

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF:
THE APPLICATION
OF YUCCA GROWTH
INFRASTRUCTURE, LLC
FOR AN AIR QUALITY PERMIT
NO. 10883**

AQB 26-57(P)

**APPLICANT YUCCA GROWTH INFRASTRUCTURE, LLC'S RESPONSE TO
REQUESTS FOR HEARING OFFICER TO ORDER DISCOVERY**

Applicant Yucca Growth Infrastructure, LLC ("YGI" or "Applicant") hereby responds to New Mexico Environmental Law Center ("NMELC") and the Center for Biological Diversity's ("CBD") Request and New Energy Economy's First and Second Requests ("NEE" and collectively the "Requestors") for the Hearing Officer to Order Discovery (collectively the "Requests").

The Amended Scheduling Order contemplates that "formal discovery will be allowed only upon order of the Hearing Officer." Applicant respectfully requests that the Hearing Officer decline to issue such an order, both because discovery is simply not authorized by the Air Quality Control Act (the "Air Act") and its implementing regulations for a hearing such as this, and because of the impermissibly broad scope of the Requests.

The New Mexico Environment Department made the clear decision to distinguish hearings under the Solid Waste Act from all other permitting proceedings. Specifically, Section 20.1.4.200(E) authorizes discovery in "special procedures for hearings under the Solid Waste Act." Neither Section 20.1.4.200(E) nor any other subsection of that provision authorizes discovery in any other permitting proceedings. This is consistent with the legislative direction under Section 74-9-29 of the Solid Waste Act expressly authorizing discovery procedures to be adopted in Solid Waste Act *permit* proceedings. No similar legislative authority is found in the

Air Act. Indeed, with respect to air, the legislature has only authorized discovery in *enforcement* proceedings. *Compare* Solid Waste Act § 74-9-29 (“As a minimum, the procedural regulations shall provide: ... (5) procedures for discovery” in adjudicatory proceedings which are defined to include permit proceedings) *with* Air Act § 74-2-12 (“In connection with a proceeding under this section [concerning enforcement of the Air Act], the secretary or the director ... may adopt rules for discovery procedures.”).

Bottom line, the Hearing Officer is bound by the regulations and cannot invoke authority in a procedural order that has not been granted by statute or regulation. It is black letter law that “administrative agencies are bound by their own regulations.” *Law v. N.M. Human Servs. Dep’t.*, 2019-NMCA-066, ¶ 23, 451 P.3d 91. Because the New Mexico Environment Department is a creature of statute, it “has no common law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them.” *Alto Coal. for Env’t Pres. v. Roper Constr., Inc.*, 2025-NMCA-018, ¶ 12, 572 P.3d 268. Indeed, Applicant reviewed dockets applicable to air permit hearings before the Secretary and was unable to locate *any prior instance* of a Hearing Officer ordering discovery in an air permit proceeding like this one. Nor is there any authority or basis for the argument that “due process” requires discovery in this proceeding.

Even if discovery were permissible here, Requestors’ proposed discovery is so patently unreasonable that it should not be authorized. While Applicant does not agree that the Solid Waste Act implementing provisions govern here, Applicant agrees that all limits provided in the New Mexico Rules of Civil Procedure and 20.1.4.200(E) should be strictly applied to determine whether to order discovery. Discovery should only be authorized upon a determination by the Hearing Officer that:

- (a) The discovery will not unreasonably delay the proceeding and is not unreasonably burdensome or expensive;
- (b) The information sought is not privileged and is relevant to the subject matter of the proceeding;
- (c) The information to be obtained is not unreasonably cumulative or duplicative, or not otherwise reasonably obtainable; and
- (d) The benefit of the information to be obtained outweighs the burden or expense of the proposed discovery.

See 1-026, 1-033, and 1-034 NMRA; *see also*, 20.1.4.200.E(2), NMAC.¹ The discovery sought by Requestors fails all these criteria.

To be considered relevant, discovery should relate to the statutory criteria for approving or denying an air permit application, *i.e.*, whether the project:

- (a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal [Clean Air] act;
- (b) will cause or contribute to air contaminant levels in excess of a national or state standard or, within the boundaries of a local authority, applicable local ambient air quality standards; or
- (c) will violate any other provision of the Air Quality Control Act or the federal [Clean Air] act.

NMSA § 74-2-7(C)(1); *see also* 20.2.7.208, NMAC; *Alto Coal. for Env't Pres. v. Roper Constr., Inc.*, 2025-NMCA-018, ¶ 14, 572 P.3d 268 (focusing exclusively on statutory criteria in Air Act 74-2-7(C)(1) in review of similar air permit).

Requestors never explain why any of their Requests are relevant to the air permitting proceeding or why extensive discovery is needed in light of all other reasonably available information. Nor can they. Indeed, they prematurely issued their requests knowing that substantial additional information would be released July 29, 2026. The burden is on Requestors

¹ While Applicant does not agree that 20.1.4.200(E) applies to this air permit proceeding, the concepts limiting the ability to seek discovery mirror the New Mexico Rules of Civil Procedure.

to show that each and every Interrogatory and RFP is necessary. Yet Requestors fail to justify their discovery Requests at all.

Instead, Requestors submitted their Requests here before the Department released the draft permit and statement of basis (which are now available), and administrative record (which the Department has committed to produce prior to the hearing). If Requestors were serious about trying to fill information gaps, they would have waited until after July 29, conferred with Applicant prior to submitting their motions, and made an attempt to show why the expansive amount of information requested is relevant and necessary to adduce via discovery. Requestors made no such effort. Requests that do not fulfill even the broadest principles governing discovery in a proceeding like this should be denied.

The Hearing Officer previously indicated that he would consider allowing discovery after reviewing the proposed requests. Now that the specific requests are available, it is apparent they should not be allowed for at least three independent reasons: (1) the Requests go far beyond the narrow scope of this air permit hearing and therefore are not “relevant to the subject matter” of the proceeding; (2) the Requests are unreasonably burdensome and harassing; and (3) the Requests fail to address why the information is not otherwise reasonably obtainable through a review of the draft permit, statement of basis, the administrative record, the public domain, and the hearing itself.² Each of these categories is discussed more fully below, with reference to examples and Applicant’s specific objections as appropriate.³

² The timing allowed for the Department to prepare the administrative record cannot drive a decision on discovery. That is because the regulations provide that the Administrative Record can be filed as late as the date of the hearing. *See* 20.1.4.200.A(2), NMAC. The Applicant supports the Department’s stated commitment to file the administrative record as early as possible in this proceeding. But the fact that the Department is following its normal procedures with respect to filing of the Administrative Record should not be a basis for ordering extensive discovery or outweigh the undue burden these Requests will place on Applicant.

³ In submitting this Response to the Requests for the Hearing Officer to Order Discovery, Applicant does not waive any objection to specific Interrogatories or RFPs it may make at a later date to extent discovery is authorized.

I. The Hearing Officer Should Deny the Requests Because They Are Outside the Scope of This Proceeding

Applying the Rules of Civil Procedure and the Department's limits for Solid Waste Act permit proceedings, discovery must be "relevant to the subject matter" of the proceeding. *See* 1-026(B)(1) NMRA; *see also* 20.1.4.200.E(2)(b), NMAC. The subject matter of this proceeding is an air permit. Thus, the subject matter of discovery should relate to the air permit application and associated requirements for its issuance. *See* NMSA § 74-2-7(C) (allowing Department to deny permit only if it finds that a construction permit application will not meet requirements of the Air Act or will contribute air emissions in excess of an applicable air quality standard).

The Interrogatories and RFPs from Requestors ask for information outside of this limited scope, including numerous requests relating to: water, waste, pipeline proceedings, manufacturing process, and project completion schedules. For example:

Water: NMELC and CBD Interrogatories Nos. 16-17 ask Applicant to "describe the maximum volumes of water needed to begin" operation of and the "amount of water that will be discharged from the proposed facility." RFP #19 requests "all documents related to the water needs of the proposed facility." Requests related to water are clearly beyond the scope of this air permit proceeding. Requestors are more likely to obtain relevant information in other proceedings.

Waste: NMELC and CBD Interrogatories 3-7 relate to waste "canisters" generated by fuel cells at other projects. Requests related to waste canisters are clearly beyond the scope of this air permit proceeding.

Manufacturing Process: Several requests relate to Bloom's fuel cell manufacturing process and whether Bloom will have the raw materials or manufacturing capacity to produce the fuel cells needed for the project. For instance, NMELC and CBD RFP No. 27 asks how "Bloom acquires scandium" and whether any of that material is "mined and/or processed in any way in China." These type of requests are not within the scope of this proceeding (and are harassing).

Completion of the Project: Numerous requests raise questions regarding the available equipment and other prerequisites to complete the project. However, the specific questions and detailed information sought are far beyond the relevant scope of this proceeding. For instance, NEE Interrogatory No. 18 demands that Applicant "Identify every internal risk assessment prepared concerning the possibility that Project Jupiter cannot be completed by the proposed commercial

operation date.” Not only is this overly broad and harassing, it raises obvious privilege concerns. All projects have numerous considerations that can impact the timing of completing a project, but that does not make the details of such information relevant to the proceeding. Further, delays or limitations on completion of the project have no nexus whatsoever with the interests purportedly represented by the entities seeking the discovery request. If the Applicant fails to meet deadlines and the project does not proceed or does not result in the capacity anticipated, there can be no alleged harm to Requestors.

Pipeline Proceedings: *All of the Interrogatories and RFPs in NEE’s Second Requests relate to pipeline issues and should be denied. Pipeline-related aspects of the project are the subject of entirely separate proceedings before the Federal Energy Regulatory Commission and the New Mexico Commission of Public Lands. Requests that focus on entirely different agency proceedings are clearly outside the scope of this air permit proceeding. See e.g., NEE 2-4, 2-5 (“State whether YGI, Energy Transfer, ET Gathering and Processing LLC, Transwestern Pipeline Company LLC, or any affiliate intends to seek administrative review or judicial review of the Commissioner’s July 14, 2026 decision denying reconsideration of the requested rights-of-way and business lease.”).*

These Requests, far beyond the scope of this proceeding, demonstrate that Requestors are not seeking discovery to better represent their interests in this air permit proceeding but rather to delay and harass the Applicant. Consequently, the Hearing Officer should decline to order this discovery. *See* 1-026(B)(1) NMRA.⁴

II. The Hearing Officer Should Deny the Requests Because They Are Unreasonably Burdensome and/or the Burden of the Proposed Discovery Outweighs the Likely Benefit

Requestors abuse the Hearing Officer’s willingness to authorize discovery by proposing nearly 60 interrogatories and over 30 RFPs that seek information far beyond the narrow scope of this air permit proceeding, seek confidential and privileged information, and contain broad

⁴ As noted *infra*, some of the information requested may also be available via other publicly available sources, such as the Land Commission’s website or County hearings that may involve a broader scope of issues. *See, e.g.,* Board of County Commissions Regular Meeting (July 28, 2026) at 2:45:00, available at <https://www.youtube.com/watch?v=GfR50pEdtw> (noting that annual water use at the project will be less than an average fast-food restaurant). Several requestors, *e.g.* NMELC, are also actively involved in other proceedings involving the project and appear to be using discovery in this proceeding inappropriately to influence other unrelated matters.

unrestricted requests.⁵ Many of these Requests are “so clearly overbroad” and inappropriate that they are “unreasonably burdensome” according to basic principles of discovery. *See, e.g.*, NMRA, Rule 1-026(B)(2)(c) (a tribunal should limit discovery when the “burden or expense . . . outweighs its likely benefit”); *Heuskin v D&E Transp., LLC*, Civ. No. 19-957, 2020 WL 1450575, at *11 (D. New Mexico March 25, 2020) (noting that “‘kitchen sink’ requests are not permitted” and that a “discovery request is so clearly overbroad that it requires little explanation” when it asks for “all documents in support of [a] claim.”).

Applicant supports the aims of transparency and access to relevant information, which is why the administrative record and hearing process itself are public. But the requested Interrogatories and RFPs are clearly overbroad and unreasonably burdensome. For instance, NMELC and CBD RFP No. 6 demands “all documents related to performance of the proposed fuel cells under various operating conditions” without any limitations on the time period covered by the RFP or the geographic location of the project. Similarly, NEE Interrogatory No. 17 demands that Applicant “Identify every Project Jupiter milestone dependent upon: a. FERC pipeline approval; b. air permit issuance; c. fuel-cell manufacturing; d. transmission availability; f. natural gas infrastructure; g. fuel-cell delivery; and h. water infrastructure.” It is important for the Hearing Officer to exercise his “supervisory role over the discovery process . . . to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense.” *Pincheira v Allstate Ins. Co.*, 144 NM 601, 607 ¶ 24; 190 P3d 322 (2008).

Additional examples of unreasonably burdensome requests include the following:

[NMELC and CBD RFP No.] 9. Please provide all documents related to the performance or efficiency of the proposed fuel cells over their lifetime.

⁵ New Mexico Rule of Civil Procedure 1-033(A) authorizes a party in a full civil trial to seek a maximum 50 interrogatories.

[NMELC and CBD RFP No.] 16. Please provide all documents demonstrating the availability of sufficient scandium to construct the proposed fuel cells.

[NEE Interrogatory No.] 20. State Bloom Energy's actual production during each calendar year from 2020 through the present, expressed in: a. megawatts manufactured; b. number of Energy Servers manufactured; c. number of fuel-cell modules and stacks manufactured; and d. percentage of stated manufacturing capacity utilized.

[NEE Interrogatory No.] 23. State the total amount of Bloom Energy's current backlog and identify what portion consists of: a. binding purchase obligations; b. nonbinding commitments; c. framework agreements; d. options; e. service revenue; f. anticipated tax credits; and g. projects that have not received required permits or financing.

These requests are “so clearly overbroad that it requires little explanation.” They are also irrelevant, unreasonably burdensome, and cannot have been asked for any reason other than to harass Applicant and cause delay of this proceeding. It would take an unfathomable amount of resources to search for these materials and determine what is relevant, responsive, and not privileged. These types of requests cannot possibly be what the Hearing Officer had in mind when he contemplated *limited* discovery in this matter. These and similarly broad and burdensome discovery “require[s] the [Applicant] either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request.” *Taylor v Grisham*, Civ. No. 1:20-cv-00267, 2020 WL 6449159, at *3 (Dist. N.M., November 3, 2020) (citation omitted). Requestors have not explained and cannot justify why this information is necessary for this hearing. Thus, the burden of the Requests outweighs their benefit and should be denied. 1-026(B)(2)(c) NMRA.

III. The Hearing Officer Should Deny the Requests Because Information in the Requests is Otherwise Reasonably Obtainable

The Application was deemed complete on May 27, 2026, and the Draft Permit and Statement of Basis were released July 29, 2026. The Department also indicated a commitment to

release the administrative record as soon as practicable (as soon as August 24, 2026), even though the regulations only require that the agency shall, “no later than the hearing, forward the Administrative Record to the Hearing Clerk.” 20.1.4.200(A)(2), NMAC. There is ample information related to many of the Requests already available to Requestors (including in attachments NEE enclosed with their Requests), and substantial additional information is forthcoming. Not only will relevant Requests be addressed in the administrative record, but the Requestors will have the opportunity via technical direct testimony and rebuttal and opportunities for cross-examination at the hearing itself to comment on and question experts on the exact topics they want Applicant to duplicate via discovery.

In light of the permitting record information already available and about to be available, many of the Requests are premature, unreasonably cumulative and duplicative, and seek information that is otherwise reasonably obtainable from other sources. *See* 1-026(B)(2)(a) NMRA; *see also* 1-033(E) NMRA.

For instance, NMELC and CBD Interrogatory No. 2 asks for Applicant to “describe what continuous emissions monitoring systems or parametric monitoring will be installed at the proposed facility...” That information is covered in Draft Permit Condition Nos. A108.B-C and A601, and in the Draft Statement of Basis explaining why those conditions were required by the Department. *See* Draft Statement of Basis at 14. It is duplicative and unreasonable to require Applicant to provide information through discovery when that information is already available to Requestors. Moreover, any suggestion that this information is incomplete is more appropriately addressed through the hearing process itself, *i.e.*, through technical testimony by Requestors or cross-examination of Applicant and Department witnesses. Requestors have not met their burden to show why this information must be adduced via interrogatories. *See* 1-033(e) NMRA

(allowing a party to point to available records when “the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served”).

Many other Interrogatories and RFPs are similarly duplicative and readily obtainable via other sources. For instance, the following examples are representative of burdensome requests for documents that are currently available or will be available as part of the administrative record:

[NMELC and CBD Interrogatory No.] 1. Please describe the concentration of all chemicals in the pipeline gas, including, for example, levels of benzene, toluene, xylene, chloroform, sulfur compounds, radon and all other chemicals and radionuclides.

[NMELC and CBD RFP No.] 1. Please provide all documents that the Applicant has produced to, created for or otherwise shared with the New Mexico Environment Department, New Mexico Economic Development Department, and State Engineer of New Mexico from January 1, 2025 until the present.

[NMELC and CBD RFP No.] 2 Please provide all documents showing communications between the Applicant and the New Mexico Environment Department, New Mexico Economic Development Department, or the State Engineer of New Mexico from January 1, 2025 until the present.”

To extent relevant related to the air permit application, this information will be included in the administrative record.

Other information sought in the Requests is available in the public domain. The following are examples of unreasonably burdensome Interrogatories and RFPs that are otherwise readily available elsewhere:

[NMELC and CBD RFP No.] 8. “Please provide all documents showing how the fuel cells reform hydrogen from methane and how the fuel cells generate electricity.”

[NMELC and CBD RFP No.] 19. Please provide all documents related to the water needs of the proposed facility.

[NEE Interrogatory No.] 1. Identify the largest Bloom Energy Solid Oxide Fuel Cell (SOFC) installation that has ever been constructed and operated anywhere in the world, stating: its location; a. installed capacity (MW); b. date placed into commercial operation; c. number of fuel cell modules or stacks; d. average annual

capacity factor; e. all measured emissions data; f. whether or not there were delivery delays and if yes, by how many months/years; and g. how that facility compares technically and operationally to the approximately 2,460 MW Project Jupiter proposal.

[NEE Interrogatory No.] 9. Identify every raw material necessary to manufacture the Project Jupiter fuel cells, including: a. scandium; b. yttria; c. zirconia; d. nickel; e. ceramics; f. interconnect materials; g. specialty alloys. For each identify: supplier; country of origin; expected quantities; delivery schedule; supply risks.

[NEE RFP No.] 2-2. Produce all documents concerning any planned administrative appeal, judicial appeal, or other effort to overturn or modify the Commissioner of State Lands' denial of the requested rights-of-way and business lease.

As noted at the hearing on July 27, 2026, questions about the basic functioning of fuel cells (including various information videos and diagrams) can easily be obtained via a review of Bloom Energy's website (and other publicly available materials related to technology that has existed since the 19th Century). Other information about existing Bloom operations and non-proprietary components is also available on Bloom's website. Information about potential appeals of an entirely different agency decision is clearly not only not relevant, but can be tracked using the public docket related to that agency. Therefore, the Requests should be denied because information is "otherwise reasonably available" in the public domain and/or that will be in the soon-to-be-released administrative record.

IV. Applicant Preserves All Specific Objections in Responses to Any Discovery

The Applicant notes that this Response is solely related to the Requests that discovery be ordered by the Hearing Officer. If, and to the extent that the Hearing Officer orders discovery, Applicant reserves all rights to raise objections relating to but not limited to privilege, relevance, scope, burden, expense, and reasonableness, among other objections that may specifically apply to particular requests.

V. Conclusion

In light of the overbroad and burdensome Requests, Applicant urges the Hearing Officer to reconsider the authority to order discovery in this air permit proceeding, and whether any discovery is necessary given the information available in the public record in the draft permit, technical analysis and public domain, and forthcoming in the administrative record and hearing process. To the extent the Hearing Officer orders that some limited discovery is appropriate, the Hearing Officer should still deny and/or limit the Requests for the reasons detailed above. If ordered to respond to discovery by the Hearing Officer, Applicant will respond to Interrogatories and RFPs as “relevant” and subject to specific objections, *e.g.* related to privilege or appropriate scope limitations, that it will raise in its specific responses. *See* 1-033, 1-034 NMRA.

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 31, 2026 a copy of the foregoing Response to Requests for the Hearing Officer to Order Discovery was emailed to the persons listed below.

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