

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 10883

AQB 26-57

**EMERGENCY MOTION FOR HEARING CONSISTENT WITH DUE PROCESS
GUARANTEES, DISQUALIFICATION OF HEARING OFFICER, AND STAY**

The New Mexico Environmental Law Center, on behalf of Jose Saldaña, Jr. and Vivian Fuller, (collectively, “Community Members”), and the Center for Biological Diversity, (hereinafter, “the Center”), collectively submit this Joint Emergency Motion for a Hearing Consistent with Due Process Guarantees, to Disqualify the Hearing Officer, and to Stay the Hearing until a new hearing officer is appointed and fair procedures are implemented.

The Hearing Officer has failed in his duty to “conduct a fair and impartial proceeding.” 20.1.4.100.E(2) NMAC. Community Members and the Center submit this motion to disqualify the Hearing Officer pursuant to 20.1.4.100.E(3)(b)(i) NMAC, and show cause as follows:

The New Mexico Environment Department (“the Department” or “NMED”) has publicly stated its strong desire to facilitate the approval of Yucca Growth Infrastructure’s (“YGI”) Application, despite this source being the largest proposed source of greenhouse gas pollution in the state of New Mexico. See Memorandum of Understanding between BorderPlex Digital Assets, LLC¹ and the State of New Mexico, February 25, 2025 (“[T]he State of New Mexico —

¹ BorderPlex Digital Assets, alongside YGI, are working together to develop Project Jupiter – the hyperscale data center YGI intends to power with this proposed source. See Saldaña v. The Board of County Commissioners of the County of Doña Ana, No. D-307-CV-202502766, Yucca Growth Infrastructure Motion to Intervene, at 1-2, (October 20, 2025).

by and through ... the New Mexico Environment Department ... — *desires the development and construction of the [BorderPlex] Infrastructure and Campuses ...*).² The Hearing Officer, as an extension of the Department, appears to be similarly committed to YGI's success: on multiple occasions, the Hearing Officer's conduct has reflected the Department's commitment, including a series of three decision reversals that materially prejudiced Movants in favor of the Department and YGI.

First, the Hearing Officer reversed his own order setting a highly accelerated but overall less unreasonable schedule in favor of a new schedule - similar to those proposed by YGI and the Department- so truncated that it deprives Movants of due process and includes truly nonsensical deadlines. Second, the Hearing Officer reversed his own orders where he originally allowed discovery, depriving Movants of any avenue to explore facts outside of YGI's curated and anemic application and the Department's barely disguised rubber stamp. Third, the Hearing Officer – at the 11th hour – reversed his own order directing parties to brief the issue of whether YGI could construct the facility in a reasonable time, as it must, given the State Land Office's repeated and firm refusal to approve YGI's only proposed fuel source, despite this being a threshold issue that should have been addressed before the Department began reviewing the substance of YGI's Application.

In isolation, each of these reversals is problematic. Taken together, and in consideration of the executive branch's clear agenda, as well as comments made by Mr. Shepherd, these actions create an arbitrary and one-sided process and demonstrate bias on the part of Mr. Shepherd that deprives Movants of meaningful participation in this proceeding. Movants are left with no choice but to file this extraordinary motion seeking the disqualification of the Hearing

²Accessible at:

<https://haussamen.com/wp-content/uploads/2025/09/2.25.25.BorderPlexDigitalMOU.pdf> (Last viewed August 16, 2026) (emphasis added).

Officer and a stay of these proceedings until a fair hearing can be ensured. Movants request expedited resolution of this emergency motion.³

I. REVERSALS IN FAVOR OF THE DEPARTMENT AND YGI

A. Scheduling Reversal in Favor of the Department and YGI

On July 2, 2026, the Department published its hearing determination letter, stating “[b]ased on the volume of comments and ‘significant public interest,’ pursuant to 20.2.72.206 NMAC, the Air Quality Bureau is recommending that a public hearing be held on the air permit application.”⁴ That same day, the Department published its Appointment of Hearing Officer, appointing the current hearing officer to serve in this role.⁵

On or around July 10, 2026, the Department notified YGI’s and NMED’s counsel of a scheduling conference to be held at 10:30 am on July 15, 2026. Neither Community Members nor the Center were notified by the Department of this conference, despite being interested parties to this process.⁶ Indeed, the Department had failed to provide notice to interested parties of the scheduling conference, as well as notice of the hearing determination, as required by 20.2.72.206(A)(6) NMAC. Community Members and the Center were not notified of the hearing

³ Pursuant to 20.1.4.200.D(3) NMAC, Movants have not sought concurrence on this Motion because the Hearing Officer’s bias and failure to ensure a fair hearing benefits the Department and YGI.

⁴ New Mexico Environment Department, Memorandum Re: Request for Public Hearing Determination for Air Quality Permit Application (July 1, 2026). Accessible at <https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2026/07/2026-07-02-AQB-26-57-Req-for-Public-Hrg-Determination-filed.pdf>. (Last viewed August 16, 2026).

⁵ Dkt. No. AQB 26-57, Notice of Docketing, Appointment of Hearing Officer, and Delegation of Final Decision Authority (July 2, 2026).

⁶ E.g., New Mexico Environment Department, “Public Involvement Plan,” at 3 (Identifying the New Mexico Environmental Law Center as a stakeholder group in the YGI permitting process). The Center for Biological Diversity had filed extensive comments along with other community groups opposing the application and the holding of a hearing, and gave NMED notice of its intent to participate in this proceeding.

determination until August 14 via a form email from the Department – nearly one month after the scheduling conference.

By sheer chance, Community Members and the Center learned of the scheduling conference through other means and were able to attend, despite not receiving *any* notice from the Department. At the scheduling conference, Community Members and the Center learned of the Department’s desire to hold the hearing on YGI’s Application beginning on August 17, 2026 – a mere 33 days after the scheduling conference. Chris Vigil, attorney for the Department, stated that the Department would “be prepared” to go to hearing on August 17.⁷ Unbeknownst to Movants, the Department had already submitted public notice to newspapers for a hearing date of August 17, prior to any determination by the Hearing Officer.⁸

At the scheduling conference, before setting a schedule, Mr. Shepherd stated that “I did not set the schedule initially, but I see some value in the schedule as it has been set.”⁹ At this point, no schedule had been set that Movants were aware of, and it was unclear what schedule Mr. Shepherd was referring to.

When Movants’ later learned of the Department’s proposed August 17 hearing date at the scheduling conference, Movants argued that the proposed date was unreasonable and would deprive them of due process. For example, under the proposed schedule, pre-hearing motions would be due 30 days prior to the hearing date, effectively two days after the scheduling conference and prior to any testimony having been filed.¹⁰

The Hearing Officer issued a scheduling order on July 16, 2026, ordering the hearing to begin on October 19, 2026. Though this schedule was highly accelerated compared to normal

⁷ July 15 at 00:18:26.

⁸ See July 15 email from NMED representative Christopher Vigil, included as Attachment 1.

⁹ July 15 at 00:28:42.

¹⁰ *Id.* at 00:32:38.

Department practice and any air permit hearing of which Movants are aware, with deadlines arising in weeks instead of the usual months, the schedule as proposed allowed time for parties to prepare some semblance of a substantive technical case.

On July 20, 2026, attorneys for YGI submitted a request for an emergency status conference, demanding the hearing be rescheduled to August 17, 2026.¹¹ The Hearing Officer held that status conference at 10am on July 27, 2026. At the July 27 status conference, Mr. Shepherd praised YGI and the Project, stating, “[o]nce this facility is in place, it has the potential to be extraordinarily beneficial to the state of New Mexico - extraordinarily beneficial.”¹²

Mr. Shepherd ultimately determined the hearing would remain slated to begin on October 19, 2026, stating, “[c]onversely if [the source] is not thoroughly investigated and it’s put in place, you’ll never get rid of it because you’re gonna have too much money invested – it’s going to stay there operating ... this really does need to be, I think, given a pretty thorough examination before we commit to it .. and I think giving the opposing parties an extension until October 19th is good ... based on due process consideration and with that due process then, abolishing the November 23 as the absolute deadline in this case, and that you can appeal.”¹³ Later that same day, unnamed representatives from Oracle, the Project Jupiter tenant who similarly stands to benefit from YGI’s development, met with Governor Michelle Lujan Grisham.¹⁴

Inexplicably, two days later, on July 29, 2026, the Hearing Officer issued an Order effectively rescinding his verbal order made at the July 27 status conference, moving the hearing date to September 14, 2026.¹⁵ In support of his decision, Mr. Shepherd only stated, “[a]fter additional consideration of the arguments of the parties, including the due process arguments of

¹¹ Dkt. No. AQB 26-57, “Request of Emergency Status Conference,” (July 20, 2026).

¹² July 27 at 1:04:07.

¹³ *Id.* at 1:04:23-1:05:25.

¹⁴ See Governor’s Official Calendar Entry, included as Attachment 2.

¹⁵ Dkt. No. AQB 26-57, Amended Scheduling Order, ¶ 1 (July 29, 2026).

the New Mexico Environmental Law Center, the Center for Biological Diversity, and the New Energy Economy, I find that the best interest of all the parties will be best served if the hearing in this case begins on September 14, 2026.”¹⁶ The hearing officer also set forth a pre-hearing schedule, ordering direct testimony and dispositive motions both due on August 24, and rebuttal testimony due a mere 10 days later, on September 3.

In response to this untenable schedule, on July 31, 2026, Movants filed a Motion to Reset the October 19 Hearing Schedule and Preserve Due Process, demonstrating the Hearing Officer’s authority to extend deadlines to preserve due process and detailing the harms to Movants from the unreasonable and impossible deadlines imposed. The Hearing Officer denied the motion.

Ultimately, the Hearing Officer’s decision to change the hearing schedule to favor the Department and YGI is unreasonable, departs from Department practice, and deprives Movants of the opportunity to meaningfully participate in this process. Indeed, under the current schedule, Movants do not have the time or information needed to submit comprehensive direct cases by the August 24, 2026 deadline. Critically, the Department has announced its intention to release the full administrative record on August 24, giving Movants no time to review “thousands of pages” of necessary documents before filing their cases.¹⁷

The schedule is also absurd on its face. Prehearing motions, including motions to exclude evidence and dispositive motions, are due August 24, 2026, the very same day that parties’ direct technical cases must be filed, and ten days prior to parties’ rebuttal case deadline. These deadlines mean that Movants will likely have mere minutes to draft motions to exclude evidence from other parties’ direct technical cases, and no time at all to move to exclude evidence from other parties’ rebuttal cases, as the deadline for such motions will have long passed before

¹⁶ Dkt. No. 26-57, Order, (July 29, 2026).

¹⁷ See July 31 email from NMED representative Christopher Vigil, included as Attachment 3.

rebuttal cases are even filed. The schedule entirely fails to comply with motion, response and reply opportunities mandated by 20.1.4.200.D NMAC (providing 15 days to respond to prehearing motions and an additional 10 days to reply to any responses). The schedule also ignores the Department's demonstrated pattern and practice of extending hearing deadlines to allow adequate time for meaningful hearing participation, which Department counsel Mr. Vigil admits is "the norm."¹⁸ There is simply no precedent in the Department's history of holding a permit hearing on such a massive, complicated source in such a short period of time.

B. Discovery Reversal in Favor of the Department and YGI

In addition, these proceedings have been plagued by a lack of transparency that gives the Department and YGI a distinct and unfair advantage.¹⁹ YGI's Application and the Departments' draft permit and statement of basis are anemic, missing significant amounts of information critical to evaluating the pollution and health impacts of the proposed facility.

At the July 15 scheduling conference, Mariel Nanasi, representing New Energy Economy, requested that the Hearing Officer allow discovery. Mr. Shepherd stated that he would allow discovery subject to his approval.²⁰ He stated that "it seems to me that in a case like this, discovery *has* to be allowed."²¹ Mr. Shepherd further stated that, while parties' direct and rebuttal testimony is supposed to "lay out everything," "there's got to be some questions that the other party is going to have that can only be addressed by a discovery request."²²

The Hearing Officer's July 16 scheduling order stated that discovery would be allowed "on order of the hearing officer."²³

¹⁸ July 27 at 00:12:44.

¹⁹ July 27 at 00:24:54 (Mr. Vigil stating "We're ready to go to hearing, we're prepared and, you know, of course we have an advantage, right?").

²⁰ July 15 1:05:17.

²¹ *Id.* at 1:09:45.

²² *Id.* at 1:10:20.

²³ Dkt. No. AQB 26-57, Scheduling Order, ¶ 7 (July 16, 2026).

At the subsequent July 27 scheduling conference, Mr. Shepherd again stated he has the authority to allow discovery, explaining, “it doesn’t make any sense to me that the discovery would only apply to a solid waste proceeding – there are several rules that just look like they haven’t been updated, I also see that the hearing officer has some discretion in these proceedings – to allow discovery, so that’s my ruling.”²⁴

In response to the Hearing Officer’s ruling allowing discovery, NMED Counsel Mr. Vigil encouraged parties to limit their discovery requests due to the fact that “a lot of what they’re asking for will be in the administrative record.” Mr. Vigil went on, seemingly understanding the parties’ needs for adequate information in order to develop a technical case, to state that “the administrative record is going to be extensive, you know, thousands of pages, if I’m anticipating correctly. We’re going to get it out as soon as we can. I will move our team to try and get it out. You know, typically it’s been our practice to file it with the notices of intent. If we adjust the timelines, then maybe then that possibly gives the parties 30 days to examine it. I will try to get it done earlier without promises. I will go to our team and, you know, in the interest of the due process of all the parties that we try to get it done as soon as possible.”²⁵ At the time of filing of this motion, the Department has not released the administrative record and Movants have only six days remaining to prepare direct technical testimony.

In the July 29, 2026, Order, Mr. Shepherd again ordered that “[a]s provided in 20.1.4.200(E), formal discovery will be allowed only upon order of the Hearing Officer.”²⁶

Relying in good faith on Mr. Shepherd’s numerous statements and three separate orders allowing discovery, Movants submitted two narrow discovery requests - the first on July 24, 2026 to YGI and the second on July 31, 2026 to the Department. Movants sought information

²⁴ July 27 at 1:13:29.

²⁵ July 27 at 1:07:47.

²⁶ Dkt. No. AQB 26-57, Amended Scheduling Order, ¶ 7 (July 29, 2026).

missing from the application and the Department's draft permit and statement of basis, including information about numerous pollutants that were omitted from the application, as well as information showing that YGI could construct the facility in a reasonable amount of time - both issues central to this permit proceeding.

On July 31, 2026, YGI objected to, and failed to answer, Movants' discovery request. Movants replied in support of their discovery request on August 5. YGI then filed an improper and unauthorized surreply addressing Movants requests on Friday, August 7, which Movants moved to strike on Monday, August 10.

On August 7, 2026, the Department similarly objected to, and failed to answer, Movants' discovery request. Movants replied in support of their discovery request on August 10.

In another inexplicable move on August 12, 2026, Mr. Shepherd issued an Order reversing his earlier and consistent position regarding discovery by parties, broadly denying the discovery requests simply because his "initial interpretation of discovery Rule 4 was incorrect and that discovery is not allowed in air quality permit proceedings."²⁷

C. Motion to Dismiss Reversal in Favor of the Department and YGI

Finally, on August 4, 2026, New Energy Economy ("NEE") filed a Motion to Dismiss YGI's Application for failure to have the necessary fuel supply and inability to construct the facility in a reasonable time. NEE requested to expeditiously show cause why the motion to dismiss should not be granted.²⁸

On August 5, 2026, Mr. Shepherd issued an order requiring parties to submit responses supporting or opposing NEE's motion to dismiss or continue by August 11, and ordering YGI

²⁷ Dkt. No. AQB 26-57, Order, (August 12, 2026).

²⁸ Dkt. No. AQB 26-57, "New Energy Economy's Motion to Dismiss YGI's Permit Application as Not Ripe for Adjudication," (August 4, 2026).

and the Department to address specific issues related to YGI's ability to construct its source.²⁹ Relying in good faith on this order, Movants prepared a response in support of NEE's motion to dismiss, showing that, at that time, YGI had no fuel source for the proposed facility and that, to Movants' knowledge, no alternate fuel source was available. Movants additionally explained that, given the global lack of critical minerals required by the fuel cells YGI intends to rely upon, and the fact that Bloom Energy has never supplied a source of this scale, it was highly unlikely, if not impossible, for YGI to construct its source in a reasonable time, as is required under the Air Quality Control Act.

Despite his earlier Order setting clear and reasonable briefing deadlines for the motion, on August 10, 2026, just one day before response briefs were due, Mr. Shepherd issued a new Order, *sua sponte*, stating, "After due consideration I have determined that my Order of August 5, 2026 ... was inadvisably filed ..." Mr. Shepherd's order then directed parties *not* to file responses and inexplicably shifted the burden from YGI back to NEE to prove that a legally available alternative fuel supply does not exist. Mr. Shepherd further determined that, despite the fact that it would be professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit or misrepresentation in a pleading,³⁰ testimony on this issue must instead be developed at the September 14 hearing.³¹

II. ARGUMENT

Hearing officers in administrative adjudications, including this proceeding, are tasked with a set of fundamental duties to ensure due process: to "conduct a fair and impartial proceeding, assure that the facts are fully elicited, and avoid delay." 20.1.4.100.E(2) NMAC; *see also Lujan v. New Mexico State Police Bd.*, 1983-NMSC-062, ¶ 10, 100 N.M. 149 ("a fair

²⁹ Dkt. No. AQB 26-57, Order, (August 5, 2026).

³⁰ NMRA 16-804.

³¹ Dkt. No. AQB 26-57, Sua Sponte Order, (August 10, 2026).

tribunal is an essential requirement of due process,” including in administrative hearings). Indeed, “[s]afeguarding these requirements is especially essential in administrative proceedings where basic rights are overlooked in the interest of administrative efficiency and expedition,” as is the case here.³² *Lujan*, 1983-NMSC-062, at ¶ 10. Though an agency is generally accorded deference in its management of its own proceedings and treatment of procedural matters, “when procedural matters fall outside the norm, experience teaches us to exercise a healthy dose of caution and circumspection.” *Resolute Wind I LLC v. New Mexico Public Regulation Commission*, 2022-NMSC-011, ¶ 23, 506 P.3d 346, 352. A hearing officer who is not able to “perform [these] function[s]” ... should be disqualified and the hearing should be stayed until a fair hearing is guaranteed. *See* 20.1.4.100.E(3)(a)(i) and (b)(i) NMAC; *See also, Resolute Wind*, 2022-NMSC-011, ¶ 25 (comparing a situation where an administrative agency sets an expedited, but ultimately manageable, procedural schedule limiting discovery with a situation where a party is denied outright any and all opportunities to conduct discovery or otherwise develop the record on a disputed factual issue and finding the latter violated parties’ right to due process) (internal quotations and citations omitted).

Mr. Shepard’s fast-tracking of this proceeding, arbitrary and inconsistent rulings, frequent reversals and consistent favoritism towards the Department and YGI demonstrates that he is not conducting a fair and impartial proceeding and he is not providing all parties the opportunity to develop the record, denying Movants the “inherently flexible nature of due process.” *Resolute Wind*, 2022-NMSC-011, ¶ 25. This pattern of behavior is in contravention of his duties, particularly that of ensuring due process and impartiality, to such an extent that the proceeding is

³² At the July 15 scheduling conference, Mr. Shepherd justified his decision to rush the hearing because, in his words, “[t]he citizens of Dona Ana County need to get a resolution on this issue.” He stated that the project “is going to have a huge impact on their lives,” and that “they have the right to have this decided as quickly as possible, and if that puts some rush on moving forward here, that would be the reason I would move forward on this.” July 15 at 27:40.

not fair and the hearing will not be fair. Moreover, he has at least one clear statement on the record that he believes the Application should be approved as beneficial to New Mexico. His statements and actions demonstrate “prejudice concerning...the Application” indicating he is therefore unsuited to “perform [the] function[s]” of a Hearing Officer in this matter and should be disqualified and the hearing should be stayed until a fair hearing is guaranteed.

A. Mr. Shepherd has displayed a pattern of bias toward the Department and YGI, requiring his disqualification.

When examining whether the bias or prejudgment of a hearing officer should result in disqualification, “[t]he inquiry is not whether the [hearing officer] is actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average [person] sitting as a judge to try the case with bias for or against any issue presented to him [or her]. This inquiry measures allegations of bias or prejudice by an objective standard.” *See Alb. Bernalillo Co. Water Utility Authority v. NMPRC*, 2010-NMSC-013, ¶ 43 (quoting *Mountain States Tel. & Tel. Co. v. Corp. Comm’n*, 99 N.M. 1, 7, 653 P.2d 501, 507 (1982) (per curiam)). Certainly Mr. Shepherd’s consistent reversal in favor of the Department and YGI suggests his temptation to try this case with bias.

Importantly, the circumstances and context surrounding his decisions must also be considered when determining whether Mr. Shepherd has prejudged the matter or given the appearance of bias or prejudgment, resulting in disqualification. *See Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 80 (10th Cir. 1972); *Zen Magnets, LLC v. Consumer Product Safety Commission*, 968 F.3d 1156, 1168-1169 (10th Cir. 2020). Throughout the course of this Application process, the Department and YGI have pushed to ensure the hearing process is rushed, pressuring Mr. Shepherd for a November 23, 2026 final decision when less complex air

permitting processes before the Department have taken years.³³ YGI has also gone so far as to spend millions of dollars on marketing campaigns to influence the public as well as government officials at the Department in support of Project Jupiter.³⁴ Notably, as a result of this campaign, the New Mexico Department of Justice announced, on July 9, 2026, it would be opening an investigation into several complaints related to YGI's Application alleging comments in support of the project were fraudulently submitted to the Department without the consent or knowledge of the named individuals.³⁵

Furthermore, as mentioned above, the State of New Mexico has entered into a Memorandum of Understanding with the Project Jupiter developers, stating, "the State of New Mexico — by and through ... the New Mexico Environment Department ... — *desires the development and construction of the Infrastructure and Campuses ...*"³⁶ and committing to "use reasonable efforts to timely process all applications and approvals for the Infrastructure and

³³ July 27 at 12:44 ("it's the norm, cases do typically go beyond [the 180 day timeline]").

³⁴ New Mexico State Ethics Commission, Elevate New Mexico Contributions, Accessible at <https://www.sec.nm.gov/2026/08/11/press-release-state-ethics-commission-announces-settlement-agreement-with-elevate-new-mexico-over-project-jupiter-lobbying-advertising-campaign/>. (Last viewed August 18, 2026).

³⁵ New Mexico Department of Justice, Letter to Secretary James Kenney re: Yucca Growth Infrastructure, LLC – YGI Microgrid (July 9, 2026). Accessible at: <https://kvia.com/wp-content/uploads/2026/07/2026-07-09-NMDOJ-Ltr-to-NMED-JKenney-re-YGI-.pdf>

(Last viewed August 18, 2026); *See also* Joshua Bowling, Source NM, "A secretive ad campaign calls on New Mexicans to support controversial Project Jupiter data center – And no one is willing to take credit for it" (March 4, 2026). Accessible at: <https://sourcenm.com/2026/03/04/a-secretive-ad-campaign-calls-on-new-mexicans-to-support-controversial-project-jupiter-data-center/> (Last viewed August 16, 2026); Nolan Rodeigues Walsh, "NMED Updates Public Comment System Following Alleged Fraud," (August 9, 2026). Accessible at:

<https://brant.one/2026/08/09/nmed-updates-public-comment-system-following-alleged-fraudulent-submissions-for-project-jupiter-proposal/> (Last viewed August 16, 2026).

³⁶ Memorandum of Understanding between BorderPlex Digital Assets, LLC and the State of New Mexico, February 25, 2025 (emphasis added). Accessible at: <https://haussamen.com/wp-content/uploads/2025/09/2.25.25.BorderPlexDigitalMOU.pdf>. (Last viewed August 16, 2026).

Campuses that are correctly completed, requested, and filed by [BorderPlex Digital Assets] or its contractors; and that the State of New Mexico intends to dedicate sufficient staff (including staff at applicable agencies) to timely process applications and approvals for the Infrastructure and Campuses.”³⁷ Indeed, the Department has complied with this commitment, submitting public notice of an August 17 hearing to newspapers, prior to any determination by the hearing officer,³⁸ opposing all discovery requests and failing to provide the administrative record despite the Department being prepared to go to hearing on August 17,³⁹ seemingly in order to limit Movants’ ability to adequately prepare technical testimony.⁴⁰

It is within this context that, on multiple occasions, Mr. Shepherd has displayed bias toward the Department and the Applicant – disregarding entirely the typical practice of the Department and reversing himself in favor of the Department and YGI, in violation of Movants’ right to due process.

Mr. Shepherd’s abrupt and unexplained scheduling reversal in favor of the Department and YGI deprives Movants adequate time to prepare and present technical testimony, deprives Movants of the opportunity to conduct discovery and the ability to meaningfully engage in pre-hearing and post-hearing motions practice and briefing. The schedule ignores “the statutory mandate that the hearing be conducted so that both sides may present their evidence amply and fairly.” *Redman v. Bd. of Regents*, 102 N.M. 234, 240 (Ct. App. 1984).⁴¹ It fails to balance the

³⁷ *Id.*

³⁸ See Attachment 1.

³⁹ July 15 at 00:18:26.

⁴⁰ Mr. Vigil further stated that the public notice and draft permit, which would contain “much more information about what [parties] will need to do to prepare for the hearing” was “imminent” and coming “this week.” July 15 at 1:04:55.

⁴¹ In *Redman*, the court upheld a postponement of a statutory deadline for a State Board of Education appeal hearing related to a teacher’s termination. In allowing an extension of a statutory deadline for good cause, the court balanced the “significant right the legislature has granted a teacher to require that the local board present its case within sixty days as well as with

statutory deadline against Movants' right to obtain records and present evidence, reducing the hearing rules to "hollow safeguards." *State v. Bunnell (In re Bunnell)*, 100 N.M. 242, 244 (Ct. App. 1984).⁴²

Mr. Shepherd's discovery reversal in favor of YGI and the Department, after consistently ordering that discovery would be allowed, leaves Movants in the dark and unable to properly review numerous significant issues with YGI's incomplete application and the Department's cursory statement of basis and boilerplate draft permit. It also results in the waste of many hours of lawyer time in a proceeding where time is already limited beyond reason. Ultimately, Mr. Shepherd has rewarded the Department's gamesmanship in withholding the administrative record until after direct technical testimony deadlines.⁴³

Mr. Shepherd justified his inexplicable reversal on discovery by stating simply that his "initial interpretation of discovery Rule 4 was incorrect and that discovery is not allowed in air quality permit proceedings."⁴⁴ Such a ruling, provided without basis, is demonstrative of such bias that would make fair judgment impossible.

Finally, Mr. Shepherd's last-minute reversal in favor of YGI cancelling the briefing schedule for New Energy Economy's motion to dismiss prematurely ended a threshold inquiry Mr. Shepherd himself had ordered parties to brief and that Movants had by that point spent

the statutory mandate that the hearing be conducted so that both sides may present their evidence amply and fairly."

⁴² The *Bunnell* court held that the statutory deadline must be balanced against counsel's right to present evidence, stating that "[u]nless an attorney has an opportunity to obtain records, talk with his client, and secure witnesses necessary to present his client's response to a commitment petition, the rights afforded him in § 43-1-11 provide only hollow safeguards." *Id.* at 244.

⁴³ Community Members and the Center again note that this record could have been provided much earlier, as the Department consistently represents, but, for no reason other than inappropriate gamesmanship, continues to be withheld by the Department. See July 27 Status Conference, 25:00 ("It's imminent ... the Department's statement is more of like "we're ready to go ... we're ready to go to hearing we're prepared, of course we have an advantage I want to acknowledge that").

⁴⁴ Dkt. No. AQB 26-57, Order, (August 12, 2026).

significant legal resources responding to. This reversal, like the two preceding it, came without any adequate explanation.⁴⁵

While any one reversal may not individually suggest improper bias, considered as a pattern, without reasoned explanation,⁴⁶ and taken together with Mr. Shepherd's prior comment in support of the Application,⁴⁷ as well as the State's commitment to ensuring YGI's Application be approved, it becomes clear that Mr. Shepherd is unable to try this case fairly, and, as a result, must be disqualified from presiding over this matter.

B. Mr. Shepherd has created an arbitrary and one-sided hearing process, requiring his disqualification.

In addition to displaying improper bias in favor of the Department and YGI, Mr. Shepherd has abused his discretion with frequent reversals, creating an arbitrary process with an unfair result. Mr. Shepherd's pattern of reversing his own decisions is arbitrary and capricious for three reasons. First, his decisions ignore the clear legal requirements of briefing timelines set forth in the New Mexico Administrative Code, and are therefore "not in accord with legal procedure." *Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regul. Comm'n*, 2014-NMSC-008, ¶ 9, 319 P.3d 1284 (internal quotation marks and citation omitted). Second, his reversals are not a product of rational or reasoned decision-making. Compare August 12, 2026 Order stating Mr. Shepherd's "initial interpretation of discovery Rule 4 was incorrect and that discovery is not allowed in air quality permit proceedings"⁴⁸ with *McDaniel v. New Mexico Bd. of Medical Examiners*, 1974-NMSC-062, ¶ 11, 86 N.M. 447 quoting *Smith v. Hollenbeck*, 48 Wash.2d 461,

⁴⁵ Dkt. No. AQB 26-57, Sua Sponte Order (August 10, 2026).

⁴⁶ *Alb. Bernalillo Co. Water Utility Authority*, 2010-NMSC-013, ¶ 43 (Comments made by a hearing officer which constitute prejudgment may constitutionally taint any subsequent hearing so as to invalidate any ensuing order).

⁴⁷ July 27 at 1:04:07 ("Once this facility is in place, it has the potential to be extraordinarily beneficial to the state of New Mexico - extraordinarily beneficial").

⁴⁸ Dkt. No. AQB 26-57, Order, (August 12, 2026).

294 P.2d 921 (1956) (“An agency action is arbitrary and capricious when it is a “willful and unreasonable action, without consideration and in disregard of facts or circumstances”); *See also Resolute Wind*, 2022-NMSC-011, ¶ 26 (explaining that a commission’s procedural decisions must be the result of reasoned decision-making process which “demonstrat[es] the connection between the facts found and the choice made”). Because Mr. Shepherd’s one-sided procedural approach ultimately “fails to comport with the traditional notions of fairness,” *id.* at ¶ 27, and has resulted in a procedure that is fundamentally flawed, Mr. Shepherd must be disqualified from presiding over this matter and the hearing must be stayed until a fair hearing is guaranteed.

III. CONCLUSION

For the foregoing reasons, Community Members and the Center respectfully request Mr. Shepherd’s disqualification from presiding over this matter. Community Members and the Center further request a stay of these proceedings until a fair hearing is guaranteed.

Respectfully submitted,

/s/ Maslyn Locke

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Certificate of Service

I hereby certify that on August 19, 2026 a copy of the foregoing motion was emailed to the persons listed below:

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/s/ Maslyn Locke 8.19.26



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Fw: [EXTERNAL] Re: AQB 26-57 Entry of Appearance

Vigil, Christopher J, ENV <ChristopherJ.Vigil@env.nm.gov>

Wed, Jul 15, 2026 at 1:12 PM

To: Nick Maxwell <inspector@sunshineaudit.com>

Cc: "Lopez, Luis, ENV" <luis.lopez@env.nm.gov>, "Yardman-Frank, Brian, ENV" <brian.yardman-frank@env.nm.gov>, "ejantz@nmelc.org" <ejantz@nmelc.org>, "max.shepherd@comcast.net" <max.shepherd@comcast.net>, "jennifer@bradfutelaw.com" <jennifer@bradfutelaw.com>, "david@bradfutelaw.com" <david@bradfutelaw.com>, "jbiever@williamsweese.com" <jbiever@williamsweese.com>, "cromo@williamsweese.com" <cromo@williamsweese.com>, "editor@thecandlepublishing.com" <editor@thecandlepublishing.com>, "joe@progressnownm.org" <joe@progressnownm.org>, Colin Cox <ccox@biologicaldiversity.org>, Gail Evans <GEvans@biologicaldiversity.org>, "mnanasi@newenergyeconomy.org" <mnanasi@newenergyeconomy.org>, "chris@fayerbergdodd.com" <chris@fayerbergdodd.com>, "mlocke@nmelc.org" <mlocke@nmelc.org>, "esperanza@yuccnm.org" <esperanza@yuccnm.org>

Yes, Nick. We won't have an order until Monday. NMED has already sent to ad to newspapers, so the ad will come out on Friday. If the Order schedules another date, we will have to notice that as well. In any event, the Draft Permit will also be issued this week.

Chris Vigil*Assistant General Counsel**Air Quality Bureau**New Mexico Environment Department**121 Tijeras Ave. NE, Ste. 1000**Albuquerque, NM 87102**Phone: (505) 469-4696**Fax: (505) 383-2064**Email: christopherj.vigil@env.nm.gov**<https://www.env.nm.gov/>*

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From: Nick Maxwell <inspector@sunshineaudit.com>**Sent:** Wednesday, July 15, 2026 1:06 PM**To:** Vigil, Christopher J, ENV <ChristopherJ.Vigil@env.nm.gov>

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[Quoted text hidden]



Office of the Governor
MICHELLE LUJAN GRISHAM

Official Schedule

Week of July 27, 2026

This schedule is subject to change. All times are Mountain Time.

Monday, July 27th

Time	Event
1:00 PM – 2:00 PM	Meeting w/ Dr. Goldstein
2:30 PM – 3:30 PM	Meeting w/ Oracle
4:00 PM – 5:00 PM	Meeting w/ Carpenters
5:30 PM – 7:30 PM	Dinner w/ Senator Stewart

Tuesday, July 28th

Time	Event
10:30 AM – 12:00 PM	Senior Staff Meeting
1:00 PM – 1:30 PM	Comms Weekly Check-In Call
2:00 PM - 2:30 PM	Meeting w/ Secretary DeBlassie
3:00 PM – 4:00 PM	ALTSD Promo Filming
4:00 PM – 5:00 PM	Weekly Media
5:30 PM – 7:30 PM	Visit w/ Plexos

Wednesday, July 29th

Time	Event
3:00 PM - 4:15 PM	UnidosUS Plenary Session

Thursday, July 30th

Time	Event
12:00 PM – 1:00 PM	Call w/ Senator Heinrich and Governor Paisano
6:00 PM – 8:00 PM	Burrell College Celebration

Friday, July 31st

Time	Event
10:30 AM – 10:45 AM	Pop-in w/ Theresa Trujeque
11:00 AM – 11:30 AM	Meeting w/ Santo Domingo Pueblo
12:00 PM – 12:30 PM	Filming w/ Comms
12:45 PM – 1:00 PM	Briefing w/ Secretary DeBlassie and Secretary Sandoval
3:00 PM – 4:30 PM	Dr. Jill Biden Event
5:30 PM – 7:30 PM	Dinner at Robert Meya's

Saturday, August 1st

Time	Event
2:00 PM – 3:00 PM	Santa Fe Back-to-School Bash
5:30 PM – 11:30 PM	Lili Elbe Opera



Maslyn Locke <mlocke@nmelc.org>

AQB 26-57: Maxwell Objection to Department's Failure to Produce AR

Vigil, Christopher J, ENV <ChristopherJ.Vigil@env.nm.gov>

Fri, Jul 31, 2026 at 10:05 AM

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Any document you want is available through IPRA. We are delivering the Administrative Record to the parties on August 24.

Locating and delivering documents takes time, and NMED is in full compliance with both IPRA and the ACQA.

Chris Vigil*Assistant General Counsel**Air Quality Bureau**New Mexico Environment Department***121 Tijeras Ave. NE, Ste. 1000****Albuquerque, NM 87102***Phone: (505) 469-4696**Fax: (505) 383-2064**Email: christopherj.vigil@env.nm.gov**<https://www.env.nm.gov/>*

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Subject: [EXTERNAL] AQB 26-57: Maxwell Objection to Department's Failure to Produce AR

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