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Luis Lopez (OPF)
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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. 10883

AQB 26-57(P)

APPLICANT YUCCA GROWTH INFRASTRUCTURE, LLC'S RESPONSE IN
OPPOSITION TO NEW ENERGY ECONOMY'S MOTION TO DISMISS
APPLICATION WITHOUT PREJUDICE AS INCOMPLETE AND NOT READY FOR
HEARING ([Dkt. No. 107](#))

Applicant Yucca Growth Infrastructure, LLC ("YGI") responds in opposition to New Energy Economy's ("NEE") Motion to Dismiss Application Without Prejudice as Incomplete and Not Ready for Hearing, served October 14, 2026 (Dkt. No. 107) (the "Motion").

INTRODUCTION

The relief NEE seeks—to dismiss YGI's application because YGI has supplemented and corrected information submitted in the application—is not a valid action under the governing law and regulations. The New Mexico air permit regulations recognize that a draft permit is a dynamic working document subject to updates throughout the review process. The regulations expressly provide for the New Mexico Environment Department (NMED) to request additional information and for applicants to supplement or correct information in the air permit application after initial submission. 20.2.72.203(E) NMAC. YGI provided additional information including refined dispersion modeling in response to requests from the NMED Air Quality Bureau (AQB or Bureau). Pursuant to 20.2.72.203(E) NMAC, YGI timely responded to the Bureau's requests and public comments, including proposed refinements to lower allowable emissions.¹ This

¹ NEE argues that the October 9 email set no deadline for YGI's response. Motion at 2, 5. Section 203(E)(2)'s deadline requirement governs the exchange between the Department and the applicant. Nothing in it makes the

follows the standard process authorized by the governing regulations and is fully consistent with the process followed in previous agency proceedings cited below. Following this standard regulatory process is not a basis upon which the Secretary can deny YGI's application.

After discussions with the Bureau, YGI submitted refined modeling and application components on October 14-16, 2026. The refinements reduce the facility's permitted emissions. YGI will accept an enforceable 1,600 MW cap on microgrid generation, implemented through hourly and annual capacity limits, which **lowers** permitted emissions by about 35 percent.² YGI also refined the microgrid's design to improve dispersion and limit off-site pollutant concentrations. The site, the same number of identical 65-kW Bloom energy modules, the maximum 2,462 MW nameplate capacity, and the emission factors with their 15 percent safety factor all remain the same. The refined modeling results are substantially similar to those submitted in April 2026. These refinements are routine. Applicants commonly update their modeling and design in response to agency questions and public comments. YGI's refinements show the process working as intended and produce a more protective design that meets all federal health-based air quality standards.

The Hearing Officer should deny the Motion, and the alternative request to stay this proceeding and vacate the hearing schedule, for seven reasons:

- **First**, neither Part 72 nor Part 4 authorizes the Hearing Officer to dismiss an air permit application on the factual grounds NEE asserts, and NEE cites no authority otherwise.
- **Second**, dismissal would defeat the purpose of agency review, public comment and hearing, which exist so applicants can refine their applications in response to public or agency concerns. If every responsive change required dismissal, agency review

absence of a deadline a ground for dismissal. The point is also moot: YGI answered all five items five days later and provided support for those answers two days after that.

² YGI plans to construct the full permitted capacity of 2,462 MW, but under this refined design will limit operations such that total operating capacity never exceeds 1,600 MW.

and public participation would become a mere formality and create an endless loop of permit proceedings.

- **Third**, Part 72 expressly requires applicants to supplement applications, if necessary, before a final decision. 20.2.72.203(E)(1)–(2) NMAC. Dismissing the application for doing just that would be inconsistent with that longstanding provision and discourage applicants from making refinements that improve air quality.
- **Fourth**, administrative completeness is a front-end filing determination that starts the clock on issuing public notice and a decision on the permit. It is not a condition that an intervenor can ask the Hearing Officer to revoke simply because an application is supplemented in accordance with agency rules.
- **Fifth**, whether YGI’s modeling supports the permit is a disputed question of fact that can be resolved only on an evidentiary record at the hearing.
- **Sixth**, the Department routinely carries revised applications through hearing, and withdrawal and refiling would lead to inefficiency and defeat the process.
- **Seventh**, NEE’s due process concern is answered by the hearing process provided for in regulation and already in place: every party will have at least 30 days prior to decision to review the materials, and is afforded an opportunity to present technical testimony and cross-examine YGI and the Bureau’s witnesses at the hearing.

I. BACKGROUND

The administrative record reflects a careful and evolving review process that functioned precisely as intended: the Department raised questions, considered additional information, and required further analysis, which YGI then provided. YGI filed its application in April 2026. The Department ruled it administratively complete in May and issued a draft permit in July that was released for public comment. The Bureau then asked further questions about emissions and modeling as it continued to review public comments regarding the draft permit. YGI answered each question, met with the Bureau, and refined the facility’s design in October. Those refinements lower every permitted emission rate by about 35 percent, and the refined modeling is consistent with the April results. That is the process Part 72 describes: questions, answers, and supplementation before a final decision. 20.2.72.203(E) NMAC.

A. The application and the Department's initial review.

YGI filed Application No. 10883 on April 27, 2026. The Application is for a microgrid powered by fuel cells capable of producing 2,462 megawatts of electricity. YGI is developing the microgrid and is the permit applicant. Bloom Energy Corp. (Bloom) will be the operator of the microgrid. The Application included required emissions estimates, detailed forms, and a modeling report demonstrating that emissions from the facility would not cause or contribute to violations of state and federal air quality standards. During the month of May 2026, the Bureau reviewed the application materials, asked questions regarding emission estimates, and conducted its completeness determination in May 2026. Ke Decl. ¶ 5. The Bureau found the application administratively complete on May 27, 2026. Completion Letter and Public Notice (Administrative Record NSR 10833_001355–001359).³ On July 29, 2026, the Department issued a draft permit and Statement of Basis, along with its June 16, 2026 Modeling Review Report. AQB Modeling Review Report (Administrative Record NSR 10833_001422–001497), Statement of Basis, Draft Permit Part A, Draft Permit Parts B&C (Administrative Record NSR 10833_001609–001664).

B. The Bureau's review of public comments.

In late August 2026, while reviewing public comments, a Bureau modeler sent YGI a series of questions. The Bureau flagged one comment, which questioned the application's exhaust flow rates and carbon dioxide calculation, as “a public comment of high concern.”⁴ Other questions concerned nearby sources in Texas. YGI answered each question and supplied

³ The Administrative Record appears to be inadvertently labeled “10833.” The Permit No. is 10883.

⁴ Rathod to Lovegren (Aug. 28, 2026) (Administrative Record NSR 10833_011502–011503) (the Bureau was “in the process of reviewing public comments on the YGI permit and one of the questions focused on the CO₂ emissions calculations”); *see* Leveen to Kuhn (Aug. 26 and 30, 2026) (Administrative Record NSR 10833_011438–011440, 011486–011488) (comment questioning the exhaust flow in Table 2-H and the CO₂ calculation); Kuhn to Rathod (Aug. 31, 2026) (Administrative Record NSR 10833_011486) (forwarding comment); Kuhn to Leveen (Aug. 27, 2026) (Administrative Record NSR 10833_011439).

the vendor's (Bloom) design data for the exhaust streams. Lovegren to Rathod (Sept. 2, 2026) (Administrative Record NSR 10833_011685).

The Bureau then asked YGI to rerun the modeling with three changes. First, it asked YGI to assign exhaust flow to each stack based on a configuration that Bloom was then considering, with exhaust stacks serving 10, 18, or 20 power modules. Second, it asked YGI to represent each stack as three separate release points, rather than the single plenum and stack each cluster actually has. Third, it asked YGI to add Texas background sources.⁵ YGI ran the requested modeling and submitted it on September 21, and it answered the Bureau's follow-up questions on September 22. Ke to Rathod (Sept. 21, 2026) (Administrative Record NSR 10833_011700); Lovegren to Rathod (Sept. 22, 2026) (Administrative Record NSR 10833_011690–011692). This overly conservative modeling produced higher concentrations than the original modeling, but in the Bureau's words the results "still appear[] to be under NAAQS and PSD increment thresholds." Motion, Ex. A at 2 (Administrative Record NSR 10833_011967).

C. The October 2026 correspondence and YGI's refinements.

On October 2, 2026, the Department's counsel summarized the exchange and asked for a meeting. Motion, Ex. A (Administrative Record NSR 10833_011966–011967). The email reminded YGI of its continuing duty to supplement its application and noted the Department's own "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." *Id.* at 1

⁵ Rathod to Lovegren (Sept. 15, 2026) (Administrative Record NSR 10833_011695) (stacks "should be modeled accordingly and not assume that all the 2275 stacks have the same flow rate," and CO2 totals should be shown "using stack parameters, as the public comment requested"); Rathod to Lovegren *et al.* (Sept. 4, 2026) (Administrative Record NSR 10833_011683) (Texas sources); Lovegren to Rathod, Resp. to Q4 (Sept. 22, 2026) (Administrative Record NSR 10833_011691) (three "notional Model IDs" per stack "included at NMED's request and identified solely for modeling purposes").

(Administrative Record NSR 10833_011966) (citing 20.2.72.206(B)–(C), .207(D)–(E). NMAC). The Department did not find the application incomplete, and it did not ask YGI to withdraw it.

YGI met with the Bureau on October 5, 2026. Ke Decl. ¶ 10. During the meeting, Bureau staff raised concerns about refinements to the configuration reflected in the September 21 modeling. Even though such a configuration was contemplated by the Application, utilized the same equipment, same footprint and had the same emissions (and, per the Department “still appears to be under NAAQS and PSD increment thresholds” (Administrative Record NSR_10833_011967)) in response to the Bureau, YGI decided **not** to pursue those refinements to the configuration. Instead, in response to the Bureau, YGI refined the microgrid configuration in a manner consistent with Bureau feedback. Ke Decl. ¶¶ 8–14.

On October 9, the Department’s counsel confirmed that YGI was pursuing such a refined configuration and requested five items in connection with the refined configuration and modeling of the refined configuration. Motion, Ex. B (Administrative Record NSR 10833_011976). YGI worked on the refined configuration and also considered how such a refined configuration would be responsive to public comment, including by lowering the facility’s emissions. On October 14, YGI’s consultant sent the Bureau a letter answering all five items and describing those refinements, and YGI submitted the refined modeling and application components to the Department (and all parties to the hearing) on October 16. Ke Decl. ¶ 8; Ke. Decl. Ex. 1 (Letter from Trinity Consultants to Julia Kuhn (Oct. 14, 2026) (“October 14 Response”)). These refinements included a request to cap operating capacity at 1,600 MW. October 14 Response at 1–4, 7; *see* [Dkt. No. 113](#) (Certificate of Service for October 14 Response). The cap lowers all permitted emissions. *See id.* at 2, Table 2.

Table 1. Refinements to Application.

Feature	Application as filed	Refinements
Site	As filed	Unchanged
65-kW Bloom power modules	37,877	37,877 (unchanged)
Nameplate capacity	2,462 MW	2,462 MW (unchanged)
Emission factors and 15% safety factor	As filed	Unchanged
Pollutants and emission unit types	As filed	Unchanged
Stacks	2,275	1,263 (three-tier structure)
Stack height	30 feet	45 feet
Operating limit	None	Enforceable 1,600 MW cap

Table 2. Emissions Reductions.

Pollutant (tpy)	Annual Emissions based on Nameplate/Application (tons per year)	Annual Requested Emissions based on 1600MW Capacity (tons per year)
NO _x	37.20	24.18
CO	161.21	104.77
VOC	124.01	80.59
SO ₂	0.076	0.049
PM ₁₀ /PM _{2.5}	75.40	49.00
HAPs	1.4	0.92
CO ₂ e	8,820,970	5,732,544

YGI ran air dispersion modeling based on the 1,600 MW cap and demonstrated that air emissions from the microgrid would fall under applicable air quality standards. YGI also ran a worst-case air dispersion modeling analysis that assumes the **full nameplate capacity**. **YGI will never operate the facility under those conditions.** Ke Decl. ¶¶ 19-21. Even in these extreme worst-case conditions the modeling shows that the facility meets all state and federal minor

source air permitting requirements under any feasible operating scenario. *Id.*; *see also* October 14 Response at 3, 6. YGI served the refined modeling and its correspondence with the Department on every party on October 16, 2026. *See* Dkt. No. 113.

ARGUMENT

The governing regulations give no basis for the relief NEE seeks. Part 4 permits summary dismissal only “for a jurisdictional defect,” and NEE has not alleged one. 20.1.4.600(B)(1)(a) NMAC. Part 72 also does not treat dismissal as an available outcome. The Secretary may grant a permit, grant it with conditions, or deny it, and dismissal is not among those options. 20.2.72.207(B) NMAC. To the extent NEE’s request is a request for denial, it still fails because denial must rest on one of the limited grounds in 20.2.72.208 NMAC. NEE invokes none of them. Supplementing a permit application is not a ground for denial. Part 72 instead provides a specific remedy when the Department needs more information. The Department may request it and set a deadline for the applicant to submit it. 20.2.72.203(E) NMAC. That process is exactly what has happened here. NEE asks the Hearing Officer to replace the remedy the regulations prescribe with one they do not authorize.

II. LEGAL STANDARD: DISMISSAL IS UNAUTHORIZED AND WOULD BE ARBITRARY AND CAPRICIOUS.

A. Dismissal is unauthorized.

Neither the Air Quality Control Act nor Part 72 air permit regulations provide for a motion to dismiss an air permit application, and NEE identifies no rule that authorizes its Motion or states the standard for granting it. The only basis for dismissal in the Department’s permitting procedures, 20.1.4 NMAC (“Part 4”) is by the Secretary for a jurisdictional defect:

The Secretary may issue a final order after an expedited hearing on a motion by a party if not inconsistent with the law: (a) to dismiss the Application or Petition **for**

a jurisdictional defect; or (b) to decide the merits of the Application or Petition on legal arguments presented in writing or oral argument.

20.1.4.600(B)(1) NMAC (emphases added). This provision forecloses NEE’s Motion on three independent grounds.

- i. **In this case, only the Deputy Secretary may dismiss the application, and only on jurisdictional grounds.**

First, the regulation authorizes only the Secretary, not the Hearing Officer, to issue a final order dismissing an application. Part 4 gives the Hearing Officer broad authority to conduct the proceeding: to hold the hearing, rule on motions and procedural requests, and issue non-final orders. 20.1.4.100(E)(2)(a)–(c) NMAC. The regulation authorizes the Hearing Officer to “issue all necessary orders, **except final orders** issued by the Secretary under this Part.”

20.1.4.100(E)(2)(c) NMAC (emphasis added). An order dismissing the application would end the proceeding. It would be a final order by another name, and that authority rests with the Secretary (here, through delegation, the Deputy Secretary).

The Hearing Officer does not issue permits, and he does not deny them.⁶ Here, that decision belongs to the Deputy Secretary. NMSA § 9-7A-6(B)(2); [Dkt. No. 99](#) (Cabinet Secretary Kenney delegating authority to make all final and dispositive decisions in this matter to Deputy Cabinet Secretary Rhoderick). And 20.2.72.207(D) NMAC directs that the permitting decision be made “based on information contained in the Department’s administrative record”—a record that, as to the merits, does not yet fully exist, because the hearing at which it would be made has not occurred. This reason alone should defeat NEE’s motion.

⁶ The Secretary’s delegation confirms this division of function. The Notice of Substitution of Hearing Officer delegated to the Hearing Officer the procedural powers arising under 20.1.4 NMAC (which do not include the power to dismiss the entire application) and delegated the merits and dispositional issues in this proceeding only to the Deputy Secretary. *See* Dkt. No. 99. Authority to rule on a dispositive motion was not delegated to the Hearing Officer. A Hearing Officer exercising delegated procedural authority under 20.1.4 NMAC cannot enter an order disposing of the Application on the merits. Contrast this with the authority delegated to the Deputy Secretary, which is to “make all final and dispositive decisions in this matter.” Dkt. No. 99.

ii. NEE identifies no jurisdictional defect.

Second, the Secretary (here, Deputy Secretary) may dismiss an application subject to a hearing only for “a jurisdictional defect.” 20.1.4.600(B)(1)(a) NMAC. That is a narrow ground concerning whether the Department has authority to rule on an application—or a specific issue—at all, not whether the application should be granted on the merits. *See, e.g., Alto Coal. for Env’t Pres. v. Roper Constr., Inc.*, 2025-NMCA-018, ¶ 15 (holding that the EIB has jurisdiction to consider whether the applicant’s use of an emissions factor will cause or contribute to an exceedance of the NAAQS). An agency’s subject matter jurisdiction is “defined by statute, and an agency is limited to exercising only the authority granted by statute.” *Citizen Action v. Sandia Corp.*, 2008-NMCA-031, ¶ 12. The Air Quality Control Act requires any person intending to construct a source to obtain a construction permit from the Department before construction begins. NMSA § 74-2-7(A)(1). The Act gives the Department authority over YGI’s application. NEE does not dispute that.

NEE identifies no jurisdictional defect. NEE asserts 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.” Motion at 1. The Motion challenges YGI’s design and modeling, which are disputed technical questions that the hearing process exists to resolve on a full evidentiary record. NEE asks the Hearing Officer to second-guess the Department’s technical judgment about what application information should suffice. The New Mexico Court of Appeals has rejected attempts to recast that kind of challenge as jurisdictional. *See Citizen Action*, 2008-NMCA-031, ¶¶ 1, 13–14 (holding that a dispute over which type of permit was appropriate under the Hazardous Waste Act was “not jurisdictional” because it went to the correctness of the agency’s determination, not to the agency’s authority to address the

issue) (citation omitted). Even if completeness were a prerequisite to the Department’s authority, it has been met: the Department ruled the application complete in May 2026 (Completion Letter and Public Notice (Administrative Record NSR 10833_001355–001359)), and NEE fails to cite to any authority indicating that application supplements invalidate an agency’s completeness determination.

Part 4 of the NMAC also addresses the specific result NEE seeks. “No later than the beginning of the hearing, the Applicant or Petitioner may file a Motion for Withdrawal,” and the Secretary grants or denies it. 20.1.4.600(A) NMAC. The choice to withdraw belongs to the applicant. NEE asks for a dismissal “without prejudice” so that YGI can refile. Motion at 10–12. That would be a forced withdrawal of an application YGI has not chosen to withdraw.⁷

iii. A decision on the merits of the Application under 20.1.4.600(B)(1) NMAC is a fact question and not based “on legal arguments.”

The Secretary (here, the Deputy Secretary) may issue a final order after an expedited hearing upon a motion to “decide the merits of the Application or Petition **on legal arguments** presented in writing or oral argument.” 20.1.4.600(B)(1)(b) NMAC (emphasis added). This decision is rooted in summary procedure and distinguishable from the Secretary’s issuance of a final order to adopt, modify, or set aside the Hearing Officer’s recommended decision on the Application after a hearing under 20.1.4.500(D) NMAC. Here, NEE’s claim that the Application lacks necessary information is a **factual dispute, not a pure question of law**. The question rests on contested technical evidence about the contents of the Application, YGI’s design, and highly technical modeling assumptions and results.

⁷ Whether the October 16, 2026 Notice on the Motion satisfies Part 4’s requirements for notice of an expedited hearing remains unclear. The Notice does not expressly designate an expedited hearing or reflect a determination that NEE’s requested relief is likely to be granted. [Dkt. No. 111](#); 20.1.4.600(B)(2) NMAC. Absent satisfaction of those prerequisites, the currently noticed hearing may not provide a basis for final dismissal under 20.1.4.600(B)(1) NMAC.

Questions of fact must be decided on the record, and the record here is still being developed. Unless a pure question of law warrants dispositive relief, any decision to deny or dismiss the Application must rest on substantial evidence in the record (including evidence adduced at the hearing) and may only be reviewed on that basis. NMSA § 74-2-9(C); 20.2.72.207(D) NMAC; *Alto Coal. for Env't Pres. v. Roper Constr., Inc.*, 2025-NMCA-018, ¶ 8. The hearing record consists of the record proper, the transcript, and the hearing exhibits, and it closes only when the hearing ends. 20.1.4.7(A)(14), 20.1.4.500(B) NMAC. The complete Administrative Record has not yet been offered or admitted and continues to be supplemented. Disputed technical facts must be resolved on “the evidence presented by both parties.” *Alto Coal.*, 2025-NMCA-018, ¶ 24; *see also WildEarth Guardians v. N.M. Env't Improvement Bd.*, 2024-NMCA-021, ¶ 46 (relying on rebuttal testimony by applicant at hearing to find that substantial evidence supported the NAAQS determination).

Part 4's expedited procedure permits a merits decision on legal arguments, not the resolution of disputed technical facts. 20.1.4.600(B)(1)(b) NMAC. The Hearing Officer therefore cannot decide the merits of the Application on NEE's Motion. That question must be resolved on a complete evidentiary record after a full hearing.

iv. Dismissal is also not an available outcome under Part 72.

Part 72, not Part 4, more narrowly defines what the Secretary may do with a construction permit application. Part 72 establishes the Environmental Improvement Board's specific regulations governing construction permits under the Act. Part 4 governs the general procedures for permitting hearings before the Department “except to the extent any provision of this Part is inconsistent with any rule promulgated by the Environmental Improvement Board.” 20.1.4.2 NMAC. Part 72 gives the Secretary three options: grant the permit, grant it with conditions, or

deny it. 20.2.72.207(B) NMAC. Dismissal is not an option. Any reading of Part 4's summary provisions that would allow dismissal of a Part 72 application therefore conflicts with Part 72 and must yield to it. Part 4 cannot create a permitting outcome that the Board's rules do not provide.

To the extent NEE's Motion is a request for denial, it still fails. Part 72 allows denial only on the specific grounds listed in 20.2.72.208 NMAC. Supplementing an application and the Department's requests for more information are not grounds for denial. When the Department needs more information, Part 72 provides a specific remedy under 20.2.72.203(E) NMAC. That is exactly what has happened here. YGI has responded to the Department's requests and supplemented its application. NEE asks the Hearing Officer to replace the remedy Part 72 prescribes with an outcome that Part 72 does not authorize.

B. Dismissal is disfavored, and no precedent supports it.

The Rules of Civil Procedure "shall not apply" in this proceeding, although the Hearing Officer may use them "for guidance". 20.1.4.100(A) NMAC. Used as guidance, these rules set a demanding standard that NEE cannot meet. Rule 1-012(B)(6) NMRA. A motion to dismiss tests only the "legal sufficiency of the complaint, not the factual allegations of the pleadings." *Salas v. Guadalupe Credit Union*, 2025-NMSC-006, ¶ 12 (citation omitted). A court accepts the well-pleaded facts as true, resolves all doubts in favor of the non-moving party, and dismisses only if the claimant "cannot be entitled to relief under any state of facts provable under the claim." *Id.*

Here, the best analogue of a complaint in an air permit hearing is the application and supplemental changes expressly authorized under 20.2.72.203(E) NMAC, which represent that the proposed source will meet the applicable emission standards and regulations. Taking those representations as true, viewing them in the light most favorable to YGI, and resolving every

doubt in favor of sufficiency, dismissal would require a conclusion that there is no state of facts provable under which the permit could be issued.

New Mexico law strongly prefers resolving matters on their merits. Courts “favor the right of a party to a hearing on the merits over dismissal of actions on procedural technicalities,” *Montoya v. N.M. Dep’t of Fin. & Admin.*, 1982-NMCA-051, ¶ 27, and New Mexico’s “strong preference for resolving cases on their merits” requires caution before any dispositive ruling. *Freeman v. Fairchild*, 2018-NMSC-023, ¶ 25. Summary disposition is “a drastic remedial tool which demands the exercise of caution in its application.” *Blauwkamp v. Univ. of N.M. Hosp.*, 1992-NMCA-048, ¶ 10. In a permit proceeding, the merits are decided at the hearing the regulations require—on “evidence submitted at the hearing.” 20.2.72.206(C), 207(D) NMAC.

NEE asks the Hearing Officer to skip the evidentiary record hearing step entirely. NEE cites no precedent for doing so, and YGI has found none. YGI searched the Department’s recent permitting records, Board decisions, New Mexico appellate decisions, and federal and other state authority for any case in which an air permit application was dismissed because the applicant refined its design or modeling while the application was under review. YGI found no such case.

In fact, YGI found the opposite. The Department has repeatedly carried revised applications through hearing, including applications with revised modeling, relocated sources, changed stack parameters, and reduced emissions after the draft permit was issued. *E.g.*, *Targa Northern Delaware, LLC*, NSR 7200-M4 (AQB 23-58(P)), Hearing Officer’s Report at 1 (Oct. 13, 2023) (App. A-59) (Targa “updated [its application] several times during the administrative process”);⁸ *Chevron USA Inc.*, Permit No. 6109-M8 (AQB 22-26), NMED Ex. 3 at 6:1–2, 6:9–

⁸ Appendix A contains a list of Environmental Improvement Board and NMED Air Quality Bureau cases cited. The Appendix provides a hyperlink to the document cited. Due to the length of certain documents in these cases, YGI did not include the entire document hyperlinked and instead only provides relevant excerpts.

10, 6:19–7:29 (Aug. 29, 2022) (Sherrill Test.) (App. A-19–20) (after the application was ruled complete on January 5, 2022, Chevron submitted a dozen dated updates from February through July 2022, including a July 20, 2022 version that “incorporated all changes and updates into a complete pdf application” and “added Malfunction emissions”); *DLK Black River Midstream, LLC*, NSR 6567-M8 (AQB 22-25), NMED Ex. 1 at 3:21–22, 4:12–14, 7:8 (Aug. 29, 2022) (Kuhn Test.) (App. A-32–34) (application ruled complete May 25, 2021, and updated application received September 15, 2021; NMED testified that “[a] draft permit is a dynamic working document which may be updated throughout the review process”), Hearing Officer’s Report at 9–10 (Dec. 8, 2022) (App. A-37–38), Final Order at 2 (Dec. 16, 2022) (App. A-40) (permit granted); *Roper Construction, Inc.*, Permit No. 9295 (AQB 21-57), NMED Ex. 1 at 2:1–2, 6:22, 7:12–13, 8:7–19 (Jan. 19, 2022) (Saikrishnan Test.) (App. A-43–46) (application ruled complete July 22, 2021, and publicly noticed July 28, 2021, followed by nine dated updates from August 10, 2021 through January 13, 2022; permit writer testified that “[u]pdates to the original application are often required”); *ConocoPhillips Co.*, NSR 7746-M8 (AQB 21-36), Hearing Officer’s Report at 5, 12 (Dec. 27, 2021) (App. A-23–24) (applicant “submitted several updates in response to NMED inquiries and requests for clarification between January 2021 and September 2021,” including after the May 11, 2021 draft permit, and the Hearing Officer recommended approval); *Associated Asphalt & Materials, LLC*, Permit No. 8585 (AQB 20-12), NMED Ex. 1 at 7:22, 8:21–9:17 (Mar. 1, 2021) (Primm Test.) (App. A-4–6) (application ruled complete December 20, 2019, followed by fifteen dated updates through December 29, 2020), *aff’d*, Final Order at 1, 4, No. EIB 21-48 (Aug. 26, 2022) (App. A-7–8) (Board unanimously sustained the Department’s decision to issue Permit 8585). Analogous civil rules confirm that disposition via summary judgment is inapplicable here.

NEE's Motion does not rest on the application. It rests on its interpretation of two Department emails attached to its motion as exhibits. Where a motion relies on matters outside the pleadings, it is treated as one for summary judgment. Rule 1-012(B) NMRA. Summary judgment is available only if the movant shows that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, with all reasonable inferences drawn in favor of the non-moving party. Rule 1-056(C) NMRA; *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶¶ 16, 33. As the movant, NEE bears that burden. YGI's burden of proof under 20.2.72.207(D) NMAC applies only at the hearing and on the full record.

Summary judgment is particularly inapplicable here because any decision to deny a permit must rest on substantial evidence in the record, and that record is still being developed via the hearing process. Where, as here, the Secretary has found a significant public interest, that record continues to be built at a public hearing, where interested persons may submit data, views, and arguments and examine witnesses. 20.2.72.206(C) NMAC. New Mexico courts "view summary judgment with disfavor, preferring a trial on the merits." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8. Two emails are not substantial evidence that YGI will fail any standard—especially when the Department did not affirmatively conclude that the application was incomplete—and the record on which a denial could rest has not yet been made. *Id.* at ¶ 10 (the moving party must make a showing sufficient to "raise a presumption of fact or establish the fact in question unless rebutted.").

NEE's Motion rests entirely on its counsel's reading of two emails. It does not identify a single standard the facility would fail. Its own exhibit says the opposite: the Department confirmed that the revised concentrations "still appear[] to be under NAAQS and PSD increment thresholds." Motion, Ex. A at 2. NEE has not shown the absence of a genuine factual dispute.

YGI accepts its burden of proof and will meet it at the hearing, as the rules provide. The October 26 hearing is on NEE's Motion, not the public hearing on the application and whether to issue the permit. Dismissing the application there, before YGI, parties, and the public have presented their evidence and views at the hearing the Secretary ordered, would be error.

C. Dismissal here would be arbitrary and capricious.

Agency action may be set aside if "arbitrary, capricious or an abuse of discretion" or "otherwise not in accordance with law." NMSA § 74-2-9(C). An agency action is arbitrary and capricious "if it is unreasonable, if it provides no rational connection between the facts found and the choices made, or if it entirely omits consideration of important aspects or relevant factors of the issue at hand." *Alto Coal. for Env't Pres. v. Roper Constr.*, 2025-NMCA-018, ¶ 8. An agency is also bound by its own regulations. *Law v. N.M. Human Servs. Dep't*, 2019-NMCA-066, ¶ 23.

Here, the Department has a consistent past practice of processing supplements to applications within the same docket. *See* Section VI below. The federal district court in New Mexico has found that a Bureau supervisor had instructed that an updated application submitted after the completeness determination "is to be considered additional or addendum information; it does not restart the review process." *Ram v. N.M. Dep't of Env't*, No. CIV 05-1083 JB/WPL, 2007 WL 5239192, at *18 (D.N.M. July 6, 2007) (Finding of Fact 77). Other federal courts have similarly held that, in a similar air permitting context, a request for additional information during the public comment stage does not make an application incomplete:

The regulations establish the date of a "complete" application as the date all materials necessary for approval have been filed. Just because additional information is found necessary after the agency begins to analyze the submission during the public comment stage does not mean that the application is incomplete. If this were the case[,] no application would ever be complete until EPA received the last morsel of information. To approve such a result would be disruptive of the administrative process and would serve no useful purpose.

Citizens Against Refinery's Effects, Inc. v. U.S. E.P.A., 643 F.2d 178, 182 (4th Cir. 1981)
(internal citation omitted).

Dismissing this application would break from that practice. It also would ignore the regulation that governs permit applications, which requires (and allows for) supplementation “[p]rior to a final decision,” 20.2.72.203(E)(1) NMAC, and it would rest on authority Part 72 and Part 4 do not provide. *See* Sections IV, V, and VI below. And it would have no rational connection to the facts. The refined application lowers every permitted emission rate by about 35 percent. The Department itself reported that even the September modeling “still appear[ed] to be under NAAQS and PSD increment thresholds,” and the changes respond to some of the very issues raised in public comments that the process is designed to consider. Motion, Ex. A at 2 (Administrative Record NSR 10833_011967).

Penalizing an applicant for reducing its permitted emissions in response to agency questions and public comment is an unreasonable result. That is true no matter which party urges dismissal. If the Bureau or its counsel were to support the Motion, the Department would still need to explain why YGI should be treated differently from the applicants in at least eleven prior dockets, each of which revised its application during review and went forward on that same application.⁹ *See* Section VI below. Treating one applicant differently in a single contested docket, without new rules and without a reasoned explanation, is the kind of action the arbitrary-and-capricious standard forbids. *See Alto Coal.*, 2025-NMCA-018, ¶ 8 (“An agency action is arbitrary and capricious if it is unreasonable, if it provides no rational connection between the

⁹ Permits issued or were upheld on the same application in *Associated Asphalt* (EIB 21-48), *C&E Concrete* (AQB 21-29), *Crestwood* (AQB 21-38), and *DLK Black River* (AQB 22-25). The hearing officer recommended approval of eight XTO permits, including *Cowboy CDP* (AQB 21-34) and *Jayhawk* (AQB 21-32), whose applications were revised during review. *Roper* (AQB 21-57; EIB 22-34), *Zia Hills* (AQB 21-36), *Targa Road Runner* (AQB 23-58), and *Chevron Salado Draw 19* (AQB 22-26) likewise proceeded to hearing on supplemented applications. These precedents are included in Appendix A.

facts found and the choices made, or if it entirely omits consideration of important aspects or relevant factors of the issue at hand.” (citation omitted).

III. THE PUBLIC COMMENT AND HEARING PROCESS EXISTS TO FACILITATE REFINEMENTS.

Part 72 and Part 4 build public participation into every step of a construction permit review. After the Department rules an application complete, it publishes notice and invites interested persons to express interest. 20.2.72.206(A)(3), (A)(5) NMAC. It then makes its analysis available and gives the public at least thirty days to submit written comments or request a hearing. 20.2.72.206(B) NMAC. Where the Secretary finds significant public interest, the Department holds a public hearing at which interested persons may submit data, views, or arguments and examine witnesses. 20.2.72.206(C) NMAC. The Department must base its decision on the administrative record, which includes the public comments and the information from the hearing. 20.2.72.207(D) NMAC; 20.1.4.7(A)(2) NMAC.

This process has a purpose: commenters raise questions and concerns, the Department and the applicant respond to them, and the applicant responds and/or refines the application in response before a final decision. The draft permit is only “the [Department’s] proposed decision.” 20.1.4.7(A)(9) NMAC. After the hearing, the Secretary may adopt, modify, or set aside the Hearing Officer’s recommendation. 20.1.4.500(D)(2) NMAC. The regulations contemplate that the permit may change in response to the issues raised at the hearing, including by the public and other parties. The Department’s own counsel described that obligation in the very email NEE relies on: the Department must “review public comments for material concerns bearing on regulatory compliance and evaluate the same to be able to issue a reasoned permitting decision.” Motion, Ex. A at 1. The Supreme Court reads the Department’s permit procedures the

same way, to “facilitate meaningful participation by members of the public.” *Colonias Dev. Council v. Rhino Env’t Servs., Inc.*, 2005-NMSC-024, ¶ 42.

The process was followed as intended here. NMED and Commenters raised questions about the application and the facility to be constructed and operated, including its emissions. YGI supplemented the application in response. As part of that supplementation, YGI included a 1,600 MW operating cap. Commenters raised concerns about criteria pollutants. The 1,600 MW cap cuts every permitted criteria air pollutant rate by about 35 percent. NMED asked that clusters have a uniform size. The refined configuration meets that objective. NMED and Commenters asked about ground-level air quality near the facility. Taller stacks improve dispersion. Commenters asked for fewer emission points. The refined design nearly halves them. October 14 Response at 3.¹⁰

If an applicant that responds to agency questions or public comment by lowering its permitted emission levels must withdraw and start over, public comment becomes a formality: applicants would have every reason to resist change, and the Department would have every reason not to ask for it. Every protective improvement would risk restarting the process.

¹⁰ The refinements align with specific requests in the record. The enforceable 1,600 MW cap cuts greenhouse gas emissions by more than three million tons per year. It responds to comments that the facility’s greenhouse gas emissions conflict with New Mexico’s climate goals, including the community members’ demand that the Department “restrict the greenhouse gas emissions coming from the microgrid.” NMELC comment for J. Saldaña Jr. and V. Fuller, May 20, 2026 (Administrative Record NSR 10833_001749); NEE comment, July 6, 2026 (Administrative Record NSR 10833_001834–001837). Consolidating 2,275 stacks into 1,263 uniform clusters responds to NEE’s objection that a design of “2275 individual fuel cells, each with its own stack,” does not “provide a realistic mechanism to verify compliance,” *id.* at 001831; *see id.* at 001840; to a public comment urging that “the applicant must consolidate” the “2,275 individual fuel cells, each with its own unmonitored exhaust stack,” (A. Garrett-Gianardi, Administrative Record NSR 10833_006512); and to the Bureau’s request “to keep the clusters uniform in configuration,” October 14 Response at 1. The per-stack emissions, flow composition, Texas background sources, supporting calculations, and description of changes answer the five items the Bureau listed on October 9. Motion, Ex. B at 1; October 14 Response at 3–7. The per-stack flow rates and CO₂ calculations also respond to a commenter who asked the Department to have Bloom “explain the data in Table 2-H” and, “[w]hen you get the real data,” to “post this to the revised administrative record.” L. Leveen, Aug. 26, 2026 (Administrative Record NSR 10833_011440 (copying counsel for CBD and NMELC, *id.* at 011439)); *see id.* at 011695 (Bureau asking for CO₂ totals “using stack parameters, as the public comment requested”); *see also id.* at 010546 (comment urging that the 2,275 stacks “be consolidated into a much smaller number of centralized exhaust systems”).

IV. IF ADDITIONAL INFORMATION IS NECESSARY, THE REMEDY IS SUPPLEMENTATION, NOT DISMISSAL.

A. *NEE's own reading of Section 203(E) defeats its Motion.*

NEE acknowledges that 20.2.72.203(E)(1) NMAC imposes a continuing duty to supplement and correct the application “[p]rior to a final decision.” Motion at 4. NEE also acknowledges that 20.2.72.203(E)(2) NMAC authorizes the Department to request information “necessary to evaluate or take final action on that application,” “**regardless of whether it has been determined to be administratively complete.**” *Id.* (emphasis added). These provisions reflect the expectation that new information may be submitted while the application is pending. The regulation assumes that applications change during review and does not call for dismissal when they do.

The Bureau’s modeler made the same point in the *Roper* AQB permit hearing, testifying that “the applicant shall have a duty to promptly supplement and correct information submitted in the application.” NMED Reb. Ex. 2 at 1:5–7, No. AQB 21-57(P) (Feb. 2, 2022) (Peters) (quoting 20.2.72.203(E)(1) NMAC). When the opponents in the *Roper* appeal moved to dismiss on the theory that the amended application was in effect a new one, the Department disagreed: “[t]he updates to the Application and the resulting Draft Permit have been reviewed by the Department,” they were made “to improve” the application, and “[t]he Board will have the opportunity to make that determination at the hearing.” NMED Resp. to Mot. to Dismiss, No. EIB 22-34, 5–6 (Oct. 13, 2022). The Board then held a three-day evidentiary hearing. *Alto Coal.*, 2025-NMCA-018, ¶ 5.

NEE mischaracterizes the October emails as “admissions.” Motion at 7. But the information NEE relies on came from YGI, supplied at the Bureau’s request, and the modeling NEE describes reflects a notional configuration and modeling representations the Bureau

specifically asked YGI to evaluate. *See* Sections I.B and I.C. above. An applicant that discloses information and refines its project is doing what Section 203(E)(1) requires. Further, and importantly, all the modeling assessments YGI submitted demonstrate compliance with all federal and state air quality standards.

V. ADMINISTRATIVE COMPLETENESS IS NOT A BASIS FOR DISMISSAL.

NEE’s central theory is that the application “is now incomplete” and “no longer complete or ready for adjudication.” Motion at 6, 9. That theory misreads what completeness is and how Part 72’s provisions work together.

A. Completeness is a front-end determination of an application’s contents.

Section 20.2.72.203(A) NMAC lists the items that “are required before an application can be deemed administratively complete.” These are categories of information that must be in the application before review can begin. They are a checklist of contents, not a test of whether the application will succeed on the merits. The Act frames completeness the same way, requiring regulations that describe the “elements required before the department . . . shall deem an application administratively complete.” NMSA § 74-2-7(B)(4). And the Court of Appeals describes the two steps separately in a minor source permit case: the Bureau first reviews “whether [the] application contained the required components,” and only then begins “its technical review, which requires it to verify the applicant’s emissions calculations” and compliance with applicable standards. *Alto Coal.*, 2025-NMCA-018, ¶¶ 2–3. In practice, the Bureau’s completeness review confirms that the modeling has been submitted. Ke Decl. ¶ 5.

The completeness decision belongs to the Department, which must make it within thirty days of receiving the application and give notice by certified mail. 20.2.72.207(A) NMAC. The Department did so here on May 27, 2026. Part 4 nowhere indicates that completeness is a

hearing officer function in an air permit case. Part 4’s definition of “Completeness Determination” applies only to determinations by the Secretary on applications under the Solid Waste Act, which is not at issue here under the Air Quality Control Act. 20.1.4.7(A)(5) NMAC.

B. Completeness starts the process; supplementation does not affect the determination.

A completeness determination does two things. First, it triggers public notice. The Department publishes notice “[s]ubsequent to an affirmative administrative completeness determination.” 20.2.72.206(A)(3) NMAC. Second, it starts the Department’s technical review and decision clock. *Alto Coal.*, 2025-NMCA-018, ¶¶ 2–3. The Department must act within ninety days after the application is ruled complete, subject to one extension of up to ninety days for good cause. 20.2.72.207(B)–(C) NMAC; NMSA § 74-2-7(B). Once those steps run, Part 72 turns to different tools to process the permit: the Department’s analysis and the comment period, the public hearing, a decision by the designated Department official on the administrative record with the burden on the applicant, and the standards for denial. 20.2.72.206(B)–(C), 207(D), 208 NMAC.

C. Every provision that applies after completeness assumes completeness stands.

Part 72 assumes that applications may require supplementation after they are ruled complete either in response to facts identified by the applicant or in response to requests for additional information by the Bureau. In fact, the regulations are specific that the Bureau may request additional information necessary to evaluate or take final action on an application, “regardless of whether [the application] has been determined to be administratively complete.” 20.2.72.203(E)(2) NMAC. The rules thus expect addenda to a pending application, not a new application.¹¹

¹¹ The Department has applied the rules that way. In *C&E Concrete* (No. AQB 21-29), the application was ruled complete on December 4, 2020, and a complete updated application followed on July 29, 2021. NMED Ex. 1 at

When technical questions arise after completeness, the regulations call for the applicant to supplement its application as necessary and refine its design or modeling, not a reversal of the completeness determination. Part 72 contains no provision that reverses a completeness determination, and none that dismisses an application as incomplete after it has been ruled complete.

D. NEE’s theory would undermine the statutory structure for processing permitting applications.

Supplementing an application does not retroactively make it incomplete; it builds on a complete application that the Department has already accepted. If supplemental information made an application “incomplete,” every correction would restart public notice and the decision clock. The applicant’s duty to correct under Section 203(E)(1) would become a trap that rewards silence, and the statutory deadline in Section 74-2-7(B) would mean little, because any party could restart it by pointing to a supplement. NEE’s reading would produce an absurd result that the EIB cannot have intended.

7:21–22, 9:23, No. AQB 21-29 (Sept. 13, 2021) (Sherrill Test.) (App. A-11–12). In *Crestwood* (No. AQB 21-38), the application was ruled complete on March 18, 2021, and revised on September 14, 2021, and NMED “incorporated [the revisions] into the Draft Permit.” Hearing Officer’s Report at 2, No. AQB 21-38 (Dec. 27, 2021) (App. A-27). In *DLK Black River* (No. AQB 22-25), the application was ruled complete on May 25, 2021, and revised that September. NMED Ex. 1 at 3:21–22, 4:12–14, No. AQB 22-25 (Aug. 29, 2022) (Kuhn Test.) (App. A-32–33); Hearing Officer’s Report at 9–10, No. AQB 22-25 (Dec. 8, 2022) (App. A-37–38). Each proceeded on the same application, with revisions, and each permit issued. Final Order at 2, No. AQB 21-29 (Nov. 17, 2021) (App. A-15); Final Order at 2, No. AQB 21-38 (Feb. 10, 2022) (App. A-29); Final Order at 2, No. AQB 22-25 (Dec. 16, 2022) (App. A-40). And in *Roper* (No. AQB 21-57(P); No. EIB 22-34), the Hearing Officer denied a motion to dismiss for incompleteness because “the omissions identified by Movants were addressed by Roper” in a revised application submitted after the completeness determination. Order Denying Mot. to Dismiss ¶¶ 16–18, No. AQB 21-57(P) (Dec. 27, 2021) (App. A-50); NMED Ex. 1 at 6:22, No. AQB 21-57 (Jan. 19, 2022) (Saikrishnan Test.) (App. A-44). *See also* Section VI.A.

VI. THE DEPARTMENT ROUTINELY CARRIES REVISED APPLICATIONS THROUGH HEARING, AND REILING WOULD ADD NOTHING.

A. *Department practice allows applicants to update pending applications.*

NEE cites no permitting matter in which the Department dismissed or required reiling of an application because the applicant supplemented an application. Department practice runs the other way and expressly contemplates supplements to applications (*see* Appendix A to this Response):

- ***Associated Asphalt & Materials, Permit No. 8585 (AQB 20-12; EIB 21-48):***
 - The applicant submitted fifteen dated application updates from December 13, 2019 through December 29, 2020, including repeated updates to its emission tables, with the application ruled complete on December 20, 2019. Statement of Intent, NMED Ex. 1 at 7:22, 8:21–9:17, No. AQB 20-12 (Mar. 1, 2021) (Primm Test.) (App. A-4–6). The matter proceeded on the same application through hearing, and the permit issued and was upheld. Final Order at 1, 4, No. EIB 21-48 (Aug. 26, 2022) (App. A-7–8) (Board unanimously sustained the Department’s decision to issue Permit 8585).
- ***Roper Construction, Alto Concrete Batch Plant, Permit No. 9295 (AQB 21-57; EIB 22-34):***
 - NMED testified that “[u]pdates to the original application are often required,” and documented nine rounds of updates, some after the draft permit and one after the hearing notice. Statement of Intent, NMED Ex. 1 at 2:1–2, 8:7–19, 9:19–20, 12:5–8, 12:22–23, No. AQB 21-57 (Jan. 19, 2022) (Saikrishnan Test.) (App. A-43, A-46–48). On appeal to the Board, Roper amended its application, updating its modeling, site plan, and haul roads, and the Department reviewed the updates and treated the application as amended, not new. NMED Resp. to Mot. to Dismiss at 5–6, No. EIB 22-34 (Oct. 13, 2022) (App. A-52–53).
- ***Targa Northern Delaware, LLC, Road Runner Gas Plant, NSR 7200-M4 (AQB 23-58):***
 - The application was “updated several times during the administrative process.” Hearing Officer’s Report at 1 (Oct. 13, 2023) (App. A-59).
- ***ConocoPhillips Co., Zia Hills Central Facility, NSR 7746-M8 (AQB 21-36):***
 - The applicant submitted updates between January and September 2021, including after the May 11, 2021 draft permit, and the Hearing Officer recommended approval on the same application. Hearing Officer’s Report at 5, 12 (Dec. 27, 2021) (App. A-23–24).

- ***Chevron USA Inc., Salado Draw 19, Permit No. 6109-M8 (AQB 22-26):***
 - After the application was ruled complete, it went through multiple revisions, including one adding malfunction emissions, and proceeded to hearing on the same application. NMED Ex. 3 at 6:1–2, 6:9–10, 6:19–7:29, No. AQB 22-26 (Aug. 29, 2022) (Sherrill Test.) (App. A-19–20)
- ***DLK Black River Midstream, LLC, Black River Gas Processing Plant (AQB 22-25):***
 - The application was ruled complete on May 25, 2021, and NMED received an updated application on September 15, 2021, within the same permit action. NMED testified that “[a] draft permit is a dynamic working document which may be updated throughout the review process.” NMED Ex. 1 at 3:21–22, 4:12–14, 7:8, No. AQB 22-25 (Aug. 29, 2022) (Kuhn Test.) (App. A-32–34). The Secretary granted the permit. Hearing Officer’s Report at 9–10, No. AQB 22-25 (Dec. 8, 2022) (App. A-37–38); Final Order at 2 (Dec. 16, 2022) (App. A-40).

A revised stack arrangement at the same site, with lower emissions, is a narrower change than relocating a facility. If the *Roper* and *Associated Asphalt* changes were supplements, these are too.

Three NMED permit writers, in three separate dockets, have given the same sworn testimony: “Updates to the original application are often required.” *In re Associated Asphalt & Materials, LLC*, No. AQB 20-12, NMED Ex. 1 at 2:1–2 (Mar. 1, 2021) (Primm Test.) (App. A-3); *In re Roper Construction, Inc.*, No. AQB 21-57, NMED Ex. 1 at 2:1–2 (Jan. 19, 2022) (Saikrishnan Test.) (App. A-43); *In re Chevron USA Inc.*, No. AQB 22-26, NMED Ex. 3 at 2:19–20 (Aug. 29, 2022) (Sherrill Test.) (App. A-18). The Department has accepted revised applications and revised modeling in the same docket many times, including in C&E Concrete, the XTO dockets, Crestwood, and Short Line. Each ended with a permit or a recommendation to grant one.¹² None was dismissed or refiled.

¹² *E.g., In re C&E Concrete, Inc.*, No. AQB 21-29, NMED Ex. 1 at 9:23, 16:6–7 (Sept. 13, 2021) (Sherrill Test.) (App. A-12–13) (complete updated application submitted July 29, 2021, after the applicant commented on the draft permit), Final Order at 2 (Nov. 17, 2021) (App. A-15) (granting permit); *In re XTO Energy, Inc. (Jayhawk Compressor Station)*, No. AQB 21-32, Hearing Officer’s Report at 8, 25–26, Nos. AQB 21-31 et al. (Dec. 27, 2021) (App. A-62, A-65–66) (updated application submitted Sept. 20, 2021, after the May 25, 2021 draft permit;

B. Withdrawal and refiling of the application would repeat the same review without added benefit.

NEE identifies no provision of Part 72 or Part 4 that requires an applicant to withdraw and refile when it refines its design during review. Refiling would accomplish nothing that supplementation does not. It would require a new completeness review, new public notice and comment, new review of thousands of public comments, a new hearing determination, and a new statutory decision clock, all to review the same design a second time. 20.2.72.203, 206, 207 NMAC; NMSA § 74-2-7. The public would have to find a new docket and comment again. Entries of appearance would have to be refiled. And the permit standards, modeling requirements, and NAAQS and PSD increment analyses would be exactly the same.

NEE's position would turn public participation into a formality and deter applicants from engaging in a collaborative process. If any application change made in response to public or agency input could justify dismissal, then applicants would have every reason to stop making such changes. Applicants would submit an application that meets the minimum regulatory requirements, decline to refine it during review, and litigate to obtain a permit without considering feedback from the public or the Department. And if permitted, those facilities would be permitted without regard to public comment. Such a result would encourage a different type of application process that the Act, Part 72, and Part 4 do not contemplate.

recommending approval of all eight XTO permits); *In re Crestwood New Mexico Pipeline LLC (Willow Lake Gas Plant)*, No. AQB 21-38, Hearing Officer's Report at 2 (Dec. 27, 2021) (App. A-27) (application revised Sept. 14, 2021, and NMED "incorporated [the revisions] into the Draft Permit"), Final Order at 2 (Feb. 10, 2022) (App. A-29) (draft permit issued Mar. 18, 2021; granting permit); *Short Line, LLC (Las Vegas HMA Plant)*, NSR Permit No. 10129, Modeling Summary at 4 (May 1, 2024) (App. A-56) ("Modeling was last revised on 2/19/2024"), NSR Permit No. 10129 at 1 (signed Nov. 25, 2024) (App. A-57).

VII. NEE’S DUE PROCESS CONCERN IS ANSWERED BY THE HEARING PROCESS ALREADY IN PLACE.

NEE argues that a changing application forces intervenors to “chase a moving target” and denies them due process. Motion at 5, 8, 10–11. NEE cites no constitutional, statutory, or case authority for that claim, and the facts do not support it.

NEE has ample due process here. YGI served the updated modeling and correspondence with the Department on every party on October 16, 2026. Every party will have at least 30 days to review those materials before the hearing (and prior to the time that statements of intent are due). The vast majority of the application has not changed: the site, the equipment, the nameplate capacity, the emission factors, and the pollutants are all the same, and the changes lower the facility’s permitted emissions. The 1,600 MW cap will be an enforceable permit condition with monitoring and recordkeeping, and any increase would require a permit revision with its own public process. October 14 Response at 2; 20.2.72.219 NMAC.

Part 4 also gives the Hearing Officer the tools to manage the proceeding to assuage any due process concerns. The Secretary may adopt procedures to “avoid obvious injustice,” 20.1.4.100(E)(1) NMAC, and the Hearing Officer rules on procedural requests and may adopt “special procedures for managing proceedings involving difficult or complex issues.” 20.1.4.100(E)(2)(b); 20.1.4.300(A)(3) NMAC.

Most importantly, the hearing itself resolves NEE’s concern. At the hearing, every interested person may submit evidence and examine witnesses. 20.2.72.206(C) NMAC; 20.1.4.400 NMAC. NEE and the other parties may present their own technical and rebuttal testimony and cross-examine YGI’s experts on every aspect of the updated modeling. That is the process the regulations provide, and it fully protects NEE’s interests. Here YGI has provided

information to all parties in a timely manner well in advance of the hearing, and all parties can comment on the information as they would in any other proceeding.

CONCLUSION

YGI refined its project in response to public comment and the Bureau's review, and during that process lowered its project's permitted emissions. It should not be punished for this. Dismissal would depart from the Department's own rules and its consistent practice. YGI respectfully requests that the Hearing Officer deny the Motion, deny the alternative request for a stay, and proceed to hearing on the application as supplemented.

Respectfully submitted this 19th day of October, 2026.

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CERTIFICATE OF SERVICE

I certify that on October 19, 2026, I served the foregoing on all parties and counsel of record on the service list for AQB 26-57(P) by electronic mail.

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Pro Se Intervenor

/s/ Jennifer L. Bradfute
Jennifer L. Bradfute

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

IN THE MATTER OF:

AQB 26-57

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

DECLARATION OF JOHN KE

I, John Ke, declare as follows:

I. Background

1. My name is John Ke. I am over the age of eighteen years and competent to make this Declaration. I am a Senior Consultant with Trinity Consultants (“Trinity”), supporting Trinity’s Albuquerque office at 9400 Holly Ave NE, Building 3, Suite B, Albuquerque, New Mexico 87122.

2. I received my B.Ch.E. from the University of Minnesota in Chemical Engineering. I have been at Trinity since 2019. My main focus at Trinity is air dispersion modeling.

3. Trinity is the air quality permitting and air dispersion modeling consultant engaged to support Yucca Growth Infrastructure, LLC (“YGI”), the Applicant in this proceeding, for the fuel cell microgrid that is the subject of Air Quality Permit Application No. 10883 (respectively, the “Application” and the “Microgrid”). Trinity is listed as the preparer of the Application on Application Section 1-C. Trinity is listed as the Applicant's modeler in Section 16-A of the Universal Application 4 (“UA-4”), and I performed the dispersion modeling submitted to the NMED on October 16, 2026.

4. This Declaration is based on my personal knowledge, my professional work on the Application, communications with other Trinity consultants that worked on the Application, communications with Bloom Energy, and on my review of the documents referenced herein.

5. The Application was submitted in April 2026 and deemed administratively complete in May 2026. In practice, the Bureau's completeness review confirms that all necessary application contents and the modeling have been submitted.

6. The Application has been subject to several rounds of public comment and public interest. Public comments have both supported the Application and raised concerns with the Application. Public comments raising concerns have largely focused on air quality impacts and the electric generating capacity of the Microgrid.

7. As is the case with most air permit applications, the Application resulted in clarifying questions from the NMED Air Quality Bureau ("AQB") permitting staff, which the Applicant timely responded to.

II. Refinements in response to NMED Questions and Public Comment

8. On October 14, 2026, I signed, on behalf of Trinity, a letter to Julia Kuhn, Major Sources Manager, Permits Section, AQB, titled "Questions on Air Quality Permit Application No. 10883 Response (Agency Interest No. 41351 – PRN20260001) – YGI Microgrid" (the "Response Letter"). A true and correct copy of the Response Letter is attached as Exhibit 1.

9. The Response Letter responds to AQB's questions dated October 9, 2026, which followed an October 1, 2026 e-mail requesting additional information and an in-person conference held at the AQB on October 5, 2026.

10. At the meeting on October 5, 2026, the parties discussed technical questions raised by public comments submitted in August and questions from Bureau staff on additional modeling requested by the Bureau in September.

11. The Applicant committed to provide responses to AQB's October 9 questions by the week of October 12, 2026. The Applicant was in regular communication with AQB regarding its responses to the Bureau's questions, and it timely submitted responses to NMED's questions on October 14, 2026 with related materials submitted on October 16, 2026.

12. The purpose of the Response Letter was to detail certain refinements made to the Application in response to questions from AQB staff and public comments received on the Application.

13. The refinements do not alter the Microgrid proposal to install 2,462 MW of electricity generating capacity via fuel cell clusters. Instead, the refinements to the Application clarify how the Microgrid will operate in practice, reconfigure how the fuel cell clusters will be arranged to reduce emissions and air quality impacts, and request an operating cap of 1,600 MW for the Microgrid. More specifically, the following elements will optimize the Microgrid and reduce emissions:

- a. Three-tier cluster design. The same Bloom fuel cell modules will be consolidated, using identical servers, into three-tier clusters, reducing the number of stacks from 2,275 to 1,263. The revised system consists of 1,262 identical clusters ("Type A"), each consisting of six 325-kW Energy Servers containing 30 power modules, with a nameplate capacity of 1.95 MW per cluster (2,460.9 MW in total); and one cluster ("Type R") consisting of three

260-kW Energy Servers and one 325-kW Energy Server containing 17 power modules, with a nameplate capacity of 1.105 MW. The total system nameplate capacity of 2,462.005 MW is identical to the nameplate capacity shown in the Application. All but one cluster will share the same configuration, which responds to a request from NMED that clusters be uniform. One cluster cannot be identical because of the total number of modules included within the Microgrid's total nameplate power capacity.

- b. Taller stacks. Stack height will increase from 30 feet to 45 feet for 1262 clusters and remain at 30 ft for one cluster, which remains in compliance with the draft permit. The increased stack height allows emissions to disperse more effectively before reaching ground level, reducing potential pollutant concentrations in the surrounding area.
- c. Revised stack parameters. Exhaust temperature, velocity, and flow have been updated in Table 2-H to reflect actual operation in a three-tier configuration. Multiple versions of Table 2-H have been provided to reflect the modeling scenarios described in Section IV.below.
- d. Enforceable 1,600 MW operating cap. YGI requests that a term and condition be added to the draft permit limiting the Microgrid's operation of its 2,462 MW permitted capacity through both an hourly limit and a lower annual limit on output. The Microgrid is being constructed with redundancy to ensure reliable electricity delivery. As a result, YGI will not operate the Microgrid at more than 1,600 MW, which is 65% of the 2,462 MW nameplate capacity.

Emissions based on nameplate capacity are reflected in Table 2-D in the Application, and the requested allowable emissions based on the 1,600 MW cap are reflected in a revised Table 2-E.

14. In my experience, these types of refinements to the design of a project and air permit application and associated air dispersion modeling are typical in air permit proceedings in New Mexico. Trinity pulled several air permit application examples in New Mexico where an application or project was refined and supplemented without requiring a new application. Indeed, the majority of applications Trinity reviewed from 2017-2024 involved changes to facility layout, equipment, and modeling during application review and before final permit issuance.

III. Emission Reductions

15. The refinements respond to concerns raised in public comments and result in a facility that is more protective of the environment and nearby communities:

- a. Greenhouse gases (“GHGs”) have not been subject to any ambient air quality standards at the state or federal level. GHG emissions are not subject to regulation as minor sources under Department rules, and their emissions do not create GHG permitting obligations.
- b. Nonetheless, the enforceable 1,600 MW operating cap reduces potential maximum greenhouse gas emissions by more than three million tons per year, from 8,820,970 to 5,732,544 tons of CO₂e, responding to comments about the Microgrid’s greenhouse gas emissions and their effect on New Mexico’s climate goals.

- c. Although the original draft permit would ensure compliance with National Ambient Air Quality Standards (“NAAQS”), the operating cap reduces both criteria pollutant and greenhouse gas emissions by 35%. The corresponding modeling demonstration continues to be protective of the NAAQS.
- d. Raising the Type A stacks from 30 feet to 45 feet allows emissions to disperse more and become more diluted before reaching the ground, generally resulting in lower modeled ground-level concentrations, responding to residents’ concerns about air quality in the neighborhoods closest to the Microgrid.
- e. Consolidating 2,275 stacks into 1,262 uniform clusters (and one unique cluster) responds to commenters who asked for fewer emission points, and the hourly and annual cap on power output gives the public a clear, enforceable limit on the Microgrid’s emissions.

16. All emission factors and safety factors are unchanged from the Application.

Because of the 1,600 MW operating cap, both hourly and annual emissions are reduced by 35%.

17. The following table compares emissions based on the Microgrid’s nameplate capacity, as presented in the Application, with the requested emissions based on the 1,600 MW operating cap:

Pollutant*	Nameplate Capacity / Application (Table 2-D)		Requested Emissions Based on 1,600 MW Cap (Table 2-E)***	
	lb/hr	tpy	lb/hr	tpy
NO _x	8.49	37.20	5.52	24.18
CO	36.81	161.21	23.92	104.77
VOC	28.31	124.01	18.40	80.59
SO ₂	0.017	0.076	0.01	0.049
PM ₁₀ /PM _{2.5}	17.21	75.40	11.19	49.00
HAPs (Table 2-I)	0.3	1.4	0.21	0.92
CO ₂ e** (Table 2-P)	–	8,820,970	–	5,732,544

* Criteria pollutant and HAP limits include the 15% safety factor included in the Application.

** GHG limits do not include the 15% safety factor, consistent with the draft permit.

*** Updated modeled emissions and stack parameters in Tables 2-E and 2-H, respectively, reflect the 1,600 MW operating cap.

IV. Improved Air Dispersion Modeling

18. In response to requested refinements to the air dispersion modeling by NMED, the cumulative impacts analysis for applicable pollutants includes all data received from the Texas Commission on Environmental Quality's ("TCEQ") Air Permits Allowables Database ("APAD"), with corrections as noted in Form UA-4.

19. The requested permit condition limits total Microgrid output to 1,600 MW. Within that limit, an individual cluster may operate anywhere from idle up to 100% of its 1.95 MW rating. To cover the range of load distributions the condition allows, YGI modeled two operating cases: (1) all 1,263 clusters operating at an equal 65% load (the "1,600 MW Scenario"); and (2) all 1,263 clusters operating at 100% load, representing the full 2,462

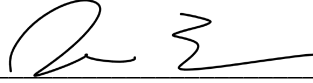
MW nameplate capacity (the “Alternate Scenario”). Per-stack emissions are provided in multiple versions of Table 2-G.

20. The Alternate Scenario assumes all units are running at 100% load capacity using the associated exhaust parameters, which produces the most conservative model results. The modeled emissions in the Alternate Scenario correspond to those in Table 2-D. The Microgrid will not operate above the requested 1,600 MW, and the Alternate Scenario is not achievable in practice. It was modeled to ensure that, regardless of how YGI meets the 1,600 MW operating cap, its operations will comply with the NAAQS, and it represents a reasonable impact ceiling. Together, the two scenarios indicate that compliance with the NAAQS is achieved under multiple variable load scenarios. The modeling results of the 1,600 MW Scenario and the Alternate Scenario were submitted with the refined modeling under separate cover to NMED on October 16, 2026.

21. The refined modeling scenarios show that the Microgrid will not cause or contribute to any violation of the NAAQS.

I declare under penalty of perjury under the law of the State of New Mexico that the foregoing is true and correct.

Executed on October 19, 2026

A handwritten signature in black ink, appearing to be 'John Ke', written over a horizontal line.

John Ke
Senior Consultant
Trinity Consultants

Ke

Exhibit 1

October 14, 2026

Julia Kuhn
Major Sources Manager
Permits Section
NMED Air Quality Bureau
525 Camino de los Marquez Suite 1
Santa Fe, NM 87505-1816

RE: Questions on Air Quality Permit Application No. 10883 Response (Agency Interest No. 41351 – PRN20260001) – YGI Microgrid

Ms. Kuhn:

Thank you for your e-mail dated October 1, 2026, requesting additional information. We understand that responsive information was provided at our in-person conference on October 5, 2026, and that AQB has issued superseding questions dated October 9, 2026, for which we are pleased to provide a response herein. Following discussions at our recent conference, updated dispersion modeling results and application components are submitted under a separate cover. These include updated UA-1, Section 1-C, UA-2 (including updates to Table 2-A, D, E, G, H, I, J, M, and P), and UA-3 Sections 6, 10, 12, 15, and 20. Please find the below summary of refinements being made to the microgrid and responses to each of NMED's specific questions below in ***bold, italic font***. Each of the AQB's questions is repeated verbatim, with the response following.

Microgrid Refinements in Response to NMED Feedback & Public Comment

After considering NMED's questions and public comments, and following NMED's guidance that YGI should focus on the most positive environmental impact possible, YGI seeks to make the following responsive refinements to its microgrid facility:

1. **Three-tier cluster design.** The same Bloom fuel cell modules will be consolidated using identical servers into 3-tier clusters, reducing the number of stacks from 2,275 to 1,263.¹ This design results in a consistent cluster configuration for all but one cluster in the microgrid and is responsive to NMED's request to keep the clusters uniform in configuration. Additional details regarding the specific parameters associated with these clusters are included in our responses below. This design yields dispersion modeling outputs that are consistent with the April modeling submission and, along with #4 below, will reduce the overall environmental impact of the microgrid by 35%.

¹ There will be one cluster that is not identical, due to the total number of modules included within the total nameplate power capacity.

2. **Taller stacks.** Stack height will increase from 30 to 45 feet, which will remain in compliance with the draft permit. The increased stack height provides an environmental benefit by allowing emissions to disperse more effectively before reaching ground level, reducing potential pollutant concentrations in the surrounding area.
3. **Revised stack parameters.** Exhaust temperature, velocity, and flow are updated in Table 2-H to reflect actual operation in a three-tier configuration. Multiple versions of Table 2-H have been provided to reflect the modeling scenarios described in item 5.
4. **Enforceable 1,600 MW operating cap.** To further address the NMED's guidance to ensure YGI prioritizes the environmental impact, YGI is requesting that a term and condition be added to the draft permit which limits the facility's operation of its 2,462 MW permitted capacity, through both an hourly limit and lower annual limits on output. The facility is being constructed with redundancy to ensure reliability for electricity delivery. As a result, YGI will not operate the facility at more than 1,600 MW, which represents 65% of the 2,462 MW. To more accurately reflect this operational limit and associated emissions, YGI requests a permit condition which would limit capacity for the microgrid in the form of an hourly and annual limit. This limit could either be in the form of an hourly and annual limit on the output capacity in annual MW-hour. This enforceable condition would significantly reduce maximum allowable emissions from the facility as shown in the table below. Emissions from the original application reflecting the entire nameplate capacity are shown, as are the reduced emissions based on the 65% operational limitation. YGI has included the emissions based on nameplate capacity in Table 2-D, and the requested allowable emissions in Table 2-E. Updated tables will be submitted under separate cover.

Pollutant*	Annual Emissions based on Nameplate/Application (Shown in Table 2-D)		Annual Requested Emissions based on 1600MW Capacity (Shown in Table 2-E)***	
	lb/hr	tpy	lb/hr	tpy
NO _x	8.49	37.20	5.52	24.18
CO	36.81	161.21	23.92	104.77
VOC	28.31	124.01	18.40	80.59
SO ₂	0.017	0.076	0.01	0.049
PM ₁₀ /PM _{2.5}	17.21	75.40	11.19	49.00
HAPs (Table 2-I)	0.3	1.4	0.21	0.92
CO ₂ e** (Table 2-P)	-	8,820,970	-	5,732,544

* Criteria and HAP pollutant limits include the 15% safety factor.

** GHG limits do not include the 15% safety factor, consistent with the draft permit.

*** Updated modeled emissions in Table 2-E and 2-H reflect the 1600MW operating cap.

These refinements respond directly to the concerns raised in public comments and result in a facility that is more protective of the environment and nearby communities. Commenters objected to the facility's greenhouse gas emissions and their effect on New Mexico's climate goals. The enforceable 1600MW operating cap answers that concern by cutting permitted greenhouse gas emissions by more than three million tons per year, from 8,820,970 to 5,732,544 tons. Commenters also expressed concern about the amounts of criteria pollutants; although the original draft permit would ensure compliance with ozone NAAQS, the cap nevertheless cuts both criteria pollutants and GHGs by 35%. Raising the stacks from 30 to 45 feet lets emissions disperse more before they reach the ground, which responds to residents' concerns about air quality in the neighborhoods closest to the facility. Finally, consolidating 2,275 stacks into 1,263 uniform clusters responds to commenters who asked for fewer emission points, and an hourly and annual cap on power output gives the public a clear, enforceable limit on the facility's emissions.

5. Alternate Modeling Scenario. YGI has also completed modeling of a scenario representing 100% of the stacks (1,263) operating at 100% of their capacity (2,462 MW) and associated exhaust parameters, resulting in the most conservative model results (i.e., lowest exhaust temperature). This scenario assumes that all units will be running at 100% load capacity, at an ambient temperature of 0 °C. This was done to ensure that regardless of how YGI meets the 1,600 MW operating cap that its operations will comply with the NAAQS. The facility will not operate above the requested 1,600 MW, this scenario models all 2,462 MW from all 1,263 stacks to provide assurance that the worst-case assumptions will be protective of the NAAQS. The results of this alternate modeling scenario will be submitted with the refined modeling under separate cover.

Response to NMED's Questions/Requests

Please find the responses below in ***bold, italic font***. Each of the AQB's questions is repeated verbatim, with the response following.

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.

The cumulative impacts analysis for applicable pollutants includes all data received from TCEQ's Air Permits Allowables Database (APAD), with corrections as noted in form UA-4.

2. Specific emissions per stack and how the emissions relate to the number of clusters, servers, and power modules for each respective stack.

Per-stack emissions are reflected in the updated Table 2-G and in the enclosed calculation workbook. The physical layout has been altered to reflect a representative operating scenario where the model is limited to 65% capacity output. The revised system consists of (1,262) identical clusters each consisting of (6) 325-kW Energy Servers (ES); and a single cluster consisting of (3) 260-kW Energy Servers and (1) 325-kW Energy Server. The system nameplate capacity is identical to that shown in the application. However, the project will take a voluntary limit on capacity output to 1,600 MW. All emission factors and safety factors are unaltered. However, both hourly and annual emissions will be reduced by 35%.

Cluster Type	Count	325-kW ES per Cluster	260-kW ES per Cluster	Power Modules per Cluster	Nameplate Subtotal (MW)
A	1262	6	0	30	1262 @ 1.95 MW ea. = 2,460.9 MW
R	1	1	3	17	1 @ 1.105 MW ea. = 1.105 MW
All					2,462.005 MW

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.

In this configuration, all but one of the clusters will contain 30 operating power modules. As noted in our response to Question #2, there will be one cluster containing 17 power modules. Since all but one cluster consists of 30 power modules, the example information below is specific to those clusters. Following is a description of each parameter as well as the requested information.

Release Height:

As mentioned above, the modeling now reflects a three-tier configuration instead of the previously submitted two-tier structure. As a result of increasing the number of tiers, the release height for the stacks is now 45 ft above grade instead of 30 ft. This value remains constant regardless of modeling scenario.

Diameter:

The release diameter is rectangular in nature and engineered to provide a discharge area of 52.25 ft² as originally represented. The same rectangular exhaust point is maintained from the previously submitted modeling demonstration. Since AERMOD cannot represent a rectangular stack, the

exhaust point is represented by a circular stack, which will have the same cross-sectional area, 52.25 ft². The following calculation shows how an equivalent diameter is calculated in order to model this stack in AERMOD:

$$A = \pi r^2 \text{ or } A = \pi (d/2)^2 \text{ (where } r \text{ is the radius of a circle and } d \text{ is the diameter)}$$

$$\text{Solving for } d, \text{ we get: } d = (4A/\pi)^{(1/2)}$$

$$\text{Solving for } d = ((4 * (52.25 \text{ ft}^2)) / \pi)^{(1/2)} = 8.16 \text{ ft}$$

This value also remains constant regardless of the modeling scenario.

Flow Rate and Temperature:

Flow rate and exhaust temperature are interrelated modeling parameters based on the fuel cell design. For ease of review, we have provided a table below which provides the associated flow and temperature for the hotbox, cabinet ventilation, and DC module ventilation. The combined stream represented by the “Total” was used in the modeling for each cluster as shown in the “Modeled Parameters” table. The following table represents the flow for the entire 30-power module cluster in the 1,600 MW modeling and the associated emissions from Table 2-E.

Exhaust Makeup	Temperature (°C)	Flow (acfs)	Flow Percentage
Hotbox	364	78.78	13%
Cabinet Ventilation	61	293.91	48.5%
DC Module	64	233.31	38.5%
Total	103 (217.4 °F)	606	100%

Modeled Parameters for 30-Power Module Cluster (1,600 MW Modeling)

Modeled Values	Exit Velocity (ft/s)	Temperature (°F)
	11.6	217.4

Modeled Parameters for 17-Power Module Cluster (1,600 MW Modeling)

Modeled Values	Exit Velocity (ft/s)	Temperature (°F)
	6.24	217.4

The tables below outline the parameters for the alternate modeling scenario that assumes 100% of the clusters operating at 100% capacity (2,462 MW). This means that the modeled emissions correspond to those in Table 2-D. To be clear, the facility will never operate at these conditions, but the modeling in this scenario provides assurance that even at these assumptions, modeled concentrations from the facility will not cause or contribute to an exceedance of the NAAQS. The exit velocity increases because all 30 power modules are operating at 100% of their capacity. Temperature decreases based on worst-case meteorological conditions assumptions for the area.

Modeled Parameters for 30-Power Module Clusters (2,462 MW Modeling)

Modeled Values	Exit Velocity (ft/s)	Temperature (°F)
	12.7	163.4

Modeled Parameters for 17-Power Module Cluster (2,462 MW Modeling)

Modeled Values	Exit Velocity (ft/s)	Temperature (°F)
	6.81	163.4

The requested condition limits total facility output to 1,600 MW (65% of the 2,462MW nameplate capacity). Within that limit, an individual cluster may operate anywhere from idle up to 100% of its 1.95 MW rating (as cited in Question #2). To cover the range of load distributions the condition allows, YGI modeled two operating cases using exhaust parameters at (1) all 1,263 clusters at an equal 65% load; and (2) 1,263 clusters at 100% load. Because case 2 is not achievable in practice, it represents a reasonable impact ceiling and the two scenarios together are indicative that compliance with the NAAQS is achieved at multiple variable load scenarios.

4. All supporting calculations used to justify the parameters and associated emissions.

Supporting information for the modeling parameters was provided in the response to question #3. Table 2-G emission rates are determined in the same manner as described in Section 6 of the application. Below is a sample calculation showing how the carbon monoxide (CO) emission rate per cluster (which includes a safety factor) is determined:

Cluster Size (MW) = Power Modules (PM) per Cluster × 0.065 MW per Power Module

1.95 MW/Cluster = 30 PMs/Cluster × 0.065 MW/PM (Type A)

1.105 MW/Cluster = 17 PMs/Cluster × 0.065 MW/PM (Type R)

Emission Rate per Cluster (lb/hr) = Emission Factor (lb/MW-hr) × Cluster Size (MW) × 115%

0.00673 lb NO_x/hr = 0.003 lb/MW-hr × 1.95 MW × 115%

0.00381 lb NO_x/hr = 0.003 lb/MW-hr × 1.105 MW × 115%

Facility Total Emission Rate (lb/hr) = Emission Factor (lb/MW-hr) × System Nameplate (MW) × 115%

$$8.49 \text{ lb NO}_x/\text{hr} = 0.003 \text{ lb/MW-hr} \times 2462 \text{ MW} \times 115\%$$

Using the 1,600 MW cap:

$$5.52 \text{ lb NO}_x/\text{hr} = 0.003 \text{ lb/MW-hr} \times 1600 \text{ MW} \times 115\%$$

5. A detailed description as to the specific changes that YGI is making compared to its 10/18/20 configuration.

As noted above, the system has been configured to eliminate differences in power modules across the various clusters. The clusters have a larger number of power modules (30 instead of 10, 18, or 20) to improve energy density. Accordingly, there will be a total of 1,263 clusters (rather than 2,275). For the same reason, the (1,262) 30-power module clusters (+1 smaller 17-module cluster) will be arranged in three vertical tiers, increasing the release height from 30-feet to 45-feet. Section 5 (plot plan) is updated to show the revised layout due to the elimination of (1,012) clusters.

While there is a change in layout, there are no additional structures like an administrative office or a maintenance shed that has been added to the area of influence. The downwash analysis has been updated to reflect the three-tier structure; the three-tier structure has raised building height from 25 ft. to 32 ft. The site still maintains more than a 100 m buffer from the fenceline, and so buildings at the nearby data center (estimated to be between 30-50 ft. tall) would not be near enough, using the 5L rule, to have an impact on stack downwash. The only buildings included in the BPIP inputs runs are those in the site layout.

If you have any questions or comments about the information presented in this letter, please do not hesitate to call Trinity's Albuquerque Office at 505-266-6611.

Sincerely,

TRINITY CONSULTANTS



John Ke
Senior Consultant

APPENDIX A

TAB 1

Associated Asphalt & Materials, Permit No. 8585

No. AQB 20-12; No. EIB 21-48

Documents excerpted:

- NMED Ex. 1, Technical Testimony of Kathleen Primm, No. AQB 20-12 (filed Mar. 1, 2021) [\[NMED link\]](#)
- EIB Final Order, No. EIB 21-48 (Aug. 26, 2022) [\[NMED link\]](#)

**STATE OF NEW MEXICO
BEFORE THE DEPUTY SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION
OF ASSOCIATED ASPHALT AND MATERIALS, LLC
FOR AN AIR QUALITY PERMIT**

AQB 20-12 (P)

TECHNICAL TESTIMONY OF KATHLEEN PRIMM

I. INTRODUCTION

My name is Kathleen Primm. I am a Permit Specialist in the Minor Source Unit of the Permitting Section of the Air Quality Bureau (“AQB” or “Bureau”) of the New Mexico Environment Department (“NMED” or “Department”). I present this written testimony on behalf of the Department for the public hearing on the permit application submitted by Associated Asphalt & Materials, LLC (“AAM”). Citizens challenge the Department’s issuance of Air Quality Permit No. 8585 to Associated Asphalt & Materials, LLC for the Santa Fe Facility in Santa Fe County, New Mexico. AAM’s air permit application 8585 (“Application 8585”) for its Santa Fe Facility was received by the New Mexico Environment Department on November 26, 2019. **[AR No. 1, Bates 000001 - 000321]**. Citizens contend that the Department’s issuance of the proposed AAM permit would have negative impacts on air quality; endanger public health; increase noise and vehicle traffic on public roads; degrade natural beauty and quality of life for residents; and threaten wildlife, historic structures, tourism, water quality, water conservation, and property values.

As a Permit Writer, it is my responsibility to conduct a complete and thorough review of an air quality permit application, including an administrative review and a technical review. I coordinate with various stakeholders including the public, industry, consultants, Air Quality Bureau staff, and other regulatory agencies to provide quality customer service and aid in the permitting process. If parts of the application are incomplete or inaccurate, it is my responsibility

1 to contact the applicant and request clarifications or corrections, as necessary. Updates to the
2 original application are often required, and it is my responsibility to review all updates for
3 completeness and accuracy. I write technical support documents and a legally enforceable air
4 permit, initially based on standardized AQB template language and monitoring protocols. The
5 template language and monitoring protocols are consistent for similar types of facilities. Unique
6 permitting conditions or modifications to standard template language are typically required for site
7 specific operations and equipment, based on information provided in the application. I customize
8 the permit to the specifics of the application with site specific conditions and the recommendations
9 of the air dispersion modeling staff to ensure the facility will operate as represented in the
10 company's application and comply with all applicable state and federal regulations and ambient
11 air quality standards.

12 My testimony will address the following topics: my qualifications, a summary of
13 Application 8585, an overview of construction permits authorized under 20.2.72 NMAC, my
14 administrative review of Application 8585, the technical review of Application 8585, AQB's
15 public outreach efforts throughout various stages of this permitting action, and the basis for
16 conditions in the 2021.02.04 version of Draft Permit 8585 for AAM's proposed facility.

17 **II. QUALIFICATIONS**

18 I have been an employee of the Bureau for approximately twelve years, working as a Permit
19 Specialist. As a Permit Specialist, I perform technical and regulatory review of complex Air
20 Quality Bureau permit applications within regulatory deadlines. I verify emissions calculations;
21 determine applicable state regulations and federal regulations; coordinate with various
22 stakeholders including the public, industry, consultants, and AQB staff; write legally enforceable
23 air permits and technical support documents for the administrative record; enter data into the AQB

1 the applicant's proof of public notice. All required contents of the application are listed in
2 20.2.72.203 NMAC. Upon receipt of Application 8585, I provided the applicant's modeling files
3 to the assigned AQB modeling staff member, Eric Peters, for his review. On December 11, 2019,
4 Eric sent me an e-mail confirming Application 8585 could be ruled complete from a modeling
5 perspective. **[AR No. 172, Bates 001711]**. On December 12, 2019, I sent an e-mail to AAM's
6 consultant, Paul Wade, and AAM's Environmental Specialist and air permit contact, Matt Lane.
7 **[AR No. 14, Bates 000623 – 000625]**. My e-mail laid out missing information in Section 1-D,
8 Facility Location Information, which related to missing portions of Section 9, Proof of Public
9 Notice. **[Id.]**. Mr. Wade responded on December 13, 2019 with the requested updates, including
10 new certified mail receipts verifying the applicant's public notice was sent to Pueblo of Tesuque
11 and Pueblo of Cochiti. **[AR No. 15, Bates 000635]**. Santa Fe County and Sandoval County had
12 already been notified, but they were not listed in Section 1-D, line 7 of the original application.
13 These two counties were added to the updated Section 1-D, line 7. **[AR No. 15, Bates 000627]**.
14 With the additional certified receipts demonstrating public notice was correctly sent to Pueblo of
15 Tesuque and Pueblo of Cochiti, the applicant completed the public notice requirements per
16 20.2.72.203.B(2) NMAC. **[Id.]**. As I requested, the updated Section 1-D also included the addition
17 of Bandelier Wilderness Area, Pecos Wilderness Area, and Bernalillo County in Section 1-D, line
18 8. **[Id.]**. These agencies would be notified by the Department per requirements in 20.2.72.206.A(7)
19 NMAC. These application revisions made all sections of the application complete.

20 After I calculated the permit fee for AAM's application 8585 based on fee units in 20.2.75
21 NMAC and applicable regulations, AQB's administrative staff generated an invoice for the permit
22 fee. **On December 20, 2019, I ruled application 8585 administratively complete.** **[AR No. 9, Bates**
23 **000562-0005635]**. I sent the completion determination letter, including a copy of the Department's

1 Legal Notice, and the invoice for the permit fee to the applicant on December 20, 2019. **[AR No.**
2 **16, Bates 000637 - 000643]**. I also sent the Department's Legal Notice to EPA Region 6; Erica
3 LeDoux at EPA; the Director of the Eight Northern Indian Pueblo Council; Bandelier Wilderness
4 Area, Pecos Wilderness Area, and Bernalillo County Air Quality Control Board (AQCB). **[AR**
5 **Nos. 319-323, Bates 001967-001984]**. The Department's Legal Notice was posted on the AQB
6 website on two different pages: one page with all public notices of permitting actions and one page
7 for permit applications with public interest. **[AR No. 499, Bates 002568; AR No. 500, Bates**
8 **002569, 002672]**. AQB's administrative staff sent the Department's Legal Notice to *The Santa Fe*
9 *New Mexican* for publication, and it was published on December 24, 2019. **[AR No. 515, Bates**
10 **002601-002603]**.

11 VI. TECHNICAL REVIEW

12 I began the technical review of AAM's application 8585 after I determined it was
13 administratively complete. The technical review requires verification of emissions calculations
14 and a determination of applicable federal regulations and state regulations.

15 I verified emissions calculations by confirming the correct emission factors and formulas
16 were used in calculating emissions for all sources. **[AR No. 5, Bates 000347 - 000429]**. If methods
17 were unclear, I asked the consultant for further explanation or updates, as necessary. Also, I
18 verified the emissions totals from the calculations matched the emissions totals in Section 2 of the
19 application.

20 Per my inquiries and requests for clarification, Paul Wade, the consultant for AAM,
21 submitted several updates to the original AAM application 8585. Below is a list of dates of
22 application updates:

23	12/13/19	Sections 1-D and 1-E, Section 9, Section 11 [AR No. 15, Bates 000626-000636] .
24	1/24/20	Section 13 [AR No. 32, Bates 000710-000715] .

1	2/4/20	Section 2 Tables 2A, 2D, and 2E; Section 6 [AR No. 41, Bates 000747-000768].
2		Aggregate Plant Calculation Spreadsheet.
3	2/14/20	Section 2 Tables 2A, 2D, and 2E; Section 6 and Section 13 [AR No. 54 Bates
4		000887 - 000898].
5	2/21/20	Section 2 Tables 2D and 2E; Section 6, Aggregate Plant Calculation Spreadsheet
6		[AR No. 60, Bates 000905-000924].
7	2/26/20	Hot Mix Asphalt Plant (HMA) #2 and HMA #5 Calculation Spreadsheets [AR No.
8		65, Bates 001008-001027].
9	3/10/20	Section 2 Tables 2A and 2E [AR No. 67, Bates 001029-001036].
10	4/7/20	Aerial Site Road Map [AR No. 72, Bates 001041-001042].
11	8/24/20	Section 6 [AR No. 78, Bates 001048-001126].
12	9/4/20	Section 2 Table 2I and Section 6 [AR No. 90, Bates 001139-001143].
13	9/22/20	Section 2 Table 2C [AR No. 104, Bates 001254-001255].
14	10/6/20	Section 2 Table 2C [AR No. 113, Bates 001264-001265].
15	11/10/20	Section 2 Table 2I and Section 6 [AR No. 125, Bates 001285-001287].
16	12/16/20	Section 2 Table 2D [AR No. 133, Bates 001352-001354].
17	12/29/20	Section 2 Tables 2A, 2D, and 2E [AR No. 136, Bates 001418-001426].

18 I requested some of these updates while doing an initial review of calculations. I requested
19 other updates if discrepancies in the application became apparent while writing Draft Permit 8585.
20 The Department has reviewed the emission calculations submitted in the application for all
21 regulated equipment and the emission factors relied upon in those calculations. The emission
22 factors used in those calculations are based upon the US EPA's AP-42 Compilation of Air
23 Emission Factors, EPA Tier 1 emission factors, and EPA Tier 4i emission factors. [AR No. 1,
24 Bates 000119-00212]. AP-42 is the EPA's compilation of emission factors for various industries.
25 Emission factors are representative values that relate the quantity of a pollutant released to the
26 ambient air with an activity associated with the release of that pollutant. ([https://www.epa.gov/air-](https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors)
27 [emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors](https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors) [March 1, 2021,
28 9:45 AM]). These factors are usually expressed as the weight of pollutant divided by a unit weight,
29 volume, distance, or duration of the activity emitting the pollutant. The factors are expressed in
30 units such as pounds per ton of material processed and pounds per hour. Such factors facilitate
31 estimation of emissions from various sources of air pollution. In most cases, these factors are

**STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF THE PETITION FOR
HEARING ON AIR QUALITY PERMIT NO. 8585**

No. EIB 21-48

**EARTH CARE NEW MEXICO, BY MIGUEL ACOSTA MUÑOZ
and LINDA MARIANELLO, AS AN INDIVIDUAL,
Petitioners,**

v.

**NEW MEXICO ENVIRONMENT DEPARTMENT
Respondent.**

FINAL ORDER

This matter comes before the New Mexico Environmental Improvement Board (“EIB”) upon the Petition for Hearing on Air Quality Permit No. 8585 (“Petition”) filed by Earth Care New Mexico, by Miguel Acosta Munoz, and Linda Marianello, as an individual (collectively, the “Petitioners” or “Community”).

Petitioners were represented by Maslyn Locke and Eric Jantz of the New Mexico Environmental Law Center. The New Mexico Environment Department was represented by counsel Christopher Vigil. The Applicant, Associated Asphalt and Materials, LLC (“AAM”), was represented by Travis G. Jackson and Meghan D. Stanford of Jackson Loman Stanford Downey, P.C.

On June 24, 2022, the Board met pursuant to 20.1.2.403 NMAC to deliberate and consider the Hearing Officer’s Report and Recommended Findings of Fact and Conclusions of Law (“Recommended Decision”). By a unanimous vote of 6-0, the Board decided to adopt in part and set aside in part the Recommended Decision, and to sustain the Department’s decision to issue Permit 8585. The EIB issues this Final Order pursuant to 20.1.2.403(B) NMAC.

On October 15, 2021, the EIB heard from both the Department and the Petitioners regarding the Department's request that the Petition be denied. The EIB denied the Department's request, granted the Petition, and set the EIB Public Hearing on the three claims set forth in the Petition for February 23-25, 2022 ("EIB Hearing"). The EIB appointed Hearing Officer Richard Virtue to conduct the hearing pursuant to 20.1.2.109 NMAC. The Hearing Officer's February 21, 2022 Order removed Petitioners' federal Civil Rights claims from consideration at the hearing without prejudice to pursuit of those claims in another forum. *See* Hearing Officer's Order Granting in Part and Denying in Part New Mexico Environment Department's Motion *In Limine*.

After the EIB Hearing, the Hearing Officer issued a Report and Recommended Findings of Fact and Conclusions of Law ("Recommended Decision"). The EIB considered the Hearing Officer's Recommended Decision during deliberations at its public meeting on June 24, 2022. **It is the decision of the EIB to adopt in part and set aside in part the Recommended Decision, and to sustain the Department's decision to approve the issuance of Permit 8585, for reasons that follow.**

REASONS FOR ADOPTION IN PART AND SETTING ASIDE IN PART OF THE RECOMMENDED DECISION

Pursuant to 20.1.2.403(B) the EIB adopts in part and sets aside in part the Hearing Officer's Recommended Decision. The EIB adopts the Hearing Officer's Recommended Conclusions of Law contained in Sections I through V of the Recommended Decision as consistent with and supported by the evidence in the record. The EIB sets aside the Ultimate Conclusions of Law reached by the Hearing Officer as contained in Section VI, paragraph 10, including subparagraphs a through d (page 37 of the Recommended Decision), as not supported by the evidence in the record, and for the reasons stated by the Department and the Applicant in their respective Comments to the Hearing Officer's Recommended Decision. For the purposes of this Final Order, although the EIB has found the Petitioners have not met their burden of proof to establish by a

APPENDIX A

TAB 2

C&E Concrete, Permit No. 9027

No. AQB 21-29

Documents excerpted:

- NMED Ex. 1, Technical Testimony of Todd Sherrill, No. AQB 21-29 (filed Sept. 13, 2021) [\[NMED link\]](#)
- Final Order, No. AQB 21-29 (Nov. 17, 2021) [\[NMED link\]](#)

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION
OF C&E CONCRETE, INC.
FOR AN AIR QUALITY PERMIT**

AQB 21-29 (P)

TECHNICAL TESTIMONY OF TODD SHERRILL

I. INTRODUCTION

My name is Todd Sherrill and I am a Permit Specialist in the Minor Source Permitting Unit of the New Mexico Environment Department (“NMED” or “Department”), Air Quality Bureau (“AQB” or “Bureau”). I present this written testimony on behalf of the Bureau for the public hearing for the permit application submitted by C&E Concrete, Inc. (C&E) on behalf of Gamerco HMA. The proposed construction of C&E’s Gamerco HMA (“HMA”) facility will be located in the community of Gamerco, McKinley County, New Mexico. Citizens of Gamerco expressed opposition to the Department’s issuance of the Air Quality Permit No. 9027 to C&E. C&E’s application for the Gamerco HMA facility was received by the New Mexico Environment Department on November 6, 2020. [AR No. 1]. Citizens of Gamerco maintain that the Department’s issuance of the proposed permit and the construction of the hot mix asphalt facility would have negative impacts on air quality, increase wear and tear on area roads, create noise pollution, endanger public health, increase airborne vehicle generated dust and will degrade quality of life for the residents of Gamerco. Some citizens have commented that there are many community members that have pre-existing health conditions and the presence of a hot mix asphalt facility in their neighborhood will only exacerbate these health conditions.

As a permit specialist, I conduct a thorough review of air quality permit applications, including an initial administrative review to determine whether the application meets the Bureau’s minimum requirements for completeness. Once an application has been ruled administratively

1 **V. ADMINISTRATIVE REVIEW**

2 The Air Quality Bureau received application 9027 on November 6, 2020. [AR No. 1]. On
3 November 9, 2020 I sent an email to Paul Wade, consultant for Montrose Air Quality Services and
4 Walter Meech of C&E requesting electronic files containing a complete application. [AR No. 12].
5 On November 16, 2020 Paul Wade replied with an email containing all application files. [AR Nos.
6 13-19; 85]. In accordance with 20.2.72.207(A) NMAC, the Bureau had 30 days to review the
7 application and determine whether it meets the Departments standards of being ruled
8 administratively complete.

9 The review for administrative completeness of an application is a review of the presence
10 of the required parts of the application including but not limited to: correct location, sufficient
11 public notice provided, the modeling analysis, and the presence of a signed and notarized
12 certification page. All required contents of the application are listed in 20.2.72.203 NMAC. Upon
13 receipt of Application 9027, I provided the applicant's modeling files to Sufi Mustafa, supervisor
14 of the Air Quality Bureau's Modeling Section. On November 23, 2020, Sufi informed me that
15 Application 9027 met the modeling requirements and stated that Eric Peters was assigned for the
16 modeling's technical review. Once I completed my review of the application packet that Paul
17 Wade submitted on November 16, 2020, I determined that C&E's application had satisfied all the
18 required elements for completeness. I then calculated the permit fee for C&E's Gamarco HMA
19 application 9027 based on fee units in 20.2.75 NMAC and applicable regulations. AQB's
20 administrative staff generated an invoice for the permit fee based on the number of units and
21 associated applicable regulations. On December 4, 2020, I ruled application 9027 administratively
22 complete and sent the completion determination letter, including a copy of the Department's Legal
23 Notice, and the invoice for the permit fee to the applicant. [AR No. 26].

When reviewing an NSR for the technical components, I start by confirming that the approved emission factors and formulas are used for each of the pollutants and confirm the sources of those emission factors and formulas. If any of the calculations or the variables within are unclear, I ask the consultant/applicant for further explanation or clarification and then request updates to the application, as necessary. Once all the calculations have been performed and verified, I compare these results with what was entered into the emission totals in Tables 2-D and 2-E of the application. If the emissions totals corroborate and fall within the regulatory limits, I begin writing the permit draft. If there are any discrepancies in these totals or something does not make sense, I contact the consultant/applicant for clarification.

During my technical review I had several inquiries and requests for clarification. Paul Wade, the consultant for Gamerco HMA, responded to my questions, providing explanations and supporting documents to those explanations. Paul also submitted several updates to the original Gamerco HMA application at my request. Below is a list of application updates and their associated received dates:

12/10/20	Updated State and Federal Regulations
12/10/20	Excel File containing emissions
12/28/21	Section 6 (Drum HAPs, Heater HAPs)
1/29/21	Section 2 Table 2-I
2/3/21	Section 2 Table 2-H
2/17/21	Section 1-D #7
5/25/21	Section 16 UA4 update to include Calcium
5/25/21	Section 2 Table 2C
7/29/2021	Complete application containing all updates in PDF form
8/27/2021	Section 2 Table 2-J

Several requests for updates were necessary in order to complete my review of the calculations, other updates were requested due to deficiencies or inconsistencies observed while writing the permit draft. I have reviewed the emission calculations provided in the application for

1 and language are frequently modified throughout the process. Once the permit draft is complete, I
2 email it to the applicant and consultant for their review and an opportunity to make comments, and
3 I send copies of the permit draft to Air Quality Bureau management for their review. It is common
4 to make additional revisions after the draft has been reviewed by the applicant and Bureau
5 management staff.

6 The applicant submitted comments on the draft permit on March 2, 2021 and August 26,
7 2021. [AR. Nos. 56 and 83]. Permit conditions were revised to be consistent with the permit
8 application, emission calculations, and air dispersion modeling.

9 Once all requests and concerns have been addressed in the draft, the final draft is returned
10 to permitting management staff where it is again reviewed by several members of Bureau
11 management.

12 **IX. CONCLUSION**

13 The technical review of Gamerco's application has been completed, and based on the
14 application, and the modeling demonstrates compliance with federal and state regulations. As
15 outlined in the application, and modeling Gamerco's HMA operations, will not cause or contribute
16 to any significant exceedance of any applicable air quality standards. This was determined based
17 on the modeling analysis of the facility and emission calculations for Carbon Monoxide, Nitrogen
18 Dioxide, Volatile Organic Compounds, Particulate Matter 10, Particulate Matter 2.5, Sulfur
19 Dioxide, Asphalt fumes and Calcium Hydroxide. State regulations and the directives set forth by
20 the Clean Air Act do not give the Bureau the authority to regulate any activity that is not directly
21 related to issues of air quality, therefore the Bureau cannot refuse an air quality permit based on
22 anything other than air quality standards. The Bureau also does not have the authority to make
23 decisions based on business and commercial zoning laws adopted in counties and municipalities.

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION
OF C&E CONCRETE INC.
FOR AN AIR QUALITY PERMIT,
NSR PERMIT NO. 9027, GAMERCO HMA**

No. AQB 21-29(P)

FINAL ORDER

This matter comes before the Secretary of Environment following a hearing before the Hearing Officer on September 27, 2021, held via the ZOOM virtual platform in response to the public health orders in place at that time.

C&E Concrete, Inc submitted an air quality permit application to construct a 200 ton per hour hot mix asphalt plant which will be co-located with an existing concrete batch plant at 208 Crystal Avenue, Gamerco, NM 87317, approximately 2.66 miles north of the intersection of I-40 and Highway 491 in McKinley County, NM. C&E Concrete, Inc. owns and operates the facility.

C&E Concrete, Inc. filed the air quality construction permit application for the plant on November 6, 2020, and it was deemed complete on December 4, 2020. The NM Environment Department's Air Quality Bureau ("AQB") has reviewed the application, including emission rates and concluded that operation of the plant will comply with applicable requirements and not cause or contribute to an exceedance of federal and state ambient air quality standards if conducted in accordance with the Department's draft permit conditions.

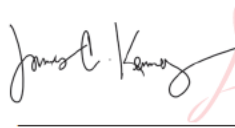
The New Mexico Environment Department Air Quality Bureau supports the approval of the permit allowing construction and operation of the plant with conditions necessary to protect human health and welfare and the environment.

Having considered the administrative record, including all post-hearing submittals and the Hearing Officer's Report; and being otherwise fully advised regarding this matter;

THE SECRETARY HEREBY ADOPTS THE HEARING OFFICER'S REPORT AND RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IT IS THEREFORE ORDERED:

The application for an air quality permit is granted, and the permit shall be issued by the Air Quality Bureau in the form set forth in the Draft Permit, as shown in the Administrative Record.

 Digitally signed by
James Kenney
Date: 2021.11.16
16:34:57 -07'00'

JAMES C. KENNEY, Secretary of Environment

NOTICE OF RIGHT TO REVIEW

Pursuant to Section 74-2-7.H, NMSA 1978, any person who participated in this permitting action and who is adversely affected by the action may file a petition for hearing by the Environmental Improvement Board, c/o Gregory Chakalian, 1190 St. Francis Drive, Santa Fe, New Mexico 87502. The petition shall be made in writing to the Board within thirty days from the date notice is given of this action.

APPENDIX A

TAB 3

Chevron USA Inc., Salado Draw 19, Permit No. 6109-M8

No. AQB 22-26

Documents excerpted:

- NMED Ex. 3, Technical Testimony of Todd Sherrill, No. AQB 22-26 (filed Aug. 29, 2022)
[\[NMED link\]](#)

1 **STATE OF NEW MEXICO**
2 **BEFORE THE SECRETARY OF ENVIRONMENT**

3 **IN THE MATTER OF THE APPLICATIONS OF**
4 **DLK BLACK RIVER MIDSTREAM, LLC** **AQB 22-25**
5 **FOR AN AIR QUALITY PERMIT NO. 6567-M8**
6 **FOR THE BLACK RIVER GAS PROCESSING PLANT**

7
8 **CHEVRON USA INC.**
9 **FOR AN AIR QUALITY PERMIT NO. 6109-M8** **AQB 22-26**
10 **FOR THE SALADO DRAW 19 CENTRAL**
11 **TANK BATTERY AND COMPRESSOR STATION**

12
13 **CHEVRON USA INC.**
14 **FOR AN AIR QUALITY PERMIT NO. 6832-M8** **AQB 22-27**
15 **FOR THE SALADO DRAW 23 COMPRESSOR**
16 **STATION AND TANK BATTERY**
17

18 **TECHNICAL TESTIMONY OF TODD SHERRILL IN SUPPORT OF THE APPROVAL**
19 **OF THE APPLICATION OF CHEVRON USA INC.**
20 **FOR AN AIR QUALITY PERMIT NO. 6109-M8 FOR THE CHEVRON SALADO**
21 **DRAW 19 CENTRAL TANK BATTERY AND**
22 **COMPRESSOR STATION, AQB-22-26**

23 **I. INTRODUCTION**

24 My name is Todd Sherrill. I am a Permit Specialist in the Minor Source Permitting Unit of
25 the New Mexico Environment Department (“NMED” or “Department”), Air Quality Bureau
26 (“AQB” or “Bureau”). I present this written testimony on behalf of the Bureau for the public
27 hearing on the permit application submitted by Chevron U.S.A. Inc. for Air Quality Permit No.
28 6109M8 for the Chevron Salado Draw 19 Central Tank Battery (“CTB”) and Compressor Station
29 “CS”). The initial application was received by the Bureau on December 6, 2021 [**AR No. 1, Bates**
30 **0001-0322**].

31 My testimony will address the following topics: my qualifications, a summary of
32 Application 6109M8, the administrative and technical review of Application 6109M8, AQB’s
33 public outreach efforts throughout various stages of this permitting action, the basis for conditions

1 in the proposed Draft Permit dated August 4, 2022 [**AR No. 22, Bates 1516-1567**], and responses
2 to comments received by the Bureau concerning this permitting action.

3 **II. QUALIFICATIONS**

4 I received a Bachelor's degree in Biology and a Minor in Psychology from the University
5 of New Mexico in 2002. From 2004-2018, I held various positions as a scientific analyst. I joined
6 the Air Quality Bureau in June 2018 as a Permit Specialist.

7 As a Permit Specialist, I review complex Air Quality Bureau permit applications within
8 regulatory deadlines. This includes administrative and technical reviews. I verify emissions
9 calculations; determine applicable state and federal regulations; coordinate with various
10 stakeholders including the public, industry, consultants, AQB staff and other regulatory agencies
11 to provide quality customer service and aid in the permitting process; write legally enforceable air
12 permits and technical support documents for the administrative record; enter data into the AQB
13 database; and complete various special projects to achieve the Air Quality Bureau's goals. I have
14 worked on over 318 permitting actions for the Bureau and trained new staff on application review
15 requirements and procedures for various permitting action types, regulations, and Bureau policies.
16 My full background and qualifications are set forth in my resume. [**Bureau Exhibit 4**].

17 Throughout the permitting process, if parts of the application are incomplete or inaccurate,
18 it is my responsibility to contact the applicant and request clarifications or corrections, as
19 necessary. Updates to the original application are often required, and it is my responsibility to
20 review all updates for completeness and accuracy. I write technical support documents and a
21 legally enforceable air permit, initially based on standardized AQB template language and
22 monitoring protocols. The template language and monitoring protocols are consistent for similar
23 types of facilities. Unique permitting conditions or modifications to standard template language

1 fee invoice [AR No. 2, Bates 323-324]. On January 5, 2022, I sent the completion letter and the
2 fee invoice [AR No. 30, Bates 1601-1606] to Keaton Byars of Chevron and Chevron's consultant
3 Justin Mechell informing them that the application for the Salado Draw 19 CTB and CS had been
4 ruled administratively complete. I sent the affected parties' letter and Legal Notice to the TCEQ
5 (Texas Commission on Environmental Quality) [AR No. 11, Bates 1339-1342] and sent the legal
6 notice to Erica LeDoux (EPA) and the region 6 EPA office [AR No. 12, Bates 1343-1345]. Staff
7 posted the application and Legal Notice on the Department's website [AR No. 76, Bates 1964,
8 email and posting AR No. 82, Bates 1975], and arranged to have the Public Notice published in
9 the *Albuquerque Journal* [AR No. 75, Bates 1963]. I finished my completeness determination and
10 notice requirements on January 5, 2022.

11 V. TECHNICAL REVIEW

12 The Technical review of Chevron's – Salado Draw 19 CTB and CS (permit # 6109M8)
13 application began on January 5, 2022. The technical review requires verification of emissions
14 calculations and a determination of applicable state and federal regulations. I verified emissions
15 calculations by confirming Department accepted emission factors and formulas were used in
16 calculating emissions for all sources [AR No. 9, Bates 1325-1332]. If methods were unclear, I
17 asked the consultant for further explanation or updates, as necessary. I also verified that the
18 emissions totals from the calculations matched the emissions totals in Section 2 of the application.

19 Per my inquiries and requests for clarification, Justin Mechell, the consultant for Chevron,
20 as well as Keaton Byars of Chevron, submitted several updates to the original Salado Draw 19
21 CTB and CS Application 6109M8, as listed below:

1 2/15/2022 Chevron sent modeling waiver and “Operational Plan to Mitigate Source Emissions
2 During Malfunction, Startup, or Shutdown.” [AR No. 38, Bates 1613-1631]
3 2/14/2022 Chevron clarified: Glycol pump rate, fuel sulfur content, inclusion of SSM units in
4 Table 2-A, clarification on past and present equipment. [AR No. 39, Bates 1632-
5 1635]
6 2/17/2022 Chevron represented flare’s pilot emissions separately from SSM flaring emissions.
7 [AR No. 42, Bates 1638-1645]
8 2/23/2022 Chevron updated Table 2-A with engine serial numbers, flare rated
9 capacity/permitted capacity, and incorporated the flare spec sheet into the
10 application, and a request for the separator’s pressures. [AR No. 46, Bates 1651-
11 1737]
12 3/2/2022 Chevron included the Flash Gas Compressor in the application [AR No. 51, Bates
13 1744-1745]
14 3/2/2022 Chevron provided the manufacture date for the Flash Gas Compressor [AR No. 4,
15 Bates 524-722]
16 3/22/2022 Chevron provided clarification on VOC totals in Table 2-E, clarification of the
17 heating values for the heaters and separators in Table 2-J, clarification of fuel usage
18 of the Reboiler. [AR No. 57, Bates 1760]
19 3/22/2022 Chevron explained that the VOC totals in Table 2-E include Formaldehyde and
20 clarified the basis for the temperatures used to calculate the reboiler emissions. [AR
21 No. 59, Bates 1765-1766]
22 6/16/2022 Chevron confirmed the correct permit number [AR No. 68, Bates 1936]
23 6/16/2022 Chevron confirmed the facility’s proximity to the state of Texas (Section 1-D line
24 8) [AR No. 69, Bates 1937-1938]
25 6/16/2022 Chevron updated the application to acknowledge that the facility is a source of
26 HAPs (Section 1-F, line 4) [AR No. 70, Bates 1939-1940]
27 7/20/2022 Chevron incorporated all changes and updates into a complete pdf application.
28 (Chevron added Malfunction emissions to the 7/20/2022 version of the application)
29 [AR No. 74, Bates 1950-1962]
30

31 The Department has reviewed the emission calculations submitted in the latest version of
32 the application for all regulated equipment and the emission factors relied upon in those
33 calculations. See, Excel spreadsheets [AR No. 1, Bates 238-322] containing manufacturer’s
34 specification sheet emission factors, GRI-GLYCalc simulation, Promax US EPA’s AP-42¹

¹ AP-42 is the EPA’s compilation of emission factors for various industries. Emission factors are representative values that relate the quantity of a pollutant released to the ambient air with an activity associated with the release of that pollutant. (<https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors> [August 18, 2022, 2:28 PM]. These factors are usually expressed as the weight of pollutant divided by a unit weight, volume, Bureau Stmt of Intent Ex. 3
Test. of Todd Sherrill
Chevron 19, AQB 22-26

APPENDIX A

TAB 4

ConocoPhillips Co., Zia Hills Central Facility, NSR Permit No. 7746-M8

No. AQB 21-36

Documents excerpted:

- Hearing Officer's Report (Dec. 27, 2021) [[NMED link](#)]

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**ZIA HILLS CENTRAL FACILITY
(CONOCOPHILLIPS) FOR AN AIR QUALITY PERMIT,
NO. 7746-M8**

AQB 21-36

HEARING OFFICER'S REPORT

I. INTRODUCTION

Applicant ConocoPhillips Company (“COPC”) operates the Zia Hills Facility (“Facility”), a central gathering facility located in Lea County, New Mexico. The Facility receives oil and gas from wells and compresses and dehydrates natural gas before sending them to sales lines. Oil, gas, and water flow separately into the facility. Gas is dehydrated and then reinjected for gas lift or compressed to the sales line. Oil is stabilized then temporarily stored in tanks before being sold via pipeline. Water is processed, then temporarily stored before being shipped offsite via pipeline. Engine emissions are controlled using engine catalysts and emissions from dehydrators are controlled by reboilers and condensers. The Facility also uses a vapor recovery unit (as well as a backup) and three flares to control emissions.

The Facility currently operates under the General Construction Permit – Oil & Gas (“GCP”) issued by New Mexico Environment Department (“NMED”) in 2018. Accordingly, the Facility’s operations are currently subject to the terms and conditions of the GCP, along with other state and federal emissions regulations, including 40 CFR Part 60 Subparts JJJJ and OOOOa.

COPC intends to increase production from the Facility to 18,503 barrels of oil per day and 120 million standard cubic feet per day. In accordance with 20.2.72 NMAC, COPC applied for a minor source New Source Review (“NSR”) permit from the NMED to authorize the production increase and the equipment necessary to support the increase. NMED received

General comment (non-technical) was taken from the public before and during the public hearing, both in writing and as sworn testimony. Five members of the public submitted written comment, one in favor and four opposed to the approval of the Draft Permits. The public member in favor cited fairness of rules and regulations for companies to operate in New Mexico. Those against, cited the air quality and ozone levels in Lea and Eddy Counties and the link between air pollution and climate change. Fourteen public members spoke during the two-day hearing (some of the members had also submitted written comment), all voiced their opposition to the air quality construction permits. The reasons mirrored the written comments but more focused on the potential for ozone pollution produced by oil and gas Facilities to harm human health and the environment. The comments were general in nature.

II. APPLICABLE LAW

New Mexico Air Quality Control Act, NMSA 1978, §§ 74-2-1 to 74-2-17

New Mexico Air Quality Regulations - Construction Permits, 20.2.72 NMAC

New Mexico Environment Department Permitting Procedures – 20.1.4 NMAC

III. RECOMMENDATION

Based upon the Hearing Record as defined in 20.1.4.7 NMAC, including the post-hearing submittals, I recommend that the proposed final Draft Permit be approved, as set forth in the Record with specific conditions to protect the public health and the environment. What follows is drawn from XTO, NMED, and WEG’s proposed findings of fact and conclusions of law based on the evidence that I found relevant, reliable and credible.

IV. FINDINGS OF FACT

Zia Hills Facility Background

30. COPC and COPC's consultants submitted several updates in response to NMED inquiries and requests for clarification between January 2021 and September 2021. NMED Ex. 29 at 5-6.
31. The Department sent a Draft Permit to COPC for review and comment on April 27, 2021. The Department requested comments no later than noon on May 4, 2021. COPC submitted comments on the Draft Permit on May 4, 2021, via email. *See* AR at 0960-1013, 1018-1051; NMED Ex. 29 at 7.
32. Following finalization by AQB staff, the final Draft Permit A version 05.06.21 was signed by Elizabeth Kuen and issued on May 11, 2021. *See* AR at 1056-1108; NMED Ex. 29 at 8.
33. AQB staff reviewed the emission calculations submitted in the application for all regulated equipment and the emission factors relied upon in those calculations. The facility emissions were calculated using Excel spreadsheets using manufacturer's data sheet emission factors, engine test stack data that was submitted to NMED, US EPA's AP-42 Compilation of Air Emissions Factors, or Texas Commission on 5 Environmental Quality (TCEQ) Air Emissions Factors, including TCEQ document RG- 360A/11(February 2012), as well as oil and gas industry software. *See* NMED Ex. 29 at 7.
34. The evidence supports the finding that emission factors used in Application 7746-M8's emission calculations are appropriate for this source type and approved by NMED. The approved calculated emission rates were used in the Bureau's air dispersion modeling analysis, which predicts concentrations of the National Ambient Air Quality Standards ("NAAQS"). *See* NMED Ex. 29 at 7.
35. The Department summarized the technical review of Application 7746-M8 in the Statement of Basis, which is a permitting record that includes a description and history of the Zia Hills

APPENDIX A

TAB 5

Crestwood, Willow Lake Gas Plant, NSR Permit No. 5142-M8

No. AQB 21-38

Documents excerpted:

- Hearing Officer's Report (Dec. 27, 2021) [\[NMED link\]](#)
- Final Order (Feb. 10, 2022) [\[NMED link\]](#)

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**WILLOW LAKE GAS PLANT
(CRESTWOOD NEW MEXICO) FOR AN
AIR QUALITY PERMIT, NO. 5142-M8**

AQB 21-38

HEARING OFFICER'S REPORT

I. INTRODUCTION

On February 19, 2021, Crestwood New Mexico Pipeline LLC (“Crestwood”) submitted an application for modifications to its New Source Review Permit (“Application”) for the Willow Lake Gas Plant (the “Facility”) pursuant to 20.2.72.219.D(1)(a) NMAC. Administrative Record (“AR”) at 007. The Application seeks to add the following equipment to the Facility: three compressor engines, a produced water/condensate tank, and a triethylene glycol dehydration unit and associated reboiler at the Willow Lake Compressor Station. AR:039. This additional equipment will increase the gas gathering capacity of the Facility to accommodate increased production from upstream oil and natural gas producers. Exhibit Crestwood-11 at 4. Increasing Crestwood’s gas gathering capacity will allow upstream producers to send more gas to the Facility in lieu of flaring or venting the gas in the field, thereby avoiding the carbon dioxide and methane emissions associated with wellhead flaring and venting, resulting in positive environmental benefits. *Id.*

The Application also seeks to revise some of the Facility’s existing emission sources. Specifically, to change formaldehyde emissions to account for higher catalyst control efficiency guarantees for seven of the existing compressor engines (i.e., cleaner engine exhaust), increase the volume of liquid throughput going through storage tanks and loaded into tank trucks, increase the volume of gas the Facility may need to control by flaring; and increase the estimate of fugitive components because of the additional equipment added. AR:039.

NMED designated the Application administratively complete on March 18, 2021, and labeled it Permit No. 5142-M8. AR:345. NMED published the Legal Notice and Preliminary Determination (“Notice”) of the Application on March 20, 2021, and a revised Notice on April 22, 2021. AR:361–363. The March 20, 2021 Notice provided the required 30-day public comment period. AR:356–360. The April 22, 2021 Notice included an email address for submission of comments and provided an additional 30-day public comment period (commencing May 28, 2021) in response to a request from WildEarth Guardians (“WEG”). AR:362. In the Notices, NMED concluded the Facility would continue to meet the criteria to be classified as a PSD minor source after Crestwood makes the modifications requested and the Draft Permit is issued. AR:358, 362. WEG filed a request for public hearing in a letter to NMED dated April 16, 2021, which NMED granted. AR:500–503, 510–512.

On September 14, 2021, Crestwood revised portions of the Application to manage an unanticipated increase in condensate at the Facility. AR:583–613. Separately, Crestwood submitted an administrative revision to NMED on September 14, 2021, requesting authorization for four (4) electric powered pumps, which will be used to pump liquids from the produced water/condensate tanks at Willow Lake 1 and the Willow Lake Compressor Station into the Orla Express Pipeline. See Exhibit Crestwood-11 at 6.

These revisions resulted in a further decrease in emissions at the Facility by eliminating tank truck load venting to atmosphere and the control of tank truck vapors from Willow Lake 1 and Willow Lake Compressor Station storage tank offloading. *Id.*

NMED supported the requested revisions and incorporated them into the Draft Permit. NMED sent the revised Draft Permit to WEG on September 21, 2021, and posted it to the NMED website on September 22, 2021. Exhibit NMED 25 at 7. NMED posted the revised Draft

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**WILLOW LAKE GAS PLANT
(CRESTWOOD NEW MEXICO) FOR AN
AIR QUALITY PERMIT, NO. 5142-M8**

AQB 21-38

FINAL ORDER

This matter comes before the Deputy Secretary of Environment¹ following a public hearing before the Hearing Officer on October 25-26, 2021. The public hearing was held virtually via the Zoom platform with the option for individuals to attend the virtual hearing at a location within the appropriate geographical area, consistent with the Amended Scheduling Order entered August 6, 2021.

Crestwood New Mexico Pipeline LLC (“Crestwood”) seeks to modify its existing New Source Review Permit for the Willow Lake Gas Plant (“Facility”) by the addition of three compressor engines, a produced water/condensate tank, and a triethylene glycol dehydration unit and associated reboiler at the Willow Lake Compressor Station. This additional equipment will increase the gas gathering capacity of the Facility to accommodate increased production from upstream oil and natural gas producers. Increasing Crestwood’s gas gathering capacity will allow upstream producers to send more gas to the Facility in lieu of flaring or venting the gas in the field, thereby avoiding the carbon dioxide and methane emissions associated with wellhead flaring and venting, resulting in positive environmental benefits.

In addition, Crestwood seeks to revise some of the Facility’s existing emission sources. Specifically, to change formaldehyde emissions to account for higher catalyst

¹ See June 25, 2021, Delegation of Authority.

control efficiency guarantees for seven of the existing compressor engines (i.e., cleaner engine exhaust), increase the volume of liquid throughput going through storage tanks and loaded into tank trucks, increase the volume of gas the Facility may need to control by flaring, and increase the estimate of fugitive components because of the additional equipment added.

Following both an administrative and technical review, NMED issued Draft Permit No. 5142-M8 on March 18, 2021. The New Mexico Environment Department's Air Quality Bureau supports approval of the Draft Permit allowing construction and modification of the Facility with permit conditions necessary to protect human health and welfare and the environment.

Having considered the Hearing Record as defined in 20.1.4.7 NMAC, including all post-hearing submittals and the Hearing Officer's Report, and being otherwise fully advised regarding this matter,

THE DEPUTY SECRETARY HEREBY ADOPTS THE HEARING OFFICER'S REPORT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IT IS THEREFORE ORDERED:

The application for an air quality permit is granted, and the permit shall be issued by the Air Quality Bureau in the form set forth in the Draft Permit, as shown in the Administrative Record.

REBECCA ROOSE, Deputy Secretary of Environment

APPENDIX A

TAB 6

DLK Black River Midstream, LLC, Black River Gas Processing Plant

No. AQB 22-25

Documents excerpted:

- NMED Ex. 1, Technical Testimony of Julia Kuhn, No. AQB 22-25 (filed Aug. 29, 2022) [\[NMED link\]](#)
- Hearing Officer's Report and Recommended Decision (Dec. 8, 2022) [\[NMED link\]](#)
- Final Order (Dec. 16, 2022) [\[NMED link\]](#)

1 **STATE OF NEW MEXICO**
2 **BEFORE THE SECRETARY OF ENVIRONMENT**

3 **IN THE MATTER OF THE APPLICATIONS OF**
4 **DLK BLACK RIVER MIDSTREAM, LLC** **AQB 22-25**
5 **FOR AN AIR QUALITY PERMIT NO. 6567-M8**
6 **FOR THE BLACK RIVER GAS PROCESSING PLANT**

7
8 **CHEVRON USA INC.**
9 **FOR AN AIR QUALITY PERMIT NO. 6109-M8** **AQB 22-26**
10 **FOR THE SALADO DRAW 19 CENTRAL**
11 **TANK BATTERY AND COMPRESSOR STATION**

12
13 **CHEVRON USA INC.**
14 **FOR AN AIR QUALITY PERMIT NO. 6832-M8** **AQB 22-27**
15 **FOR THE SALADO DRAW 23 COMPRESSOR**
16 **STATION AND TANK BATTERY**

17
18 **TECHNICAL TESTIMONY OF JULIA KUHN IN SUPPORT OF THE APPROVAL OF**
19 **THE APPLICATION OF DLK BLACK RIVER MIDSTREAM, LLC FOR AN AIR**
20 **QUALITY PERMIT NO. 6567-M8 FOR THE BLACK RIVER GAS PROCESSING**
21 **PLANT, AQB 22-25**

22 **I. INTRODUCTION**

23 My name is Julia Kuhn. I am a Permit Specialist in the Major Sources Permitting Section
24 of the Air Quality Bureau (“AQB” or “Bureau”) of the New Mexico Environment Department
25 (“NMED” or “Department”).

26 I present this written testimony on behalf of the Bureau for the public hearing on the New
27 Source Review (NSR) construction permit application submitted by DLK Black River Midstream,
28 LLC (“Black River”) for a modification of its Black River Gas Processing Plant (“Original
29 Application” and “Revised Application,” and collectively, the “Application”). [AR No. 1 and 4,
30 Bates 001-291 and Bates 294-565].

31 My testimony will address the following topics: my qualifications, a summary of
32 Application 6567M8, administrative review of Application 6567M8, technical review of
33 Application 6567M8, AQB’s public outreach efforts throughout various stages of this permitting

Bureau Statement of Intent
 Exhibit 1

1 data; adding a process heater; and adding Startup, Shutdown, Maintenance, and Malfunction
2 emissions.

3 The facility is currently permitted under a General Construction Permit, NSR GCP-O&G
4 6567M7, issued on August 28, 2020. The proposed permit will add additional conditions and
5 requirements for monitoring, testing, recordkeeping, and reporting.

6 **IV. ADMINISTRATIVE REVIEW**

7 Application 6567M8 was received by the New Mexico Environment Department on May
8 5, 2021. Pursuant to 20.2.72.207(A) NMAC, the Department had 30 days to review the Application
9 and determine whether it was administratively complete.

10 The administrative review of an application is not a technical review, but a review of the
11 presence of the required parts of the application, including the applicant's modeling analysis, the
12 applicant's proof of public notice, and a notarized certification stating that the information and
13 data submitted in the application is true and accurate. All required contents of an application are
14 listed in 20.2.72.203 NMAC. Upon receipt of Application 6567M8, the applicant's modeling files
15 were submitted to the AQB Modeling Manager, Mr. Sufi Mustafa, for assignment to an AQB
16 dispersion modeler. On May 13, 2021, I sent a "notification to modeler" via email to inform Mr.
17 Mustafa of Application 6567M8 and modeling files. The modeling for this project was assigned
18 to Angela Raso. **[AR No. 25, Bates 990-992].**

19 Based on fee units in 20.2.75 NMAC and applicable regulations, the Bureau calculated the
20 permit fee for Black River's Application 6567M8, and administrative staff generated the
21 corresponding invoice. **[AR No. 2, Bates 292].** On May 25, 2021, the Bureau ruled Application
22 **6567M8 administratively complete.** **[AR No. 6, Bates 568-573].** The Bureau sent the completion

determination letter, which includes a copy of the Department's Legal Notice, and the invoice for the permit fee to Black River on May 25, 2021. [AR No. 34, Bates 1010].

V. TECHNICAL REVIEW AND PROCESSING OF THE APPLICATION

After the Application was determined to be administratively complete, technical review of Black River's Application 6567M8 began. The technical review requires verification of emissions calculations and a determination of applicable federal regulations and state regulations.

Emissions calculations are verified by confirming the correct emission factors and formulas used to calculate emissions for all sources. If methods are unclear in the Application, the consultant must provide explanations or updates, as necessary. The emissions totals from the calculations must be in agreement with the emissions totals reported in Section 2 of the Application.

In general, I requested updates and/or clarifications of discrepancies in the Application if they became apparent while writing Draft Permit 6567M8. I received an updated version of the Application on September 15, 2021; the Bureau posted the updated version on the NMED website on September 21, 2021. The Bureau has reviewed the emission calculations submitted in the Application for all regulated equipment and the emission factors relied upon in those calculations. The facility emissions were calculated using Excel spreadsheets and manufacturer's data sheet emission factors, Texas Commission on Environmental Quality ("TCEQ") emission factors, or US EPA's AP-42 Compilation of Air Emission Factors, as well as oil and gas industry software.

The emission factors used in the calculations are appropriate for this source type and are approved by the Bureau. The approved calculated emission rates were used as inputs into the Bureau's air dispersion modeling analysis. The air dispersion model predicts concentrations of the

1 requirements to ensure compliance and allow the Bureau to verify compliance with the terms of
2 the permit.

3 A permit has three parts, A, B and C. Conditions in Part A of the permit are Facility
4 Specific Requirements. They are site-specific and based on information provided in the
5 Application. Conditions in Part B of the permit are General Conditions and standard language
6 which generally apply to all sources. Part C is also standard language about supporting online
7 documents, definitions, and acronyms which apply to all sources.

8 A draft permit is a dynamic working document which may be updated throughout the
9 review process. Draft Permit 6567M8 started with standardized language in an AQB permit
10 template and standardized AQB monitoring protocols added as appropriate for the sources of
11 emissions and control devices at a proposed facility. Unique permitting conditions for site specific
12 operations and equipment, based on information provided in the Application were added to
13 customize the permit, as appropriate.

14 Permit conditions establish ongoing testing and monitoring requirements for processes and
15 pieces of equipment to ensure the equipment will operate in compliance with the permitted
16 emission limits.

17 **VIII. RESPONSES TO COMMENTS RECEIVED ON THE APPLICATION**

18 The Air Quality Bureau received public comments from WEG on this Application on June
19 24, 2021, during the 30-day comment period following publication of the Bureau's newspaper
20 legal notice on May 27, 2021. [AR No. 9, Bates 577-579]. On September 8, 2021, the Bureau
21 started the 30-day analysis period on the draft permit and sent the draft permit and draft Statement
22 of Basis to WEG. [AR No. 45, Bates 1079]. On October 8, 2021, AQB received a second set of
23 comments from WEG. [AR No. 46, Bates 1080-1081; AR No. 24, Bates 987-989]. Finally, on

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF THE APPLICATION OF
DLK BLACK RIVER MIDSTREAM, LLC
FOR AN AIR QUALITY PERMIT NO.6567-M8,
BLACK RIVER GAS PROCESSING PLANT

AQB 22-25

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

I. Introduction

This matter came before Hearing Officer Gregory Chakalian on the request for hearing made by WildEarth Guardians (Guardians) on June 24, 2021. [AR No. 21, Bates 0979-0982]. The New Mexico Cabinet Secretary of Environment granted the request for hearing filed in the Office of Public Facilitation (OPF) on June 30, 2022. [AR No. 30, Bates 1000-1004]. Pursuant to the Scheduling Order of July 12, 2022, the permit challenge was scheduled for a public hearing, which was held on October 3, 2022. The hearings for Chevron's Salado Draw 19 and Salado Draw 23 were consolidated with a hearing for DLK Black River Midstream, LLC by stipulation of the Parties and pursuant to the July 12, 2022 Scheduling Order.

Guardians challenged the issuance of draft NSR Air Quality Permit No. 6567-M8 (Draft Permit) for the Black River Gas Processing Plant requested by Applicant DLK Black River Midstream, LLC (DLK or Applicant) on the single issue of the enforceability of the emissions limit for malfunction venting in condition A107. Guardians failed to present an affirmative case on the challenged condition—filing no technical testimony, presenting no expert witnesses, and submitting no evidence into the administrative record. Thus, Guardians failed to meet its burden in opposition to issuance of the permit and on the challenged permit conditions.

In contrast, the New Mexico Environment Department (NMED or Department) and the Applicant have met their respective burdens in support of the Draft Permit. Accordingly, NMED's determination to issue the Draft Permit should be upheld.

III. Facility and Permit Application

The Black River Gas Processing Plant (Gas Plant) is an existing natural gas processing plant located in Eddy County, New Mexico, approximately 2.1 miles southwest of Loving. DLK Ex. 1 at 2; [AR No. 1, Bates 0254]. The primary function of the plant is to remove carbon dioxide, water, and natural gas liquids from sweet field gas to meet pipeline specifications. DLK Ex. 1 at 2; [AR No. 1, Bates 0254]. The plant has been designated a primary Standard Industrial Classification (SIC) Code of 1321. DLK Ex. 1 at 2; [AR No. 1, Bates 0254]. The Gas Plant currently operates under a General Construction Permit, NSR GCP O&G Permit, 6567-M7, issued on August 28, 2020. DLK Ex. 1 at 2; NMED Ex. 1 at 3.

DLK submitted an NSR modification Application to NMED on May 3, 2021. DLK Ex. 1 at 2; [AR No. 1, Bates 001-291]. The proposed modification will supersede the GCP O&G Permit, 6567-M7 for the Gas Plant with a standard NSR construction permit. DLK Ex. 1 at 2. Among other things, the modification seeks to increase permitted emissions at the facility resulting from the following: changes in operation time of engines from 2190 hours/year to 8760 hours/year, and revision of emissions based on manufacturer's data. DLK Ex. 1 at 2; NMED Ex. 1 at 2-3. This modification also includes addition of a stabilizer heater (HT-803) and Startup, Shutdown, and Maintenance (SSM) and malfunction emissions to the permit. DLK Ex. 1 at 2; NMED Ex. 1 at 2-3.

NMED deemed the Application administratively complete on May 25, 2021. [AR No. 6, Bates 0568-0573]. In response to requests for updates and clarifications from NMED, the Application was revised in September 2021. [AR No. 4, Bates 0294-0565]; NMED Ex. 1 at 4. NMED conducted a technical review of the Application and prepared the Draft Permit under consideration (proposed Permit Number 6567-M8). [AR No. 20, 0922-0978]; NMED Ex. 1 at 3-7.

emissions based on manufacturer's data. This modification also includes addition of a stabilizer heater (HT-803) and startup, shutdown, and maintenance (SSM) and malfunction emissions to the permit. DLK Ex. 1 at 2; NMED Ex. 1 at 2-3

4. NMED ruled the Application administratively complete on May 25, 2021. [AR No. 6, Bates 0568-0573].
5. Legal notice was sent to the State of Texas and EPA Region 6 on May 25, 2021. [AR No. 7, Bates 0574; 14 AR No. 29, Bates 0999; AR No. 28, Bates 0998].
6. Legal notice was posted on the NMED website on May 25, 2021 and published in the Carlsbad Current Argus on May 27, 2021. The notice stated that NMED had made a preliminary determination that the facility will comply with state and federal requirements as well as noted its preliminary intent to issue the air quality permit. Interested persons were advised that they could obtain the draft air quality permit, submit written comments, or request a public hearing. [AR No. 27, Bates 996-997; AR No. 9, Bates 577-579].
7. On June 24, 2021, Guardians submitted comments and a request for public hearing to NMED related to the permit modification. [AR No. 21, Bates 0979-0982].
8. The New Mexico Cabinet Secretary of Environment granted the request for hearing on August 6, 2021, subsequently docketed in OPF on June 30, 2022. [AR No. 30, Bates 1000-1004].
9. NMED conducted a technical review of the Application and prepared a public notice, draft permit, and draft analysis on September 8, 2021. [AR No. 15, Bates 765-778; AR No. 1516, Bates 779-835]; NMED Ex. 1 at 56.
10. In response to requests for updates and clarifications from NMED, the Application was

revised in September 2021. [AR No. 4, Bates 0294-0565]; NMED Ex. 1 at 4.

11. On October 8, 2021, Guardians submitted additional comments in response to a second 30-day comment period for the proposed permit. [AR No. 24, Bates 0987-0989].

12. NMED prepared a revised draft permit (proposed Permit Number 6567-M8) on January 21, 2022, which is the Draft Permit under consideration. [AR No. 20, 0922-0978].

B. Procedural Timeline

13. On July 1, 2022, NMED issued a Notice of Hearing and Appointment of Gregory Chakalian, Administrative Law Judge and Hearing Officer for the DLK matter (AQB 22-25).

14. On July 8, 2022, the Hearing Officer conducted a prehearing scheduling conference with all Parties in attendance and issued a Scheduling Order consolidating three matters for a public hearing to be held virtually and in a physical location in the Southeast region of the State of New Mexico starting on October 3, 2022 and continuing on subsequent days as necessary. The Scheduling Order also required that Guardians file on or before July 19, 2022 a statement of issues “stat[ing] with specificity every challenge Guardians will pursue at the public hearing.”

15. On July 19, 2022, Guardians submitted its Statement of Issues identifying the single issue of the practical enforceability of the Malfunction Venting annual emission limit for VOCs set forth in Table 107.A as part of draft permit condition A107.A. Guardians’ Stmt of Issues.

16. On August 29, 2022, Guardians filed its Entry of Appearance stating that “the legal enforceability of draft permit condition A107.A is at issue with regards to the Malfunction Venting annual emission limit for VOCs set forth in Table 107.A.”

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION OF
DLK BLACK RIVER MIDSTREAM, LLC
FOR AN AIR QUALITY PERMIT NO. 6567-M8,
BLACK RIVER GAS PROCESSING PLANT**

AQB 22-25

FINAL ORDER

This matter comes before the New Mexico Cabinet Secretary of Environment following a public hearing conducted by Gregory Chakalian, Administrative Law Judge, Office of Public Facilitation, and appointed Hearing Officer on October 3, 2022, via the Webex virtual platform, and in-person at the Carlsbad Field Office located at 406 N. Guadalupe, Suite C, Carlsbad, NM 88220. The Scheduling Order entered as of record July 12, 2022, consolidated 3 similar matters to be held in a hybrid fashion to encourage public participation.

The Black River Gas Processing Plant (Gas Plant) is an existing natural gas processing plant located in Eddy County, New Mexico, approximately 2.1 miles southwest of Loving. The primary function of the plant is to remove carbon dioxide, water, and natural gas liquids from sweet field gas to meet pipeline specifications. The plant has been designated a primary Standard Industrial Classification (SIC) Code of 1321. The Gas Plant currently operates under a General Construction Permit, New Source Review (NSR) Oil & Gas Permit, 6567-M7, issued on August 28, 2020.

DLK submitted an NSR modification Application to the New Mexico Air Quality Bureau (NMED) on May 3, 2021. The proposed modification will supersede Permit 6567-M7 with a standard New Source Review (NSR) construction permit. Among other things, the modification seeks to increase permitted emissions at the facility resulting

from the following: changes in operation time of engines from 2190 hours/year to 8760 hours/year, and revision of emissions based on manufacturer's data. This modification also includes addition of a stabilizer heater (HT-803) and Startup, Shutdown, and Maintenance (SSM) and malfunction emissions to the permit.

NMED deemed the Application administratively complete on May 25, 2021. In response to requests for updates and clarifications from NMED, the Application was revised in September 2021. NMED conducted a technical review of the Application and prepared the Draft Permit under consideration (proposed Permit Number 6567-M8).

Having considered the Hearing Record as defined in 20.1.4.7 NMAC, including all post-hearing submittals and the Hearing Officer's Report, and being otherwise fully advised in this matter,

THE CABINET SECRETARY OF ENVIRONMENT HEREBY ADOPTS THE HEARING OFFICER'S REPORT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IT IS THEREFORE ORDERED:

The application for Air Quality Permit No. 6567-M8 is hereby granted, and the Final Permit shall be issued by the Air Quality Bureau in the form set forth in the Draft Permit.

 Digitally signed by James Kenney
Date: 2022.12.04 12:23:53 -07'00'

JAMES C. KENNEY, Cabinet Secretary of Environment

APPENDIX A

TAB 7

Roper Construction, Inc., Alto Concrete Batch Plant, Permit No. 9295

No. AQB 21-57(P); No. EIB 22-34

Documents excerpted:

- NMED Ex. 1, Technical Testimony of Deepika Saikrishnan, No. AQB 21-57 (filed Jan. 19, 2022) [\[NMED link\]](#)
- Order Denying Motion to Dismiss, No. AQB 21-57(P) (Dec. 27, 2021) [\[NMED link\]](#)
- NMED Response to Motion to Dismiss, No. EIB 22-34 (Oct. 13, 2022) [\[NMED link\]](#)

**STATE OF NEW MEXICO
BEFORE THE DEPUTY SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION
OF ROPER CONSTRUCTION, INC.
FOR AN AIR QUALITY PERMIT**

AQB 21-57 (P)

TECHNICAL TESTIMONY OF DEEPIKA SAIKRISHNAN

I. INTRODUCTION

My name is Deepika Saikrishnan. I am a Permit Specialist in the Technical Services Unit of the Permitting Section of the Air Quality Bureau (“AQB or Bureau”) of the New Mexico Environment Department (“NMED” or “Department”). I present this written testimony on behalf of the Department for the public hearing on the permit application submitted by Roper Construction, Inc. (“RCI”). Citizens challenge the Department’s issuance of Air Quality Permit No. 9295 to Roper Construction, Inc. for the Alto Concrete Batch Plant (“Alto CBP”) in Lincoln County, New Mexico. RCI’s air permit application 9295 (“Application 9295”) for its Alto Concrete Batch Plant was received by the New Mexico Environment Department on June 22, 2021. [AR No. 1, Bates 0001-0190]. Citizens contend that the Department’s issuance of the proposed RCI permit would have negative impacts on air quality; endanger public health; increase noise and vehicle traffic on public roads; impact the night sky with light pollution; degrade natural beauty and quality of life for residents; and threaten wildlife, tourism, water quality, water conservation and property values.

As a Permit Writer, it is my responsibility to conduct a complete and thorough review of an air quality permit application, including an administrative review and a technical review. I coordinate with various stakeholders including the public, industry, consultants, Air Quality Bureau staff, and other regulatory agencies to provide quality customer service and aid in the permitting process. If parts of the application are incomplete or inaccurate, it is my responsibility

1 to contact the applicant and request clarifications or corrections, as necessary. Updates to the
2 original application are often required, and it is my responsibility to review all updates for
3 completeness and accuracy. I write technical support documents and a legally enforceable air
4 permit, initially based on standardized AQB template language and monitoring protocols. The
5 template language and monitoring protocols are consistent for similar types of facilities. Unique
6 permitting conditions or modifications to standard template language are typically required for site
7 specific operations and equipment, based on information provided in the application. I customize
8 the permit to the specifics of the application with site specific conditions and the recommendations
9 of the air dispersion modeling staff to ensure the facility will operate as represented in the
10 company's application and comply with all applicable state and federal regulations and ambient
11 air quality standards.

12 My testimony will address the following topics: my qualifications, a summary of
13 Application 9295, an overview of the construction permits authorized under 20.2.72 NMAC, my
14 administrative review of Application 9295, the technical review of Application 9295, AQB's
15 public outreach efforts throughout various stages of this permitting action, and the basis for
16 conditions in the 2021-12-30 version of Draft Permit 9295 for RCI's proposed facility.

17 **II. QUALIFICATIONS**

18 I have been an employee of the Bureau for approximately three years, working as a Permit
19 Specialist. As a Permit Specialist, I perform technical and regulatory review of complex Air
20 Quality Bureau permit applications within regulatory deadlines. I verify emissions calculations;
21 determine applicable state regulations and federal regulations; coordinate with various
22 stakeholders including the public, industry, consultants, and AQB staff; review air permit
23 applications and technical support documents for the administrative record; enter data into the

1 On June 3, 2021, the Bureau received a call from a citizen concerned about this application.
2 There were several letters and calls from citizens concerned in the following days. Upon receipt
3 of the hard copy application on June 22, 2021, on June 23, 2021, I requested RCI's consultant Paul
4 Wade to provide the electronic version of the documents due to the mandatory teleworking policy
5 in place at that time. Paul Wade provided the electronic documents to me and the modeling files
6 to the Bureau's Modeling Section. A copy of Application 9295 was posted on the AQB web page
7 for permit applications with public interest on June 23, 2021 [**AR No. 94, Bates 1741**].

8 The administrative review of an application is not a technical review, but a review of the
9 presence of the required parts of the application, including the applicant's modeling analysis and
10 the applicant's proof of public notice. All required contents of the application are listed in
11 20.2.72.203 NMAC. On June 28, 2021, I received an email from AQB's Modeling Section
12 manager Sufi Mustafa confirming that Application 9295 could be ruled complete from a modeling
13 perspective [**AR No. 89, Bates 0965-0966**]. On July 19, 2021, I sent an email to RCI's consultant
14 Paul Wade, requesting the property tax record, the certified mail receipt for Reynaldo Cervantes,
15 and an example of the letter sent to the landowners [**AR No. 36, Bates 0481**]. Mr. Paul Wade
16 responded on July 19, 2021, providing the list provided by the Lincoln County Assessor's office,
17 the certified mail receipt for Reynaldo Cervantes's Mexico address which was already present in
18 the original application, and a statement that the letter sent to the government officials was also
19 sent to the landowners [**AR No. 37, Bates 0482-0487**].

20 After I calculated the permit fee for RCI's application 9295 based on fee units in 20.2.75
21 NMAC and applicable regulations, AQB's administrative staff generated an invoice for the permit
22 fee. On July 22, 2021, I ruled application 9295 administratively complete [**AR No. 38, Bates 0488-**
23 **0493**]. I sent the completion determination letter, including a copy of the Department's Legal

1 Notice, and invoice for the permit fee to the applicant on July 22, 2021[**AR No. 38, Bates 0488-**
2 **0493**]. I also sent the Department's Legal Notice to EPA Region 6, Erica LeDoux, and Mary
3 Layton at EPA [**AR No. 97, Bates 1839-1841**]. I sent an email on July 22, 2021 to Ms. Christina
4 Thompson, Recreation/Lands/Minerals Staff Officer, Forest Service, Lincoln National Forest,
5 Smokey Bear Ranger District requesting the contact details for the appropriate authority to notify
6 Class I area-White Mountain Wilderness [**AR No. 96, Bates 1835-1836**]. She responded providing
7 the contact details of the appropriate authority [**AR No. 96, Bates 1837**]. I then sent the
8 Department's Legal Notice to Lincoln National Forest and Smokey Bear Ranger District; Christina
9 Thompson, Camille Howes, Travis Moseley and Andres Bolanos [**AR No. 97, Bates 1839-1841**].
10 The Department's Legal Notice was posted on the AQB website on the web page for permit
11 applications with public interest [**AR No. 106, Bates 2020**]. AQB's administrative staff sent the
12 Department's Legal Notice to *Ruidoso News* for publication, and it was published in that
13 newspaper on July 28, 2021[**AR No. 104, Bates 1980**].

14 VI. TECHNICAL REVIEW

15 I began the technical review of RCI's application 9295 after I determined it was
16 administratively complete. The technical review requires verification of emission calculations and
17 a determination of applicable federal regulations and state regulations.

18 While performing the technical review, it was determined that the emissions represented
19 for Unit 12 were from 3 heaters combined and since there were 3 units, an additional fee was
20 calculated and an invoice for the additional two heaters was sent to the applicant on August 5,
21 2021. While I performed my technical review, I noticed that Section 1D-question 7 and question
22 11(not answered) were not reflective of the notification provided to Mescalero Tribe in the original
23 application (page 105 of the original application) [**AR No. 1, Bates 0001-0190**] and requested the

1 updates for those questions from Paul Wade on August 7, 2021 [AR No. 43, Bates 0515-0516]
2 and I received the updates on August 10, 2021. I verified emission calculations by confirming the
3 correct emission factors and formulas were used in calculating emission for all sources [AR No.
4 5, Bates 0208-0241]. If methods and calculations were not clear, I asked the consultant for further
5 explanation on updates as necessary. I also verified the emission totals from the calculations
6 matched the emissions total in Section 2 of the application.

7 RCI's consultant, Paul Wade, submitted several updates to the original RCI application
8 9295 throughout the review process. Below is a list of dates of application updates:

9 08/10/21 Section 1- 1C, 1D, Section 2- 2A, 2D and 2E, Section 5, Section 6-page 3, Section 16
10 [AR No. 45, Bates 0518-0602].

11 09/22/21 Section 2- 2D,2E, 2H, 2I and 2J [AR No. 70, Bates 0712-0798].

12 11/5/21 Section 11- 11A [AR No. 75, Bates 0811-0813].

13 11/17/21 Section 3, 4, 6 and 13 [AR No. 77, Bates 0871-0821; AR No. 108, Bates 2029-2053].

14 12/21/21 Section 1 [AR No. 78, Bates 0822-0824].

15 12/29/21 Section 16 [AR No. 83, Bates 0861-0880].

16 12/30/21 Section 1 [AR No. 84, Bates 0881-0883].

17 1/4/22 Section 9 [AR No. 86, Bates 0887-0896].

18 1/13/22 Section 6, Section 7 [AR No. 87, Bates 0897-0960].

19 I requested some of these updates while doing my technical review of the calculations. I requested
20 other updates if discrepancies in the application became apparent while writing the Draft Permit
21 9295.

22 The Department has reviewed the emission calculations submitted in the application for all
23 regulated equipment and the emission factors are based upon US EPA's AP 42 Compilation of Air

1 Emission Factors [AR No. 1, 0001-0190; AR No. 5, 208-241]. AP-42 is the EPA's compilation of
2 emission factors for various industries. Emission factors are representative values that relate the
3 quantity of a pollutant released to the ambient air with an activity associated with the release of
4 that pollutant. ([https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-](https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors)
5 [air-emissions-factors](https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors) [January 19, 2022, 9:53 AM]). These factors are usually expressed as the
6 weight of pollutant divided by a unit weight, volume, distance, or duration of the activity emitting
7 the pollutant. The factors are expressed in units such as pounds per ton of material processed and
8 pounds per hour. Such factors facilitate estimation of emissions from various sources of air
9 pollution. In most cases, these factors are averages of all available data of acceptable quality and
10 are generally assumed to be representative of long-term averages.

11 The emission factors used in the calculations are appropriate for this source type and are,
12 thus, approved by the Department. The approved calculated emission rates were used as inputs
13 into the Department's air dispersion modeling analysis. The air dispersion model conservatively
14 predicts concentrations of the National Ambient Air Quality Standards (NAAQS) based upon the
15 approved emission rates.

16 As I performed my technical review, I began to write the Draft Permit and the Draft
17 Statement of Basis. The Statement of Basis is a permitting record that includes a description and
18 history of the facility, public response received by the Department, a regulatory compliance
19 discussion, and unique conditions in the permit. After completing the initial draft permit version
20 2021-09-13, I sent it to Paul Wade for comments on September 13, 2021 [AR No. 68, Bates 0678-
21 0693] and I received a response on the draft permit on September 15, 2021[AR No. 69, Bates
22 0694-0711]. The applicant requested updates to condition A108B monitoring and record keeping,
23 condition A112 Haul Roads, condition A502 Process Equipment and to condition A503C. I also

1 written after incorporating all the calculation updates provided by the consultant. Updates related
2 to typographic errors, address update for the facility and incorrect unit number references were
3 provided by the applicant later and all the updates were posted on the Department's webpage for
4 public notices under Lincoln County **[AR No. 106, Bates 2002 -2023]**.

5 An updated version of the draft permit named Draft Permit Version 2021-12-30 **[AR No. 9, Bates**
6 **0338-0395]**, updated version of the draft Statement of Basis named Statement of Basis Version
7 2021-12-30 **[AR No. 2, Bates 0191-0198]** and the draft Database Summary version 2021-12-30
8 **[AR No. 3, Bates 0199-0203]** were posted on the Department's webpage for public notices under

9 Lincoln County. AQB created a document titled Frequently asked Questions in response to
10 citizens' comments and questions and posted it on the Department's webpage for public notices
11 under Lincoln County on 12-30-2021. **[AR No. 99-102, Bates 1917-1967; AR No. 106, Bates**
12 **2002 -2023]**. The FAQs were developed by grouping like-kind public comment questions into 19
13 FAQs with answers **[AR No.103, Bates 1968-1979]**. The Scheduling Order for the hearing date
14 stated that the hearing is scheduled for February 9, 2022 and may continue through February 11,
15 2022. AQB staff made arrangements for a Spanish interpreter to be present at the hearing and for
16 a court reporter to be present at the hearing. AQB staff wrote a notice of Hearing per requirements
17 in 20.1.4 NMAC. The Notice of hearing was translated into Spanish and received by AQB on
18 December 21, 2021. On December 30, 2021 the Notices of Hearing both English and Spanish
19 were posted on the Department's webpage for public notices under Lincoln County under Roper
20 Construction Inc's documents. AQB Administrative staff e-mailed requests for publication of the
21 Notice of Hearing in English and the Notice of Hearing in Spanish to *The Albuquerque Journal*
22 and *Ruidoso News* on December 30, 2021. The Notice of Hearing was published in English and in
23 Spanish in *The Albuquerque Journal* and *Ruidoso News* on January 5, 2022 **[AR No. 104, Bates**

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF THE APPLICATION
OF ROPER CONTRUCTION INC.
FOR AN AIR QUALITY PERMIT
NO. 9295, ALTO CONCRETE BATCH PLANT

AQB 21-57(P)

ORDER DENYING MOTION TO DISMISS

THIS MATTER having come before the Hearing Officer on the motion to dismiss Roper Construction Inc.'s ("Roper") permit application and case number AQB 21-57(P), filed by The Ranches of Sonterra Property Owners Association, Don "Donnie" R. Weems and Kathleen Weems ("Movants"), and the Hearing Officer having reviewed the responses filed by Roper and the Air Quality Bureau of the New Mexico Environment Department ("Bureau"), and having heard the arguments of Mr. Hnasko, counsel for the Movants, Mr. Rose, counsel for Roper, and Mr. Vigil, counsel for the Bureau,

FINDS:

1. The leading case on adequacy of notice is *Nesbit v. City of Albuquerque*, 91 N.M. 455, 1977-NMSC-107. The Supreme Court held that the lack of notice rendered subsequent proceedings void. *Id.* at 457. The Court began by noting that

[l]ack of statutory notice is generally held to be a jurisdictional defect which renders the [administrative] action . . . void. However, this rule is tempered somewhat by the fact that New Mexico does not take a strict view regarding compliance with statutory notice requirements. Instead, substantial compliance with the statutory notice provisions would satisfy the purpose of the statute."

Id.

2. The content of the notice was not at issue.

3. The Hearing Officer rejected the arguments advanced in the responses that regulatory notice is somehow less binding a governmental agency than statutory notice, and that the Movants lacked standing.

Notice to Owners of Record

13. Movants asserted by affidavit that the notice was posted on a barbed wire fence, about 40 feet from the road on a laminated sign using 10-point font. Therefore, the notice was not “conspicuously” posted at the entrance of the proposed facility.
14. The Bureau asserted that the regulation requires the posting of notice in an accessible and conspicuous *place*, and the barbed wire fence satisfied the rule. Moreover, as the location is currently a vacant lot, there is no “entrance” to post.
15. The Hearing Officer ruled that Roper did substantially comply with the notice requirement in posting the notice where it did.

Administrative Completeness

16. Movant asserted that the Application must be dismissed based on information missing from Section 1-D questions 7 and 11 originally left unanswered.
17. The Bureau attached the revised Application dated August 9, 2021 (three months before Movants filed their motion) which showed the Application was corrected and revised during the Bureau’s review process.
18. The Hearing Officer ruled the omissions identified by Movants were addressed by Roper.

THE HEARING OFFICER concludes that the motion is not well taken and is, therefore,
DENIED.

**Gregory
Chakalian**

Digitally signed by
Gregory Chakalian
Date: 2021.12.24 11:43:04
-07'00'

Gregory Chakalian, Hearing Officer

**STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF THE PETITION FOR
HEARING ON AIR QUALITY PERMIT NO.
9295, ROPER CONSTRUCTION INC.'S
ALTO CONCRETE BATCH PLANT**

No. EIB 22-34

**Roper Construction Inc.,
Petitioner**

**NEW MEXICO ENVIRONMENT DEPARTMENT'S RESPONSE TO
ALTO'S MOTION TO DISMISS PETITION OF ROPER**

Pursuant to 20.1.2.113(D) NMAC, the New Mexico Environment Department ("Department" or "NMED"), submits this Response to the Motion to Dismiss Petition of Roper Construction, Inc., or in the Alternative, to Preclude Roper Construction, Inc. from Presenting New Evidence that was not Presented in the Proceeding Before the New Mexico Environment Department ("Motion to Dismiss") filed by the Alto Coalition for Environmental Preservation ("Alto") in the above-captioned matter. The Department requests that the Hearing Officer deny this Motion on the following grounds:

I. PERMIT APPEALS BEFORE THE BOARD ARE *DE NOVO*

Alto asks the Board to construe its role as analogous to that of the Court of Appeals – that is, as an “appellate” body that generally only reviews the record below in cases coming from evidentiary tribunals. Alto makes the simplistic argument that because “[t]he words “*de novo*” are conspicuously absent from the regulations governing appeals to the Board from Department decisions,” that this proceeding cannot proceed as a typical *de novo* administrative proceeding. [Motion to Dismiss at 4]. Alto’s argument ignores the entirety of the law governing permit appeals before the Board, as well as the history and practice of permit appeals to the Board under the

for rules allowing hearing officers to issue subpoenas to compel testimony and production of documents, or admit or exclude evidence, because the proceeding would be based entirely on the record below.

iv. The Board Rules allow any person to present evidence

The Board rules allow “[a]ny person who wishes to present technical evidence at the hearing” to file a statement of intent to present technical testimony, regardless of whether such persons were parties to the proceeding below. 20.1.2.206(A) NMAC (emphasis added). The only limitation of the type of evidence any party may bring are the requirements of relevance and admissibility. 20.1.2.303(A) NMAC. In addition, the Board Rules allow members of the public to submit oral and written testimony, and “offer exhibits in connection with his testimony.” 20.1.2.207(B) NMAC. The Board Rules clearly intend that permit appeals be conducted as *de novo* proceedings.

II. THE APPLICATION HAS BEEN AMENDED AND IS NOT “NEW”

Alto’s argument that the amendments to the Application amount to a new application is without merit. The updates to the Application and the resulting Draft Permit have been reviewed by the Department, and are a response to concerns raised by members of the public and identified in the final Order entered in AQB 21-57. Alto’s argument that the updates do not relate to the Petition are also without merit.

Updates to the modeling relate to Roper’s objection to the application of an evidentiary standard which, Roper argues, allowed Alto to “simply **raise doubt** without actually demonstrating that Roper will violate state and federal regulations or that using different inputs in the modeling would result in an exceedance of NAAQS, NMAAQs, or PSD increments, is a clear misapplication of both state law and Board regulations.” [Petition at 4] (emphasis in original).

Updates to the site plan and haul roads relate directly to Roper's objection that "[t]he Hearing Officer and Deputy Secretary improperly relied on testimony concerning AP-42 emission factors for haul roads." [Petition at 12]. Alto's argument on this point is without merit.

The Amended application and Draft Permit have been updated to improve them and to responds to concerns raised by members of the public. The Department will offer testimony at the hearing on the updates for the Board's consideration, and the Board is fully competent and within its authority to evaluate that testimony. This is not a zoning case; this case is about whether the Draft Permit is protective of human health and the environment, and whether the Draft Permit will result in exceedances of any applicable air quality standard if Roper operates in accordance with the Permit conditions. The Board will have the opportunity to make that determination at the hearing.

III. CONCLUSION

For the reasons set forth above, the Department respectfully requests that the Hearing Officer deny the Motion to Dismiss.

/s/ Chris Vigil

Chris Vigil

Lara Katz

Assistants General Counsel

121 Tijeras Ave NE Ste. 1000

Albuquerque, NM 87102

Telephone: (505) 469-4696

Email: christopherj.vigil@env.nm.gov

lara.katz@env.nm.gov

APPENDIX A

TAB 8

Short Line, LLC, Las Vegas HMA Plant, NSR Permit No. 10129

Documents excerpted:

- AQB Air Dispersion Modeling Summary, Permits 10129 and 10131 (May 1, 2024) [\[NMED link\]](#)
- NSR Permit No. 10129 (signed Nov. 25, 2024) [\[NMED link\]](#)

Air Dispersion Modeling Summary for Permit No. 10129 and 10131

Report Date: 5/1/2024

NMED/AQB Modeler: Eric Peters

Facility Identification:

Project: Las Vegas HMA Plant and Las Vegas Crusher Plant

Company: Short Line, LLC

Permit number: 10129 (HMA) and 10131 (crusher)

TEMPO ID: 41129 (HMA) and 41130 (crusher)

Location Information:

The facility is located 2.5 miles northeast of Las Vegas, in San Miguel County. The facility is located 12.8 miles north-northeast of Tecolote.

UTM Coordinates: 482,170 m East, 3,943,060 m North, zone 13, Datum: NAD83

Elevation = 6510 feet

Air Quality Control Region (AQCR): 154

Airshed: Pr

Project Description:

Brief: Short Line, LLC has applied to the New Mexico Air Quality Bureau for a New Source Review air quality permit for the construction of the Las Vegas HMA Plant and the Las Vegas Crusher Plant (the facility). The facilities are an asphalt plant and a gravel crusher plant. The facilities are initially located together. Combined modeling for both facilities was presented to verify that air quality standards will be protected either with each facility operating individually or with both facilities combined. References to “the facility” in this document refers to the combination of both plants unless otherwise specified.

The following types of emission sources are included in the project: Crusher Haul Road, Feeder, Finish Piles, Generator, HMA Bin Loading, HMA Asphalt Cement Heater, HMA Asphalt Silo Loading, HMA Asphalt Silo Unloading, HMA Baghouse Stack, HMA Bin Unloading, HMA Conveyor Transfer to Drum Conveyor, HMA Generator, HMA Haul Road, HMA Scalping Screen, HMA Scalping Screen Unloading, HMA Storage Pile Handling, Primary Crusher, Primary Crusher Conveyor, Raw Material Piles, Screen, Screen Conveyor, Secondary Crusher, Secondary Crusher Conveyor, Stacker Conveyor Drop to Pile, and Waste Conveyor. The emission units used in the modeling are described in the tables below.

For this permit, modeling was required for the following pollutants: Asphalt Fumes, Carbon Monoxide (CO), Nitrogen Dioxide (NO₂), Particulate Matter 10 micrometers or less in aerodynamic diameter (PM₁₀), Particulate Matter (2.5 microns or less) (PM_{2.5}), and Sulfur Dioxide (SO₂).

Table 1: Table of Total Facility Emissions

Asphalt fumes (lbs/hr)	NO ₂ Rate (lbs/hr)	CO Rate (lbs/hr)	SO ₂ Rate (lbs/hr)	PM ₁₀ Rate (lbs/hr)	PM _{2.5} Rate (lbs/hr)
1.504	20.290	24.030	7.513	9.213	4.192

Air Dispersion Modeling Summary for Permit No. 10129 and 10131

Modeling Assumptions: The asphalt heater and asphalt cement storage silo operate continuously. The rest of the facility operates during daylight hours only.

Permit Conditions for Permit 10129, HMA Plant:

Operating hours: The asphalt heater and asphalt cement storage silo may operate at any time. The rest of the facility shall only operate during daylight hours.

Permit Conditions for Permit 10131, Gravel Crusher:

Operating hours: The facility shall only operate during daylight hours.

Relocation conditions: The Crusher Plant may relocate to other parts of New Mexico without providing additional modeling with the following exceptions. The permit does not provide authority to locate in tribal land or Bernalillo County. Upon relocation, all sources of NO_x shall be at least 143 meters from the nearest fenceline. When located in an area with minor source baseline dates established for PSD increments, the Crusher Plant shall move to a new location before one year of starting operations at that location. Locations in Lea County, Dona Ana County, or the City of Rio Rancho are not authorized.

If a location does not meet the conditions above, the facility may gain authorization under this permit by providing modeling that addresses the relevant conditions. Before submitting a relocation request for these exceptions, the facility shall submit an analysis that demonstrates compliance with applicable air quality standards and/or PSD increments at the new location. After NMED responds with approval of the analysis, the relocation application for those locations may be submitted.

Conclusion:

This modeling analysis demonstrates that operation of the facility described in this report neither causes nor contributes to any exceedances of applicable air quality standards. The standards relevant at this facility are NAAQS for CO, NO₂, PM₁₀, PM_{2.5}, and SO₂; NMAAQs for CO, NO₂, and SO₂.

20.2.72.400-499 NMAC establishes permitting requirements for State Toxic Air Pollutants (TAPs) which are identified in 20.2.72.502 NMAC. The regulations require a source to conduct modeling to predict the concentration of a TAP if its potential emission rate is greater than the screening level identified in that section. The screening level may be adjusted by the stack height correction factor listed in 20.2.72.502 NMAC. If a source must model the concentration of a TAP, the TAP is not expected to pose an environmental concern, and no further action is required, if its concentration remains below one percent of the Occupational Exposure Limit (OEL) for that TAP. For this application, modeling demonstrates that the concentrations of Asphalt Fumes remain below one percent of the OEL.

Action: The permits can be issued based on this modeling analysis.

Modeling report submitted by Montrose Air Quality Services (dated 10/26/2023)

Modeling was last revised on 2/19/2024.

The air quality analysis demonstrates compliance with applicable regulatory requirements.

Model(s) Used: AERMOD version 22112 was used to run the modeling analysis.



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

AIR QUALITY BUREAU NEW SOURCE REVIEW PERMIT Issued under 20.2.72 NMAC

Version: 02.27.2024

Certified Mail No:

Return Receipt Requested

NSR Permit No: 10129
Facility Name: Las Vegas HMA Plant

Permittee Name: Short Line LLC

Mailing Address: PO Box 1499
Peralta, NM 87042

TEMPO/IDEA ID No: 41129 - PRN20230001
AIRS No: 35-777-1656

Permitting Action: Regular-New
Source Classification: Synthetic Minor

Facility Location: 482,170 m E by 3,943,060 m N, Zone 13;
Datum NAD83

County: San Miguel

Air Quality Bureau Contact Joseph Mashburn
Main AQB Phone No. (505) 476-4300

DocuSigned by:

Cindy Hollenberg

005075032748482...

Cindy Hollenberg
Bureau Chief
Air Quality Bureau

11/25/2024

Date

Template version: 06/30/2021

APPENDIX A

TAB 9

**Targa Northern Delaware, LLC, Road Runner Gas Plant, NSR
Permit No. 7200-M4**

No. AQB 23-58

Documents excerpted:

- Hearing Officer's Report (Oct. 13, 2023) [[NMED link](#)]

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION OF
TARGA NORTHERN DELAWARE LLC FOR
AN AIR QUALITY PERMIT FOR ROAD
RUNNER GAS PROCESSING PLANT
NO. 7200-M4**

AQB 23-58 (P)

HEARING OFFICER REPORT

INTRODUCTION

Applicant Targa Northern Delaware, (“Targa” or “Applicant”) seeks to modify its air quality permit for its Road Runner Facility, a gas processing plant located 1.6 miles south-southwest of Loving, in Eddy County, 4 miles northwest of Malaga.

Targa currently holds a Part 72 New Source Review (“NSR”) Permit for the Road Runner Gas Processing Plant (“Road Runner” or the “Facility”). During construction of this Facility, Targa determined that revisions were required to the current NSR permit. It is typical for a permittee to revise or modify an initial construction permit as designs and equipment specifications are finalized and modes of operations are changed to increase efficiency when the facility begins operation. Targa Ex. 2 at 9, lns 1-2. Targa submitted an application to revise its construction permit on December 16, 2022, and updated it several times during the administrative process.

The New Mexico Environment Department Air Quality Bureau (“AQB” or “Bureau”) supports the approval of the permit modification with conditions necessary to protect human health and welfare and the environment. The proposed conditions will ensure that the Facility can meet all applicable requirements, including monitoring, testing, recordkeeping and reporting to track ongoing activities. Based on air dispersion modeling and EPA Guidance regarding ozone, the Facility represented in the application demonstrates compliance with all federal and state

APPENDIX A

TAB 10

XTO Energy (Jayhawk, Cowboy CDP, et al.)

Nos. AQB 21-31, 21-32, 21-34, et al.

Documents excerpted:

- Hearing Officer's Report and Recommended Final Order (Dec. 27, 2021) [\[NMED link\]](#)

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

IN THE MATTER OF THE MATTER OF THE APPLICATION OF BULLDOG COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8153-M1	AQB 21-31
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JAYHAWK COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8152-M1	AQB 21-32
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LONGHORN COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8349-M2	AQB 21-33
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COWBOY CDP (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7877-M1	AQB 21-34
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WILDCAT COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7474-M2	AQB 21-35
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MAVERICK COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7565-M2	AQB 21-39
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SPARTAN COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7681-M2	AQB 21-40
---	------------------

TIGER COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7623-M2	AQB 21-41
---	------------------

HEARING OFFICER’S REPORT

I. INTRODUCTION

XTO currently holds Part 72 New Source Review (“NSR”) Permits for the eight Facilities: Bulldog, Jayhawk, Longhorn, Wildcat, Maverick, Spartan, and Tiger Facilities are compressor stations (collectively “the compressor stations”). The Cowboy Central Delivery Point (“Cowboy CDP” or “Cowboy”) is a gas processing facility. During the initial construction

The determination of whether to issue a Draft Permit must be based on the evidence in the Hearing Record as defined by 20.1.4.7 NMAC.

f. Public Comment⁵

General comment (non-technical) was taken from the public before and during the public hearing, both in writing and as sworn testimony. Five members of the public submitted written comment, one in favor and four opposed to the approval of the Draft Permits. The public member in favor cited fairness of rules and regulations for companies to operate in New Mexico. Those against, cited the air quality and ozone levels in Lea and Eddy Counties and the link between air pollution and climate change. Fourteen public members spoke during the two-day hearing (some of the members had also submitted written comment), all voiced their opposition to the air quality construction permits. The reasons mirrored the written comments but more focused on the potential for ozone pollution produced by oil and gas Facilities to harm human health and the environment. The comments were general in nature.

II. APPLICABLE LAW

New Mexico Air Quality Control Act, NMSA 1978, §§ 74-2-1 to 74-2-17

New Mexico Air Quality Regulations - Construction Permits, 20.2.72 NMAC

New Mexico Environment Department Permitting Procedures – 20.1.4 NMAC

III. RECOMMENDATION

Based upon the Hearing Record as defined in 20.1.4.7 NMAC, including the post-hearing submittals, I recommend that the proposed final Draft Permits be approved, as set forth in the Record with specific conditions to protect the public health and the environment. What follows is

⁵ Public comment was taken in reference to all ten (10) permits during the consolidated public hearing.

36. Toward the end of the Hearing, a verbal motion was made to strike the entire direct testimony of Mr. Nichols. After hearing additional argument from the parties, the Hearing Officer overruled the objection, reasoning that the parties had ample time to file a timely motion in limine to allow the Hearing Officer the time necessary to consider the drastic remedy.
37. Regarding public notice, Mr. Nichols stated that WEG is concerned that NMED did not provide an email address for the public to provide comment to for Bulldog, Longhorn, Cowboy, Wildcat, and Jayhawk. Vol. 2, 316:8-21 (Nichols).
38. Mr. Nichols asserted that lack of an email address and limiting public comment to mailing only “may have limited the public involvement inappropriately, particularly in light of the COVID-19 pandemic.” Tr. Vol. 2, 316:11-25 (Nichols).
39. About the issue of the email address not being included in the notice for the Bulldog, Longhorn, and Wildcat applications, Bureau staff testified that, at the time when the notice of the application was due to be published,

a permit writer has not been assigned and therefore their email address cannot be included in the applicant’s notice. While the standard text for the applicant’s notice states that comments should be submitted in writing, it also provides a toll-free phone number that would allow any interested party to reach the Bureau with questions. That provides an opportunity to register an objection or concern to mailing comments, and to request an alternative submission method. No phone calls making such a request were received on this permit. In response to the concern about the AQB notice specifying comments must be submitted in writing, AQB’s re-publication of the public notice for several other permits did not generate any additional public interest from any other party for those permits. That result on the other permits indicates that WildEarth Guardians assertion that the omission of an email address prevented other interested parties from providing comment is unlikely to be correct.

[Bulldog CS: NMED Exhibit 21 at 8; Longhorn CS: NMED Exhibit 22 at 8; Wildcat CS: NMED Exhibit 35 at 8-9].

40. About WEG’s concerns about an excluded email address in the public notice for the Cowboy CDP application, Bureau staff testified that

For this permit, the initial 30-day comment period had concluded on July 2, 2020, over 8 months before this comment was received. Therefore, the newspaper notice was not republished, and another 30-day comment initial notice was not done for the permit action. [The Bureau's] re-publication of the public notice for several other permits did not generate any additional public interest from any other party for those permits. These results suggest that WildEarth Guardians' assertion that the omission of an email address prevented other interested parties from providing comment is unlikely to be correct. The public notice from the first comment period and the draft documents for the 30-day analysis period were posted to [the Bureau's] website on February 23, 2021, and therefore were available to the public. The [Bureau] has updated its legal notices for air quality permit proposals, so that future legal notices include an email address for comment submissions, in recognition of the public health risks of COVID-19.

[Cowboy CDP: NMED Exhibit 27 at 9; AR No. 86, Bates 3208-3211].

41. About WEG's concerns about an excluded email address in the public notice for the Jayhawk CS application, Bureau staff testified that

For this permit, the initial 30-day comment period had concluded six months before this comment was received. Therefore, the newspaper notice was not republished, and another 30-day comment initial notice was not done for these permits. [The Bureau's] re-publication of the public notice for several other permits did not generate any additional public interest from any other party for those permits. That result on the other permits indicates that WildEarth Guardians' assertion that the omission of an email address prevented other interested parties from providing comment is unlikely to be correct. The public notice for the first comment period and the draft documents for the 30-day analysis period were posted to [The Bureau's] website on November 3, 2020, and on May 27, 2021, respectively, and therefore were available to the public.

[Jayhawk CS: NMED Exhibit 31 at 9-10].

42. Mr. Nichols' believed that the public notices for the Facilities should be republished is based on "fairness, public fairness, [and] a duty to the public". Tr. Vol. 2, 322:7-9 (Nichols).

43. Regarding WEG's SSM/M concerns, Mr. Nichols opined that with an annual limit, rather than limits on operational parameters, the annual limits are not practically enforceable and will not actually be complied with. He explained that without a limit on the number of flaring of SSM/M events the annual emission limits will not actually be complied with. Tr. Vol. 2, 318:10-21 (Nichols).

88. If the facility operates in accordance with the terms and conditions of the draft permit, it will comply with all applicable federal and state air quality regulations and will not cause or contribute to any concentrations above state or federal ambient air quality standards or PSD increments. NMED Am. Ex. 21 at 16; NMED Ex. 8 at 2; XTO Ex. 5 at 38.

Jayhawk Compressor Station

89. On September 24, 2020, XTO submitted an application to revise NSR Permit No. 8152. [Jayhawk AR 1, 0003]

90. On September 20, 2021, XTO submitted an updated application. [Jayhawk AR 5, 217-427; AR 45, 693-694]

91. The application proposes various modifications to Jayhawk and revisions to the permit that include updates in throughputs, removal of certain equipment, and updated equipment specifications. [Jayhawk AR 13, 465]

92. Specifically, the application includes: (1) removal of two heaters and two engines; (2) increased glycol circulation rates; (3) decreased glycol regeneration reboiler unit heat inputs; (4) removal of a flare; (5) increased flare purge gas rates; (6) updated flare heights; (7) updated tank throughputs; (8) decreased condensate truck loading; (9) added inlet gas flaring; (10) increased steady state flaring associated with increased tank throughput and glycol circulation rates; (11) updated sources venting to the flare; (12) updated sources venting to the vapor combustion unit; (13) updated control efficiencies and emission factors for two engines; (14) updated equipment nomenclature; (15) updated facility administrative information; (16) updated low pressure separator pressures; and (17) added VOC malfunction emissions. [Jayhawk AR 5, 249]

93. Sections 6 and 7 of the application included emission calculations to demonstrate compliance with NAAQS and applicable regulations. [Jayhawk AR 5, 257-343]
94. Section 16 and Form UA4 of the application included a modeling report to demonstrate compliance with NAAQS and applicable PSD increments. [Jayhawk AR 5, 416-427]
95. The application included proof of XTO's public notices. [Jayhawk AR 1, 133-169]
96. NMED received the application on September 30, 2020. [Jayhawk AR 1, 003]
97. NMED deemed the application administratively complete on October 29, 2020. [Jayhawk AR 8, 430-31]
98. NMED posted its public notice and the permit application on the Air Quality Bureau website on November 3, 2020. [Jayhawk AR 28, 388-389]
99. NMED published its initial public notice of the application in the Hobbs News-Sun on November 3, 2020. [Jayhawk AR 10]
100. By letter dated December 3, 2020, WEG requested a public hearing on the application. [Jayhawk AR 13, 466] WEG commented that it was concerned that neither XTO nor NMED had demonstrated that the air pollution from the proposed facility will protect the NAAQS for ozone. [Jayhawk AR 16, 0575] WEG also commented on potential environmental justice issues in the permit proceeding and a potential default in compliance with New Mexico Toxic Air Pollutant permitting requirements. [Jayhawk AR 16, 581]
101. NMED issued a draft permit for Jayhawk on May 25, 2021, approving the proposed permit revisions and facility modifications, with conditions. [Jayhawk AR 14]
102. NMED issued a Statement of Basis for the permit application on May 27, 2021. [Jayhawk AR 13]

contribute to any concentrations above state or federal ambient air quality standards or PSD increments. NMED Am. Ex. 22 at 16; NMED Ex. 5 at 2; XTO Ex. 5 at 38.

Cowboy CDP

140. On April 24, 2020, XTO submitted an application revise NSR permit 7877, [Cowboy AR 8, 0488]
141. NMED received the application on April 29, 2020. [Cowboy AR 8, 0488]
142. NMED deemed the application administratively complete on May 20, 2020. [Cowboy AR 19, 0878-0883]
143. After the initial determination of completeness, NMED requested numerous changes to equipment and verifications, warranting submission of a revised application and modeling. [Cowboy AR 62, 2566-2571].
144. XTO submitted a revised application, including revised modeling, on February 18, 2021. [Cowboy AR 1, 0001]
145. The revised application proposed various modifications to Cowboy and revisions to the permit including: (1) addition of selective catalytic reduction to several heaters; (2) removal of two heaters; (3) reduction in size capacity of floating roof tanks, addition of truck loading of slop oil; (4) increases in startup, shutdown, and maintenance and malfunction emissions; (5) updated emission speciation profiles; (6) updated fugitive counts; (7) updated tank throughputs; (8) additional emergency generators; (9) updated equipment nomenclature; (10) demonstrated compliance with NSPS Subpart OOOOa; (11) consolidated tank landing emissions; and (12) additional malfunction emissions. [Cowboy AR 1, 0036]
146. Sections 6 and 7 of the revised application include emission calculations to demonstrate compliance with NAAQS and applicable regulations. [Cowboy AR 1, 0044-0257]