

**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

**NEW ENERGY ECONOMY’S MOTION TO DISMISS APPLICATION WITHOUT
PREJUDICE AS INCOMPLETE AND NOT READY FOR HEARING**

New Energy Economy (“NEE”) respectfully moves the Hearing Officer to dismiss without prejudice the pending permit application of Yucca Growth Infrastructure, LLC (“YGI”) because the Administrative Record now establishes—through the New Mexico Environment Department’s (“NMED” or “Department”) own contemporaneous communications—that the Application does not contain the information NMED itself has determined is necessary to evaluate the proposed source and take final action on the Application.

This is not a dispute manufactured by an intervenor. **NMED itself has identified the defect.** On October 2, 2026, NMED advised YGI that subsequently submitted information concerning the actual source configuration produced materially different air-dispersion-modeling results from those underlying the Application and draft permit. NMED stated that although emissions increased by approximately two percent, **modeled pollutant concentrations doubled**, and expressly concluded that the new modeling “calls into question whether the original use of assumptions is a defensible and conservative approach.” NMED further stated that the Air Quality Bureau “must now assess the significance of YGI’s specific updates.” *See*, Exhibit A, attached and incorporated herein, NMED to Bradfute Email October 2, 2026, AQB 26-57, Administrative Record 10833, Bates Stamp 011966-967.

The October 9 communication goes still further. NMED identified additional information it considered necessary to evaluate YGI's Application. Yet, as reflected in that communication, NMED did not require YGI to submit that information and did not establish a reasonable deadline for its production. That procedure cannot be reconciled with NMED's own regulation. Section 20.2.72.203(E) NMAC expressly governs precisely this situation and provides:

E. Changing, Supplementing or Correcting Applications:

(1) Prior to a final decision on an application, the applicant shall have a duty to promptly supplement and correct information submitted in the application. The duty to supplement shall include relevant information thereafter acquired or otherwise determined to be relevant.

(2) If, while processing an application, regardless of whether it has been determined to be administratively complete, the department determines that additional information is necessary to evaluate or take final action on that application, it may request such information. The request *shall* be in writing, identify the additional information requested and the need for the additional information, and set a reasonable deadline for a response. The applicant shall submit the requested information in writing on or before the deadline set by the department.

20.2.72.203(E)(1)-(2) NMAC. (Emphasis supplied.)

I. NMED'S OWN OCTOBER 2nd COMMUNICATION ESTABLISHES THAT THE APPLICATION NO LONGER CONTAINS A RELIABLE AIR-DISPERSION DEMONSTRATION.

NMED's October 2nd email is extraordinary because it eliminates any legitimate dispute about whether the Application's technical foundation remains settled. NMED explains that its current draft permit and accompanying modeling report were based upon YGI's earlier representations concerning the Bloom Energy solid oxide fuel cells, related emissions, and emission assumptions. YGI had affirmatively represented that a more exact source characterization would have "no noticeable effect" on the modeling because the stacks were closely spaced and possessed the same dispersion characteristics. See Exhibit A.

That assumption proved wrong.

After reviewing public comments, NMED sought additional information concerning the accuracy of emissions testing, exhaust flow and composition, and CO₂ calculation methodology. YGI thereafter provided additional information, including the exact design of the stacks and resulting exhaust. The new information materially altered the modeling results. *See*, Exhibit B, attached and incorporated herein, NMED to Bradfute Email October 9, 2026, AQB 26-57, Administrative Record 10833, Bates Stamp 011976-977.

The magnitude of the change cannot reasonably be characterized as immaterial. NMED found that an approximately **two-percent increase in emissions resulted in modeled pollutant concentrations doubling**. NMED expressly acknowledged that the result “**calls into question whether the original use of assumptions is a defensible and conservative approach.**” *See*, Exhibit A.

That is the permitting agency’s conclusion, not NEE’s.

The existing Application and draft permit therefore rest upon source assumptions that NMED itself has determined are questionable. The issue is not merely whether YGI ultimately can demonstrate compliance after additional modeling, supplementation, analysis, and review. The antecedent question is whether the Application presently before the Hearing Officer contains the information necessary to make that determination. It does not.

Air-dispersion modeling is not a peripheral attachment that can remain frozen while the physical characteristics and emissions parameters of the proposed source continue to change. It is the mechanism through which the Department evaluates the ambient consequences of the proposed emissions. Where more accurate source information causes predicted concentrations to double, an application relying upon superseded assumptions does not provide a stable technical basis upon which the parties can prepare—or the Hearing Officer can conduct—a merits hearing.

II. SECTION 20.2.72.203(E) EXPRESSLY CONTEMPLATES THAT AN APPLICATION PREVIOUSLY DEEMED ADMINISTRATIVELY COMPLETE MAY REQUIRE FURTHER INFORMATION.

NMED's regulation anticipates exactly what has occurred here. Section 20.2.72.203(E)(2) applies "regardless of whether [the application] has been determined to be administratively complete." 20.2.72.203(E)(2) NMAC.

Those words matter. An administrative-completeness determination is not an irrevocable determination that the agency possesses everything necessary to evaluate the source. The regulation expressly recognizes that relevant information may emerge during permit processing and imposes continuing obligations upon both the YGI and Bloom Energy applicants and the Department when it does.

Subsection (E)(1) places the first obligation directly upon YGI/ Bloom Energy. Until a final decision, YGI "shall have a duty to promptly supplement and correct information submitted in the application." The duty expressly encompasses "relevant information thereafter acquired or otherwise determined to be relevant." 20.2.72.203(E)(1) NMAC.

NMED itself reminded YGI of this continuing duty in its October 2 communication and specifically stated that the responsibility applies "regardless of whether the Air Quality Bureau separately requests information necessary to evaluate or take final action on an application and regardless of whether the application has already been determined administratively complete." See Exhibit A.

That statement is fatal to any suggestion that the earlier administrative-completeness determination resolves the present problem. **NMED's own contemporaneous interpretation recognizes precisely the opposite.**

III. NMED CANNOT IDENTIFY INFORMATION AS NECESSARY TO ITS REVIEW AND THEN LEAVE ITS PRODUCTION OPTIONAL AND OPEN-ENDED.

NMED's October 9th communication presents a second and independent problem. According to that communication, NMED identified additional information it required to evaluate the Application, but did not require YGI to produce it by a date certain.

That is not the process contemplated by 20.2.72.203(E)(2).

Once the Department determines that additional information is necessary to evaluate or take final action on an application, the regulation establishes an orderly procedure for obtaining it: the Department's request must be in writing, must identify the additional information requested, must identify "the need for the additional information," and must "set a reasonable deadline for a response." The applicant, in turn, "*shall* submit the requested information in writing on or before the deadline set by the department." 20.2.72.203(E)(2) NMAC. Emphasis supplied.

The requirement of a deadline is particularly important here. This is an adjudicatory proceeding involving intervenors, technical experts, written testimony, public participation, cross-examination, and an evidentiary hearing. The Department cannot operate one procedural calendar for YGI/Bloom Energy—under which the Application continues to change as YGI and NMED exchange technical information without a firm completion date—and another for intervenors, who are expected to prepare expert testimony and litigate against whatever version of the Application happens to exist when their deadlines arrive.

Are NEE and the other intervenors expected continually to chase a moving target?

Due process does not permit that result, and NMED's own rule was designed to prevent it. A merits hearing must adjudicate a defined application and a defined evidentiary record.

Intervenors cannot meaningfully retain experts, analyze modeling, prepare testimony, formulate discovery, or conduct cross-examination when the Applicants are still supplying material technical information and NMED is still deciding what additional information it needs.

IV. THE PROBLEM IS PARTICULARLY ACUTE BECAUSE THE MISSING INFORMATION GOES TO THE CENTRAL TECHNICAL BASIS FOR THE PERMIT.

This is not a dispute over an omitted address, clerical correction, or inconsequential attachment. The information concerns the fundamental technical demonstration upon which the air permit depends.

NMED's October 2 email establishes the sequence. *See*, attached Exhibit A. The Application relied upon assumptions concerning source configuration and dispersion. YGI subsequently supplied more precise information concerning the actual stack design and resulting exhaust. That information produced *materially* different modeling results. Modeled pollutant concentrations **doubled**. And NMED concluded that those results called into question whether the assumptions used in the original modeling were defensible and conservative. *See*, Exhibit A.

Whatever the status of the Application when NMED initially determined it to be administratively complete, that determination cannot survive YGI's subsequent disclosures and NMED's own findings. The Application is now incomplete by the admissions of both YGI and NMED. YGI supplied new and more accurate information concerning the actual source configuration, stack design, exhaust characteristics, and emissions—*information materially different from the assumptions upon which the Application, NMED's modeling analysis, and the draft permit were based*. NMED then determined that the new information produced emissions results that *doubled modeled pollutant concentrations*, expressly "call[ing] into question whether the original use of assumptions is a defensible and conservative approach." NMED further

acknowledged that it “must now assess the significance of YGI’s specific updates.” *See*, Exhibit A.

These are not allegations by NEE that the Application *might* be incomplete. They are admissions by the Applicant and the permitting agency establishing that information material to the permit has changed, that the existing modeling does not reliably represent the source as now described by YGI, and that NMED has not yet completed its evaluation of those changes. *See*, Exhibit A.

The consequence is straightforward: an Application that may once have satisfied an administrative-completeness determination is no longer complete when the Applicant subsequently supplies material information that undermines a central technical demonstration upon which that determination and the Application and draft permit depend. The regulation would have little meaning if an earlier completeness determination remained permanently controlling after both the Applicants and NMED established that material assumptions underlying the Application had changed. The issue, therefore, is not whether NMED needs more time to consider an otherwise complete Application. The Application itself is incomplete: the source YGI now describes is not supported by the complete, updated technical and air-dispersion demonstration necessary to evaluate that source. Until YGI supplies that information and NMED evaluates it, there is no complete Application to adjudicate.

The applicant bears the burden. NMED expressly reminded YGI on October 2nd that, under 20.2.72.207(D) NMAC, “[t]he applicant has the burden of demonstrating that a permit or permit revision should be approved.” *See*, Exhibit A. The burden cannot be satisfied by requiring intervenors to disprove an Application whose material technical contents remain unsettled.

IV. A HEARING CANNOT FAIRLY ADJUDICATE AN APPLICATION THAT IS STILL CHANGING.

The practical question exposes the procedural defect: what application would the Hearing Officer be hearing?

If the hearing concerns the Application and modeling presently in the record, the parties would be litigating technical assumptions that NMED itself has called into question.

If YGI instead submits additional information and corrected modeling between now and the hearing, then the subject of the hearing will have changed after intervenors, and their experts, began preparing their cases.

And if material information is produced during or immediately before the hearing, the harm becomes still greater. Experts cannot responsibly analyze revised dispersion-model inputs, source configurations, exhaust parameters, concentration predictions, receptor impacts, and compliance demonstrations at counsel table. Nor can cross-examination substitute for the technical analysis that should occur before testimony is prepared.

Intervenors have repeatedly explained why that distinction matters: an expert cannot meaningfully analyze undisclosed data, statistically test an undisclosed dataset, or evaluate undisclosed operating information while simultaneously conducting cross-examination. The same principle applies with even greater force where NMED itself acknowledges that the technical information underlying the pending permit has changed.

This is precisely the moving-target problem that Section 20.2.72.203(E) prevents. The applicant must promptly supplement and correct its Application; NMED must identify additional information it determines necessary and establish a certain reasonable deadline for its production; the resulting information must become part of a completed application; NMED must evaluate it; and the parties must then have a meaningful opportunity to analyze and challenge it.

The sequence cannot fairly be reversed.

V. NMED’S OWN FINDINGS ESTABLISH THAT THE APPLICATION IS NO LONGER COMPLETE OR READY FOR ADJUDICATION

NMED cannot have it both ways. It cannot invoke an earlier administrative-completeness determination to move the case toward hearing while simultaneously acknowledging that subsequent information by YGI/Bloom Energy has undermined material assumptions supporting the Application and that still more information is needed.

Indeed, Section 20.2.72.203(E)(2) expressly forecloses that position because it applies “regardless of whether [the application] has been determined to be administratively complete.” The regulation recognizes that completeness is not frozen in time when the underlying facts change.

The operative technical basis of the Application has not been settled sufficiently to permit informed agency review, meaningful public participation, or final agency action. The substantive problem is that NMED does not presently have a fixed and reviewable application containing the technical information necessary to evaluate the proposed source and take final action. NMED’s October 2 communication admits as much: the Department states that the Air Quality Bureau “must now assess the significance” of YGI’s updates because the revised modeling calls into question assumptions upon which the Application and NMED’s prior completeness determination rested. See Exhibit A. An application whose material technical assumptions remain under revision and whose significance the permitting agency has yet to determine is not, in any meaningful sense, complete and ready for final agency review. See, Exhibit A.

An application cannot meaningfully be ready for adjudication when the agency responsible for evaluating it has not yet determined whether its central technical assumptions are defensible.

VI. DISMISSAL WITHOUT PREJUDICE IS THE APPROPRIATE REMEDY.

The appropriate remedy is dismissal without prejudice.

Dismissal does not prejudge whether YGI or Bloom Energy ultimately can submit an approvable application. It simply restores the process required by NMED's own regulation. Applicants may supplement and correct the Application with the necessary technical information, accurate emissions data, and updated modeling. NMED may then evaluate a complete, accurate, and technically supportable application, determine whether additional information is necessary, require that information through the procedure established by Section 20.2.72.203(E)(2), and proceed according to law. What NMED may not do is proceed toward a final permitting decision while the accuracy and sufficiency of the Application's underlying technical information remain unresolved and patently inaccurate.

YGI and Bloom Energy may not proceed to an evidentiary hearing on a misleading and inaccurate changing Application, with NMED's tacit approval, and continue constructing the technical basis for that Application as the proceeding moves forward. That would invert the administrative process established by NMED's own regulations. The purpose of an evidentiary hearing is to determine whether the applicant has carried its burden on the Application properly before the agency—not to provide an ongoing forum in which the applicant may revise its emissions assumptions, replace or supplement its modeling, supply missing technical information, and repair deficiencies while NMED and opposing parties continually reassess a moving evidentiary target. The applicant must first present a complete, accurate, and technically

supportable Application. NMED cannot tacitly authorize YGI and Bloom Energy to use the adjudicatory process itself to finish building the case they were required to submit before that process began.

The law does not require NEE to address a moving target. It requires YGI and Bloom Energy to present a complete application, NMED to follow its own procedures for obtaining information it determines necessary, and only then conduct a hearing at which all parties have a meaningful opportunity to test the same application on the same evidentiary record.

CONCLUSION AND REQUEST FOR RELIEF

NMED's own Administrative Record establishes that the Application presently before the Hearing Officer is not ready for merits adjudication. YGI and Bloom Energy supplied new source information that materially changed the air-dispersion modeling and modeled pollutant concentrations doubled.

NMED itself concluded that the new results undermine the very assumptions upon which YGI's original modeling—and therefore the technical basis of its Application—depended.

NMED's own admissions and subsequent actions establish that the Application is incomplete: NMED expressly acknowledged that the result “[YGI and Bloom Energy's] **new modeling calls into question whether the original use of assumptions is a defensible and conservative approach.**” *See*, Exhibit A.

NMED stated that it still must assess the significance of YGI's updates, and thereafter identify further technical information necessary to conduct that assessment and complete its review. *See*, Exhibits A & B. An application for which the permitting agency acknowledges that material technical questions remain unresolved—and for which the agency continues to require

additional information necessary to determine the significance of changed modeling—is patently incomplete. The Application therefore should not proceed to hearing in its present form. It should be dismissed without prejudice, allowing YGI and Bloom Energy to submit a complete, accurate, and technically supportable application that NMED can properly evaluate under the procedures required by its own regulations.

WHEREFORE, New Energy Economy respectfully requests that the Hearing Officer:

1. Dismiss YGI’s Application without prejudice as incomplete and not presently capable of merits adjudication;
2. Vacate any merits-hearing schedule predicated upon the present Application;
3. Require that any renewed or supplemented application contain complete and updated air-dispersion modeling incorporating YGI’s current source design, stack configuration, exhaust characteristics, emissions information, and all other material information subsequently supplied by YGI;
4. Require NMED to comply with 20.2.72.203(E)(2) NMAC by identifying in writing all additional information it determines necessary, explaining the need for that information, and establishing a reasonable deadline for YGI’s response;
5. In the alternative, if the Hearing Officer declines to dismiss the Application, stay this proceeding and vacate the merits-hearing schedule until (a) YGI has fully supplemented and corrected its Application as required by 20.2.72.203(E)(1) NMAC; (b) NMED has obtained all additional information it determines necessary pursuant to 20.2.72.203(E)(2) NMAC and completed its technical review of that information; (c) the Application contains complete and updated air-dispersion modeling based upon YGI’s current source design and emissions information; and (d) NEE and the other parties have been afforded adequate time to conduct discovery, obtain expert review and analysis of the completed Application and updated modeling, and prepare testimony and cross-examination based upon a fixed and complete administrative record; and
6. Grant such other and further relief as is necessary to ensure that any merits hearing proceeds only upon a complete Application and affords NEE, the other parties, and the public a meaningful opportunity to review, analyze, test, and challenge the evidence upon which YGI and Bloom Energy seek a permit.

NEE sought the positions of the parties and can state: The Center for Biological Diversity, Mr. Saldaña and Ms. Fuller, Wetherbee Nick Maxwell, Christine Dobbins, and Youth United for Climate Crisis Action support the Motion. YGI opposes the Motion. No other party provided their position before the filing of this Motion.

Respectfully submitted this 14th day of October, 2026,

NEW ENERGY ECONOMY

By: /s/ Mariel Nanasi

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October 2026, a copy of the foregoing was sent to the following parties or counsel of record via electronic mail:

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Exhibit A

From: [Yardman-Frank, Brian, ENV](#)
To: [Jennifer Bradfute](#)
Cc: [Kelsea Sona](#)
Subject: Request for Meeting on YGI Microgrid Application-on Monday 10/5/26 1:00pm
Date: Friday, October 2, 2026 4:51:53 PM
Attachments: [Outlook-Logo_Desc.png](#)

Good afternoon, Jennifer,

Thank you for speaking with me earlier. This email is confirming that the NMED's Air Quality Bureau technical staff and legal team have reviewed the information provided by Yucca Growth Infrastructure, LLC (YGI) and are prepared to have a discussion concerning the batch of information YGI provided to the Air Quality Bureau through September 22.

As a reminder, under 20.2.72.203(E)(1) NMAC, air permit applicants have a continuing duty to promptly supplement and correct their applications, including with relevant information subsequently acquired or determined as relevant. This responsibility applies regardless of whether the Air Quality Bureau separately requests information necessary to evaluate or take final action on an application and regardless of whether the application has already been determined administratively complete. 20.2.72.203(E)(2) NMAC. NMED may require, and if it does the applicant must comply, updated emissions calculations, equipment descriptions, operating schedules, control information, or compliance analyses where those materials are necessary to evaluate the changed information. See 20.2.72.203(A)(3)–(4), (7)–(11), and (E)(2) NMAC. Furthermore, NMED has an obligation to review public comments for material concerns bearing on regulatory compliance and evaluate the same to be able to issue a reasoned permitting decision based on the administrative record. See 20.2.72.206(B)–(C), 207(D)–(E) NMAC. As you are aware, ultimately, “[t]he applicant has the burden of demonstrating that a permit or permit revision should be approved.” 20.2.72.207(D) NMAC.

The Air Quality Bureau received YGI's permit application on April 27, 2026, and revision in May 2026. In May 2026, in response to questions about the application by the Air Quality Bureau, YGI and Bloom Energy – through Trinity Consultants – provided additional information on the fuel cells, related emissions and emission assumptions, including an affirmative statement that a more exact source characterization would have had no noticeable effect on the results as the stacks are spaced closely together and have the same dispersion characteristics. NMED's current draft permit and accompanying modeling report is based on YGI's statements in response to those inquiries.

Based on the Air Quality Bureau's review of public comments, the Air Quality Bureau then sought additional information from YGI regarding the accuracy of emissions testing, exhaust flow and composition, and CO2 calculation methodology. As part of YGI's responses, YGI provided additional information. Specifically, YGI provided the exact design of the stacks and resulting exhaust. This new information leads to different results than the original permit

materials.

In the most recent modeling compared to the original modeling, there is an approximately 2% increase in emissions but, more significantly, the modeled pollutant concentrations doubled although it still appears to be under NAAQS and PSD increment thresholds. And, the new modeling calls into question whether the original use of assumptions is a defensible and conservative approach.

The Air Quality Bureau must now assess the significance of YGI's specific updates, particularly as a new Hearing Officer has been appointed and the November 23, 2026, decision deadline for the agency is rapidly approaching.

To discuss the above, the Air Quality Bureau requests YGI and its technical and legal team meet in-person at the Watson Building (5401 Watson Dr SE, Bldg. B, Albuquerque, NM 87106) on Monday, October 5, 2026, at 1pm. NMED will also bring its technical and legal team to further discuss the information YGI provided.

Thank you,

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From: [Yardman-Frank, Brian, ENV](#)
To: [Jennifer Bradfute](#)
Cc: [Kelsea Sona](#)
Subject: YGI Permit Application No. 10883
Date: Friday, October 9, 2026 3:35:42 PM
Attachments: [Outlook-Logo_Desc.png](#)

Exhibit B

Ms. Bradfute,

Thank you and Yucca Growth Infrastructure, LLC (“YGI”), Bloom Energy, and Trinity Consulting for meeting with the Air Quality Bureau’s technical and legal team this past Monday, October 5, 2026.

At the meeting, the Air Quality Bureau listened to YGI’s explanation of its latest air dispersion modeling and reviewed with YGI how different configurations of energy servers into clusters result in different ambient air pollutant concentrations.

As discussed, the configuration and operating conditions described in the permit application must accurately represent the physical and operational design of the YGI Microgrid’s energy server and cluster composition. This information must, in turn, correspond to the parameters used for air dispersion modeling, including the associated exhaust flows and velocities within each stack as described by YGI.

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.

As part of this forthcoming air dispersion modeling submission, the Air Quality Bureau asks that YGI provide the following to ensure that the Air Quality Bureau can adequately review and confirm the information YGI provides:

1. Incorporation of TCEQ emissions data.
2. Specific emissions per stack and how the emissions relate to the number of clusters, servers, and power modules for each respective stack.
3. The flow rate, temperature, and other stack parameters with respect to flow composition (*i.e.* how much flow is from the hotbox, ventilation, and DC inverter modules), as well as any additional blowers or fans YGI intends to use.
4. All supporting calculations used to justify the parameters and associated emissions.
5. A detailed description as to the specific changes that YGI is making compared to its 10/18/20 configuration.

We also understand that YGI may be amenable to an extension of the November 23 decision deadline; however, the Air Quality Bureau cannot properly evaluate extending the decision deadline without the above information.

Thank you,

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