

Mr. Timmons

Thank you for your interest in our rulemaking and your suggested comments. Please find each comment addressed below.

WEG Comment #1:

“First, I want to reiterate my concern regarding the public notice provided for this proceeding. In addition to not directly emailing the public notice to myself or Mr. Nykiel, despite our entries of appearance in this proceeding, the public notice was also not put up on the EIB's website in a timely manner. While I understand that the May 21 comment deadline is not a regulatory requirement, the rules do require public notice on the EIB's website at least 60 days prior to hearing. 20.1.1.301 NMAC (requiring 60 days public notice); 20.1.1.6.N NMAC [sic] (defining "provide to the public" as including posting on the Board's website and emailing to rulemaking participants). The Board's failure to meet this obligation does not simply affect Guardians, but the public at large. Accordingly, we believe it would be appropriate to extend the date of the hearing and provide supplemental notice as needed to meet the applicable requirements.

AQB response #1:

A notice of rulemaking hearing was sent to the Air Quality Bureau's Regulatory and SIP Bulletin list serve on March 30, 2021; and as shown by the attached distribution list, five members of WEG, including yourself, were sent notice. (dtimmons@wildearthguardians.org, jhorning@wildearthguardians.org, jnichols@wildearthguardians.org, mnykiel@wildearthguardians.org, rsobel@wildearthguardians.org,). In addition, you were present at the EIB meeting on March 26, 2021, where AQB requested and was granted a hearing date and time regarding EIB 21-07 (R).

The AQB does not review EIB actions to ensure that the EIB is in compliance with 20.1.1 NMAC - *Rulemaking Procedures - Environmental Improvement Board*; however, AQB has complied with Agency requirements for public notice and hearings contained in 20.1.1 NMAC - *Rulemaking Procedures - Environmental Improvement Board* and the *State Rules Act* at 14-4-1, NMSA 1978. Additional outreach was conducted as outlined in the Public Involvement Plan for the Sunland Park Nonattainment Area (January 28, 2021).

The certification that AQB's NNSR rule is adequate, is due to EPA by August 3, 2021. Any delay in the hearing date will cause the AQB to miss this deadline.

The AQB opposes any postponement of this hearing.

WEG Comment #2:

“Second, regarding the substance of the rule, Guardians remains concerned that the amended language at 20.2.79.109 could be misinterpreted as excluding ozone from the "cause or contribute" analysis required by statute. As we discussed, because there is no significant ambient concentration established by rule, the rule could be read to imply that the cause or

contribute standard does not apply to ozone. The regulations, of course, require permit denial where a new facility will cause or contribute to any NAAQS exceedance, which includes ozone. 20.2.72.208.D NMAC. Our concern regarding the potential misinterpretation of the proposed language is exacerbated by the Board's recent decision indicating that the Department lacks the authority to deny minor source permits based on ozone impacts. EIB No. 20-21. I am attaching redline language that attempts to clarify that ozone is still subject to the cause or contribute standard, which should be evaluated on a case-by-case basis absent a regulatory significant ambient concentration. This approach comports both with the regulations as well as applicable EPA guidance regarding Significant Impact Levels for PM_{2.5} and ozone, which I am also attaching for your reference.”

AQB Response #2:

AQB opposes the language proposed in your comment. Any proposed rule language that is at variance from language already approved into the SIP (i.e., 20.2.79 NMAC) must receive concurrence from EPA, or they will not approve the proposed SIP revision. Since your proposed text does not appear to be reflected by the Code of Federal Regulations, EPA is unlikely to approve it. The text proposed by AQB, while not verbatim, is derived from and aligns with 40 CFR 51.165.(b)(1) & (2). The AQB has worked with EPA on these revisions, and EPA has indicated that they are adequate. Since the language proposed by AQB mirrors the CFR, there should not be any misinterpretation of applicability or of whether a major source or major modification causes or contributes to the violation of the ozone NAAQS. In addition, the table of significant ambient concentrations at 20.2.79.119 NMAC is verbatim from 40 CFR 51.165.(b)(2), which also does not list a significance level for ozone. Further, the comment is not germane to the proposed amendments to 20.2.79 NMAC as the rule applies to major sources or major modifications only, not minor sources.

The April 17, 2018 EPA *Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program* is non-binding guidance and applies to the PSD permitting program (20.2.74 NMAC) and not the nonattainment permitting program (20.2.79 NMAC) per se.

The permitting rules that are currently in place are protective of air quality, including requirements for sources located within ozone attainment and nonattainment areas. When considering ozone impacts, major sources and major modifications (i.e., an increase of 40 TPY VOC or NO_x) in attainment, unclassifiable, or attainment/unclassifiable areas are subject to PSD permitting rules under 20.2.74 NMAC, *Permits - Prevention Of Significant Deterioration (PSD)*, and would require an ambient impact analysis (20.2.74.303 NMAC) using air quality modeling tools (20.2.74.305 NMAC). Due to the nature of ozone formation, EPA does not set a significant impact level for ozone (or for secondary PM_{2.5}). They have provided guidance that establishes a two-tiered screening approach for modeling to address impacts (i.e., *Guidance on the Development of Modeled Emission Rates for Precursors (MERPs) as a Tier 1 Demonstration Tool for Ozone and PM_{2.5} under the PSD Permitting Program*). Applicants and AQB's

permitting/modeling groups use this guidance on a case-by-case basis to determine impacts of a specific project. If it is determined that the project causes or contributes to the nonattainment violation, then the permit should be denied unless the permittee reduces their emissions to compensate for their impact. If their impact is on a designated nonattainment area (i.e., Sunland Park), the source would be subject to 20.2.79 NMAC, specifically Subsection 20.2.79.109.D NMAC:

D. “Other requirements.

(1) A new major stationary source or major modification which meets the criteria of Paragraph (2) of Subsection A of 20.2.79.109 NMAC shall demonstrate that the source or modification will not cause or contribute to a violation of any national ambient air quality standard by meeting the following requirements and no others of this part:

- (a)** Paragraph (2) of Subsection C of 20.2.79.112 NMAC regarding emission offsets;
- (b)** Subsection D of 20.2.79.112 NMAC regarding a net air quality benefit;
- (c)** 20.2.79.114 NMAC - Emission Offset Baseline;
- (d)** 20.2.79.115 NMAC - Emission Offset; and
- (e)** 20.2.79.117 NMAC - Air Quality Benefit.

(2) In addition , a new source or modification which meets the criteria of Paragraph (2) of Subsection A of 20.2.79.109 NMAC and is also a major stationary source or major modification as defined in 20.2.74 NMAC (prevention of significant deterioration (PSD)), shall obtain a PSD permit under the provisions of 20.2.74 NMAC.”

If the source’s impact is on a designated attainment area, the source would not be subject to 20.2.79 NMAC.