require Guardians to show not only that Member Trujillo Davis's employer will be affected by the permitting appeal, but that "Member Trujillo Davis' employment with Devon Energy is sufficiently connected to Devon Energy's air permitting, such that she would be financially impacted by a future decision on Devon Energy's air permits." Joint Resp. at 4-5. This goes too far. By specifically defining "employment" as a "financial interest," the Governmental Conduct Act clearly prohibits public officials from taking official acts that affect their employers, irrespective of the specific nature of the officials' employment. It is absurd for Permittees to suggest that the impartiality of a public official taking official actions that affect their employer cannot reasonably be questioned, unless the scope of the public officials' private employment is directly tied to the official action at issue. Instead, as a general rule, public officials should not take actions that affect their employers.

Permittees next try to frame Guardians' position as broadly "precluding members employed by private entities from participation in Board matters." Joint Resp. at 6. But there is a distinction between a hypothetical decision that could potentially affect a board member's employer, and the situation here. Devon Energy currently has multiple permits pending before the EIB, including permits of the same type as at issue in Guardians' appeals. Guardians has

raised legal arguments that could require mitigation of emissions from individual permits and denial of general permit registrations in the Greater Carlsbad region. Thus, the potential impact of a decision in this matter on Member Trujillo Davis's employer is not hypothetical, but concrete and imminent.

3 Bear's Supplemental Response claims that the recusal motion contradicts Guardians' positions at the hearing, and that Guardians is trying to "have it both ways." 3 Bear Suppl. Resp. at 2. But Guardians has consistently maintained that granting its appeal would not prevent the issuance of general permits "so long as permittees mitigate their emissions through offsets or other means." Guardians' Opening Statement, Transcript 31:12-14 (Sept. 23, 2020). Thus, to obtain a new individual permit, Devon Energy or any other individual permittee in the Greater Carlsbad area would need to mitigate their new emissions of ozone precursor pollutants. Absent such mitigation, future permits should be denied. Thus, a pathway to individual permitting would remain through mitigation of emissions, but that does not mean that a decision in Guardians' favor would have no effect on future permittees – and Guardians has never argued so.

Spur Energy's Supplemental Response demonstrates, once again, a fundamental misunderstanding of the nature of Guardians' appeal. That Guardians' challenge to individual permit registrations could have broader precedential impact on future permittees does not make this a "thinly veiled attack" on the original issuance of the general permit. Spur Suppl. Resp. at 1. As Guardians has repeatedly explained, the lawfulness of the Department's decision to issue the general permit is not at issue in this appeal. Instead, because air quality conditions have deteriorated since the general permit was issued, facilities in the Greater Carlsbad region are no longer eligible for registration under the specific terms of the general permit. Given recent air quality monitoring data, Permittees cannot demonstrate compliance with the National Ambient

Air Quality Standards for ozone, and the area now qualifies as a "nonattainment area" under the specific regulatory definition cited in the permit. 20.2.79.AA NMAC. Since Guardians' legal arguments are rooted in recent air monitoring data, these arguments could not have been raised in a challenge to the issuance of the general permit – hence, this is not an improper collateral attack.

Spur's attempts to cast aspersions on Guardians' motives and the timing of this filing are baseless, without merit, and warrant no further response.

Finally, the Department raises concerns about setting broad precedent requiring recusal under the Governmental Conduct Act. NMED Resp. at 1. However, these concerns are overblown, as recusal may be warranted based on the specific EIB recusal rule requiring recusal where a board member's "impartiality or fairness may reasonably be questioned." 20.1.2.113.G NMAC. While Member Trujillo Davis "may" rely on the Governmental Conduct Act in deciding to recuse herself from further participation in this matter, *id*., recusal may also be justified based solely on the EIB's rule. And as a policy matter, the Department offers no explanation why it is "concerned" about setting precedent that would require recusal of board members from participating in formal decisions that implicate their employers' financial interests.

Guardians respectfully requests that Member Trujillo Davis recuse herself from further participation in these proceedings.

Respectfully submitted this 28th day of December, 2020,

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## CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2020 I filed and served the foregoing **WILDEARTH GUARDIAN'S CONSOLIDATED REPLY TO RESPONSES TO MOTION FOR RECUSAL (AMENDED)** by electronic mail delivery to the following:

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