

**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. NSR 10833**

AQB 26-57 (P)

**NEW MEXICO ENVIRONMENT DEPARTMENT AIR QUALITY BUREAU'S
RESPONSE IN OPPOSITION TO MOTION TO RESET OCTOBER 19 HEARING
SCHEDULE AND PRESERVE DUE PROCESS**

The New Mexico Environment Department's ("Department") Air Quality Bureau ("Bureau") respectfully submits this Response in Opposition to The Center for Biological Diversity, Jose Saldaña Jr., and Vivian Fuller's ("Movants") Motion to Reset October 19 Hearing Schedule and Preserve Due Process ("Motion"), filed July 31, 2026. Movants mischaracterize this proceeding and misrepresent how permitting hearings before the Department proceed under 20.1.4 NMAC. In doing so, the Movants appear to be asking the Hearing Officer to transform this proceeding from an administrative matter to a civil matter. The Hearing Officer should not do so and should deny the Motion.

**I. MOVANTS SHOULD NOT BE PERMITTED TO TRANSFORM THIS
MATTER INTO A CIVIL PROCEEDING**

In the Motion, Movants appear to misunderstand the nature of administrative proceedings and are effectively asking the Hearing Officer to transform this permit proceeding into a civil case by seeking extensive discovery rather than proceeding under the disclosure procedures provided in 20.1.4.300(B)(1) NMAC. However, proceedings in the administrative context are designed to move faster than in the civil context. As such due process protections are not as rigid and only require that the Movants have a *reasonable* opportunity participate. See *Archuleta v. Santa Fe*

Police Dep't ex rel. City of Santa Fe, 2005-NMSC-006, ¶ 32 (restating the principle that “[c]onstitutional due process does not require an agency to afford a petitioner all elements of a traditional judicial proceeding . . . In general, the right to due process in administrative proceedings contemplates only notice of the opposing party's claims and a reasonable opportunity to meet them”) (internal citations and quotation marks omitted).

Movants misrepresent how permit hearings proceed before the Department under 20.1.4 NMAC. Movant’s Motion claims that they must have the “application and administrative record” to prepare their case for the September 14, 2026, public hearing. [Motion at 2]. This is wrong. First, Application 10883 has been available to the public since the end of May 2026.¹ Movants have had access to the Application for two months. In addition, the Draft Permit, Statement of Basis, and Modeling Review Reports are also available to the public.² Movants have the documents that they need to begin building their case and hiring experts. This hearing will be based on the information contained in the Draft Permit and the Application, both of which are available to the Movants.

Second, Movants’ claim that they must have the Administrative Record before they develop their case. This is not how air permitting hearings proceed under 20.1.4 NMAC. There is not a single instance that NMED can identify in the last seven years that parties obtained the Administrative Record before it was filed by the Department. In every instance identified, parties opposing the issuance of a permit received the Administrative Record on or AFTER the day that the Department filed its Statement of Intent to Present Technical Testimony (“SOI”) under

¹The application is available here: <https://www.env.nm.gov/public-notices/>.

² The Draft Permit, Statement of Basis, and Modeling Report are available here: <https://www.env.nm.gov/public-notices/>.

20.1.4.300(B)(1) NMAC.³ In air quality permit proceedings, SOIs take the place of discovery, and that is when the parties disclose evidence and identify witnesses. Typically, the respective parties will then develop rebuttal testimony based on the testimony and documents presented in the NOIs. To further illustrate the point, the Department has no insight on whether the Movant will produce evidence, nor what witnesses will offer testimony until the day NOIs are filed. This is the standard practice, and the Hearing Officer should not transform this proceeding into a civil matter.

Despite Movants' claim about the complexity of this proceeding, there is nothing novel about this proceeding except the proposed use of fuel cell technology to generate electricity. All the parties retain the same respective burdens of persuasion. Under Section 74-2-7 of the Air Quality Control Act, the grounds for denying a permit are whether the proposed permit "(a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal 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 act." That is the standard the opposing parties must meet, and that is based largely on documents already available to them.

II. THE BUREAU IS SEEKING A FINAL DECISION BY NOVEMBER 23, 2026

The Air Quality Control Act ("Act") and the rules promulgated to achieve its goals provide timeline for the Department to make decisions on permit applications. The Act requires the Department to decide on non-prevention of significant deterioration permit applications within 90 days of the application being deemed administratively complete. NMSA 1978, § 74-2-7(B)(2)(a). This is reflected in the rules governing this permit application at 20.2.72.207(B)(1) NMAC. If

³ In fact, under 20.1.4.200(A)(2) the Administrative Record is not actually required to be filed until the day of a public hearing.

additional time is needed, “an extension not to exceed ninety days for good cause, including the need to have public hearings” may be granted. NMSA 1978, § 74-2-7(B)(2)(a). This potential for a singular extension of 90 ninety days is also mirrored in the Department’s rules. 20.2.72.207(C) NMAC. In this matter, and absent intervening factors like a waiver, these provisions make it the duty of the Department to decide on YGI’s permit application on or before November 23, 2026.

The Department takes these deadlines very seriously. While it is true that these deadlines are rarely met in instances where a public hearing on a permit application occurs, the Department is unaware of any instance where these deadlines were not met over the objections of the permittee. At times past permittees have expressly or implicitly (through participation) waived their rights to have a decision on their permit application. For example, AQB 21-38 (referenced in footnote 4 of the Motion) was an instance where the applicant expressly stipulated to an extended hearing timeline.⁴ Furthermore, the schedule and hearing that was applicable to AQB 21-38 was for a joint hearing on ten (10) permit applications from three (3) different applicants. More frequently however, is the case where a permittee does not object to the deadline being missed and instead continues through the hearing process thereby implicitly waiving the deadline.

Conversely, in this matter, the Applicant has consistently objected to missing the deadline of November 23, 2026. Ultimately, the decision deadline established by NMSA 1978, Section 74-2-7(B)(2)(a) cannot simply be ignored while the applicant asserts its expectation under the law that the Department adheres to. The Department is currently unaware of any past air quality permit application where the decision deadline has been an issue asserted by the applicant, much less the subject of multiple scheduling conferences and rounds of motion practice. As such, the Department

⁴ See AQB 21-38—Permit Application of Willow Lake Gase Plant No. 5142-M8, Stipulation Regarding Schedule and Procedures, <https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2021/10/2021-10-05-Stipulation-re-Schedule-and-Procedures-4.pdf>.

is currently bound to make its decision within the deadline provided by its rules and the provisions of the Act.

For the reasons set forth above, the Bureau respectfully requests that the Hearing Officer deny the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response was sent via electronic mail to the persons listed below this 2nd day of August 2026.

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