WildEarth Guardians' Opening Statement

Presented by Daniel Timmons

EIB Hearing Nos. 20-21(A), 20-33(A)

September 23, 2020

Thank you, Mr. Chair and Members of the Board. Daniel Timmons on behalf of Petitioner WildEarth Guardians.

Boiled down, this case is a simple one. Ozone pollution levels in the southeastern corner of New Mexico violate the public health standards set by the EPA. The monitoring data for Carlsbad, Hobbs, and Carlsbad Caverns is all very clear on this point, and neither the Department nor any of the Intervenors dispute this. Yet despite acknowledging the region's ozone problem, the Department continues to issue new permits allowing more and more emissions of ozone precursor pollutants, making the situation worse. The Department and Intervenors raise various technical and legal arguments to obscure this basic truth. But they cannot deny the reality on the ground – by continuing to permit new facilities and more emissions, the Department has and continues to exacerbate the problem of ozone pollution in the region. We simply ask that the Board uphold the law and the Department's permitting regulations and put a stop to this untenable situation.

This hearing will address two separate appeals filed by Guardians. First, an individual minor source construction permit for the 3 Bear Libby Gas Plant, Permit No. 7482. Second,

three separate registrations under Department General Construction Permit for Oil & Gas – Permit Nos. 8729, 8730, and 8733. While there are some legal distinctions between the individual permit challenge and the registration appeals, the core issue is applicable to both. Because monitored air pollution levels demonstrably violate the National Ambient Air Quality Standards (or NAAQS) for ozone, the Department cannot continue approving registrations under the general permit, and the agency must require offsets or other means to ensure emissions won't cause or contribute to ozone violations before approving new individual permits.

Lets start with the problem. Ozone pollution levels in southeastern New Mexico threaten public health; the data from all of the air quality monitors in the region shows rising pollution levels over the past few years, which now exceed federal public health standards. And this is not just an erroneous blip in the data; its based on a three-year average of the fourth-highest daily 8-hour maximum reading, referred to as the design value. The Carlsbad monitor is a particular problem, with that three-year average from 2017 to 2019 registering 79 ppb, well-above the 2015 federal standard of 70 ppb. So while southeastern New Mexico may have been formally designated as meeting the ozone NAAQS after that standard was first promulgated in 2015, current data plainly shows the area now out of compliance.

Turning to the 3 Bear Permit. The Department's regulations at 20.2.72.208 NMAC require the agency to deny a permit application where emissions from the facility will "cause or contribute to air contaminant levels in excess of any National Ambient Air Quality Standard"

unless the emissions are offset. Here, the 3 Bear expansion will add new emissions of ozone precursors - 72 tons of VOCs and 21 tons of NOX each year – in an area where monitoring data is already in exceedance of the ozone NAAQS. Despite a lot of hand-waving, Department does not dispute that these emissions are likely to increase ambient ozone levels in the area. While the Department's excuses continue to shift, it has not disputed the basic fact that adding new emissions of VOCs and NOx increases ozone levels.

In its Answer to Guardians petition, the agency claimed that photo-chemical modeling to quantify a single source's impact on ozone levels is "not possible;" but subsequent testimony indicated that its actually just complex and can be expensive. And there are also existing models and datasets which the agency could use much more cheaply without starting from scratch. And the agency also acknowledges that there are simplified tools – in particular EPA guidance on Modeled Emission Rates for Precursors – known as MERP, that allow for ozone impacts from individual sources to be quantified in a cost-effective manner. But the administrative record for this case is blank. It includes no ozone modeling, new or refreshed, no MERP analysis, no quantification whatsoever of the ozone impacts from the new emissions at 3 Bear.

After issuing the 3 Bear permit without conducting that analysis, the Department is now trying to insert a significance threshold into its regulations – claiming that 3 Bear will not *significantly* contribute to exceedances of the NAAQS because it is a minor source. The Department tries to rely on what are known as Significant Impact Levels (or SILs) as establishing essentially a magic threshold, or legal fiction, below which emissions and resulting ozone

impacts may be deemed not to contribute to ozone exceedances. But there are several critical problems with the Department's attempt to insert a significance threshold into its regulations.

First, there is no significance threshold set forth in the statutory or regulatory language, which requires denial of permits which will "cause or contribute" NAAQS exceedances. Neither the statute nor the rules do not say "significantly contribute" and no Court has upheld any attempt to insert a significance threshold into that statutory or regulatory language.

Second, even if a significance threshold might be appropriate in certain circumstances, as described in EPA's Guidance, the Department has not made the necessary demonstration that it is appropriate here, with respect to the 3 Bear facility. EPA's Guidance is very clear that a permitting authority – like the Department - cannot simply assume that any impact below the SIL will not contribute to ozone exceedances. Instead, it must provide a "reasoned explanation" on a case-by-case basis why emissions from a particular facility will not contribute to ozone exceedances.

Here, prior to issuing the 3 Bear permit, the Department did not quantify the facility's ozone impacts, and the permitting record shows no consideration of the ozone SIL, or really, any assessment of ozone impacts at all. Instead, only after issuing the permit has the agency articulated its purported reliance on a significance threshold. But the Department has failed to demonstrate - in the record or in its testimony - how it is possibly reasonable to conclude that

increasing ozone precursor emissions in an area already exceeding the NAAQS will not contribute to further NAAQS exceedances.

For that reason, this case perfectly illustrates why application of a bright-line significance threshold is inappropriate and unlawful. Monitored ozone levels in the Carlsbad area already exceed the NAAQS. Allowing new emissions undoubtedly makes this problem worse. The Department's approach is simply to assume that minor sources will not contribute to the problem because each individual source will presumptively not impact ozone levels by more than 1.0 parts per billion, the SIL level provided in EPA's guidance. But the ozone standard is only 70 parts per billion, and there are hundreds, if not thousands of sources contributing to the problem. So by applying a significance threshold, and completely discounting smaller levels of levels of contribution, the Department is effectively assuming that the vast majority of emissions sources don't contribute to the ozone problem. And so the problem persists.

The Department's regulations require denial of a permit where it will "cause or contribute" to an exceedance of the federal ozone standard. There is no significance threshold in the regulations, and the Board should reject the Department's attempt to effectively insert such a provision without formally modifying those regulations, particularly in an area that is already exceeding the NAAQS. The 3 Bear Permit was unlawfully issued and should be vacated.

Turning to the three General Permit registrations.

Here, the terms of that general permit are clear and controlling. To be eligible for this type of streamlined, fast-track permit, facilities cannot be located in areas with pre-existing ambient air quality problems. Because air quality conditions in the Carlsbad area have deteriorated since the general permit was issued, that permit – by its own terms – is no longer applicable in the area. And this is made plain in two separate places in the general permit.

First, to be eligible to register under the general permit, the permittee must demonstrate that they meet all applicable requirements listed in Part A103. Among those requirements listed in the permit is 40 CFR Part 50, the National Ambient Air Quality Standards, which includes the ozone NAAQS. The administrative record for the Department's approvals of these registrations shows no consideration of this issue, no demonstration of compliance with the ozone NAAQS. And as already discussed, the area is demonstrably out of attainment with the NAAQS, so without emission offsets or some other measures to prevent further contributions to the problem, there is no way for these facilities to demonstrate compliance.

Second, under Part A100(H)(6) of the Permit, the Department must deny any registration for facilities located in a non-attainment area, as defined by specific Departmental regulations. Now the Department has apparently interpreted this provision to only apply to *designated* nonattainment areas, but that's not what the definition says. Looking at 20.2.79 NMAC, as referenced in the permit, nonattainment area means "an area which is shown by monitored data or which is calculated by air quality methods (or other methods determined by the administrator to be reliable) to exceed any national ambient air quality standard for such

pollutant." This includes, but is plainly not limited to areas designated nonattainment under the Clean Air Act.

The Department will try to offer technical legal arguments why you should not look at the plain language of this regulation, tying itself into legal knots and trying to defend its registration approvals by arguing that its own rules are unlawful, and effectively asking the Board to amend its regulations without going through the required rulemaking process. This is plainly because the Department does not and cannot dispute that the Carlsbad area – where these facilities are located – plainly meets the regulatory definition of a nonattainment area specifically incorporated into the General Permit.

As a policy matter, the fast-track general permit process should not be available in areas that are already violating air quality standards. As the Department's testimony has indicated, a formal attainment designation from EPA takes some time. It can take years, if at all. And in the meantime, we find ourselves here in limbo, with air pollution levels demonstrably above federal standards, standards designed to protect public health. But EPA hasn't yet acted, and is under no deadline or obligation to do so. In this circumstance, where we find ourselves today, it makes perfect sense to simply pull off the table a fast-track process for approving new emissions, which will undoubtedly make the problem worse. And so that's why, by its very terms, the General Permit is not available in areas that are shown by monitored data to be exceeding the NAAQS.

The Department and the permittees claim that Guardians' challenge threatens to shut down the entire oil and gas industry in southeastern New Mexico. But that is simply not the case. We do believe that because ozone levels in Lea and Eddy counties plainly exceed the NAAQS, the Department cannot issue new general permit registrations for oil and gas facilities. But individual permits could still be issued, so long as permittees mitigate their emissions through offsets or other means to avoid contributing to the problem. That's the standard process in nonattainment areas and what the state's rules require.

To conclude, the Department and Permittees will try to make this hearing a lot more complicated than it needs to be. At core, there's no dispute that ozone pollution is a serious problem and public health threat in southeastern New Mexico, and the Department's continued issuance of new permits and registrations is making this problem worse. Instead of addressing this problem head-on, the Department points to scientific complexities, legal technicalities, and possible future rules that are not yet on the books. But what we are asking for is really quite simple. As quoted in our expert's report, Roy Rogers: "When you're in a hole, stop digging."