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Luis Lopez (OFF)



STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF:

THE APPLICATION OF YUCCA
GROWTH INFRASTRUCTURE, LLC
FOR AN AIR QUALITY PERMIT,
NO. NSR 10883

AQB 26-57 (P)

**APPLICANT'S CONSOLIDATED RESPONSE IN OPPOSITION TO NICHOLAS
MAXWELL, NEE AND CBD'S REQUESTS FOR DISCOVERY**

I. Introduction

Nicholas Maxwell, New Energy Economy ("NEE") and Center for Biological Diversity, Jose Saldaña Jr. and Vivian Fuller ("CBD" and collectively "Objectors") served over one hundred and sixty discovery requests comprising requests for admission, requests for production of documents, and interrogatories on Applicant and NMED ("Requests"), and seek an order directing Applicant and NMED to respond. The Hearing Officer should decline to order Applicant to respond to the Requests because the Requests are unauthorized by law and are far outside the bounds of what is relevant, reasonable, or appropriate.

Significantly, none of the Objectors cite to any legal authority allowing discovery in this type of air permit proceeding, or any prior instance where discovery was allowed in a similar proceeding.

This hearing concerns an application for an air permit, and the statutory factors governing whether the Application should be granted are clear and discrete. Those factors are whether the project (1) will meet the requirements of the New Mexico Air Quality Control Act and the federal Clean Air Act or (2) will cause or contribute to an exceedance of air quality standards.

NMSA § 74-2-7(C). Because those are the statutory factors that determine whether the Application must be granted, any discovery, if permitted at all, must be limited to information directly relevant to those factors.

The documents and information sought by Objectors are far outside this limitation. The Requests served by NEE and CBD seek information regarding topics such as Bloom's fuel cell manufacturing process, supply chain, water needs, wastewater and separate pipeline proceedings before the New Mexico State Land Commission—none of which bear any connection to the statutory factors governing this proceeding. The Hearing Officer can deny those Requests on that basis alone. Mr. Maxwell's Exhibit A disclaims most of those subjects, but his Requests are unreasonably burdensome in other ways.

Applicant addresses Mr. Maxwell's Requests in Sections II, III and IV below. Section V addresses NEE's Requests, and Section VI briefly addresses CBD's Requests.

Generally, many of the *relevant* documents and information sought in the Requests will be provided in the administrative record, which NMED is currently compiling, and/or will be the subject of NMED and Applicant technical testimony (or technical testimony from Objectors). The regulations provide that the Division shall forward the Administrative Record to the Hearing Clerk no later than the date of the hearing. 20.1.4.200(A)(2) NMAC. Applicant takes no position on the separate question, directed to the Department rather than to Applicant, of how the administrative record will be made available for public review in the interim. Objectors will have an opportunity—the same opportunity provided to all parties to air permit proceedings—to cross-examine witnesses and provide technical and rebuttal testimony 10 days after the administrative record is produced. None of the Objectors have demonstrated why the incredibly

burdensome discovery would not duplicate all of this relevant information (and the entire purpose of the hearing) and unreasonably burden NMED and Applicant.

Applicant maintains that, in accordance with the Air Act and Part 4 regulations, discovery is not permitted in this type of proceeding. But even if the Hearing Officer believes some limited discovery is appropriate, Objectors' Requests are unreasonably burdensome and improper, and the Hearing Officer should decline to order Applicant to respond to them.

II. Discovery is not authorized by the Air Act or the Part 4 or Part 72 Regulations

Applicant incorporates by reference its Response to New Mexico Environmental Law Center ("NMELC"), CBD, and NEE's requests for Hearing Officer to Order Discovery filed July 31, 2026, and specifically arguments related to the lack of authority to order discovery in this air permit proceeding.

Applicant respectfully requests that the Hearing Officer similarly decline to order Applicant to respond to any of the Requests directed to Applicant in Exhibit A attached to Mr. Maxwell's Motion. Section 20.1.4.200(E) authorizes discovery only in "special procedures for hearings under the Solid Waste Act." Neither Section 20.1.4.200(E) nor any other applicable statute or rule authorizes discovery in air permit proceedings. *Compare* 1.2.2.25 NMAC (utility hearing procedures expressly allowing discovery).

To the extent that Mr. Maxwell contends he has an unequivocal right to serve the "Requests for Admission to Applicant" listed in Exhibit A to the Motion, that contention is incorrect. *See* Motion at 11. Mr. Maxwell implies that requests for admission are not "discovery" subject to the limitations of the Amended Scheduling Order and are, instead, expressly authorized by section 20.1.4.300(A)(3). But a request for admission is—like an interrogatory or a request for production of documents—a well-established method of civil discovery, *see* 1-036

NMRA, and are subject to the same limitations. *See* 1-026(B)(2) NMRA. Nor does the provision in section 20.1.4.300(A)(3) authorizing the Hearing Officer to “issue pre-hearing orders” concerning “stipulations or admissions of fact or law” grant Mr. Maxwell the unconditional right to serve requests for admission of factual assertions. That provision merely describes the *Hearing Officer’s* authority to issue pre-hearing orders and seek stipulations to streamline the hearing, not *Mr. Maxwell’s* ability to serve requests for admission. Here, the Hearing Officer has issued a pre-hearing order specifying that all discovery must be pre-approved by the Hearing Officer. Order (July 29, 2026), ¶ 7. In any case, all of Mr. Maxwell’s Requests for Admission are inappropriate because they are based on documents that speak for themselves.

Mr. Maxwell alternatively grounds his requests in 20.1.4.100(E)(2) and 20.1.4.300(A)(3) NMAC. Neither provision entitles a party to pre-hearing discovery. Section 20.1.4.100(E)(2) enumerates the Hearing Officer’s own duties in conducting the hearing—to conduct a fair proceeding, to assure that the facts are fully elicited, to avoid delay, and to issue necessary orders. The duty to fully elicit facts is discharged through the technical testimony, rebuttal, and cross-examination procedures that a Part 4 permit hearing prescribes; it is not a source of pre-hearing discovery.

Applicant further notes that Relief Items 1 and 3 of the Motion, the Administrative Record Access Request, and the Requests directed to NMED in Exhibit A to the Motion seek relief from the Department rather than from Applicant. Applicant takes no position on that relief, except to confirm that it has no objection to the Department making administrative record materials available for review on a rolling basis.

III. Mr. Maxwell's discovery Requests are unnecessary, unduly burdensome, and duplicative.

Even if some limited discovery were permissible, Mr. Maxwell's Requests are unreasonable and should not be authorized. The multi-part Interrogatories concerning relatively tangential issues are particularly burdensome and unreasonable. For instance, Mr. Maxwell's four interrogatories on NMED have more than 50 discrete subparts. His seven interrogatories on Applicant have more than 60 discrete subparts.¹ The number of subparts alone exceeds the maximum allowed interrogatories the New Mexico Rules of Civil Procedure in civil cases, and they are propounded on the same two responding parties that could be simultaneously answering over 100 separate Requests served by NEE, NMELC, and CBD.²

As previously stated, if some limited discovery is ordered, Requests 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.

¹ New Mexico Rules of Civil Procedure provide that interrogatories in civil cases cannot exceed 50 "including all discrete subparts." 1-033(A) NMRA.

² Collectively, the parties have issued 160 Requests on NMED and Applicant. "[I]n some instances nominally separate parties should be considered one party for purposes of the 25-interrogatory limitation" in the federal rules. Wright & Miller 8B Fed. Prac. & Proc. Civ. § 2168.1 (3d ed.).

See 1-026, 1-033, and 1-034 NMRA; *see also*, 20.1.4.200.E(2) NMAC.³ The discovery sought by Mr. Maxwell fails all these criteria.

First, Mr. Maxwell's Requests are unreasonably burdensome because Applicant shouldn't be required to explain every complex equation or related Application assumption via discovery. The air permit application is technical. Technical testimony from the Department and the Applicant will support various calculations in the Application. Discovery is not the appropriate means to question or probe the accuracy of Application calculations. There is simply no reason why Objectors can't put on their own technical testimony or use cross-examination time at the hearing if the Hearing Officer deems the questioning relevant and material.

The benefit to be obtained by Mr. Maxwell's Requests pales in comparison to its burden.

As one example, see Mr. Maxwell's Applicant Interrogatory No. 1:

Describe Applicant's current proposed design for onsite natural-gas treatment from the facility inlet through delivery to the Energy Servers. State:

- a. each treatment, conditioning, filtration, liquid-separation, heating, pressure-regulation, sulfur-removal, guard, or polishing stage;
- b. whether any facility-wide, regional, or other Fuel-Treatment Component is upstream of the disclosed CDS units and whether those units receive untreated pipeline gas or gas already treated onsite;
- c. whether any Fuel-Treatment Component remains downstream of a CDS unit, including equipment located adjacent to or within an Energy Server;
- d. whether the CDS units are connected to a common untreated or pretreated header, arranged only in parallel, arranged in multiple treatment tiers, or arranged otherwise;
- e. the current design count and the maximum number of CDS units that could be installed or operated under the Draft Permit as written;
- f. why the narrative states "approximately ninety-five" while the SSM Worksheet uses exactly 95;
- g. whether all CDS units are identical with respect to parameters material to emissions and, if not, each materially different CDS class;

³ While Applicant does not agree that 20.1.4.200(E) NMAC applies to this air permit proceeding, the concepts limiting the ability to seek discovery mirror the New Mexico Rules of Civil Procedure.

- h. the Energy Servers, clusters, and project areas served by each CDS or CDS class, and the generating capacity and maximum gas flow associated with each CDS or CDS class; and
- i. whether any CDS unit is spare, standby, redundant, partially loaded, or available for alternate routing, and whether the count or configuration may change by construction phase or final equipment mix.

For each Fuel-Treatment Component identified upstream or downstream of the CDS units, state its type, location, number, service interval, and associated isolation, purging, blowdown, venting, servicing, or replacement activity.

This single Interrogatory has 20 discrete subparts. CDS (which refers to the centralized desulphurization system used to remove any remaining trace amounts of sulfur from incoming natural gas already low in sulfur) is mentioned 142 times in Mr. Maxwell's Requests (and is the subject of all seven of his Interrogatories on Applicant with over 60 subparts). For context, the estimated emissions from the CDS units is 0.34 tons per year (tpy) of Volatile Organic Compounds (VOC) of the total 124 tpy VOC from fuel cell operation. In other words, Mr. Maxwell's Requests are incredibly burdensome and broad related to one aspect of the project that has immaterial emissions. Thus, the benefit of the information obtained from this and similar multi-part Interrogatories, RFPs, and Requests for Admission from Mr. Maxwell does not outweigh the substantial burden his Requests will impose on Applicant.

Second, the information in Mr. Maxwell's Requests is indisputably "otherwise reasonably obtainable" because the materials requested will be produced as part of the administrative record and/or can be part of technical testimony and cross-examination.⁴ Mr. Maxwell does not explain why the ability to address issues 10 days after the administrative record is issued in rebuttal testimony, and the opportunity to ask questions during cross-examination of NMED's and Applicant's witnesses at the hearing, are insufficient methods to obtain the information he seeks.

⁴ Applicant has no objection to Mr. Maxwell's request that NMED provide expedited review of the administrative record documents on a rolling basis.

See, e.g., Ramirez v Marsh, 2025-NMSC-050 ¶, 580 P3d 768, 779 (holding that the ability to conduct “thorough cross-examination” satisfied party’s constitutional Sixth Amendment right to confrontation and denying discovery). If cross-examination in lieu of discovery is sufficient in criminal proceedings (with the highest due process rights), surely cross-examination is sufficient for this air permit proceeding.

Mr. Maxwell incorrectly argues that rebuttal and cross-examination cannot supply materials needed to prepare an affirmative case, invoking 20.1.4.400(A)(1) and 20.1.4.400(B)(2) NMAC. None of the parties in this case, including Mr. Maxwell, have pointed to a permitting case where discovery was ordered – indicating that parties are typically able to prepare affirmative cases in air permitting cases without discovery. And the burden of going forward under 20.1.4.400(A)(1) attaches only to a party that contends a proposed condition is inadequate or improper. Mr. Maxwell has the Application, Draft Permit, Statement of Basis, and access to the Draft Modeling Review Report, and he will have the complete technical case of every party to make that contention. This is the same information that every other party will have, and the information that parties typically have in permitting cases before the Secretary.

Last, Mr. Maxwell’s Requests, if ordered by the Hearing Officer, would upend the procedures that the Department has established in the Part 4 regulations by effectively requiring Applicant to put on its case prior to the statement-of-intent deadline of August 24, 2026. The Part 4 regulations and the Amended Scheduling Order establish deadlines for presentation of technical and non-technical testimony and rebuttal testimony. Requiring Applicant to respond to Mr. Maxwell’s onerous highly technical Requests (some with 20 subparts to a single

interrogatory) before those deadlines violates the Department's and the Hearing Officer's determinations that this proceeding must follow an established process.⁵

IV. Objectors have no "due process" right to discovery.

Objectors have repeatedly relied on "due process" concerns to support their argument that the Hearing Officer should order discovery. But the Due Process Clause does not require the Hearing Officer or the Secretary to provide Objectors and other participants with any right to discovery. New Mexico law is settled that "there is no constitutional right to pre-trial discovery in administrative hearings." *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 31, 137 N.M. 161, 108 P.3d 1019.

"Before a procedural due process claim may be asserted, the plaintiff must establish that he was deprived of a legitimate *liberty* or *property* interest and that he was not afforded adequate procedural protections in connection with the deprivation." *Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell*, 118 N.M. 470, 477 (1994) (emphasis added). Unless a party asserts a protected "liberty" or "property" interest, the Due Process Clause has no application. *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972). "Liberty," as that term is used in the procedural due process context, includes fundamental rights such as the right of the individual to "contract," "acquire useful knowledge," "marry," "establish a home and bring up children," and "worship God according to the dictates of his own conscience." *Bd. of Regents v. Roth*, 408 U.S. at 572 (citation omitted). A protectible "property" interest includes continued public employment, *Greene v. Barrett*, 174 F.3d 1136, 1140 (10th Cir. 1999), a professional license, *Bell v. Burson*, 402 U.S. 535, 539 (1971), and government benefits, *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

⁵ Applicant does not waive any objection to any specific discovery request and preserves its ability to assert such objections if the Hearing Officer orders Applicant to respond to the Requests.

Here, Objectors and other participants have no property or liberty interest that results in a constitutional right to discovery. Courts have repeatedly ruled that neighbors or other interested participants do not have a constitutionally protected “liberty” or “property” interest in participating in an administrative hearing regarding *another party’s* application for a government permit or authorization—even if state law provides the neighbors a right to a hearing. *See Moore v. City of Parkville*, 156 S.W.3d 384, 391 n.3 (Mo. App. 2005) (acknowledging that neighbors had *standing* to challenge the rezoning of a nearby parcel but determined that “whether a neighbor has a constitutionally protected interest for procedural due process purposes is ... a separate question” and concluding that the neighbors possessed no such due process rights); *Sandy Beach Def. Fund v. City Council of City & Cnty. of Honolulu*, 70 Haw. 361, 377 (1989) (“While we have recognized the importance of aesthetic and environmental interests in determining an individual’s standing to contest [a permit for a residential development], we have not found that such interests rise to the level of ‘property’ within the meaning of the due process clause, and Appellants refer us to no authorities so holding.”); *In re Freshwater Wetlands Statewide Gen. Permits*, 185 N.J. 452, 468–70 (2006) (same principle).

The general rule in New Mexico is that “there is no constitutional right to pre-trial discovery in administrative hearings.” *Archuleta v. Santa Fe Police Dep’t ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 31, 137 N.M. 161, 172, 108 P.3d 1019, 1030. *Archuleta* observed that this general rule “is not dispositive,” because “in some cases, due process might require that depositions be allowed in order to afford a party a meaningful opportunity to prepare.” *Id.* (quoting *Dente v. State Taxation and Revenue Dep’t*, 1997–NMCA–099, ¶ 8, 124 N.M. 93, 946 P.2d 1104). This is not such a case. Objectors have had access to the Application since May 2026 and the Draft Permit, Statement of Basis, and Modeling Review Report since July 29, 2026.

They will receive the complete technical testimony and exhibits of every party under 20.1.4.300(B)(1) NMAC on August 24, 2026. And they will have an opportunity to submit rebuttal testimony on September 3, 2026, and cross-examine every witness who offers testimony at the hearing starting September 14, 2026. No Objector has identified any specific prejudice that would follow from denying these Requests—the showing the Court found determinative in both *Archuleta* and *Dente*. *Archuleta*, 2005-NMSC-006, ¶ 35; *Dente*, 1997–NMCA–099, ¶ 8.

Objectors’ own authorities confirm the point. NEE relies on *Public Service Co. of New Mexico v. New Mexico Public Regulation Commission*, 2019-NMSC-012, ¶ 102, 444 P.3d 460, *Albuquerque Bernalillo County Water Utility Authority v. NMPRC*, 2010-NMSC-013, ¶ 21, *Jones v. New Mexico State Racing Commission*, 1983-NMSC-089, ¶ 6, *Atherton v. Gopin*, 2015-NMCA-087, ¶ 30, 355 P.3d 804, and *In re Pamela A.G.*, 2006-NMSC-019, ¶ 15. Each of those decisions describes the requirements of administrative due process as reasonable notice, an opportunity to be heard and to present a claim or defense, and an opportunity to confront and cross-examine adverse witnesses. The process those cases describe is precisely the process this proceeding provides.

The factors *Archuleta* drew from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), would weigh decisively against allowing the Requests here.⁶ The private interest is attenuated at best: participation in an adjudication of another party’s permit application. The discovery sought is overbroad and in many instances irrelevant, with little probative value. And even the arguably

⁶ The Supreme Court identified three factors in *Mathews* relevant to procedural due process: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 US 319, 335 (1976). All these factors weigh against discovery here.

relevant information is not “critical” to the questions the Department must decide. *Archuleta*, 2005-NMSC-006, ¶ 34. Conversely, the Department and Applicant’s interest is substantial and concrete: the Department must take final action on this Application by November 23, 2026, *see* NMSA 1978, § 74-2-7(B)(2)(a); the hearing is set for September 14, 2026; and the discovery proposed would consume the Department’s and the parties’ time on collateral subjects. As such, an analysis under *Mathews* weighs in favor of following NMED’s typical pre-hearing procedures which do not include discovery.

V. NEE’s Requests do not Meet the Criteria for Limited Discovery

The Air Act identifies the statutory grounds which the Department must use to evaluate approval or denial of an air permit. NEE’s Discovery Requests go far beyond the relevant statutory criteria focused on air quality and are based entirely on one regulatory provision focused on construction timelines related to major sources.⁷ A closer look at 20.2.72.208(G) shows it is not intended to broaden the scope of a hearing on a minor air permit into issues unrelated to air quality.

⁷ 20.2.72.208 NMAC provides in full: “The Department shall deny any application for a permit or permit revision if considering emissions after controls:

- A. It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act;
- B. The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board;
- C. For toxic air pollutants, see 20.2.72.400 NMAC - 20.2.72.499 NMAC;
- D. The construction, modification, or permit revision will cause or contribute to air contaminant levels in excess of any National Ambient Air Quality Standard or New Mexico Ambient Air Quality Standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable;
- E. The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a Prevention of Significant Deterioration (PSD) increment;
- F. Any provision of the Air Quality Control Act will be violated;
- G. It appears that the construction of the new source will not be completed within a reasonable time; or
- H. The Department chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.”

A. NEE cannot rely on 20.2.72.208(G) for its broad scope of Requests

The criteria in 20.2.72.208 apply to both major and minor air sources, but the Application here concerns a *minor source* of air emissions.⁸ This is important because the specific provision at 20.2.72.208(G) is most relevant to permits for *major sources*, as evidenced by the fact that 20.2.72.208(G) mirrors requirements in state and federal Prevention of Significant Deterioration (“PSD”) regulations applicable to commencement of, and completion of construction of “major stationary sources.” *See* 20.2.74.7.N. NMAC; 40 C.F.R. § 52.21(b)(9). The definition of “commencement” in the more general construction permit requirements related to minor source permits does not have similar language regarding completing construction of a project within a reasonable time. *See* 20.2.72.7.G. NMAC. In fact, the minor source permit construction requirements include provisions which allow a source to take up to two years to commence construction of a project, and suspend a project for another year before a permit can be eligible to be cancelled (and only after a hearing to determine if cancellation is appropriate). *See* 20.2.72.211 NMAC. This means Applicant would have at least two years to secure all other related approvals related to the project before construction even begins, and at minimum another year to phase construction as needed. There is nothing in the statute or rules that suggests a project proponent must have every authorization needed for a project in hand to secure an air permit.

Relatedly, when referring to completion of construction of a major source project within a reasonable time, the major source PSD regulations refer to the need to have “necessary preconstruction approvals or permits” which are defined to mean Federal and state permits or

⁸ The project is a minor source because it is not on “Table 1” at 20.2.74.501 NMAC of major sources, and a “major source” not on Table 1 is defined as any source that has the potential to emit over 250 tons per year of a regulated pollutant. 20.2.74.7.AG(2) NMAC.

approvals “required under” “air quality control laws.” 20.2.74.7.AK. NMAC; 40 C.F.R. § 52.21(b)(10). Thus, even under the more stringent major source requirements,⁹ the relevant inquiry related to timely completion of a major source is focused on permits and approvals related to *air quality*.

This regulatory framework demonstrates the vast majority of NEE’s Requests are not relevant. It would be inappropriate to use 20.2.72.208(G) to greatly expand the scope of a minor air permit hearing to issues unrelated to air quality. If NEE were right, 20.2.72.208(G) would allow discovery and examination into every tangential business decision and approval related to development of even the most insignificant new sources. That is not what the Air Act contemplates.

According to the Air Act, the Department may deny an application if the permit: (a) will not meet applicable requirements of the Air Quality Control Act or federal Clean Air Act; (b) will cause or contribute to exceedances of applicable air quality standards; or (c) will violate any other provision of the Air Act or federal Clean Air Act. NMSA § 74-2-7(C)(1). New Mexico appellate courts evaluating air permit decisions confirm that the focus is on these statutory criteria related to air quality, not on open-ended collateral inquiries into every supply-chain issue that could conceivably affect a project. *See, e.g., Alto Coal. for Env’t Pres. v. Roper Const., Inc.* 2025-NMCA-018, ¶ 14, 572 P.3d 268 (focusing on statutory criteria and “whether construction will cause or contribute to air contaminant levels in excess of a national or state standard”).

⁹ Requirements applicable to minor sources are much more streamlined than requirements applicable to major sources. *See Sierra Club v. EPA*, 964 F.3d 882, 886 (10th Cir. 2020) (“The substantive requirements for preconstruction permits differ markedly depending on whether the new source is deemed ‘major’ or ‘minor’.... Minor [New Source Review permit] entails only the barest of requirements.”) (citations omitted).

B. NEE's Requests are overly broad and unreasonably burdensome

NEE's Requests regarding fuel cell manufacturing capacity, internal risk assessments, supply chains, separate administrative proceedings, and related infrastructure development are several steps removed from the criteria guiding this hearing and the Department's decision. NEE attempts to make virtually every aspect of the project as a whole relevant in this limited air permit proceeding because of a single prong in 20.2.72.208 NMAC related to timely completion of construction of the project. Discovery into broad categories of business information is not justified simply because NEE speculates that some aspect of that information could delay the project.

For instance, NEE overstates the significance of pipeline availability and current fuel-supply planning efforts. The issue before the Department is whether to issue a minor air permit, not whether every separate permit, lease, easement, right-of-way, commercial arrangement, and piece of infrastructure necessary to support eventual operations has already been secured. NEE's entire second set of Requests and its Response in support of those Requests repeatedly emphasizes the denial of a single state land authorization associated with one potential right of way for a proposed pipeline and argues that pipeline-related discovery is therefore indispensable (and that the entire application should be dismissed). But as with any similar project, the air permit regulations contemplate a multi-year period for development before the project is required to even *commence* construction. *See* 20.2.72.211 NMAC. NEE can attempt to argue that construction of the project "will not be *completed* within a reasonable time" but it has already demonstrated it does not need extremely burdensome discovery to allege those claims.

The burden imposed by NEE's requests far outweighs any likely benefit. *See* 1-026(B)(2)(c) NMRA. As Applicant previously explained, NEE seeks extraordinarily broad categories of information, including "every" project milestone, "every" risk assessment,

extensive manufacturing data, “all documents” concerning supply-chain information, internal analyses, and contingency planning spanning multiple years and business units.¹⁰ Responding would require massive review and production efforts on matters that are only marginally related, at best, to the issues presented in this permitting proceeding. Discovery is not a license for project opponents to conduct a wholesale audit of a vendor’s operations in hopes of uncovering some potential for delay of an infrastructure project. *See Ramirez, 2025-NMSC-050 ¶ 42* (noting that a discovery request for “the entire file” in a criminal proceeding “bears the hallmarks of an impermissible fishing expedition” and that the ability to conduct “thorough cross-examination” satisfied defendant’s rights).

Finally, NEE never explains why less burdensome sources of information (*e.g.* other agency dockets) are inadequate or why the requested materials are necessary to resolve a genuine dispute regarding air-permit compliance. *See* 1-026(B)(2)(a) NMRA (“The court shall limit use of discovery methods set forth in this rule if it determines that: (a) the discovery sought is unreasonably cumulative or duplicative, *or is obtainable from some other source that is more convenient, less burdensome, or less expensive.*”) (emphasis added).

Discovery into every aspect of pipeline right-of-way issues, for example, is especially inappropriate where those matters are being evaluated in dedicated proceedings before other forums with their own records, schedules, and evidentiary mechanisms. Information concerning state land authorizations, appeals, and rights-of-way can be tracked through the public records of the New Mexico Commissioner of Public Lands.¹¹ Technical information concerning Bloom fuel cells, project development, and alleged performance issues is already available through the very

¹⁰ *See* NEE Interrogatory Nos.: 2, 3, 4, 7, 8, 11, 13, 15, 17, 18, 2-2, 2-3, 2-1 through 2-12; NEE RFP Nos. 2 through 10 and 2-1 through 2-3

¹¹ *See* <https://www.nmstatelands.org/ipra-request/>.

materials that NEE attached as Exhibit A (or cited therein), which consists largely of publicly sourced analyses and publicly available datasets.¹² Moreover, the Department’s administrative record, Draft Permit, Statement of Basis, technical testimony, rebuttal testimony, and cross-examination process provide multiple avenues for testing relevant evidence without imposing the burden of expansive discovery.

Authorizing NEE’s requests would transform a focused air permit hearing into open-ended litigation concerning pipeline development, corporate manufacturing operations, supply-chain management, confidential commercial planning, and disputed third-party commentary. That is not what the Air Act contemplates.

VI. NMELC and CBD’s Requests Do not Meet the Criteria for Limited Discovery

On August 5, 2026, NMELC and CBD for the first time offered their rationale for 29 Interrogatories and 24 Requests for Production on Applicant. As such, Applicant briefly responds to NMELC and CBD.

According to NMELC and CBD, all of their Requests, including requests for “*all documents related*” to the “*water needs of the proposed facility*”, relate to air permitting issues and seek information that is unobtainable elsewhere. But NMELC and CBD have no basis in fact for suggesting water issues relate in any way to air issues. They presume without support that there is wastewater associated with the process. There is not. Any water used in the Bloom system exits as steam. There is no wastewater at any point in the process, start-up, shut-down, or end-of-life. Nor would the existence of wastewater be presumed to result in a corresponding emissions impact.

¹² See also *infra*. n. 13.

In its Response to NMELC and CBD's Discovery Requests, Applicant pointed to other public proceedings where water use information can be found. *See* Applicant Response at Footnote 4. CBD ignores publicly available information. Similarly, NMELC and CBD's Requests related to fuel cell components are well documented in the public domain.¹³ Applicant should not have to muster up a public record for every request that is not remotely applicable to this limited air permit proceeding.

As with the NEE requests, NMELC and CBD cannot shoehorn burdensome requests related to fuel cell manufacturing capacity into the criteria related to *completion* of construction of the project; 20.2.72.208(G) does not drag in every possible supply-chain issue that could affect the project.

It is the scope of many of NMELC and CBD's Requests that make them overly burdensome and unreasonable. Gathering, reviewing, and producing "*all documents related to performance of the proposed fuel cells under various operating conditions*" (RFP #6) or "*all documents related to emissions testing from the proposed fuel cells*" (RFP#4) is simply unreasonable, particularly in the 10 days requested. To be clear, all of the following CBD Interrogatories and RFPs are similarly overly burdensome and not appropriate for "limited discovery": CBD Interrogatory Nos. 26-29, RFP Nos. 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 14, 16, 17, 18, 19, 20, 21, 22, 23, and 24.

Ultimately, as with Mr. Maxwell, NMELC and CBD never address why they cannot address purported deficiencies in the administrative record in their own technical testimony or

¹³ *See* Bloom Energy Form 8-K filed with the U.S. Securities and Exchange Commission (July 9, 2026) (noting that Bloom has "sufficient supply of scandium oxide to meet our current fuel cell demand and backlog, and our supply is not dependent on China. We are also not dependent on China to scale scandium oxide to meet future demand growth. We have clear visibility into our supply chain to support production of 25GW of fuel cells per year, and we will continue to expand this capacity.") *available* at bloomenergy.com (Financial and investor information).

rebuttal testimony (due 10 days after the record is anticipated) and cross examination of technical NMED and Applicant witnesses at the hearing.

VII. Conclusion

As NMED noted in its persuasive response to discovery requests that will duplicate its efforts on the administrative record, Objectors are attempting to transform this limited and narrowly focused air permit proceeding subject to strict statutory criteria and timelines into a full-blown civil trial with no limitation on scope and no corresponding deadline for completion. For all of the reasons cited here and in Applicants' prior Response, Applicant respectfully asks the Hearing Officer to deny the Requests.

Respectfully submitted,

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Certificate of Service

I hereby certify that on August 7, 2026 a copy of the foregoing Consolidated Response to Requests for the Hearing Officer to Order Discovery was emailed to the persons listed below.

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