

AUG 23 2026

Luis Lopez (OFF)


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 THE JOINT EMERGENCY MOTION FOR A
HEARING CONSISTENT WITH DUE PROCESS GUARANTEES,
DISQUALIFICATION OF HEARING OFFICER, AND STAY, AND
TO MAXWELL'S SUPPLEMENTAL MOTION FOR EXPEDITED DISCLOSURE
CONCERNING THE ERG CONTRACTUAL RELATIONSHIP

The New Mexico Environment Department ("Environment Department") Air Quality Bureau ("Bureau") respectfully submits this response in opposition to the New Mexico Environmental Law Center and the Center for Biological Diversity's (together the "Movants") *Emergency Motion for Hearing Consistent with Due Process Guarantees, Disqualification of Hearing Officer, and Stay* (filed Aug. 19, 2026) ("*Joint Motion*")¹ and *Maxwell's Response in Substantial Support of Joint Emergency Motion for Disqualification and Stay, and Supplemental Motion for Expedited Disclosure Concerning the ERG Contractual Relationship* (filed Aug. 21, 2026) ("*Maxwell's Supplemental Motion*").

This response is timely served and filed before the Hearing Officer's issuance of a recommended decision within five days of the *Joint Motion*, which is August 24, 2026. See 20.1.4.100(E)(3)(b)(ii) NMAC; 20.1.4.100(F)(1) NMAC (computation of time).

¹ Movants failed to seek the position of the other parties and make no statement or showing for why concurrence was not sought – a violation of 20.1.4.200(D)(3) NMAC. Parties in this proceeding have become exceedingly lax and often fail to seek concurrence or afford so little time for a response that the request is rendered meaningless.

Furthermore, as the Bureau was preparing this response, Yucca Growth Infrastructure, LLC (“Applicant”) filed *Applicant’s Response in Opposition to the Joint Emergency Motion for a Hearing Consistent with Due Process Guarantees, Disqualification of Hearing Officer, and Stay, and to Maxwell’s Supplemental Motion for Expedited Disclosure Concerning the ERG Contractual Relationship* (served Aug. 21, 2026; not yet file stamped) (“*Applicant’s Response*”). The Bureau independently evaluated the issues raised in the *Joint Motion* and *Maxwell’s Supplemental Motion* and concluded that the legal and procedural arguments set forth in *Applicant’s Response* accurately state the governing law and address arguments the Bureau intended to raise. Since Applicant filed its *Response* before the Bureau could present those same arguments, the Bureau joins *Applicant’s Response* to avoid unnecessary duplication and burdening the record in the interest of judicial economy.

The Bureau’s joinder reflects its independent agreement with the legal and procedural arguments stated *Applicant’s Response*; it does not reflect coordination with Applicant, adoption of Applicant’s private interests, or a departure from the Bureau’s commitment to the fair and impartial administration of the proceeding. The Bureau joins certain portions of *Applicant’s Response*, as follows: the introduction at pages 2 to 4; the section regarding the governing standard being personal bias, not adverse rulings at pages 4 to 6; the section regarding rulings Movants call a “reversal” actually applied a governing rule and established law in subsections 1(A) and 1(B) at pages 6 to 9; the section regarding Applicant’s identification of rulings it deemed adverse to Applicant at pages 13 to 14 for the purpose of illustrating examples of Movants’ hyperbole; the section regarding the lack of demonstrated prejudice by the Hearing Officer at pages 14 to 15 but not the unsupported assertions/characterizations regarding public participation; the section regarding characterization of *Maxwell’s Supplemental Motion* at pages 16 to 17; the section

regarding the Eastern Research Group (“ERG”) contract failing to serve as a basis for disqualification at pages 17 to 19; and the section regarding Mr. Maxwell’s request for expedited disclosure at pages 19 to 20.

The Bureau’s Response herein contains additional arguments to further support denial of both the *Joint Motion* and *Maxwell’s Supplemental Motion*.

INTRODUCTION

Neither the *Joint Motion* nor *Maxwell’s Supplemental Motion* establish a legal or factual basis to disqualify the Hearing Officer nor cause to stay the proceeding or current deadlines. Despite Movants’ allegations, the air quality statutory and regulatory framework, as established by the New Mexico Legislature and reviewed by the New Mexico courts, stand as operative in this administrative proceeding – as with any other administrative proceeding of this kind. To help clarify the process relied upon by the Environment Department and explain why denial of the requests for disqualification, a stay, and discovery are appropriate, the Bureau submits the below.

BACKGROUND

As part of an air quality permitting proceeding under the laws and regulations of the Environment Department, it is critical to understand legally and contextually the air quality permitting decision process of the agency as determined by the New Mexico Legislature who adopted the governing statutes, the Environmental Improvement Board and Environment Department who adopted the governing regulations, and the New Mexico courts that have interpreted the same. This is important context for the governing procedural law, 20.1.4 NMAC (the “Rule”), for this administrative public hearing on the pending air quality permit.

Factual Background

In general terms, the Bureau will explain its process so far, where the air quality permitting

decision sits in the process, and what can be expected following the administrative public hearing on the pending air quality permit leading to a decision on the permit application.

The Bureau received an application for an air quality construction permit from the Applicant on April 27, 2026, which the Bureau deemed administratively complete on May 27, 2026, after determining the application contained sufficient information to begin technical and public review. The administrative completeness determination was not approval of the permit. The Bureau issued the administrative completeness determination and made that available to the public along with the full set of application materials submitted by the Applicant. The Bureau issued public notice on the application and opened a public comment period from May 31 to July 6, 2026, on the same.

Following this public notice and comment period, the Cabinet Secretary determined that the level of public interest warranted an administrative public hearing on the pending air quality permit after reviewing such recommendation from the Bureau. The Cabinet Secretary's determination initiated the process for the administrative public hearing on the pending air quality permit process here.

As part of that process, the Cabinet Secretary delegated final decision-making authority to Deputy Cabinet Secretary John Rhoderick, and appointed Max Shepherd as the independent hearing officer in the matter. Also, since an administrative public hearing on the pending air quality permit was initiated, the Bureau notified the Applicant of the 90-day extension to the deadline for a final decision by the Environment Department. See NMSA 1978, § 74-2-7(B)(2)(a).

Along this timeline, the Bureau made additional materials available for public review, including its draft permit, statement of basis, and modeling report. The Bureau also opened up a second opportunity for public comment on the draft permit and statement of basis – which

continues to be open – and provided notice of the administrative public hearing on the pending air quality permit set to begin on September 14, 2026.

After the administrative public hearing on the pending air quality permit and development of the evidentiary record that will be included in the administrative record and before the expiration of the 180-day deadline on November 23, 2026, for a decision, the Deputy Cabinet Secretary will determine whether to approve the permit, approve it with conditions, or deny it. See NMSA 1978, § 74-2-7(B)(2)(a); 20.2.72.207(C)(1) NMAC.

The permit final decision may be appealed. NMSA 1978, § 74-2-7(H)-(K); 20.1.4.500(E) NMAC; 20.2.72.207(F)-(G) NMAC; 20.1.2 NMAC (adjudicatory procedures). A final decision by the Environmental Improvement Board may be appeal to the New Mexico Court of Appeals. NMSA 1978, § 74-2-9; 20.1.2.404 NMAC; 20.2.72.207(H) NMAC.

Legal Background

As a legal matter, the Air Quality Control Act describes the administrative public hearing on the pending air quality permit in two places. First, the New Mexico Legislature afforded the Environment Department the opportunity to extend the deadline by which it must issue a permit decision when there is a need to have a public hearing. NMSA 1978, § 74-2-7(B)(2)(a). Second, the New Mexico Legislature required the Environmental Improvement Board to issue regulations with “provisions [for] . . . specification of the . . . public hearing, if any, required prior to the issuance of a permit[.]” NMSA 1978, § 74-2-7(B)(5). Pursuant to this direction, the Environmental Improvement Board adopted 20.2.72 NMAC for construction permits, with the primarily applicable provision for public hearings at 20.2.72.206(C) NMAC. By regulation, the Environmental Improvement Board required “a public hearing if the secretary determines that there is a significant public interest.” Id.

Based on this delegation and pursuant to the Secretary’s authority to “make and adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions[,]” NMSA 1978, § 9-7A-6(D), the Environment Department adopted 20.1.4 NMAC. See 20.1.4.1 NMAC (“ISSUING AGENCY: Environment Department”). The Rule sets forth procedures that apply to public hearings for several environmental laws implemented by the Environment Department, including the administrative public hearings on pending air quality permits. Many of the requirements in 20.1.4 NMAC that generally apply the administrative public hearing on the pending air quality permit stem not from the Air Quality Control Act but from statutory requirements in other environmental laws such as the Hazardous Waste Act and the Solid Waste Act.

The Environment Department and the Secretary utilize hearing officers for many administrative proceedings that occur pursuant to the New Mexico statutes and regulations. Those proceedings occur either before the Secretary (or their designee) as a decision-maker, boards or commissions; they are administrative and not same as appearing before a civil court judge in a state or federal court setting. The Environment Department also utilizes its Office of Public Facilitation to support administrative public hearings on pending air quality permits and the Office’s paralegal staff to serve as the hearing clerk under 20.1.4.7(A)(11) NMAC.

Here, the Rule states “[t]he Secretary may appoint one or more Hearing Officers[,]” 20.1.4.100(E)(2) NMAC, “to conduct a proceeding under this Part[,]” 20.1.4.7(A)(13) NMAC.²

² Until quite recently, the Department has regularly only one hearing officer – Felicia Orth. Ms. Orth cannot alone support the hearing officer needs of the Department and Secretary. Securing lawyers interested and capable of serving as hearing officers for the Department has been a decades long challenge. ERG is a national company that provides many contract services for the Department, including assisting with locating interested and eligible hearing officers. To undersigned counsel’s knowledge, Hearing Officer Shepherd came to serve the Department through ERG’s search by way of a recommendation from the New Mexico Regulation

As previously noted, the Secretary appointed Max Shepherd as the hearing officer in this matter.

ARGUMENT

Neither the *Joint Motion* nor *Maxwell's Supplemental Motion* establish a legal or factual basis to grant the relief requested regarding disqualification of appointed Hearing Officer Max Shepherd, a stay of the administrative public hearing on the pending air quality permit and the interim deadlines, or discovery on tangential claims regarding disqualification.

Regarding disqualification, under 20.1.4.100(E)(3)(b)(i) NMAC, a party may move to disqualify the hearing officer before the administrative public hearing on the pending air quality permit only “for cause” identified in 20.1.4.100(E)(3)(a)(i) NMAC, which is personal bias or prejudice concerning a party or the application (there is no petition for variance at issue here). The *Joint Motion* largely substitutes alleged procedural error for evidence of personal bias and relies on hyperbolic accusatory rhetoric instead of focusing on what New Mexico law actually requires as established by New Mexico courts. The *Joint Motion* presents inflammatory and unsubstantiated accusations, such as “inexplicable,” “arbitrary,” “one-sided,” “absurd,” “nonsensical,” “anemic,” to undercut the administrative process as set forth under New Mexico law rather than provide any actual evidence of any impropriety.³ Notably, the Hearing Officer must guess that the *Joint Motion* and *Maxwell's Supplemental Motion* assert an applicable standard

and Licensing Department, where Mr. Shepherd has been a hearing officer for years.

³ It is well-established law that argument of counsel is not evidentiary proof. See *Cain v. Champion Window Co. of Albuquerque, LLC*, 2007-NMCA-085, ¶ 14, 142 N.M. 209, 214, 164 P.3d 90, 95 (“Arguments by counsel are not evidence and cannot be used to create a material issue of fact to defeat summary judgment.”) (citing *Oschwald v. Christie*, 95 N.M. 251, 253, 620 P.2d 1276, 1278 (1980) (holding that the opponent to summary judgment cannot meet its burden of establishing a material fact by relying on mere arguments and contentions); *C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 163, 597 P.2d 1190, 1203 (Ct.App.1979) (stating that an assertion is not entitled to consideration absent support by affidavit or admissible evidence)); see also Rule 16-802(A) NMRA (prohibiting a lawyer from making statements concerning the integrity of an adjudicatory officer without an objectively reasonable factual basis).

for disqualification for his evaluation because the *Joint Motion* merely implies instead of explaining the standard for bias is 20.1.4.100(E)(3)(a)(i) NMAC and, in fact, *Maxwell's Supplemental Motion* disclaims application of all the standards in 0.1.4.100(E)(3)(b) NMAC. In a state court proceeding, this failure alone would be grounds for dismissal of the motions. See Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (“[w]e will not review unclear arguments, or guess at what a party’s arguments might be” (alteration, internal quotation marks, and citation omitted)); Hall v. City of Carlsbad, 2023-NMCA-042, ¶ 16, 531 P.3d 642 (declining to consider claims unsupported by argument or authority); Lukens v. Franco, 2019-NMSC-002, ¶ 5, 433 P.3d 288 (stating that “counsel should properly present this [C]ourt with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice[.]”) (internal quotation marks and citation omitted); State v. Julg, 2021-NMCA-058, ¶ 25 n.3, 497 P.3d 678 (“We will not develop Defendant’s arguments for him, nor will we guess at what his arguments might be.”) (citing Headley v. Morgan Mgmt. Corp., 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076).

Turning to the substance of the Movants’ briefing, 20.1.4.100(E)(3)(b) NMAC does not authorize disqualification merely because a party disagrees with the Hearing Officer’s management of the proceeding, believes a procedural ruling is erroneous, or contends that a ruling disproportionately affects that party. It requires cause consisting of the Hearing Officer’s own personal bias or prejudice. Movants attempt to infer personal bias of the Hearing Officer based on his rulings, but New Mexico law expressly forecloses that inference, even if the ruling is later determined to be legally incorrect. Movants similarly fail in their attempt to infer personal bias of the Hearing Officer based on the perspectives of others. Movants also overstate the argument that any deviation from the process in the Rule necessarily violates the regulation and thereby impedes

their due process rights. The Hearing Officer has considerable discretion to manage the proceeding.

Regarding the request for a stay, as with the disqualification arguments, Movants and Mr. Maxwell identify no statute, regulation, or other authority permitting an indefinite stay of this permit proceeding. Notably, the filing of a disqualification motion has an explicit expedited decisions process, and the Rule has no considerations for a corresponding stay of the proceeding.

Regarding the request in *Maxwell's Supplemental Motion* for discovery before the *Joint Motion* is decided, it is already established that discovery is not allowed in administrative public hearings on pending air quality permits. Continued requests for discovery are frivolous, unsupported by the law, and an abuse that only serves to cause further delay and expense in this proceeding. Again, this is not a trial before a judge in a civil district court matter; it is an administrative proceeding with a separate set of rules.

I. MOVANTS INVOKE “DUE PROCESS” WITHOUT IDENTIFYING A PROTECTED INTEREST OR A PROCEDURE TO WHICH THEY ARE LEGALLY ENTITLED AND BEING DEPRIVED OF.

Movants assert violations of due process without ever addressing the origin of the purported due process right they claim was violated. The *Joint Motion* appears to assume that participation in an administrative public hearing on the pending air quality permit creates a constitutional entitlement to their preferred schedule, formal discovery, earlier compilation of the administrative record, and a particular sequence of motion practice. It does not. The ability to participate in the administrative public hearing proceeding is defined solely by the Air Quality Control Act and 20.1.4 NMAC adopted pursuant to NMSA 1978, Section 9-7A-6(D), stating the Secretary's authority to “make and adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions.” Part 20.1.4 NMAC provides extensive opportunities for participation and procedural protections. The Rule is

designed already to “ensure due process” and “the ability to participate” within a “orderly structure[d]” proceeding. 20.1.4.6 NMAC. The Rule empowers the Hearing Officer with certain duties but those are not independent procedural rights.

No party other than Applicant has a constitutional due process right to participate in the administrative public hearing on the pending air quality permit proceeding. The New Mexico Constitution, Article II, Section 18, provides that no person shall be deprived of life, liberty, or property without due process of law. The threshold requirement for constitutional due process protection is the existence of a cognizable protected property or liberty interest. Bounds v. State ex rel. D’Antonio, 2013-NMSC-037, ¶ 50, 306 P.3d 457. There is no recognized property or liberty interest attached to public participation in an administrative public hearing on the pending air quality permit proceeding. See e.g., El Paso Elec. Co. v. New Mexico Pub. Regul. Comm’n, 2025-NMSC-009, ¶ 33, 563 P.3d 920, 930; Atencio v. State, 2026-NMCA-011, ¶¶ 52- 57, 584 P.3d 985, cert. granted (Nov. 10, 2025), cert. granted, 2025-NMCERT-011, 583 P.3d 264. Regardless, the Hearing Officer has no authority to decide constitutional questions.

The right to participate in the proceeding is solely statutory and regulatory. See e.g., Sw. Org. Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd., 2021-NMCA-005, ¶ 29, 482 P.3d 1273, 1284. The Rule assigns duties and case-management authority to the Hearing Officer to “conduct a fair and impartial proceeding, assure that the facts are fully elicited, and avoid delay” by authorizing the Hearing Officer to “take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising[.]” 20.1.4.100(E)(2) NMAC. The Rule appropriately affords the Hearing Officer with considerable discretion. See Old Abe Co. v. New Mexico Min. Comm’n, 1995-NMCA-134, ¶ 28, 121 N.M. 83, 908 P.2d 776. Conversely, a grant of authority to the Hearing Officer does not grant each party

an independent entitlement to compel or repeatedly demand a particular procedure, particularly not procedures that are outside of the law. Here, Movants selectively invoke the Hearing Officer's duties, while disregarding his concurrent duty to avoid unnecessary delay and manage the proceeding so the Environment Department may issue its permit decision within the 180-day statutory period – a legal requirement Movants ignore completely. Movants cannot define the Hearing Officer's duties selectively by emphasizing the obligations that support their position while ignoring those the law also requires him to fulfill. Throughout the upcoming processes, the parties remain able to file technical testimony, present and examine witnesses, submit rebuttal evidence, make objections, brief the merits, comment upon the Hearing Officer's recommended decision, and seek review of the final order. Simply invoking "due process" is not enough to make allegations rise to a deprivation of a constitutionally protected interest or statutory procedural protection. The Hearing Officer has not summarily resolved the application against Movants, excluded any party from the proceeding, or denied parties an opportunity to create a record in a manner such that "due process" has been impaired.

II. THERE IS NO BASIS FOR THE HEARING OFFICER TO BE DISQUALIFIED.

A. Procedural rulings by the Hearing Officer that are disputed by Movants do not establish a basis for disqualification.

In a review involving an administrative public hearing, the New Mexico Supreme Court held that "[i]t is well established that adverse rulings do not constitute a valid basis for disqualification based on personal bias or prejudgment of a disputed factual issue." Alb. Bernalillo Co. Water Util. Auth. v. NMPRC, 2010-NMSC-013, ¶ 42, 148 N.M. 21, 37, 229 P.3d 494, 510 (citing Liteky v. United States, 510 U.S. 540, 541 (1994) ("[J]udicial rulings alone almost never constitute valid basis for a bias or partiality recusal motion."); see State v. Hernandez, 115 N.M. 6, 846 P.2d 312 (1993); United Nuclear Corp. v. Gen. Atomic Co., 96 N.M. 155, 249, 629 P.2d

231 (1980)). “Personal bias cannot be inferred from an adverse ruling[.]” State v. Hernandez, 115 N.M. at 20. Further, “[r]ulings adverse to a party do not necessarily evince a personal bias or prejudice on the part of the judge against it even if the rulings are later found to have been legally incorrect.” United Nuclear Corp., 96 N.M. 155, 249.

Movants rely principally on three rulings from the Hearing Officer with which they represent their disagreement: (1) modification of the administrative public hearing on the pending air quality permit schedule the Hearing Officer set for the proceeding to align with the deadline established by the New Mexico Legislature; (2) the Hearing Officer’s order disallowing discovery; and (3) the Hearing Officer’s withdrawal of an order directing briefing on the motion to dismiss. These rulings by the Hearing Officer do not become evidence of personal bias merely because the Movants characterize them as so. In fact, the Hearing Officer’s orders reflect sound judgment in applying governing New Mexico law. There is no evidence that the rulings stem from personal bias.

1. The statutory deadline informs the schedule for the administrative public hearing on the pending air quality permit.

The New Mexico Legislature, through Section 74-2-7(B)(2)(a) of the Air Quality Control Act, requires the Bureau to issue a permit decision within 90 days of the Bureau deeming a permit application complete, with a permissible additional up-to-90-day extension for good cause, including if there is a need to have an administrative public hearing on the pending air quality permit. See 20.2.72.207(B)(1) NMAC (implementing the statutory requirement); 40 C.F.R. § 52.1620 (the federally approved New Mexico State Implementation Plan includes the complete 90-day deadline and extension provisions – *i.e.*, the deadline is included as federal law). Thus, there is a 180-day window for the Bureau to complete its review, have public engagement, and to conduct the administrative public hearing on the pending air quality permit proceeding itself.

Neither regulations nor procedural orders can ignore statutory requirements. Gila Res. Info. Project v. New Mexico Water Quality Control Comm’n, 2015-NMCA-076, ¶ 20, 355 P.3d 36, 42, aff’d, 2018-NMSC-025, 417 P.3d 369 (“Regulations that have been enacted by an agency ‘are presumptively valid and will be upheld if [they are] reasonably consistent with the authorizing statutes.’”) (quoting N.M. Mining Ass’n v. N.M. Water Quality Control Comm’n, 2007-NMCA-010, ¶ 11, 141 N.M. 41, 150 P.3d 991). Thus, this window of time directly informs the Hearing Officer’s duty to “avoid delay” in conducting the administrative public hearing on the pending air quality permit. 20.2.72.100(E)(2) NMAC. The Hearing Officer must conclude the proceeding in a manner that allows for a decision by November 23, 2026.

Turning to the rulings themselves, the Hearing Officer’s decisions disputed by Movants do not uniformly support Movants’ accusation that the Hearing Officer has consistently adopted the position advocated by Applicant and the Bureau. For example, when Applicant requested that the administrative public hearing on the pending air quality permit begin on August 17, 2026 (or in the alternative August 24, 2026), the Hearing Officer did not grant that request. He instead set the administrative public hearing on the pending air quality permit for September 14, 2026. The selected date falls between the August 17 date requested by the Applicant and the October 19 date requested by Movants. A ruling that rejects each side’s preferred date does not demonstrate favoritism toward either side.

The *Joint Motion* repeatedly asserts that the Bureau has improperly “withheld” the administrative record. That assertion directly conflicts with the express governing procedural rule in this administrative proceeding. Pursuant to the Rule, the Bureau must deliver the administrative record to the Hearing Clerk no later than the start of the administrative public hearing on the pending air quality permit. See 20.1.4.200(A)(2) NMAC. Thus, contrary to Movants’ assertion,

the *Amended Scheduling Order* ensures the administrative record is submitted before the day of administrative public hearing on the pending air quality permit by directing the Bureau to file the record before the hearing begins. Notably, the administrative record is not static or self-generating; it continues to develop as the Bureau completes its review and as relevant materials are generated, which the Bureau must then identify and compile often near the conclusion of the process. While there might be prior instances of the Bureau filing an early copy of the administrative record and supplementing as it continues to develop, the fact that the administrative record has not been filed here earlier than required by regulation does not constitute misconduct, much less evidence of personal bias by the Hearing Officer. As with the discovery matter (discussed below) in which opponents repeatedly assert misleading and frivolous arguments contrary to regulation, same too are their assertions that the administrative record is somehow “withheld.” For the Hearing Officer to set a filing and regulatory deadline in accordance with governing law for the Bureau does not establish that the Hearing Officer has a disqualifying personal favoritism for the Bureau or that compliance 20.1.4 NMAC – designed to ensure due process – somehow violates due process. Movants’ arguments are irreconcilable and do not support the relief being requested.

Movants also improperly demand a strict application of the motion response and reply periods in the Rule. The response and reply periods prescribe a default course of motion practice; they do not divest the Hearing Officer of all authority to organize motion practice through a case-specific scheduling order to meet statutory deadlines set by the New Mexico Legislature. Otherwise, the Hearing Officer could not discharge his express duties to manage complex proceedings, avoid unnecessary motions, resolve urgent procedural issues, or prevent motion practice from extending beyond a statutory decision deadline.

Lastly, despite the Bureau also raising the practicality of filing pre-hearing motions the

same day that the technical testimony is filed and prior to the rebuttal technical testimony, 20.1.4 NMAC does not require every objection be presented through a prehearing motion. The Rule allows a party to object to conduct during the administrative public hearing on the pending air quality permit orally or in writing, and the objection and ruling become part of the hearing record. 20.1.4.400(C)(1) NMAC. Thus, the prehearing-motion deadline does not eliminate any party's ability to object to direct testimony, rebuttal testimony, exhibits, or other evidence. That will all occur at the administrative public hearing on the pending air quality permit.

2. Movants disagree with the Hearing Officer's order denying discovery while failing to recognize they had no right to discovery in the first place and the current order appropriately corrected the Hearing Officer's prior decisions to conform with applicable law.

Personal bias cannot be inferred from a correct application of the law; the Hearing Officer's correction of his interpretation of the discovery provision to conform with applicable law does not demonstrate bias. In another hyperbolic and disingenuous assertion, Movants characterize the Hearing Officer's final discovery ruling as "provided without basis," even though the Hearing Officer's identified basis was his conclusion that he had incorrectly applied the discovery provision applicable to only proceedings under the Solid Waste Act.

Movants themselves confuse the law on discovery. First, the Albuquerque-Bernalillo County Air Quality Control Board ("AQCB") – which is not the Environment Department, nor the Cabinet Secretary, nor a state board or commission – has separate and distinct regulations for a different quasi-adjudicatory permit appeal proceeding that allows for discovery, 20.11.81.14(J) NMAC ("Formal discovery is not a right, and, therefore, is discouraged and shall only be allowed by order of the hearing officer if the following conditions exist."). The specific discussion of discovery relied on by Movants appears based on familiarity with that rule, as discovery is entirely absent from the Environmental Improvement Board's adjudicatory proceedings regulation at

20.1.2 NMAC⁴ and the Secretary’s public hearing regulation 20.1.4 NMAC that governs this administrative public hearing on the pending air quality permit.

Second, application of the proper regulatory scheme is highly relevant here. It means case law evaluating permit appeal proceedings by the AQCB, as a local board with separate and distinct regulations, is inapplicable in the present proceeding that is governed by a completely different set of regulations. The New Mexico Court of Appeals decision in Southwest Organizing Project, does **not** stand for the proposition that discovery is allowed in the administrative public hearing on the pending air quality permit proceedings before the Cabinet Secretary or their designee. 2021-NMCA-005. That case involved an AQCB quasi-adjudicatory permit appeal proceeding under 20.11.81 NMAC, which expressly allows for discovery. See id., ¶ 25. The governing regulation for this administrative public hearing on the pending air quality permit before the Deputy Secretary, as the Secretary’s designee, is 20.1.4 NMAC, which has no provisions regarding discovery in any proceeding other than those under the Solid Waste Act. See 20.1.4.200(E)(2) (“Special Procedures for Hearings Under the Solid Waste Act: . . . Discovery”). Administrative public hearings on pending air quality permits are also governed by the Air Quality Control Act, which does not provide for discovery.

Parties who seek discovery in this proceeding must stop misleading the public to think there is entitlement to a discovery process in this matter and must stop making frivolous claims that are clearly erroneous and contrary to law. See Rule 16-301 NMRA (lawyers are required to inform themselves of the applicable law, and a contention becomes frivolous when counsel cannot

⁴ The regulation 20.1.2 NMAC governs air permit appeals, as well as Uniform Licensing Act Proceedings. The section 20.1.2.208 NMAC describes the procedures for discovery only in Uniform Licensing Act Proceedings – not air quality or other proceedings – because the Uniform Licensing Act, NMSA 1978, Section 61-1-9, includes powers of the board and hearing officer related to the nature of allowing discovery by counsel in Uniform Licensing Act hearings.

support it either through a good-faith argument for changing the law, which is impossible in this proceeding, or under existing law); Rules 16-303(A)(1)-(2) NMRA (requiring candor toward the tribunal); Rule 16-401(A) NMRA (requiring truthfulness in statements to others); Rules 16-804(C)-(D) NMRA (dishonesty and prejudice to the administration of justice are prohibited).

3. The Hearing Officer’s withdrawal of an order directing briefing on the motion to dismiss did not prejudice the issue but directed deferment until the evidentiary record could support the briefing.

The Bureau supplements argument on this matter with one additional point. The Hearing Officer did not decide the disputed fuel-supply issue in Applicant’s favor. He determined that the issue should be developed through evidence at the administrative public hearing on the pending air quality permit rather than resolved through expedited prehearing briefing. Preserving a disputed factual issue for testimony and examination at the administrative public hearing on the pending air quality permit does not show that the Hearing Officer has prejudged the issue.

B. The Hearing Officer’s alleged statement does not display prejudice or deep-seated favoritism toward the New Mexico Environment Department, Air Quality Bureau, Applicant or application/permit.

Movants assert the Hearing Officer expressed a belief that the application “should be approved,” *Joint Motion*, at p. 11, but provide no such evidence. Movants characterization is an exaggeration; the quoted language of the Hearing Officer’s statement reflects that he only said that the facility has the “potential” to benefit New Mexico. Conversely, Movants ignore other statements by the Hearing Officer that they themselves quote in the *Joint Motion* where the Hearing Officer expresses potential adverse consequences of the application being approved. See *Joint Motion*, at p. 5 (“[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.”). The New Mexico Supreme Court recognizes that “judicial remarks during the course of the trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge” except where they rise to the level of “display[ing] a deep-seated favoritism or antagonism[.]” U S West Commc’ns, Inc., 1999-NMSC-016, ¶ 44, 127 N.M. 254, 980 P.2d 37 (quoting Liteky, 510 U.S. at 555). The Hearing Officer has merely acknowledged the application poses potential benefits and risks in the context of discussion about scheduling matters. Such statements do not demonstrate that he has predetermined the outcome.

Furthermore, potential benefit is neither the legal standard governing the permit decision nor a finding that the applicable standard has been met. See NMSA 1978, § 74-2-7(C) (listing reasons for denial); 20.2.72.208 NMAC (same). The circumstances here do not arise to an announcement of the Hearing Officer’s decision on the recommendation he will make to the Deputy Secretary regarding the application, as Movants try to allege. See Lujan v. New Mexico State Police Bd., 1983-NMSC-062, ¶¶ 6-7, 100 N.M. 149, 150, 667 P.2d 456, 457 (ordinary interactions “fall far short of showing a possible temptation to try the case with bias”); compare Reid v. New Mexico Board of Examiners in Optometry, 1979-NMSC-005, ¶¶ 7-8, 92 N.M. 414 (a hearing where a medical provider’s rights were at issue and a board member stated before adjudication that the licensee would lose his job).

Thus, statements by the Hearing Officer to the parties in this proceeding do not amount to a predetermination about the application, personal bias or prejudice against opposing parties, or personal bias or prejudice for supporting parties, such as the Bureau or Applicant.

C. The origins and existence of a contractual relationship between the Environment Department and Hearing Officer Shepherd does not impute onto him the positions held by others or demonstrate bias or prejudice.

Much of the *Joint Motion* is devoted not to any conduct by the Hearing Officer in this administrative proceeding on the air quality permit application, but to allegations concerning a memorandum of understanding, the Governor’s calendar, a meeting involving Oracle, public advocacy concerning Project Jupiter (of which the current air quality permit application is related), newspaper notices, and actions allegedly taken by the Environment Department. In sum, Movants just generally disapprove of any action taken by the Governor, Environment Department, Bureau, Applicant, or any other persons associated with Project Jupiter that do not correspond to Movants’ view – even as the Environment Department and Bureau in this proceeding continue to follow all governing regulations and direction set forth by the Hearing Officer.

Administrative adjudicators are presumed to act with honesty and integrity. Jones v. New Mexico State Racing Commission, 1983-NMSC-089, ¶ 13, 100 N.M. 434. The party asserting bias bears the burden of overcoming that presumption with evidence. Id. Movants present no evidence – only alleging their own conclusory inferences, which do not satisfy the disqualification provision requiring personal bias or prejudice by the Hearing Officer. Alb. Bernalillo Co. Water Util. Auth., 2010-NMSC-013, ¶ 45 (declining to draw inferences of bias where there was no supporting evidence)

Most allegations in the *Joint Motion* are also wholly unsupported by evidence. For example, Movants provide citations to “July 27 at [apparent timestamp]” with no indication what this record is or where it is accessible to the public. *Joint Motion*, at n. 12, n. 18, n. 19, n. 24, n. 25, n. 33, n. 43, and n. 47. The other parties have no way to evaluate to contextual basis for the information this absent evidence purportedly supports. Also, “statements of counsel are not evidence.” Ortiz v. Shaw, 2008-NMCA-136, ¶ 20, 145 N.M. 58, 65, 193 P.3d 605, 612; Yount v. Millington, 117 N.M. 95, 100, 869 P.2d 283, 288 (Ct.App.1993); Phillips v. Allstate Ins. Co.,

1979-NMCA-146, ¶ 11, 93 N.M. 648, 651, 603 P.2d 1105, 1108 (“The arguments of counsel, no matter how erudite, are not evidence.”); see also Response, p. 7, n. 3. Thus, Movants cannot cite statements by the Environment Department’s prior counsel, Christopher Vigil, as affirmative conclusive proof that the underlying fact is true merely because counsel said it. Prior counsel’s statements establish only what he actually said; they cannot be enlarged through inference into proof of the Hearing Officer’s knowledge, motive, or personal bias.

Furthermore, the Bureau notes that the articles cited by Movants as purported evidence are not admissible and cannot be considered here. Rule 11-801 NMRA (hearsay); Sw. Org. Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd., 2021-NMCA-005, ¶ 31, 482 P.3d 1273, 1285 (recognizing the appropriateness of applying the legal residuum rule in quasi-adjudicatory proceedings) (citing Duke City Lumber v. N.M. Env’tl Imp. Bd., 1984-NMSC-042, ¶ 19, 101 N.M. 291, 681 P.2d 717). Such articles consist of unsworn, out-of-court statements prepared by third parties, frequently containing additional out-of-court statements from unidentified or quoted sources. As a result, newspaper articles generally contain multiple layers of hearsay, with both the reporter’s account and the quoted statements offered for their truth. Since the articles reflect a journalist’s compilation and characterization of information rather than sworn testimony or firsthand evidence, they lack the reliability necessary to be considered admissible evidence.

As for the allegations in *Maxwell’s Supplemental Motion*, his voluminous reference to documents reflecting the Environment Department’s standard contracting practices with hearing officers, including Hearing Officer Max Shepherd, do not demonstrate there is a bias towards the Bureau or the Applicant or against opposing parties in the proceeding. ERG is a well-respected national company that assists government agencies, non-government organizations, higher education, corporations, and businesses, including environmental and industry, see *Our Clients*,

ERG, <https://www.erg.com/clients> (last visited Aug. 22, 2026), including the Department, with a myriad of projects and tasks in the environmental realm, *see Services*, ERG, <https://www.erg.com/> (scroll to “Services”) (last visited Aug. 22, 2026). Mr. Maxwell implies the Hearing Officer must evaluate and the Secretary (or designee) must impose a standard that has the absurd result of nullifying every appointment of a hearing officer simply because they are engaged by the Department to provide services under regulations adopted by the Secretary and Environmental Improvement Board. Such a standard is not appropriate. *See* 20.1.4.100(E)(3)(ii) NMAC.

D. “Arbitrary and capricious” is not an independent disqualification ground under the Rule.

Again, Movants confuse the law and make arguments already dismissed by the New Mexico Supreme Court when they argue that the Hearing Officer’s rulings were arbitrary, capricious, an abuse of discretion, or not in accordance with law. First, those standards govern review of agency action by the court. NMSA 1978, § 74-2-9(C). They are not among the enumerated grounds for disqualification under 20.1.4.100(E)(3)(a) NMAC. Second, it is well-established law that “[r]ulings adverse to a party do not necessarily evince a personal bias or prejudice on the part of the judge against it *even if* the rulings are later found to have been legally incorrect.” *United Nuclear Corp.*, 96 N.M. 155, 249; *see Alb. Bernalillo Co. Water Util. Auth.*, 2010-NMSC-013, ¶ 42 (emphasis added). New Mexico law requires evidence of personal bias or prejudice for purposes of disqualification and expressly rejects attempts to infer such bias from adverse rulings.

Movants remain free to preserve objections to rulings they believe are erroneous. However, alleged procedural error must be addressed as procedural error. It cannot be repackaged as personal prejudice without evidence connecting the ruling to an improper personal disposition by the Hearing Officer, which Movants do not do.

III. MOVANTS AND MR. MAXWELL HAVE NOT ESTABLISHED ANY BASIS TO STAY THE HEARING.

Movants and Mr. Maxwell identify no statute, regulation, or other authority permitting an indefinite stay of this permit proceeding. The Rule recognizes that there may be an occasion where a continuance is requested and provides a standard for review – “for good cause shown, and after consideration of prejudice to other parties and undue delay to the proceeding[,]” 20.1.4.100(F)(2) NMAC – but nothing allows an open-ended suspension of the entire proceeding. Nor does the filing of a disqualification motion stay the proceeding where the Rule has an expedited process to allow resolution in at least 10 days. 20.1.4.100(E)(3)(b)(ii) NMAC. A stay would prejudice all parties given that the Environment Department has secured the hearing venue and made arrangements to address the additional needs for the hearing, while jeopardizing the Deputy Secretary’s ability to issue a decision by the November 23, 2026 statutory deadline. It would also conflict with the Hearing Officer’s express duty to “avoid delay.” 20.1.4.100(E)(2) NMAC.

Since neither Movants nor Mr. Maxwell have provided any authority justifying a stay, nor have they provided good cause sufficient to overcome the resulting prejudice and undue delay, the request should be denied.

Similarly, Movants’ requests for a “hearing consistent with due process guarantees” or “fair procedures” is a simply another attempt to impose their own preferred process in this proceeding without adhering to the New Mexico Legislature’s statutory directives and well-established New Mexico court precedent. None of Movants’ express or implied procedural requests have a foundation in established law – and in fact most are actually contrary to it. Many of Movants’ and Mr. Maxwell’s requests have already been adjudicated in this proceeding, with some even having more than one decision due to demands the Hearing Officer reconsider his orders. These duplicative requests must also be denied.

CONCLUSION

Since Movants have not established cause for the Hearing Officer's disqualification under 20.1.4.100(E)(3)(a)(i) NMAC, nor made a supportable case for staying the deadlines or start date of the administrative public hearing on the pending air quality permit, both the *Joint Motion* and *Maxwell's Supplemental Motion* must be denied. The *Joint Motion* relies solely on speculation, inference, and hyperbolic allegations to manufacture support for Movants' position; the *Joint Motion* identifies no actual evidence the Hearing Officer has a disqualifying personal bias or prejudice. *Maxwell's Supplemental Motion* is only another impermissible request for discovery. No stay is warranted. The Bureau respectfully requests (1) the Hearing Officer deny all relief requested, including *Maxwell's Supplemental Motion* and the requested stay in the *Joint Motion*, and recommend denial of the *Joint Motion*, and (1) the Secretary or designee enter an order denying disqualification.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *New Mexico Environment Department Air Quality Bureau's Response in Opposition to the Joint Emergency Motion for Hearing Consistent with Due Process Guarantees, Disqualification of Hearing Officer, and Stay, and to Maxwell's Supplemental Motion for Expedited Disclosure Concerning the ERG Contractual Relationship* was electronically filed and sent via electronic mail on this 23rd day of August 2026 to the following:

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Should the Hearing Clerk require a paper original, Robles, Rael, and Anaya, P.C. shall promptly provide the document upon request.

/s/Kelsea E. Sona
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