

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

**IN THE MATTER OF:
THE APPLICATION OF YUCCA
GROWTH INFRASTRUCTURE, LLC
FOR AN AIR QUALITY PERMIT,
NO. NSR 10833**

AQB 26-57(P)

**NEW MEXICO ENVIRONMENT DEPARTMENT AIR QUALITY BUREAU'S
MOTION FOR CORRECTION OF THE HEARING RECORD**

The New Mexico Environment Department (“NMED” or the “Department”) Air Quality Bureau (“Bureau”), pursuant to the New Mexico Environment Department’s Permit Procedures at 20.1.4.200(D) NMAC, respectfully submits this *Motion for Correction of the Hearing Record*.¹

INTRODUCTION

Despite the unconventional path of this proceeding, including a stay and dismissal of stay by the New Mexico Supreme Court, this proceeding remains – as the Bureau has stated time and again – an administrative public hearing proceeding for a pending air quality new source review construction (non- prevention of significant deterioration) permit governed under the laws and rules of the Air Quality Control Act, Sections 74-2-1 to 74-2-17 (“AQCA”), and 20.1.4 NMAC. At this point in the proceeding, instead of conducting a technical review of the updated materials before it and presenting its updated technical analysis to the public for transparency and review to

¹ Pursuant to 20.1.4.200(D)(3) NMAC, the Bureau sought concurrence of the other parties prior to filing this *Motion for Correction of the Hearing Record*. The responses from New Energy Economy, the Center for Biological Diversity and NM Environmental Law Center for Mr. Saldaña and Ms. Fuller, Christine C. Dobbin, and Bruce Wetherbee did not identify a discernible position of support, opposition, or no position, as each was qualified with explanation and argument misunderstanding the relief requested, so the Bureau presumes those parties do not concur with the Motion. Nicholas Maxwell opposes. The New Mexico Department of Justice stated it takes no position on the Motion. For the remainder of the parties, the Bureau did not receive a response prior to the time requested before filing.

enable this proceeding to move forward, the Bureau has found itself outside of the AQCA and 20.1.4 NMAC and into full blown civil litigation, under unprecedented and obstructive levels of motions practice, most of which lacks any legal support. New Energy Economy (“NEE”) and the Center for Biological Diversity (“CBD”) generate “urgency” for themselves to the detriment of public transparency as they prevent the Bureau from reviewing the materials they themselves are questioning. Not only are their actions in this administrative proceeding contrary to representations made by parties at the New Mexico Supreme Court about the importance of due process, their actions deeply prejudice the Bureau’s opportunity to respond in motions practice or even meaningfully participate in this proceeding.

Within a matter of days, the parties expect the Bureau to complete more than a dozen tasks in motion practice and substantive actions contrary to regulations for an administrative public hearing proceeding on a pending air permit, permit appeals hearings before the Environmental Improvement Board (“EIB”) and the New Mexico Rules of Civil Procedure on many matters that are not ripe, contrary to law, and lacking sufficient public notice. Simply put, the risk of appealable error is substantial if this proceeding moves forwards on the current hearing record without correction.

At the same time, applicant Yucca Growth Infrastructure, LLC (“YGI”) submitted its original air permit application and modeling data five months ago that – after public comment and the subsequent review – the Bureau determined did not align and that has now been amended as of October 16 with a revised application and additional modeling data. As part of the normal review process, the Bureau routinely works with applicants to resolve such deficiencies. Ordinarily, however, applicants accommodate that additional work by withdrawing and resubmitting their applications or agreeing to extend the decision deadline when a public hearing

is granted to further develop the record due to significant public interest.

YGI cannot now stay silent regarding the existing November 23 deadline that YGI refused to extend at the initiation of this administrative proceeding while expecting the Bureau to give YGI's amended air permit application and additional modeling data submission priority over other competing air permit applications or compress the review necessary to support a reasoned permitting decision – nor should non-agency parties force a Hearing Officer to disregard established and existing process and procedure for air permit application hearings and the Bureau's review of air permit application.

There are two important actions that need to occur in this administrative proceeding at this juncture. First, this administrative public hearing proceeding for a pending air quality permit must be held in accordance with the administrative procedures under the AQCA and 20.1.4 NMAC, including holding the non-agency parties accountable for compliance with those procedures. As part of the procedures, public notice and an opportunity to participate before a decision are mandatory to avoid reversible error. Second, YGI needs to decide how it wants to proceed given its refusal throughout the entirety of this process to waive the November 23 decision deadline to date. YGI has the burden of providing the information necessary to support a permit approval and is still providing reconciliation information to the Bureau with November 23 only weeks away. These two actions will allow the Bureau to perform its job (without repeated unsubstantiated demands) under the controlling legal framework set forth in State and Federal law, which is to actually evaluate the application materials and modeling data, and then ensure that the public can then evaluate a draft permit with a statement of basis and modeling report for at least 30 days.

With this context in mind, the Bureau submits the instant motion seeking the relief identified to protect the procedural integrity for the air quality permitting process in this

proceeding, as well the precedent being established for future proceedings. To the extent the instant motion is denied in its entirety, the Air Quality Bureau requests additional time to prepare its witnesses for the October 26 hearing on the motions to dismiss and preliminary inquiry to mandate testimony from the Bureau's technical staff, and then schedule and notice any subsequent upcoming hearing on the pending dispositive motions to dismiss according to law as further discussed below. The Bureau does not support premature dismissal or denial of the application at this point in the proceeding and will address that position further in subsequent responsive filings and/or oral argument at the hearing.

BACKGROUND

On August 4, 2026, NEE filed its *Motion to Dismiss YGI's Permit Application as Not Ripe for Adjudication* [Dkt. No. 52] ("*August Motion to Dismiss*") as part of a tornado of briefings and orders followed with responses, objections, motions for reconsideration, etc. that culminated in a *Sua Sponte Order* (entered Aug. 10, 2026) denying the *August Motion to Dismiss*. This was followed by additional motions for reconsideration and additional orders from the then-Hearing Officer Max Shepherd rendering the status of *August Motion to Dismiss* relatively unclear.

On August 22, following another round of filings and public statements by opposing parties' counsel, then-Hearing Officer Max Shepherd recused himself as the Hearing Officer. *Order* (entered Aug. 22, 2026; served Aug. 24, 2026 at 12:25 p.m.).

On August 23, the New Mexico Supreme Court ordered this proceeding was stayed.

On September 17, the New Mexico Supreme Court lifted the stay for this proceeding.

On October 2, the Environment Secretary appointed Judge Browning as the replacement Hearing Officer in this case. *Notice of Substitution of Hearing Officer* [Dkt. No. 99].

On October 7, via email from Hearing Administrator Luis Lopez, Judge Browning set a status conference for October 15 at 1:30 p.m.

On October 13, NEE waited approximately a month after the stay lifted to renew its request for discovery, by filing its *Motion to Order Discovery Required by Due Process* [Dkt. No. 106] before the status conference occurred.

On October 14, in another late, new submission before the status conference, NEE filed its *Motion to Dismiss Application Without Prejudice as Incomplete and Not Ready for Hearing* [Dkt. No. 107] (“*NEE’s October Motion to Dismiss*”).

Also on October 14 – having also waited approximately a month – CBD renewed its request for discovery, by filing its *Motion for Hearing Officer to Order Discovery* [Dkt. No. 108].

Further on October 14, YGI informed the Bureau by letter that it intended to submit a revised application and two sets of supporting dispersion modeling to reflect a new design proposal.² YGI confirmed this information for the parties during the status conference on October 15.

During the October 15 status conference Judge Browning heard preliminary oral argument on *NEE’s Motion to Order Discovery Required by Due Process* [Dkt. No. 106], *NEE’s October Motion to Dismiss* [Dkt. No. 107], and *CBD’s Motion for Hearing Officer to Order Discovery* [Dkt. No. 108]. Judge Browning then set *NEE’s August Motion to Dismiss* [Dkt. No. 52] and

² In communications with YGI and its consultant Trinity, the Bureau did not opine on the appropriateness of the design or its resulting emissions. In fact, the Bureau expressly declined to make business decisions for YGI about the environmental impact of the facility and the design (*e.g.*, number of stacks, uniform configuration of modules, etc.). The October 14, 2026, letter from YGI to NMED grossly mischaracterizes the Bureau’s inquiries as instructions. The operational design of the facility and the impact it has on the current application are business decisions for YGI. The Bureau does not opine on the compliance of hypothetical alternative source designs or mandate emission reductions; proposed projects must be accompanied by results from conservative modeling to enable evaluation of air emissions and concentrations that meet the legal requirements. NMED does not build data centers. Every action taken by the Bureau is informed by NMED’s mission is to protect and restore the environment and to foster a healthy and prosperous New Mexico for present and future generations.

NEE's October Motion to Dismiss [Dkt. No. 107] for hearing on October 26. He also ordered a meet-and-confer regarding discovery without an opportunity to respond with legal arguments, set corresponding deadlines, and set a hearing for the motions for discovery and objections to any requests for October 29. No response deadlines for any of the motions were discussed, although counsel for YGI indicated it would file its responses to the motions to dismiss early the week of October 19.

Formal hearing notices followed on October 16. No response deadlines were provided in the notices. However, the *Second Amended Pre-Hearing Order*, states that for “[p]rehearing Motions (**including all dispositive motions** and motions to exclude evidence)” the “[r]esponses shall be filled [*sic*] by November 30, 2026.” *Id.*, at ¶ 6 (emphasis added) despite the additional scheduling of the October 26 dispositive motion hearing.

Also on October 16, YGI submitted to the Bureau new information and dispersion modeling, as well as components for a revised application to reflect the current design proposal in response to an inquiry by the Bureau requesting information about how YGI’s application materials align with its modeling data. See *Certificate of Service* (filed Oct. 16, 2026) [Dkt. No. 112]. YGI’s submission will likely change the Bureau’s materials for public review, including the Draft Permit, Statement of Basis, and Modeling Report from the materials on which public comment already occurred. As preliminarily understood by the Bureau, YGI’s October 16 submission reflects a new attempt at reconciling its application and modeling data, with information that now supports a three-tier design (instead of two-tiers) with nearly identical sever and cluster configurations (where the original application was only exhaust points); a decrease in the number of stacks from 2,275 to 1,263; an increase in stack height from 30 feet to 45 feet; and changed stack parameters (*e.g.*, exhaust temperature, exit velocity, and flow rates) – all different

than the original application – that inform the dispersion modeling and downwash analysis. Despite the recent submission assertion that the new “design yields dispersion modeling outputs that are consistent with the April modeling submission” such conclusion must be evaluated and confirmed by the Bureau and does not relieve YGI from the requirement to maintain an accurate application submission.

While it is not uncommon for applicants to submit revised applications and new supporting information throughout the permitting process, it is unprecedented for applicants to not simultaneously waive the decision deadline when new submissions invoke additional technical review that imposes a new burden on the agency and hinders progress in the public hearing process. Absent a public hearing, the Bureau typically asks the applicant to withdraw and resubmit their application if there are substantial changes to the materials or is forced to deny a permit. See AQB Procedure 02-013.00, New Source Review Permit Applications—Ruling Administratively Incomplete, Requesting More Information, Denials, and Extensions, at § 2.3 (Mar. 11, 2002) (attached hereto as **Exhibit A**). With a public hearing, the applicant typically recognizes the 180-day decision deadline needs to be extended as a practical matter and the public proceeding occurs unhindered under 20.1.4 NMAC. YGI’s submission of material revisions at this late stage, when it appears YGI’s original application was not ready for primetime, does not entitle YGI to priority over other applicants or require the Bureau to expedite its technical review to accommodate YGI’s preferred timeline given the obligations and liabilities that the Bureau has in other permitting matters. Revisions are a business decision that applicants are entitled to make, but the Bureau must still analyze the information, confirm the numbers add up, and ensure any resulting permit recommendation contains the necessary permit provisions.

On October 20, YGI filed responses to *NEE’s August Motion to Dismiss* [Dkt. No. 52] and

NEE's October Motion to Dismiss [Dkt. No. 107]. *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. 108) (filed Oct. 20, 2026) [Dkt. No. 114]; *Applicant Yucca Growth Infrastructure, LLC's Response in Opposition to: New Energy Economy's Motion to Dismiss YGI's Permit Application as Not Ripe for Adjudication, Filed August 4, 2026, as Corrected August 5, 2026* (Dkt. No. 52, Dkt. No. 57 (Errata)) (filed Oct. 20, 2026) [Dkt. No. 116].

Also, on October 20, NEE filed its *Expedited Motion to Compel the Appearance and Testimony of NMED Major Sources Manager Julia Kuhn, or an Equally Knowledgeable Technical Witness, at the October 26, 2026 Hearing and Request for Expedited Responses by October 22, 2026* [Dkt. No. 115] (“*Motion to Compel NMED Witness for Motion to Dismiss Hearing*”), seeking to require the Bureau to respond in less than two business days and to compel the Bureau to provide a witness at the hearing just three business days later.

By email at 6:44 p.m. on October 20, Judge Browning set a hearing for the *Motion to Compel NMED Witness for Motion to Dismiss Hearing* on October 26, 2026, before the hearing on the *August Motion to Dismiss* [Dkt. No. 52] and *October Motion to Dismiss* [Dkt. No. 107] and ordered the Bureau to have its witness available in case he granted the *Motion to Compel NMED Witness for Motion to Dismiss Hearing*. An updated formal hearing notice for the docket was entered October 21. *Amended Notice of Hearing on Motions to Dismiss* [Dkt. No. 117].

On October 22, the Jose Saldaña Jr. and Vivian Fuller, and the Center for Biological Diversity files a “notice” joining *NEE's October Motion to Dismiss* [Dkt. No. 107] with six pages of additional argument in support of NEE's requests for relief. *Jose Saldaña Jr. and Vivian Fuller and Center for Biological Diversity's Notice of Joinder in New Energy Economy's Motion to*

Dismiss Application Without Prejudice as Incomplete and Not Ready for Hearing (filed Oct. 22, 2026) [Dkt. No. ____].

The following are the tasks the Bureau has identified as necessary to meaningfully participate in this proceeding and defend its interests:

Before Monday, October 26

1. *NEE's August Motion to Dismiss* [Dkt. No. 52] – Respond in writing, which it was deprived of an opportunity to do given the *sua sponte* orders, prior to the hearing on Monday, October 26, or in the alternative prejudicially be expected to orally argue its response at the hearing on Monday, October 26; and prepare for oral argument, including evaluation of the filed response by YGI.

2. *NEE's October Motion to Dismiss* [Dkt. No. 107] – Respond in writing, or in the alternative prejudicially be expected to orally argue its response at the hearing on Monday, October 26; and prepare for oral argument, including evaluation of the filed response by YGI, as well as evaluate *Jose Saldaña Jr. and Vivian Fuller and Center for Biological Diversity's Notice of Joinder in New Energy Economy's Motion to Dismiss Application Without Prejudice as Incomplete and Not Ready for Hearing* (filed Oct. 22, 2026) [Dkt. No. ____].

3. *NEE's Motion to Compel NMED Witness for Motion to Dismiss Hearing* [Dkt. No. 115] – Respond in writing, or in the alternative prejudicially be expected to orally argue its response at the hearing on Monday, October 26; prepare for oral argument; in anticipation of a ruling in NEE's favor, identify and prepare the Bureau technical witnesses to be subject to cross-examination under oath at the hearing on Monday, October 26 on matters for which they can likely only offer preliminary and inconclusive impressions absent a full technical review.

4. Continue to ensure the same Bureau witnesses subject to NEE's *Motion to Compel*

NMED Witness for Motion to Dismiss Hearing [Dkt. No. 115] continue to conduct a technical review of YGI's additional materials submitted October 16.

5. Continue to identify, organize and maintain the Administrative Record; and

6. Evaluate untimely discovery requested from Nicholas Maxwell received at 5:04 p.m. on Tuesday, October 20; and provide a position/objection to Maxwell's discovery demands by Monday, October 26.

Before Thursday, October 29

7. *NEE's Motion to Order Discovery Required by Due Process* [Dkt. No. 106] – Respond in writing, or in the alternative prejudicially be expected to orally argue its response at the hearing on Thursday, October 29; and prepare for oral argument;

8. *CBD's Motion for Hearing Officer to Order Discovery* [Dkt. No. 108] – Respond in writing, or in the alternative prejudicially be expected to orally argue its response at the hearing on Thursday, October 29; and prepare for oral argument;

9. Maxwell's Discovery Requests – Prepare for oral argument at the hearing on Thursday, October 29; and

10. Continue the work in Nos. 4 and 5.

ARGUMENT

I. THE HEARING ON THE MOTIONS TO DISMISS HAS NOT BEEN PUBLICLY NOTICED AND A DECISION BY THE DEPUTY SECRETARY FOLLOWING ANY RECOMMENDATION FROM THAT HEARING IS LIKELY SUBJECT TO VACATUR BY THE COURT OF APPEALS.

Section 74-2-7(B)(5) of the AQCA required the EIB to adopt regulations containing “specification of the public notice, comment period and public hearing, if any, required prior to the issuance of a permit[.]” Pursuant to this direction, the EIB adopted 20.2.72 NMAC for construction permits, with the primarily applicable provision for public hearings at 20.2.72.206(C)

NMAC. The AQCA does not mandate that NMED hold a public hearing but, by regulation, the EIB required “a public hearing if the secretary determines that there is a significant public interest.” Id. That obligation includes public notice and a reasonable opportunity for all interested persons to submit “data, views, or arguments” and examine testifying witnesses. Id. While circumstances may exist in particular cases that inform NMED not holding a hearing (*e.g.*, the applicant withdraws the application or a denial is issued before the hearing), it is the general expectation.

Based on the AQCA delegation and pursuant to the Secretary’s authority to “make and adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of NMED and its divisions[,]” Section 9-7A-6(D), NMED adopted 20.1.4 NMAC. See 20.1.4.1 NMAC (“ISSUING AGENCY: Environment Department”). The rules at 20.1.4 NMAC sets forth procedures that apply to public hearings for several environmental laws implemented by NMED, including the administrative public hearings on pending air quality permits.

On July 1, 2026, the Secretary concurred with the Bureau’s recommendation to hold a public hearing on the present application due to significant public interest and the next day initiated the hearing process. See *Request for Public Hearing Determination for Air Quality Permit Application No. NSR 10883 (IDEA ID No. 41351 - PRN20260001), Yucca Growth Infrastructure, LLC - YGI Microgrid* (entered July 2, 2026) [Dkt. No. 1]; *Notice of Docketing, Appointment of Hearing Officer, and Delegation of Final Decision Authority* (entered July 2, 2026) [Dkt. No. 2]; see also 20.1.4.200(A)(1) NMAC (initiation of hearing); 20.1.4.200(B) NMAC (notice of docketing). Next, the hearing date is set, and the public is informed.

The Notice of Hearing requirements are specified in Section 20.1.4.200(C)(2)(a) NMAC, including that NMED provide in the notice, among other information, “the date, time, and location of the hearing; a brief description of the nature and location of the action to be considered in the

Draft Permit[.]” and the requirements for participation, including the deadlines to enter as a party in the proceeding and provide technical testimony at the hearing, 20.1.4.300(A)(1) NMAC. The Notice of Hearing must be served and published in accordance with 20.1.4.200(C)(2)(b) NMAC, including publication in the newspaper, sending a copy to all persons who expressed an interest in the proposed facility, and “local, state, or federal agency and Tribal government affected by the” proposed facility. Publication and service must be completed “no later than thirty (30) days prior to the hearing[.]” Id.

Section 20.1.4.600(B) NMAC sets forth a process and notice requirements for “Summary Procedures” for an Application, as defined in 20.1.4.7(A)(10) NMAC, or “Petition” as defined in 20.1.4.7(A)(17) NMAC, neither of which are a Draft Permit. The Summary Procedures apply to considerations of “jurisdictional defect” and the “merits of . . . legal arguments” (*i.e.*, a motion to dismiss and not a summary judgment motion). 20.1.4.600(B)(1)(a)-(b) NMAC. A hearing is required as part of the Summary Procedures and must be noticed the same as the primary evidentiary hearing pursuant to 20.1.4.200(C)(2) NMAC. See 20.1.4.600(B)(2) NMAC (“If the Hearing Officer determines that the relief requested is likely to be granted, the Hearing Clerk shall prepare and file a Notice of Hearing as set forth in this Part.”).³ Furthermore, the procedural rule

³ The provision creates a practical dilemma: the Hearing Officer must first determine that relief is likely to be granted, but that determination triggers a publicly noticed hearing and the associated expenditure of state resources before relief can be granted. Before initiating that additional process, the Hearing Officer should consider whether the motion presents a sufficiently developed legal question capable of resolving the proceeding through the limited summary procedures authorized by Section 600(B). The requirement of thirty days’ public notice further undermines any practical justification for a separate expedited hearing because it would place that hearing at or near the evidentiary hearing already scheduled for December 7th. A separate proceeding would offer little, if any, opportunity to resolve the matter earlier, while requiring additional notice, preparation, staff participation, and expenditure of state resources. It would also divert Bureau personnel from the ongoing technical review and preparation for the evidentiary hearing, where the relevant issues can be addressed on a developed record. Under these circumstances, a separate summary proceeding would duplicate the scheduled process without

requires that a Summary Procedures “hearing shall be conducted and post hearing procedures shall be followed as set forth in this Part.” Id.

Motion to dismiss proceedings do not delve into evidentiary hearings requiring testimony; such demonstrations of proof are treated as summary judgment requests. See e.g., NMRA, Rule 1-012 (a motion tests the legal sufficiency of the complaint, not the facts that support it, and that dismissal is proper only when the law does not support the claim under any set of facts subject to proof); compare NMRA, Rule 1-056 (when a party attempts to introduce evidence outside the pleadings at the motion to dismiss stage the motion is converted to one for summary judgment). Nothing in 20.1.4 NMAC contemplates a process for an evidentiary hearing for summary judgment. Regardless of the applicability of 20.1.4.600(B) NMAC, the rules at 20.1.4 NMAC and all general procedural rule processes support conforming an evidentiary hearing for summary judgment to the overall evidentiary hearing procedures in the regulation. For all intents and purposes, a dispositive motion based on assertions of fact does not speed up the process or demand a truncated process; no exception to the process is contemplated in 20.1.4 NMAC and one should not be created for the circumstances here. Thus, regardless of the applicability of Section 20.1.4.600(B) NMAC to the *August Motion to Dismiss* [Dkt. No. 52] and *October Motion to Dismiss* [Dkt. No. 107], nothing authorizes circumvention of applicable public notice and participation requirements in 20.1.4 NMAC.

Case law confirms that if the dispositive hearing may serve as the only hearing before final disposition, the public must receive notice accurately identifying that function and a meaningful opportunity to participate. In the case Matter of the Petition for a Hearing on the Merits Regarding Air Quality Permit No. 3135, 2017-NMCA-011, 388 P.3d 287 (Freed v. City of Albuquerque and

materially expediting a decision.

Smith's Food & Drug Centers, Inc.) ("Smith's AQP No. 3135"), the New Mexico Court of Appeals evaluated an analogous situation involving deficient public notice for a dispositive motion hearing and vacated the dispositive decision reached without a public hearing as contrary to law, remanding it for reconsideration. Id., at ¶ 24. The Court looked at the Albuquerque-Bernalillo County Air Quality Control Board's ("Local Board") use of a summary procedure for deciding an air permit issuance by the City of Albuquerque Environment Department ("CABQ"). Although the procedural posture of the situation in Smith's AQP No. 3135 was for the local air jurisdiction and one step ahead of the proceeding here, the language of the applicable law is nearly identical to inform the need for public notice here of *NEE's August Motion to Dismiss* [Dkt. No. 52] and *NEE's October Motion to Dismiss* [Dkt. No. 107].

In Smith's AQP No. 3135, the appeal was based on two assertions. First, the Local Board cannot decide on a permit appeal without an evidentiary hearing. Id., at ¶ 13. Second, "whatever the validity of the [Local] Board's use of summary procedure, it failed to provide the public with sufficient notice of its right to participate in the [Local] Board's hearing on [CABQ and Smith's] motions for summary judgment." Id., at ¶ 14. This right was asserted as one granted by the New Mexico Legislature in the AQCA:

If the subject of the petition is a permitting action deemed by the environmental improvement board or the local board to substantially affect the public interest, the environmental improvement board or the local board **shall** ensure that the public receives notice of the date, time and place of the hearing. The public in such circumstances **shall** also be given a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

NMSA 1978, § 74-2-7(I) (emphases added). The Court resolved the matter on the second narrower grounds and did not address the first assertion. Smith's AQP No. 3135, ¶ 14.

Specifically, the Court found that the Local Board

itself concluded that the petition at issue in this appeal would substantially affect

the public interest, so the Board was required to “ensure that the public receives notice of the date, time and place of the hearing . . . [and] a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing” on the petition.

Id., at ¶ 15. The Court identified that the amended public notice published in the newspaper informed the public of the date of the public hearing, described how to provide non-technical public comment at the public hearing, and informed the public of the earlier date of the “motion hearing” for “pre-hearing motions” whereas the amended pre-hearing order used the word “dispositive.” Id.; id., at n. 4. The amended public notice was based on the Hearing Officer’s amended prehearing order dated August 26, 2014, which set the dispositive motion hearing for October 8, 2014, and public hearing for November 5, 2014. Id., at ¶ 5. The Court concluded the published amended public notice did not inform the public that a summary procedure might resolve the proceeding before the public hearing that would then be canceled along with depriving the public of an opportunity to participate in the proceeding. Id., at ¶¶ 15, 17; see id., at ¶ 18 (concluding the same despite the notice instructing how to file an entry of appearance and notice of intent to present technical testimony).

It is also important to discuss the relevant arguments the Court rejected. First, while the Court recognized the Hearing Officer and Local Board’s ability to look to the New Mexico Rules of Civil Procedure for guidance, 20.11.81.12(A) NMAC, the Court focused on the qualifier that doing so was not permissible if the result “would ‘extend or otherwise modify the authority and jurisdiction of the [Local B]oard.’” Smith’s AQP No. 3135, at ¶ 16 (quoting 20.11.81.12(A) NMAC). Similarly, although 20.11.81.12(B)(1) NMAC allowed the hearing officer and Local Board to vary from the rules if the basis was to “expedite the efficient resolution of the action[.]” the Court found relevant the limitation that “the Board may not vary its procedures if doing so creates a ‘conflict with the act or the regulations, or prejudice the rights of any party.’” Smith’s

AQP No. 3135, at ¶ 16 (quoting 20.11.81.12(B)(1) NMAC). Specifically, neither flexibility allowed the Hearing Officer and Local Board to ignore the “mandatory requirement” that the public be given public notice of the hearing and afforded an opportunity to weigh in on the matter. Smith’s AQP No. 3135, at ¶ 17.

Furthermore, the guiding principle for the purpose of public notice is to “‘fairly apprise[] the average citizen . . . with the general purpose of what was contemplated . . . so that they may attend and state their views.’” Id. (quoting Nesbit v. City of Albuquerque, 1977-NMSC-107, ¶ 9, 91 N.M. 45). The Court concluded the published amended public notice failed this test because it misled the public with the suggestion that there would be a public hearing at which the public could share its views when an earlier hearing might dispose of the issue, eliminate the need for the broader public hearing, and eliminate the opportunity to participate by offering public comment. Smith’s AQP No. 3135, at ¶ 17.

Second, the Court rejected the argument that accepting public comment would have no bearing on the outcome, so the notice deficiency was not prejudicial. Id., ¶ 21; see id., ¶¶ 19-20 (summary of argument). Section 74-2-7(K) of the AQCA states: “Based upon the evidence presented at the hearing, the environmental improvement board or the local board shall sustain, modify or reverse the action of the department or the local agency respectively.” See Smith’s AQP No. 3135, at ¶ 21. The Court read this authority in connection with the Section 74-2-7(I) provisions that the Local Board must “consider ‘data, views or arguments’ offered at a public hearing when a permitting action ‘substantially affect[s] the public interest[.]’” Smith’s AQP No. 3135, at ¶ 21 (quoting NMSA 1978, § 74-2-7(I)). In doing so, the Court concluded the Local Board must “consider public input prior to reaching a decision” even if the limitations allowed presenting only non-technical information. Smith’s AQP No. 3135, at ¶ 23.

Here, a substantially analogous situation exists. As an initial matter, there has been no public notice of the motions to dismiss hearing on October 26, 2026. That in and of itself is detrimental to moving forward with the October 26 hearing. Even considering the prior public notice (the only one issued at this point), such notice states there will be a public hearing, and the public will be given an opportunity to participate. Administrative Record NSR 10833_002115-002118. In preparation for October 26, no notice has been made to the public that the permit decision recommendation may be reached in a summary procedure without the full evidentiary public hearing at which the public can offer comment.

Based on the current record, any notice NMED publishes for the hearing would be deficient, as in Smith's AQP No. 3135. The *Second Amended Pre-Hearing Order* (entered Oct. 16, 2026) [Dkt. No. 109] and *Supplement to Second Amended Pre-Hearing Order* (entered Oct. 16, 2026) [Dkt. No. 110], which will inform the eventually published and served public notice, state there will be a public hearing beginning December 7, 2026, and the public will be given an opportunity to participate. *Second Amended Pre-Hearing Order*, at ¶¶ 1, 4 [Dkt. No. 109]; *Supplement to Second Amended Pre-Hearing Order*, at ¶¶ 3-8 [Dkt. No. 110]. The Orders make no mention that the public hearing may be canceled and there may only be the motions to dismiss hearing on October 26, 2026. In fact, the *Second Amended Pre-Hearing Order*, states in contradiction that for “[p]rehearing Motions (including all dispositive motions and motions to exclude evidence)” the “[r]esponses shall be filled [sic] by November 30, 2026[,]” *id.*, at ¶ 6, which is after the October 26 hearing.

The direction in Section 74-2-7(I) of the AQCA to provide notice and an opportunity to provide input when a matter substantially affect the public interest discussed in Smith's AQP No. 3135 is analogous to 20.2.72.206(C) NMAC, adopted by the EIB and governing NMED and

Bureau processes, also requires notice to the public and an opportunity to participate when there is significant public interest. Similarly, Section 74-2-7(K) of the AQCA discussed in Smith’s AQP No. 3135 directs that permit appeal decisions are made based on evidence presented at the hearing and that is the same requirement for permit decision under 20.2.72.207(D) NMAC, which requires decisions based on the administrative record that includes the public hearing evidentiary record developed under 20.1.4 NMAC. Applying the same logic of the Court in Smith’s AQP No. 3135, Judge Browning must allow public comment at the motions to dismiss hearing and consider the non-technical information offered before making a recommendation, which necessarily requires the prerequisite public notice to inform the public of this opportunity.

NMSA 1978, § 74-2-7(I) – “If a timely petition for hearing is made, the environmental improvement board or the local board shall hold a hearing . . . If the subject of the petition is a permitting action deemed by the environmental improvement board or the local board to substantially affect the public interest, the environmental improvement board or the local board shall ensure that the public receives notice of the date, time and place of the hearing. The public in such circumstances shall also be given a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.”	20.2.72.206(C) NMAC – “The department shall hold a public hearing if the secretary determines that there is a significant public interest. Public hearings shall be held in the geographic area likely to be impacted by the source. The time, date, and place of the hearing shall be determined by the department. The department shall give notice of the hearing to the applicant and the public. The secretary may appoint a hearing officer. A transcript of the hearing shall be made at the request of either the department or the applicant and at the expense of the person requesting the transcript. At the hearing, all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.”
NMSA 1978, § 74-2-7(K) – “Based upon the evidence presented at the hearing, the environmental improvement board or the local board shall sustain, modify or reverse the action of the department or the local agency respectively.”	20.2.72.207(D) NMAC – “The department shall grant the permit, grant the permit subject to conditions, or deny the permit based on information contained in the department’s administrative record. The administrative record shall consist of the application, any other evidence submitted by the applicant, any evidence or written comments submitted by interested persons, any other evidence considered by the department, a statement of matters officially noticed, and if a public

	hearing is held, the evidence submitted at the hearing.” See 20.1.4.400(A)(3), 20.1.4.500(C)(1), (D)(2) NMAC (making the public hearing part of the decisional process, rather than an exercise detached from the ultimate permit determination).
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The procedural flexibilities in 20.1.4 NMAC are nearly identical to the procedural rules address in Smith’s AQP No. 3135. The procedural rule at 20.1.4.100(A) NMAC contains the same language discussed in Smith’s AQP No. 3135 for looking to the New Mexico Rules of Civil Procedure for guidance but that the Rules “shall not be construed to limit, extend, or otherwise modify the authority and jurisdiction of the Secretary under any Act.” Under 20.1.4.100(E)(1) NMAC, the same “efficient resolution” limitations discussed in Smith’s AQP No. 3135 are raised. As discussed in Smith’s AQP No. 3135, these flexibilities cannot serve as authority to not provide public notice and to adopt a process that deprives that public of an opportunity to offer input.

20.11.81.12(A) NMAC – “In the absence of a specific provision in 20.11.81 NMAC governing an action, the board and the board’s hearing officer may look to the New Mexico Rules of Civil Procedure, NMRA 1-001 et seq., and the New Mexico Rules of Evidence, NMRA 11-101 et seq., for guidance. No provision of the rules of civil procedure shall be construed to extend or otherwise modify the authority and jurisdiction of the board.”	20.1.4.100(A) NMAC – “The New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102 and the New Mexico Rules of Evidence, SCRA 1986, 11-101 to 11-1102 shall not apply to proceedings under this Part. At the discretion of the Hearing Officer, the rules may be used for guidance and shall not be construed to limit, extend, or otherwise modify the authority and jurisdiction of the Secretary under any Act.”
20.11.81.12(B)(1) NMAC – The board or a hearing officer appointed or authorized by the board may specify procedures in addition to, or that vary from the procedures provided in 20.11.81 NMAC in order to expedite the efficient resolution of the action or to avoid obvious injustice, if the procedures do not conflict with the act or the regulations, or prejudice the rights of any party.	20.1.4.100(E)(1) NMAC – The Secretary may specify procedures in addition to or that vary from those provided in this Part in order to expedite the efficient resolution of the action or to avoid obvious injustice, so long as such procedures do not conflict with the Act or the Regulations or prejudice the rights of any party.

As in Smith's AQP No. 3135, at ¶ 15, where the Local Board concluded that the permit appeal would “substantially affect the public interest,” here, the Secretary determined there was “significant public interest” in the permitting decision. *Request for Public Hearing Determination for Air Quality Permit Application No. NSR 10883 (IDEA ID No. 41351 - PRN20260001), Yucca Growth Infrastructure, LLC - YGI Microgrid* (entered July 2, 2026) [Dkt. No. 1]. The prior pre-hearing orders from then-Hearing Officer Max Shepherd reflect opportunities for the public to participate at the hearing, as do the now applicable *Second Amended Pre-Hearing Order* [Dkt. No. 109] and *Supplement to Second Amended Pre-Hearing Order* [Dkt. No. 110] from Judge Browning.

All information currently available to the public reflects that there will be a public hearing at which the public can share its views despite the setting of an earlier hearing that might dispose of the issue without any opportunity for consideration of public comment and eliminating the need for the broader evidentiary public hearing. There has been no public notice of the October 26 motions to dismiss hearing, let alone public notice conforming with 20.1.4.200(C)(2) NMAC that appraises the public of an opportunity to participate. This correction needs to occur before proceeding on the dispositive motion scheduled for October 26.

NEE's August Motion to Dismiss [Dkt. No. 52] and *NEE's October Motion to Dismiss* [Dkt. No. 106] both seek final orders in this proceeding. A properly noticed hearing is a necessary foundation for the Deputy Secretary's ultimate disposition because his authority to issue a final order does not cure the omission of required public participation before that decision.⁴

⁴ Only the Deputy Secretary, pursuant to his delegation from the Secretary, may issue final orders. See 20.1.4.100(E)(2)(c) NMAC (hearing officer's limited authority); 20.1.4.7(A)(10) NMAC (definition of final order); 20.1.4.500(D) (issuance of final order); *Notice of Docketing, Appointment of Hearing Officer, and Delegation of Final Decision Authority* (entered July 2, 2026)

Accordingly, before the Hearing Officer recommends granting dispositive relief and the Deputy Secretary enters a final order, the public must receive adequate notice of the hearing's potentially dispositive purpose and a meaningful opportunity to participate. Failure to preserve that process exposes the resulting final order to reversal regardless of its asserted substantive merits.

II. PROCEDURAL ERROR IS LIKELY TO RESULT BY NOT ABIDING BY CONTROLLING LAW TO ALLOW THE BUREAU A MEANINGFUL OPPORTUNITY TO PARTICIPATE IN ITS OWN PROCESS.

For motions practice, a reasonable time-period to respond serves an important purpose: it allows parties a meaningful opportunity to evaluate the relief requested, research the governing law, consult necessary technical personnel and client decisionmakers, and prepare a response that assists the Hearing Officer. The time-period set forth in the procedural rule at 20.1.4.200(D)(4) NMAC states: "Any party upon whom an opposed motion is served shall have fifteen (15) days after service of the motion to file a response." The *Second Amended Pre-Hearing Order*, states that for "[p]rehearing Motions (including all dispositive motions and motions to exclude evidence)" the "[r]esponses shall be filled [sic] by November 30, 2026." *Id.*, at ¶ 6.

For the currently set hearing on October 26, the Bureau has not been afforded meaningful time to respond pursuant to these requirements as it balances other permitting deadlines and liabilities. This leaves the Bureau in a deeply prejudiced position heading into hearing for two dispositive motions that the Bureau technical staff may be required to testify to without sufficient time to prepare. Specifically, for *NEE's August Motion to Dismiss* [Dkt. No. 52], the prior Hearing Officer issued orders without any opportunity to respond and the determination by Judge Browning from the Status Conference that the law of case may not apply reasons to mean the motion would be heard on October 26 based on the implicitly indication at the status conference and in the Notice

[Dkt. No. 2]; see e.g., 20.1.4.600(B) NMAC (summary procedures for Application or Petition, as defined in 20.1.4.7(A)(10) and (17) NMAC).

of Hearing with the use of pluralized “motions” to dismiss. For *NEE’s October Motion to Dismiss* [Dkt. No. 107], the motions to dismiss hearing is scheduled two days before the regulatory deadline (which is October 28) and more than a month before the *Second Amended Pre-Hearing Order* [Dkt. No. 109] deadline. For *NEE’s Motion to Compel NMED Witness for Motion to Dismiss Hearing* [Dkt. No. 115], the motions to dismiss hearing is scheduled just three business days after the motion was filed (note: the motion demands a response by Friday, October 22, just 10 days before the regulatory decision deadline (which is November 4) and more than a month before the *Second Amended Pre-Hearing Order* [Dkt. No. 109] deadline.

A reasonable opportunity to respond becomes particularly important when numerous motions are filed in rapid succession shortly before a hearing that becomes compounded with additional requirements, while Bureau counsel and the Bureau’s technical staff are simultaneously reviewing the newly submitted applicant materials to reconcile the application’s statements with the corresponding modeling data from YGI in this case, they are also balancing the deadlines of other applicants’ pending applicants – which is exactly why the AQCA and 20.1.4 NMAC procedures were set up in the first instance. The cumulative burden cannot reasonably be assessed by considering each motion in isolation. Compressing the response periods for Bureau counsel and preparations of Bureau technical staff for motions to dismiss hearing that also now includes a motion to compel testimony under those circumstances risks incomplete briefing, avoidable error, and diversion of the exact same Bureau technical staff needed to prepare an adequate hearing record and ensure that revised materials produced by the Bureau after thorough evaluation related to YGI’s reconciliation materials are posted for a minimum of 30 days before any public evidentiary hearing.

There is no basis to interrupt the Bureau’s technical review. The New Mexico Supreme

Court, in New Energy Econ., Inc. v. Shoobridge, 2010-NMSC-049, 149 N.M. 42, held that interruptions of agency work are disfavored, stating: courts “should not intervene to halt administrative hearings” before the agency completes its assigned work given “the necessity to respect the separate branches of government” because doing so prematurely interferes with “the administrative processes put in place by the Legislature,” prevents the agency from completing necessary factfinding, and denies the agency an opportunity to correct alleged errors during the proceeding. Id., ¶¶ 10, 14, 19. In that case, the Court dissolved the injunction that halted a Board rulemaking proceeding and returned the matter to the agency. Id., ¶ 20. “The interruption of this process of legislative fact-finding interfered with the Board’s duty, mandated by the Legislature, to hold public hearings before regulations are adopted.” Id., ¶ 9. Here, the AQCA and 20.1.4 NMAC procedures are set up to protect all interests, and they are not being followed here to the detriment of all.

III. THE CURRENT PRE-HEARING MOTIONS AND PROCEEDINGS ARE MOOT AND A DRAIN ON STATE RESOURCES IF YGI DOES NOT WAIVE THE NOVEMBER 23 STATUTORY DECISION DEADLINE.

Several months ago in this hearing, the Bureau made it known that: “[i]n this matter, and absent intervening factors like a waiver, [NMSA 1978, § 74-2-7(B)(2)(a) and 20.2.72.207(B)(1) NMAC] make it the duty of the Department to decide on YGI’s permit application on or before November 23, 2026. The Department takes these deadlines very seriously.” *New Mexico Environment Department Air Quality Bureau’s Response in Opposition to Motion to Reset October 19 Hearing Schedule and Preserve Due Process*, at p. 4 (filed Aug. 3, 2026) [Dkt. No. 47]. Since that time, although the New Mexico Supreme Court’s stay halted the progress of this public hearing process for an unprecedented 26 days, the Bureau’s technical review continued with Bureau staff asking YGI to provide explanations and corrections to information based on the application submitted to reconcile the information in the application with the information

submitted in the modeling data. During those inquiries, YGI made the decision to change the design of the source while also submitting two sets of new modeling with corresponding revisions to the application, but without agreeing to extend the decision deadline.

As previously described by the Bureau:

While it is true that [the statutory deadline is] . . . rarely met in instances where a public hearing on a permit application occurs, the Department is unaware of any instance where these deadlines were not met over the objections of the permittee. At times past permittees have expressly or implicitly (through participation) waived their rights to have a decision on their permit application. For example, AQB 21-38 (referenced in footnote 4 of the Motion) was an instance where the applicant expressly stipulated to an extended hearing timeline. Furthermore, the schedule and hearing that was applicable to AQB 21-38 was for a joint hearing on ten (10) permit applications from three (3) different applicants. More frequently however, is the case where a permittee does not object to the deadline being missed and instead continues through the hearing process thereby implicitly waiving the deadline.

Conversely, in this matter, the Applicant has consistently objected to missing the deadline of November 23, 2026. Ultimately, the decision deadline established by NMSA 1978, Section 74- 2-7(B)(2)(a) cannot simply be ignored while the applicant asserts its expectation under the law that the Department adheres to. The Department is currently unaware of any past air quality permit application where the decision deadline has been an issue asserted by the applicant, much less the subject of multiple scheduling conferences and rounds of motion practice. As such, the Department is currently bound to make its decision within the deadline provided by its rules and the provisions of the Act.

New Mexico Environment Department Air Quality Bureau's Response in Opposition to Motion to Reset October 19 Hearing Schedule and Preserve Due Process, at pp. 3-4 [Dkt. No. 47] (footnote omitted). Implicit waiver is not an option available to YGI, which has consistently, repeatedly, and publicly asserted it will not waive the November 23 statutory deadline. Neither the Secretary nor Judge Browning have authority to waive the statutory deadline – only YGI can waive the deadline. Absent YGI waiving the statutory deadline to allow the public hearing process to continue or withdrawing and re-filing its application – the options that typically occur in these situations – YGI will likely force a decision on its application materials or before November 23

based on an administrative record that is incomplete. If this statutory decision deadline is not followed, the Bureau will be in a never-ending loop of new materials and unrealistic deadlines at the risk of other permit application deadlines, which is where it finds itself now.

A. Legal Authority Applicable to the Deadline for Issuing a Decision on YGI's Request for an Air Quality Permit

Air quality is a niche area of law requiring particularized attention to detail. Understanding the limits of NMED's authority is relevant to the public hearing process and discretionary decisions necessary to achieve meaningful participation opportunities within the time afforded for the public hearing. Specifically, the public hearing must conclude in a timely manner to supplement the administrative record upon which the Secretary decides whether to approve a permit, approve it with conditions, or deny it by New Mexico Legislature's statutorily imposed permit application decision deadline.

The AQCA specifies a 90-day deadline by which NMED must decide on a permit application with an option for NMED to extend the deadline for another 90-days for good cause while imposing a notice requirement for NMED to inform the applicant that it is extending the deadline and the grounds for it. NMSA 1978, 74-2-7(B)(2)(a) (NMED must issue a permit decision within 90 days of deeming a permit application complete, with only one permissible up-to-90-day extension for good cause, including if there is a need to have an administrative public hearing on the pending air quality permit); see 20.2.72.207(B)(1) NMAC (implementing the statutory requirement); 40 C.F.R. § 52.1620 (the federally approved New Mexico State Implementation Plan includes the complete 90-day deadline and extension provisions - i.e., the deadline is also federal law). The AQCA does not allow indefinite time for NMED to decide a permit application. Section 74-2-7(B)(3) of the AQCA is not a separate source of extension authority. Such an interpretation is contrary to statutory construction principles. Despite

representations made by the New Mexico Attorney General’s Office in the Supreme Court case that materially misunderstand air quality laws, the Attorney General’s Office’s contrary legal conclusions are not binding on the NMED, the Secretary, and the Deputy Secretary who will continue to defend the administration of the statutory air programs entrusted to them.

New Mexico courts apply the same principles of construction to administrative regulations as they do to statutes. See Carrillo v. My Way Holdings, LLC, 2017-NMCA-024, ¶ 22, 389 P.3d 1087; WildEarth Guardians v. New Mexico Env’t. Improvement Bd., 2024-NMCA-021, ¶ 12, 542 P.3d 820 (reaffirming the principle). New Mexico courts follow a well-defined approach to statutory construction:

When construing a statute, we begin with the plain language, and we assume that the ordinary meaning of the words expresses the legislative purpose. If, however, the plain language of a statute creates an absurd or unreasonable result, we will reject the literal language. Our main goal is to give effect to the legislature’s intent. We ascertain the intent of the legislature by reading all the provisions of a statute together, along with other statutes in *pari materia*.⁵ We also consider the history and background of the statute, as we harmonize the language in a manner that facilitates the operation of the statute and the achievement of its goals.

N.M. Mining Assn. v. N.M. Water Quality Control Comm., 2007-NMCA-010, ¶ 12, 141 N.M. 41, 46 (internal citations and quotations omitted). Importantly, “where several sections of a statute are involved, they must be read together so that all parts are given effect.” High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413. In order to interpret the statute, the court will be “informed by the history, background, and overall structure of the statute, as well as its function within a comprehensive legislative scheme.” Badilla, 2015-NMSC-029, ¶ 12. If possible, the statute should be “construed . . . to: (1) give effect to [the statute’s]

⁵ See Tenneco Oil Co. v. New Mexico Water Quality Control Comm’n, 1987-NMCA-153, ¶ 12, 107 N.M. 469, 473, 760 P.2d 161, 165 (“[T]he reviewing court . . . will read an act in its entirety and construe each part in order to produce a harmonious whole.”).

objective and purpose; (2) give effect to its entire text; and (3) avoid an unconstitutional, absurd or unachievable result.” NMSA 1978, § 12-2A-18; see State v. Almanzar, 2014-NMSC-001, ¶¶ 14-15, 316 P.3d 183 (the court will reject a “mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute.”). However, “[i]t is the policy of New Mexico courts to determine legislative intent primarily from the legislation itself.” Regents of Univ. of N.M. v. N.M. Fed’n of Teachers, 1998-NMSC-020, ¶ 30, 125 N.M. 401. “We do not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation.” Id.

The Legislature delegated to the EIB the requirement to issue rules governing NMED’s deadlines for issuing a permit decision in accordance with the AQCA statutory limitations:

Regulations adopted by the [EIB] . . . shall include at least the following provisions: . . . (2) specification of the deadlines for processing permit applications; provided that the deadline for a final decision by the department . . . on a construction permit application may not exceed: (a) ~~one hundred eighty ninety~~ ninety days after the application is determined to be administratively complete, if the application is ~~affected by~~ subject to requirements for prevention of significant deterioration, unless the secretary . . . grants an extension not to exceed ninety days for good cause, including the need to have public hearings[.]

§ 74-2-7(B)(2)(a) (legislative edit format for 1999 amendments)⁶ (redactions to remove inapplicable mentions of local authority). Subsection (b) is identical except to set a separate

⁶ In 1999, the Legislature passed House Bill 203, to expedite the air quality permit process. The House Energy and Natural Resources Committee Substitute added the underlined language regarding the option for a maximum extension of 90 days to the deadline based on good cause, which expressly included public hearings. The law change reduced the non-PSD permit decision timeframe from 180 days to 90 days with a possible extension. NMED’s interpretation here aligns with New Mexico’s State Implementation Plan (“SIP”) for compliance with Section 110 of the CAA, 42 U.S.C. § 7410. See 40 C.F.R. § 52.1620 (the federally approved New Mexico SIP). Much of New Mexico’s state air quality law is embodied in federal law because the CAA establishes a system of cooperative federalism. After the AQCA was amended in 1999 to reduce the permit decision deadline and recognize public engagement in the shortened timeframe, New Mexico’s SIP was amended and the state law was embodied into federal law.

deadline for when a permit involves the more involved evaluation for prevention of significant deterioration (“PSD”) (*i.e.*, 180 days with the option to extend for up to an additional 90 days). §

74-2-7(B)(2)(b). The next Section states:

Regulations adopted by the [EIB] . . . shall include at least the following provisions:
. . . (3) that if [NMED] . . . fails to take final action on a construction permit application within the **deadlines** specified in Paragraph (2) of this subsection, [NMED] . . . shall notify the applicant in writing that an extension of time is required to process the application and specify in detail the grounds for the extension[.]

§ 74-2-7(B)(3) (emphasis added) (redactions to remove inapplicable mentions of local authority).

The EIB exercised its delegated authority and adopted the following relevant regulatory provisions:

B. [NMED] shall either grant, grant subject to conditions or deny the permit or significant permit revision:

(1) within ninety (90) days after [NMED] deems the application administratively complete, if the application is not subject to the requirements of [PSD]; or

(2) [PSD permit deadline] . . .

C. If [NMED] fails to take action on the application within the deadlines specified in Subsection B of 20.2.72.207 NMAC, [NMED] shall notify the applicant by certified mail that an extension of time is necessary to process the application and shall specify, in detail, the grounds for the extension. The secretary may grant an extension, not to exceed ninety (90) days, to the deadlines specified in Subsection B of 20.2.72.207 NMAC, if the secretary determines that good cause exists for the extension. The secretary shall notify the applicant by certified mail of the decision on the extension. If the secretary grants the extension, the notification shall include the length of the extension and the reasons therefore. The authority under this paragraph may be delegated by the secretary only to the deputy secretary or a division director. Examples of good cause for extension include, but are not limited to:

(1) the need to have public hearings; . . .

(5) the permit application requires review of unusually complex technical and regulatory issues; or

(6) [NMED] is unable to complete review of information submitted, because of the timing and scope of the submittal.

20.2.72.207 NMAC. The Bureau provides the relevant regulatory text in block quotation to ensure full context, which is relevant to understanding the statutory directive and how the EIB applied it

to invoke a mandatory duty on NMED.

Contextually, the EIB separated the Section 74-2-7(B)(2) deadlines and the extension authority. First, the EIB set forth the deadlines for each of the types of permit decisions – 90 days without PSD requirements and 180 days with PSD requirements. The EIB made the deadlines mandatory with its use of “shall” to direct NMED to timely decide the permit. In this provision the EIB listed both the non-PSD permit deadline and the PSD permit deadlines together. Next, the regulation discusses requirements if NMED cannot meet those deadlines. The regulation requires NMED notify the applicant that additional time is required. Then, the regulation addresses the limits of NMED’s extension authority – stating one additional time allowance (“an extension”) is available for not more than 90 days (“not to exceed ninety (90) days”) to the deadline (“to the deadlines specified in Subsection B of 20.2.72.207 NMAC”). This means that the EIB applied Section 74-2-7(B)(3) of the AQCA as a notice requirement, not a grant of authority or new deadline provision. See Gila Res. Info. Project v. New Mexico Water Quality Control Comm’n, 2015-NMCA-076, ¶ 20, 355 P.3d 36, 42, aff’d, 2018-NMSC-025, 417 P.3d 369 (“Regulations that have been enacted by an agency ‘are presumptively valid and will be upheld if [they are] reasonably consistent with the authorizing statutes.’”) (quoting N.M. Mining Ass’n v. N.M. Water Quality Control Comm’n, 2007-NMCA-010, ¶ 11, 141 N.M. 41).

The Uniform Statute and Rule Construction Act states: “‘May not’, ‘must not’ and ‘shall not’ prohibit the exercise of a power, authority, privilege or right.” NMSA 1978, § 12-2A-4(C). The Legislature directed that EIB’s regulation setting forth NMED’s permit decision “may not” exceed 90 days or 90 days with a 90-day extension for good cause. § 74-2-7(B)(2)(a). This means the EIB was prohibited from adopting a regulation that exceeds the AQCA time limits. Section 74-2-7(B)(3) of the AQCA does not alter that statutory prohibition.

The Legislature also directed that EIB's regulations provide for notice to the applicant if NMED does not meet the initial deadline to decide on a permit. The parties dispute the meaning of the word "deadlines" in Section 74-2-7(B)(3) of the AQCA and resolution requires engaging in a statutory construction analysis to resolve the interpretation. One way to read the AQCA deadlines provision is that it has four deadlines: an initial permit deadline, a permit deadline after an extension, an initial PSD permit deadline, and a PSD permit deadline after an extension. Another way to read the provision is that it has two deadlines that each allow an extension: a permit deadline with an opportunity to extend and a PSD permit deadline with an opportunity to extend. This second reading is how the EIB applied the statutory provision when adopting the regulation.

Paragraphs (B)(1) and (2) of 20.2.72.207 NMAC set forth the deadlines for each of the types of permit decisions – without PSD requirements and with PSD requirements. The regulation confirms there are only two deadlines. Thus, the use of "deadlines" in Section 74-2-7(B)(3) of the AQCA means the 90-day non-PSD permit deadline and the 180-day PSD permit deadline.

This reading is further supported by the regulation's application of the extension authority and process for notification. In Subsection C of 20.2.72.207 NMAC, if a deadline in the preceding subsection is not met, NMED must notify the applicant, explain the basis for the extension, and identify the length of time required to complete the technical review. The provision explains the limits on the length of time available for an extension in accordance with Sections 74-2-7(B)(2)(a) and (b) of the AQCA allowing only an additional 90 days. The provision explains that the extension must be based on "good cause" and sets forth "examples" of situations where good cause exists. So, Subsection C of 20.2.72.207 NMAC takes the deadline extension options in Section 74-2-7(B)(2)(a) and (b) of the AQCA and combines them with the notice requirement in Section 74-2-7(B)(3).

The EIB's application of the AQCA provisions aligns with statutory construction principles and its delegated authority, consistent with NMED's application of the law. See City of Albuquerque v. N.M. Pub. Regulation Comm'n, 2003-NMSC-028, ¶ 16, 134 N.M. 472 (“[I]t is presumed, in the context of administrative matters that the Legislature has delegated to an agency, that the Legislature intended for the agency to interpret legislative language, in a reasonable manner consistent with legislative intent, in order to develop the necessary policy to respond to unaddressed or unforeseen issues.”).

Thus, NMED applies 20.2.72 NMAC to set the deadline for a non-PSD permit decision at 90 days with an opportunity to extend the deadline once for a maximum of 90 more days only if there is good cause for the extension and the applicant is informed.

Turning now to good cause, the Legislature expressly recognized that one reason for the extension would be “the need to have public hearings[.]” § 74-2-7(B)(2)(a). This is the only example identified in the AQCA. Thus, the Legislature gave discretion to the Secretary to determine “good cause” but identified public hearings as one circumstance that would satisfy good cause.

The EIB went further and identified more examples in addition to “the need to have public hearings[.]” 20.2.72.207(C)(1) NMAC. Another express example is when “unusually complex technical and regulatory issues” arise during the permit application review. 20.2.72.207(C)(5) NMAC. Also, the regulation broadly recognizes that good cause may exist when application-specific information (*e.g.*, supplemental or revised information from the applicant, public comment, or public hearing materials) is submitted at a time or in an amount or complexity that prevents NMED from completing its review within the ordinary 90-day deadline. 20.2.72.207(C)(6) NMAC. The Secretary is not limited to the regulatory circumstances identified

as meeting the good cause standard and retains discretion to make the determination.

B. YGI Must Clarify Its Position on the November 23 Decision Deadline to Inform Responsive Next Steps in This Proceeding.

YGI's position on NMED's decision deadline is that the date is November 23, 2026. At this point in the process, YGI has declined to extend the statutory decision deadline. Thus, absent a waiver from YGI, there is a maximum 180-day window for the Bureau to complete its application review, have public engagement, and to conduct the administrative public hearing on the pending air quality permit proceeding itself to support a recommendation for issuance.

YGI "has the burden of demonstrating that a permit . . . should be approved." 20.2.72.207(D) NMAC; 20.2.72.203(E)(1) NMAC (the duty to supplement belongs independently to the applicant); 20.1.4.400(A)(1) NMAC ("The Applicant . . . has the burden of proof that a permit . . . should be issued and not denied. This burden does not shift."); Alto Coal. for Env't Pres. v. Roper Constr., Inc., 2025-NMCA-018, ¶¶ 19-20, 572 P.3d 268 (evaluating burden of persuasion on the applicant in connection with the burden of production to test the sufficiency of the applicant's *prima facie* case, as stated in 20.1.2.302 NMAC for EIB appeals which is nearly identical to 20.1.4.400(A)(1) NMAC for public hearings) (citing Duke City Lumber Co. v. New Mexico Env't Imp. Bd., 1980-NMCA-160, ¶¶ 6-7, 95 N.M. 401).

In a circumstance where the Bureau identifies and makes revisions to the Draft Permit, Statement of Basis, and Modeling Report (its "analysis") based on a new application, transparency around the permitting process may require the Bureau to publish the revised documents and give the public at least 30 days to review and comment. See 20.2.722.206(B)(2) NMAC. For the hearing to proceed beginning on December 7, 2026, this means the Bureau must complete its technical review, update the Draft Permit, Statement of Basis and Modeling Report, make the same publicly available, and publish a public notice about their availability and how to comment by

November 6, 2026. A transparent permitting process is essential for improved environmental oversight and community protection; specifically, early and meaningful public access to permitting applications and supporting materials empowers communities with clear information about how proposed projects may affect them with the benefit of the Bureau's perspective. It enhances transparency around the permitting process, including emissions limits and operational requirements, and helps clarify regulatory expectations, including avoiding costly and time-consuming hearings. The current schedule raises significant questions about the Bureau's ability to complete this process before testimony and exhibits are due Tuesday, November 17, not to mention the earlier deadline of November 3 to provide the public notice to newspapers for publication by November 7 for compliance with the 30-day public notice requirement, 20.1.4.200(C)(2)(b) NMAC, when the public notice must include information about where "a copy of the Draft Permit . . . may be obtained [,]" 20.1.4.200(C)(2)(a)(3) NMAC. Absent YGI revising its position about the statutory deadline to enable the Bureau to conduct a complete and meaningful technical review, YGI will likely force the parties to go to hearing without a revised draft permit, statement of basis, and modeling report, or to hearing on the original Draft Permit and Statement of Basis, which may no longer be relevant given the new October 16 materials.

YGI bears the consequences if the administrative record available within the period before November 23 does not establish entitlement to a permit. The Bureau's continuing authority to request information is not an obligation to keep requesting information until an applicant succeeds in reconciling its numbers; nor does it guarantee YGI additional time to cure deficiencies when the statutory deadline is not waived. Neither supplementation authority of the Bureau nor hearing management by Judge Browning requires them to ensure that YGI can produce an approvable application before the deadline. 20.2.72.203(E)(1) NMAC; 20.2.72.207(D) NMAC;

20.1.4.400(A)(1) NMAC; compare 20.2.72.203(E)(2) NMAC (NMED can request additional information); 20.1.4.400(A)(1) NMAC (“The [Bureau] has the burden of proof for a challenged condition of a permit . . . which the [Bureau] has proposed.”). NMED’s guidance – AQB Procedure 02-013.00, New Source Review Permit Applications—Ruling Administratively Incomplete, Requesting More Information, Denials, and Extensions (Mar. 11, 2002) – recognizes that failure to demonstrate entitlement or technical deficiencies that cannot be corrected within the available time may support denial when connected to the regulatory denial grounds. Id., **Exhibit A**, at § 3.2. The Bureau may investigate newly identified issues without representing that the application is approvable. However, if YGI fails to establish compliance, the substantive denial provisions in the AQCA and Part 72 and the applicant’s burden address that failure.

The Bureau’s position has remained consistent: YGI must submit an application that accurately describes the proposed source, supported by aligned corresponding air-dispersion modeling demonstrating compliance with applicable air quality requirements. See 20.2.72.203(A) NMAC. Requests to reconcile the source configuration, emissions, and modeling implement those existing requirements to the benefit of all. YGI remains responsible for promptly supplementing and correcting its submissions and ultimately demonstrating that the permit should be approved based on the Administrative Record, which includes the Bureau’s analysis. See 20.2.72.203(E)(1) NMAC; 20.2.72.207(D) NMAC.

CONCLUSION

As a threshold matter, the AQCA and 20.1.4 NMAC must govern this administrative proceeding for an air quality permit – including those for notice, dispositive motions, and public review – which allows the Bureau to perform its job for the benefit of all. The Bureau recognizes that the Hearing Officer cannot order YGI to waive the statutory decision deadline when YGI refuses to waive; however, the rapidly approaching decision deadline also does not relieve YGI of

its burden to demonstrate entitlement to a permit. Nor does the rapidly approaching deadline require the Bureau to abbreviate technical review on YGI's October 16 revised application and modeling materials. If YGI waives the statutory deadline, the Bureau requests Judge Browning vacate the October 26 motions to dismiss hearing and afford the Bureau time to conduct its technical review to inform the evidentiary record. NMED cannot assign a date to complete its due diligence; that process takes time and is informed by the Bureau's workload (as contemplated by the AQCA and 20.1.4 NMAC) and YGI's cooperation with timely submitting accurate materials to support its request for a permit, as well as the possible necessity of providing the public with time (at least 30 days) to review the Bureau's material recommendations prior to proceeding to hearing as required by law.

If YGI maintains the November 23, 2026, deadline, Judge Browning may therefore be required to recommend to the Deputy Secretary by November 23 – before the December 7 hearing begins – that YGI has not established entitlement to a permit on an adequately developed record upon which complete findings of fact, conclusions of law, and a recommended decision for issuance can be made regardless of the pending motions.

As an independent basis to the October 26 motions to dismiss and compelled testimony hearing, there has been no public notice of the proceeding which also does not afford the public an opportunity to participate. Precedent from the New Mexico Court of Appeals would make any decision by the Deputy Secretary based on that hearing subject to being overturned.

To the extent the instant motion is denied in its entirety, the Bureau requests additional time to prepare its witnesses for the hearing on *NEE's Motion to Compel NMED Witness for Motion to Dismiss Hearing* [Dkt. No. 115] and then schedule and notice any subsequent upcoming hearing on the pending dispositive motions to dismiss according to law.

The Bureau reserves all rights to respond in more substantive form to the pending motions before the Hearing Officer, including in writing and orally at any hearing.

Filed: October 22, 2026

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *New Mexico Environment Department Air Quality Bureau's Motion for Correction of the Hearing Record* was electronically filed and sent via electronic mail on this 22nd day of October 2026 to the following:

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

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