

RECEIVED

OCT 14 2026

Luis Lopez (OPF)  


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

AQB 26-57

NO. 10883

**MOTION FOR HEARING OFFICER TO ORDER DISCOVERY**

The Center for Biological Diversity, Jose Saldaña Jr. and Vivian Fuller (collectively, “Movants”) hereby request the Hearing Officer allow for limited discovery related to the air pollution impacts of the proposed facility and Applicant Yucca Growth Infrastructure, LLC’s (“YGI” or “Applicant”) ability to construct the proposed facility in a reasonable time.<sup>1</sup> Both of these issues are highly relevant to this proceeding and critical to the New Mexico Environment Department’s (“Department”) mandate to control air pollution and protect public health and the environment. 20.2.72.208(A-G) NMAC. The administrative record lacks critical information necessary for a thorough review of the YGI’s Application, and Movants request discovery to supplement that record and preserve their ability to meaningfully participate in this hearing.

The Department’s October 9, 2026 filing of the administrative record fails to resolve these issues and instead raises additional questions about the lack of sufficient information to evaluate YGI’s Application. Movant’s prior discovery requests to the Applicant and Department

---

<sup>1</sup> Pursuant to 20.1.4.200.D(3) NMAC, Movants did not seek concurrence on this motion because YGI and the Department opposed an October 13, 2026 motion from New Energy Economy seeking similar relief.

were denied on an improper legal basis. To protect due process, Movants respectfully request that the Hearing Officer issue an order allowing limited technical discovery in this hearing.

## **INTRODUCTION**

In this proceeding, YGI has presented an Application for a power plant that deploys fuel cell technology on an untested scale and is projected to become the single largest source of greenhouse gas emissions in the state of New Mexico. In response, the Department has produced a technical review of the Application, as well as a Draft Permit and Statement of Basis supporting the Draft Permit. Each of these documents is replete with missing information and factual inconsistencies. When interested parties to the proceeding, including Movants, requested discovery to fill in these foundational informational gaps and interrogate inconsistencies, they were met with an Order barring all discovery in the proceeding. This Order bases its conclusion on a flawed legal argument: that discovery is not permitted in any air permit hearing.

## **ARGUMENT**

### **I. The standing order barring discovery in this proceeding is legally flawed and must be corrected to comply with due process protections.**

On August 12, 2026, the former Hearing Officer in this proceeding issued an Order barring all discovery. The Order stated that “discovery is not allowed in air quality permit proceedings.”<sup>2</sup> By way of explanation, the Order stated that the inclusion of 20.1.4.200(E) NMAC, “Special Procedures for Hearings Under the Solid Waste Act” in the Department’s permit hearing rules may be inferred to bar discovery in all proceedings not concerning solid waste, and that the Air Quality Control Act does provide a statutory basis for discovery in air

---

<sup>2</sup> Dkt. No. AQB 26-57, Order, ¶ 2 (Aug. 12, 2026). Available at: <https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2026/07/2026-08-12-AQB-26-57-Order-Consolidated-Discovery-filed.pdf>.

permit proceedings.<sup>3,4</sup>

By declaring that discovery is not permitted in air permit hearings writ large, this Order violates interested parties' due process rights, as well as New Mexico law governing air permit proceedings. This Order must be corrected. Discovery is legally permitted in air permit hearings and must be allowed in this proceeding to satisfy due process.

## **II. Discovery is legally permitted in air permit proceedings.**

No part of the regulations governing Department permit proceedings bars or sets limitations on discovery in air permit proceedings. *See* 20.1.4 NMAC. Further, New Mexico courts have already affirmed hearing officers' authority to grant discovery requests in similar air permit proceedings. *See Southwest Org. Project v. Albuquerque-Bernalillo County Air Quality Control Board*, 2021-NMCA-005, ¶¶ 25-28 (confirming the Hearing Officer's grant of discovery in an Albuquerque-Bernalillo County Air Quality Control Board air permit proceeding). In the *Southwest* proceeding, the authority of the Albuquerque-Bernalillo County Air Quality Control Board was governed by 20.11.81 NMAC, procedural regulations derived from statutory authority granted to the Board under NMSA 1978, §§ 74-2-5 (1967) and 74-2-7 (1972). These provisions of the Air Quality Control Act grant parallel authority to local boards and to the Environmental Improvement Board ("EIB") to promulgate regulations under the Air Quality Control Act, including regulations in air permit proceedings.

Unlike the Albuquerque-Bernalillo County Air Quality Control Board, the EIB has not chosen to promulgate rules on discovery in Departmental air permit proceedings. However, that

---

<sup>3</sup> *Id.* at ¶ 3. These arguments were incorporated in full from a motion submitted by YGI.

<sup>4</sup> Concerningly, the Department itself seems to support this flawed interpretation, stating in a prior filing that "in air quality permit proceedings, SOIs take the place of discovery." Dkt. No. AQB 26-57, N.M. Env't. Dept. Response, ¶ 4 (Aug. 3, 2026). Available at: <https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2026/07/2026-08-03-AQB-26-57-NMED-Resp-to-Mtn-to-Reset-Hrg-filed.pdf>.

does not prohibit an appointed hearing officer's ability to implement discovery procedures. *See Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶¶ 20-21, 137 N.M. 161 (noting that participants may still be "entitled" to discovery when the relevant rules and regulations are "silent" on the issue, and explaining that while "[t]he technical rules of evidence and procedure often do not apply in an administrative hearing.... [t]he rules of evidence are inapplicable in order to facilitate rather than hinder discovery and to allow a full opportunity to prepare.").

Having established that discovery is not barred in air permit proceedings by regulation under any part of 20.1.4 NMAC or by statute under the Air Quality Control Act, 20.1.4.200(E) NMAC must be interpreted to set additional restrictions on discovery in solid waste permitting proceedings, rather than to prevent discovery in all Departmental permitting proceeds outside of solid waste. Any other interpretation of the rule would be an unconstitutional restriction on due process. *See N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n.*, 1986-NMSC-059, ¶ 19, 104 N.M. 565 (the "express denial of the right to conduct discovery results in a denial of procedural due process of law.... This is a correct statement of the law.") (citations omitted).

### **III. Due process requires that discovery be granted in this air permit proceeding.**

The Supreme Court's decision in *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, 137 N.M. 161, provides a guiding framework to determine whether discovery should be granted to interested parties in the current proceeding. *Archuleta* sets out a two-part test: first, the Court must determine whether a hearing officer's denial of discovery was an abuse of discretion, employing a reasonableness standard. Next, the Court must review *de novo* whether due process "required a different result." 2005-NMSC-006, ¶ 19. In determining whether a different result is required, the Court applies the *Mathews v. Eldridge* test. Broadly, this test states that "[d]ue process is flexible and calls for such procedural protections as the

particular situation demands.” *Id.* at ¶ 31 (quotations and citations omitted). More specifically, the Court must examine “[t]he importance of the individual’s and administrative body’s interests, together with the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[.]” *Id.* at ¶ 32 (quotations and citations omitted). This inquiry “dictates what additional process, if any, is due in an administrative proceeding.” *Id.* (quotations and citations omitted). Ultimately, the Court “should reverse the ruling if the agency unreasonably or unlawfully misinterprets or misapplies the law[.]” *Id.* at ¶ 18.

Here, the August 12 Order denying discovery is a clear abuse of discretion without rational basis. *See Archuleta*, 2005-NMSC-006 ¶ 17 (“A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.”) (quotations and citations omitted). As stated above, the basis for denial set out in the Order lacks legal merit and thus is not reasonable. This conclusion is further underlined by examination of the whole record, which includes statements by the former Hearing Officer on no fewer than six earlier occasions that discovery would be allowed in the proceeding.<sup>5</sup>

---

<sup>5</sup> At a July 15 Scheduling Conference, the Hearing Officer stated that he would allow discovery subject to his approval. Air Quality Bureau YGI Permit Matter Status Conf. at 1:09:07 (July 15, 2026). Available at: <https://www.youtube.com/watch?v=iIjqrOW6p6s>. Also at the July 15 Scheduling Conference, the Hearing Officer stated, “it seems to me that in a case like this, discovery *has* to be allowed.” *Id.* at 1:13:32. Additionally, the Hearing Officer stated, “there’s got to be some questions that the other party is going to have that can only be addressed by a discovery request.” *Id.* at 1:13:58. Further, in a July 16 Scheduling Order, the Hearing Officer wrote that discovery would be allowed “on order of the hearing officer.” Dkt. No. AQB 26-57, Scheduling Order, ¶ 7 (July 16, 2026). Available at: <https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2026/07/2026-07-16-AQB-26-57-Scheduling-Order-filed.pdf>. Then, at a July 27 Scheduling Conference, the Hearing Officer stated, “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

Additionally, a different result—the permitting of discovery—was required to satisfy interested parties’ due process rights in this proceeding. Here, participant parties’ interests are substantial. If issued, the air permit in question will grow the state’s annual greenhouse gas pollution by nearly a third, in addition to emitting hundreds of tons of criteria air pollutants annually. These emissions threaten matters of great personal and public importance, including interested parties’ life-sustaining climate and environment, personal health, and the public welfare of the state of New Mexico.<sup>6</sup>

The denial of discovery in this proceeding threatens erroneous deprivation of these interests. Information required to thoroughly vet the air permit application and ensure that any permit issued complies with the law has not been gathered or shared with parties to the proceeding. At baseline, a full and accurate evaluation of any proposed air pollution source must include whether it complies with the New Mexico Air Quality Control Act, and whether the Applicant can construct the proposed source in a reasonable amount of time. 20.2.72.208(A-G) NMAC.

To make this evaluation, interested parties must have access to critical information currently missing from YGI’s Application, as well as the Department’s Draft Permit and Statement of Basis. This information includes documentation demonstrating each fuel cell’s expected production capacity; documentation demonstrating all expected emissions from each

---

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.” Air Quality Bureau YGI Permit Matter Status Conf. at 1:13:29 (July 27, 2026). Available at: [https://www.youtube.com/watch?v=fJBW\\_9LnyG4](https://www.youtube.com/watch?v=fJBW_9LnyG4). Finally, in a July 29 Scheduling Order, the Hearing Officer wrote, “[a]s provided in 20.1.4.200(E), formal discovery will be allowed only upon order of the Hearing Officer.” Dkt. No. AQB 26-57, Amended Scheduling Order, ¶ 7 (July 29, 2026). Available at: <https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2026/07/2026-07-29-AQB-26-57-Amended-Sch-Order-filed.pdf>.

<sup>6</sup> See, e.g., Emergency Request at 1-2.

fuel cell; documentation showing pollution monitoring sufficient to ensure compliance with the Air Quality Control Act; documentation demonstrating the complete chemical composition of the exhaust stream from each fuel cell; documentation showing measurements of a number of hazardous pollutants that fuel cells are known to emit but that are conspicuously not listed in YGI's Application; documentation supporting assumptions that air pollution from the proposed ninety-five enormous hazardous waste tanks is exempt from regulation; documentation regarding whether the proposed source can be built in a reasonable amount of time, particularly given recent public reporting regarding the lack of sufficient scandium to construct the fuel cells; and the full administrative record.

This information, currently absent from any publicly available materials, is not incidental, but foundational. Factual inquiries concerning emissions quantity and composition, as well as the true viability of the proposed project, are the bare minimum required to properly evaluate the legality of any air permit application. This requirement is heightened for YGI's permit application, which involves fuel cell technology deployed on an untested scale – orders of magnitude larger than any fuel cell facility in the country. YGI and the Department carry the burden of demonstrating that the proposed facility will comply with the requirements of the New Mexico Air Quality Control Act. Despite this burden, neither YGI nor the Department have shared sufficient information to determine the true pollution impacts from what would be the largest source of air pollution in the State. Without this information, Movants and other interested parties cannot properly develop their arguments or have a reasonable opportunity to participate in the proceedings. Further, the Department may produce a scientifically and legally insufficient permit, erroneously and irreparably harming participating parties' interests.

The Department's filing of the administrative record on October 9, 2026 does not remedy these deficiencies but exacerbates them. In September of 2026, YGI updated various tables, significantly changing the emission characteristics of its 2,275 pollution sources. **[A.R. NSR 10833\_011782-011965]**. This in turn necessitated significant updates to YGI's air dispersion modeling, which predicts ground-level pollution impacts and is a vital component of any air pollution permit application. **[A.R. NSR 10833\_011714-011729]**. An October 9, 2026 communication from NMED reveals that YGI intends to further update the air dispersion modeling based on additional future changes to the Application: "The Air Quality Bureau understood from the meeting that YGI may not use its most current air dispersion modeling design with the three different cluster compositions (i.e., the 10/18/20 configuration) and will submit updated air dispersion modeling reflecting the permit application." **[A.R. NSR 10833\_011976]**.

This email shows that YGI has yet to submit its final air dispersion modeling. Therefore, YGI's Application is currently incomplete. Movants do not have access to air dispersion modeling that the Applicant has not yet submitted. Movants also do not have access to the Department's technical review of that yet-to-be-submitted air dispersion modeling. Movants require both of these to develop expert technical testimony for hearing. And Movants may have additional discovery requests for YGI and the Department after reviewing these materials.

The critical need for discovery in this matter, and the risk posed by its denial, overcomes any claimed interest in speed and efficiency.<sup>7</sup> Indeed, it is the Applicant who is yet to submit a completed application and to answer all of the Department's questions concerning their air permit Application. Once that process is complete, Movants will need adequate time to fully

---

<sup>7</sup> See Dkt. No. AQB 26-57, N.M. Env't. Dept. Response (Aug. 3, 2026).

evaluate the revised Application, including obtaining all information necessary to adequately evaluate the Application. Consequently, discovery is required to satisfy due process requirements in this proceeding, and the August 12 Order denying discovery must be reversed.

### **CONCLUSION**

For the foregoing reasons, Movants respectfully request that the Hearing Officer reverse the August 12 Order and allow limited discovery in this hearing.

Respectfully submitted:

By: /s/ Colin Cox  
Colin Cox  
Gail Evans  
Climate Law Institute  
PO Box 31417  
Santa Fe, NM 87594  
(832) 316-0580  
[gevans@biologicaldiversity.org](mailto:gevans@biologicaldiversity.org)  
[ccox@biologicaldiversity.org](mailto:ccox@biologicaldiversity.org)

*Counsel for Center for Biological Diversity*

/s/ Maslyn Locke  
Maslyn Locke  
Senior Staff Attorney  
Eric Jantz  
Legal Director  
New Mexico Environmental  
Law Center  
Tel.: (505) 989-9022  
[mlocke@nmele.org](mailto:mlocke@nmele.org)  
[ejantz@nmele.org](mailto:ejantz@nmele.org)

*Counsel for Jose Saldaña Jr. and Vivian Fuller*

## Certificate of Service

I hereby certify that on October 14, 2026 a copy of the foregoing Motion for Hearing Officer to Order Discovery was emailed to the persons listed below.

Zachary Ogaz  
General Counsel  
Brian Yardman-Frank  
Assistant General Counsel  
New Mexico Environment Department  
Office of General Counsel  
121 Tijeras Avenue NE, Suite 1000  
Albuquerque, NM 87102  
[zachary.ogaz@env.nm.gov](mailto:zachary.ogaz@env.nm.gov)  
[brian.yardman-frank@env.nm.gov](mailto:brian.yardman-frank@env.nm.gov)  
*Counsel for NMED*

Kelsea E. Sona  
Robles, Rael & Anaya, P.C.  
500 Marquette Ave NW, Suite 700  
Albuquerque, NM 87102  
[kelsea@roblesrael.com](mailto:kelsea@roblesrael.com)  
*Counsel for NMED*

Jennifer L. Bradfute  
David Kirmse  
P.O. Box 90233  
Albuquerque, NM 87199  
Telephone: (505) 264-8740  
[jennifer@bradfutelaw.com](mailto:jennifer@bradfutelaw.com)  
[david@bradfutelaw.com](mailto:david@bradfutelaw.com)  
*Counsel for Applicant Yucca Growth Infrastructure, LLC*

Esperanza Chairez  
Zephyr Jaramillo  
YUCCA Policy Campaign Manager  
[esperanza@yuccanm.org](mailto:esperanza@yuccanm.org)  
[info@yuccanm.org](mailto:info@yuccanm.org)  
*Youth United for Climate Crisis Action*

Jennifer L. Biever  
Carlos Romo  
Corey Lim  
Williams Weese Pepple & Ferguson, P.C.  
1801 California Street, Suite 3400  
Denver, CO 80202  
[jbiever@williamsweese.com](mailto:jbiever@williamsweese.com)  
[cromo@williamsweese.com](mailto:cromo@williamsweese.com)  
[clim@williamsweese.com](mailto:clim@williamsweese.com)  
*Counsel for Applicant Yucca Growth Infrastructure, LLC*

Colin Cox  
Sarah Baer  
Gail Evans  
Center for Biological Diversity  
P.O. Box 31417  
Santa Fe, NM 87594  
[ccox@biologicaldiversity.org](mailto:ccox@biologicaldiversity.org)  
[sbaer@biologicaldiversity.org](mailto:sbaer@biologicaldiversity.org)  
[gevans@biologicaldiversity.org](mailto:gevans@biologicaldiversity.org)  
*Counsel for the Center for Biological Diversity*

Mariel Nanasi  
Christopher Dodd  
New Energy Economy  
422 Old Santa Fe Trail  
Santa Fe, NM 87501  
[mnanasi@newenergyeconomy.org](mailto:mnanasi@newenergyeconomy.org)  
[chris@fayerbergdodd.com](mailto:chris@fayerbergdodd.com)  
*Counsel for New Energy Economy*

Bruce Wetherbee  
60 Thoreau Street #103  
Concord, MA 01742  
[editor@thecandlepublishing.com](mailto:editor@thecandlepublishing.com)  
*Pro Se Intervenor*

Maslyn Locke  
Senior Staff Attorney  
Eric Jantz  
Legal Director  
New Mexico Environmental  
Law Center  
[mlocke@nmelc.org](mailto:mlocke@nmelc.org)  
[ejantz@nmelc.org](mailto:ejantz@nmelc.org)  
*Counsel for Viviana Fuller and  
Jose Saldaña Jr.*

Yiwei Chen  
Economic Development New Mexico  
P.O. Box 20003  
Santa Fe, NM 87504-5003  
[yiwei.chen@edd.nm.gov](mailto:yiwei.chen@edd.nm.gov)  
*Counsel for the New Mexico Economic  
Development Department*

Nicholas R. Maxwell  
P.O. Box 1064  
Hobbs, NM 88241  
[inspector@sunshineaudit.com](mailto:inspector@sunshineaudit.com)  
*Pro Se Intervenor*

Isaiah Zemke  
2300 Buena Vista SE, Suite 110  
Albuquerque, NM 87106  
[izemke@smwlu49.org](mailto:izemke@smwlu49.org)  
*Counsel for Sheet Metal Workers  
Local Union No. 49*

Courtenay Eichhorst  
411 Arizona St.  
Albuquerque, NM 87108  
[courtenaye@ualocal412.org](mailto:courtenaye@ualocal412.org)  
*Counsel for New Mexico Building  
and Construction Trades Council*

Christine Dobbin  
1 Cielo Azul  
Anthony, NM 88021  
[dobbin.cc@gmail.com](mailto:dobbin.cc@gmail.com)  
*Pro Se Intervenor*

Andre Makarski  
510 San Pedro  
Albuquerque, NM 87108  
[andre@ualocal412.org](mailto:andre@ualocal412.org)  
*Counsel for United Association  
Local 412*

Joe Cardillo  
344 4<sup>th</sup> Street SW  
Albuquerque, NM 87102  
[joe@progressnownm.org](mailto:joe@progressnownm.org)  
*Pro Se Intervenor*

Nathaniel Chakeres  
General Counsel  
New Mexico Office of the State Engineer  
P.O. Box 25102  
Santa Fe, NM 87504-5012  
[nathaniel.chakeres@ose.nm.gov](mailto:nathaniel.chakeres@ose.nm.gov)  
*Counsel for NMOSE*

Mark Trujillo  
Stephanie Maez  
Electrical Workers, Local Union 611  
[markgtrujillo@ibew611.org](mailto:markgtrujillo@ibew611.org)  
[smaeznm@gmail.com](mailto:smaeznm@gmail.com)  
*Authorized Representatives for  
IBEW Local Union 611*

Darrell Deaguero  
Laborers' International Union  
of North America  
1030 San Pedro Dr. NE  
Albuquerque, NM 87110  
[darrell.deaguero@liuna16.org](mailto:darrell.deaguero@liuna16.org)  
cc: [mlor@liuna.org](mailto:mlor@liuna.org)  
*Representative of LIUNA Local 16*

Robert Aubert  
IUPAT District Council 36, Local 823  
P.O. Box 9163  
Albuquerque, NM 87119  
[robert.aubert@dc36.org](mailto:robert.aubert@dc36.org)  
cc: [uriel.apodaca@dc36.org](mailto:uriel.apodaca@dc36.org)  
*Counsel for IUPAT District Council 36,  
Local 823*

Rocky Bacchus  
Consultant  
6501 Tarascas Drive  
El Paso, TX 79912  
[rockybacchus@gmail.com](mailto:rockybacchus@gmail.com)  
*Pro Se Intervenor*

/s/ Colin Cox