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STATE OF NEW MEXICO  
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED AMENDMENTS  
TO 20.2.79 NMAC – *Permits – Nonattainment Areas*

Docket No. EIB 21-07 (R)

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WILDEARTH GUARDIANS' PRE-HEARING STATEMENT

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Pursuant to the Notice of Rulemaking Hearing for this matter, WildEarth Guardians (Guardians) provides this pre-hearing statement and three attached exhibits, including proposed red-line modifications for consideration by the Board.

**I. Guardians' Pre-Hearing Statement**

The Clean Air Act requires major source permittees to demonstrate that emissions from permitted facilities “will not cause, or contribute to, air pollution in excess of *any* ... national ambient air quality standard [NAAQS] in *any* air quality control region.” 42 U.S.C. § 7475 (a)(3) (emphasis added). This requirement plainly applies to permits which will cause or contribute to exceedances of the 2015 ozone NAAQS, 40 C.F.R. § 50.19. From NMED’s response to comments in this matter, Guardians understands that NMED also acknowledges that the cause or contribute standard generally applies to the ozone NAAQS. NMED Exhibit 11.

Guardians, however, remains concerned that NMED’s proposed modifications to the nonattainment area rules at 20.2.79.109 NMAC could be misinterpreted as excluding ozone from the “cause or contribute” analysis required by the Clean Air Act. Specifically, the proposed language ties the cause or contribute threshold to the significant levels contained in the Board’s regulations at Subsection A of 20.2.79.119 NMAC. Yet because there is no significant ambient concentration for ozone established by that rule, the proposed modifications could potentially be read to imply that the cause or contribute standard does not, in fact, apply to ozone. Such an

interpretation would violate the cause or contribute demonstration requirement under the Clean Air Act, 42 U.S.C. § 7475(a)(3), as well as specific Clean Air Act regulations mandating that State Implementation Plans require an equivalent demonstration by permittees that new sources or modified sources would not “cause or contribute to air pollution in violation of: (i) *any* national ambient air quality standard in *any* air quality control region,” 40 C.F.R. § 51.166(k) (emphasis added). Moreover, such an interpretation would conflict with Board regulations which require permit denial where a new facility will cause or contribute to any NAAQS exceedance, which includes ozone. 20.2.72.208.D NMAC. If the proposed regulatory language were interpreted to imply that ozone precursor emissions are exempt from the cause or contribute standard with respect to the ozone NAAQS, this would violate the Clean Air Act and jeopardize EPA’s approval of the New Mexico SIP.

Guardians’ concern regarding the potential misinterpretation of NMED’s proposed language is heightened by the Board’s recent decision indicating that the Department lacks the authority to deny minor source permits based on ozone impacts. Final Order, EIB No. 20-21 (attached as Exhibit 1). As the Board stated: “The Department does not have authority or discretion to deny a permit or require offsets for an individual new or modified minor source in a designated attainment area on the basis that the facility will ‘cause or contribute’ to ozone levels above the NAAQS.” Ex. 1, ¶ 105. While this decision, currently on appeal to the New Mexico Court of Appeals, relates specifically to minor source permits, as opposed to major source permits at issue in the current rulemaking, the Board’s decision raises concerns that the proposed regulatory language could be interpreted in a similar manner as to exclude major sources for ozone from the required demonstration that they will not cause or contribute to exceedances of the ozone NAAQS.

Absent a significant ambient concentration established by rule, NMED is required to make a case-by-case determination whether a proposed new or modified source will cause or contribute to exceedances of the ozone NAAQS, based on analysis of ozone precursor emissions of VOCs and NOx. In fact, EPA has issued guidance regarding Significant Impact Levels (SILs) for the ozone NAAQS to assist permitting authorities in evaluating whether a proposed source would cause or contribute to a violation of an ozone NAAQS. *See* U.S. Env'tl. Prot. Agency, Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program (Apr. 17, 2018) (attached as Exhibit 2). While non-binding, the EPA SIL Guidance makes clear EPA's position that the cause or contribute standard applies to ozone, and that "[a] determination that a proposed source does not cause or contribute to a violation can only be made by a permitting authority on a permit-specific basis after consideration of the permit record." Ex. 2 at 3. Guardians' red-line modification is intended to clarify that – absent a significance level for ozone formally incorporated into the Board's regulations – a case-by-case determination is required to demonstrate that new major sources would not cause or contribute to exceedances of the ozone NAAQS.

## **II. Guardians' Testimony and Exhibits**

Guardians does not intend to offer any technical or non-technical witnesses in this matter because its concerns and proposed modifications relate solely to legal matters of statutory and regulatory interpretation, matters best addressed by legal counsel. Guardians submits the following exhibits as legal authority in support of its proposed red-line modifications:

Exhibit 1: Final Order, EIB No. 20-21, 20-33 (Jan. 22, 2020).

Exhibit 2: U.S. Env'tl. Prot. Agency, Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program (Apr. 17, 2018).

Exhibit 3: WildEarth Guardians' Proposed Red-line Modifications.

Respectfully submitted this 4<sup>th</sup> day of June, 2021,

/s/ Daniel L. Timmons

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## CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2021, I filed and served the foregoing WILDEARTH GUARDIANS' PRE-HEARING STATEMENT by electronic mail delivery to the following:

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