

OCT 23 2026

Luis Lopez (DPF)
492

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 TO THE
NEW MEXICO ENVIRONMENT DEPARTMENT AIR QUALITY BUREAU'S
MOTION FOR CORRECTION OF THE HEARING RECORD [Dkt. No. 24]

Applicant Yucca Growth Infrastructure, LLC ("YGI") responds under 20.1.4.200(D)(4) NMAC to the Motion for Correction of the Hearing Record filed October 22, 2026 by the New Mexico Environment Department Air Quality Bureau (the "Department" or "NMED") (the "Motion") [Dkt. No. 124].

INTRODUCTION

NMED and YGI agree on most of what the Motion raises.¹ They disagree on one question: whether YGI must give up its statutory deadline, or face a pre-hearing denial, before the hearing can go forward. YGI need not. The deadline is a duty on the Department, not a ground for denial.

NMED's proposal would also depart from its own practice. NMED's docketed-matters archive lists 10 contested air permit proceedings since 2020, covering 19 different applications. In every one, the application was revised after it was deemed complete, and the matter went to hearing without withdrawal and resubmission and without a subsequent draft permit being published for an additional comment period. That includes three proceedings in which the revisions increased emissions. *See infra* Part IV.B.

¹YGI agrees with NMED that the Air Quality Control Act ("AQCA") and Part 4 govern notice, dispositive motions, and public review in this proceeding, including that any hearing at which dispositive relief is likely to be granted must be publicly noticed. Motion at 34; 20.1.4.600(B)(2) NMAC; 20.1.4.200(C)(2) NMAC.

Here, YGI followed the appropriate process. It submitted its application, and then the public commented and NMED raised technical questions. YGI responded to both and cut every requested emission rate by approximately 35 percent. It should not be punished for responding to public comment and Department questions/requests in good faith.

BACKGROUND

1. On August 23, 2026, the day before technical testimony was due for the September 14 hearing, the Supreme Court stayed this hearing from proceeding as it reviewed a petition for a writ of mandamus. Order Granting Stay, No. S-1-SC-41579 (N.M. Aug. 23, 2026); Amended Scheduling Order (July 29, 2026) [Dkt. No. 38]. The stay delayed NMED and YGI alike and took 25 days out of the statutory review period. On September 17, the Court unanimously denied the petition. Orders, No. S-1-SC-41579 (N.M. Sept. 17, 2026); [Dkt. Nos. 94, 97].

2. During NMED's technical review, NMED's modeler sent questions about the exhaust-flow and CO₂ calculation methodology to one of YGI's consultants, who was working with the fuel-cell vendor, Bloom Energy Corp. ("Bloom"). NMED's counsel later confirmed that the questions were "prompted" by a public comment. Administrative Record ("AR") NSR 10833_011502-011503. The consultant answered and supplied Bloom's exhaust design data. AR NSR 10833_011685. NMED's modeler then asked the consultant to rerun the modeling under more conservative assumptions: assigning flow stack by stack based on a configuration Bloom was then considering, splitting each exhaust stack into three release points, and adding Texas background sources. AR NSR 10833_011683, 011695-011696. These exchanges took place largely between NMED staff and the consultant. Even under those assumptions, NMED reported that the results "still appear[] to be under NAAQS and PSD increment thresholds." AR NSR 10833_011700, 011967. None of NMED's questions identified a violation of any standard. YGI's

Resp. to NEE’s Mot. to Dismiss Application Without Prejudice as Incomplete at 4-5 (Dkt. No. 115) (“YGI Completeness Resp.”). YGI answered NMED’s October 9 requests, AR NSR 10833_011976, on October 14. Letter from Trinity Consultants to J. Kuhn (Oct. 14, 2026) AR NSR 10833_011979-011985, (Decl. of John Ke (“Ke Decl.”) Ex. 1, YGI Completeness Resp. Ex. A [Dkt. No. 115]) (“October 14 Response”). On October 16, YGI submitted the refined modeling and revised application components and served them on every party. Certificate of Service (Oct. 16, 2026) [Dkt. No. 113].

3. The result is a better version of the same facility. The site, technology, fuel, number of fuel-cell modules, 2,462 MW nameplate capacity, and emission factors are unchanged. YGI will accept an enforceable 1,600 MW cap, lowering every requested emission rate by about 35 percent. The stacks drop in number from 2,275 to 1,263 and rise in height from 30 to 45 feet. YGI Completeness Resp. at 2 & n.2, 7. Taller stacks help ensure dispersion, and the refined modeling confirms it. Ke Decl. ¶ 13(b), YGI Completeness Resp. Ex. A [Dkt. No. 115]. These refinements are improvements to the initial design from an environmental perspective, and should be deemed a “win” by NMED and YGI’s opponents alike.

4. A hearing on NEE’s motions to dismiss and motion to compel [Dkt. Nos. 107, 116] is set for October 26, Dkt. Nos. 111, 117, and the public hearing begins December 7, Dkt. Nos. 109, 110. YGI has responded to each motion. [Dkt. Nos. 115, 126].

ARGUMENT

I. THE HEARING OFFICER SHOULD PROCEED AS EXPEDITIOUSLY AS POSSIBLE WITH THE HEARING AND DECISION.

Under NMSA 1978, § 74-2-7(B)(2)(a) and 20.2.72.207(C) NMAC, the 90-day decision period may be extended only once, by up to 90 days for good cause, including the need for a public hearing. The Secretary invoked that maximum extension on July 1, 2026, so the November 23

deadline cannot be extended further. YGI recognizes that the Hearing Officer has set the hearing on December 7, 2026 – a date that occurs after the November 23, 2026 deadline. YGI has not waived the November 23, 2026 deadline and should not be required or requested to waive that statutory deadline. NMSA 1978, § 74-2-7(B)(2)(a)-(b); 20.2.72.207(B)-(C); *see infra Part V*. Here, the Secretary has made certain the decision on whether to issue or deny the permit application cannot be made without a hearing on the record and an opportunity for all parties and the public to participate. 20.2.72.206(C); AR NSR 10833_2092. As the applicant, YGI has remedies at law for any failures to meet the deadlines. *See infra Part II.A*. YGI has no interest in pursuing those remedies if the December 7 hearing and any subsequent decision to issue or deny the permit application proceed expeditiously. YGI remains ready and willing to participate in the December 7 hearing, including to make its showing that the permit should be issued. As discussed below, YGI contends that NMED and the public have adequate time before December 7 to prepare for the hearing and requests that the Hearing Officer proceed with the December 7 hearing as planned.

II. THE STATUTORY DEADLINE IS A DUTY ON THE DEPARTMENT, NOT A GROUND FOR DENIAL.

A. Missing the deadline gives the applicant a remedy. It does not give the Department a ground to deny.

The Air Quality Control Act (“AQCA”) sets the time for decision: 90 days after the application is complete, plus a single extension “not to exceed ninety days for good cause, including the need to have public hearings.” NMSA 1978, § 74-2-7(B)(2)(a)-(b); 20.2.72.207(B)-(C) NMAC. If the Department does not act in time, it “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.” NMSA 1978, § 74-2-7(B)(3). That is the only consequence the Legislature attached to

a missed deadline. The statute does not deem the application denied. It does not add a missed deadline to the grounds for denial. NMSA 1978, § 74-2-7(C); 20.2.72.208 NMAC. On the governing law, NMED and YGI agree: the Department must decide within the statutory period, Section 74-2-7(B)(3) imposes only a notice duty, and “[o]nly YGI can waive the deadline.” Motion at 24, 27-30, 34.

In 1999, the Legislature directed the EIB to reduce the deadline for action on non-PSD permit applications from 180 to 90 days. The same legislation authorized a good-cause extension “not to exceed ninety days” and required notice to the applicant. Enacted together, these provisions establish a limited extension procedure, not authority to suspend permitting deadlines indefinitely. Comm. Substitute for H.B. 203 & 325, 44th Leg., 1st Sess. (N.M. 1999). NMED’s contemporaneous explanation confirms that purpose. Motion at 27, n6.

The deadline therefore protects the applicant. It does not empower the Department to end the application. When a statute sets a time for agency action but “does not specify a consequence for noncompliance,” a tribunal will not “in the ordinary course impose [its] own coercive sanction.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 150 (2003) (*quoting United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)). A deadline of this kind is meant “to spur the [agency] to action, not to limit the scope of [its] authority,” and action taken after it remains valid. *Brock v. Pierce Cnty.*, 476 U.S. 253, 265 (1986). New Mexico supplies the matching remedy. When an official fails to perform a duty the law requires, a party with “a clear legal right to be enforced” may seek mandamus. *City of Albuquerque v. Ryon*, 1987-NMSC-121, ¶¶ 6, 8, 106 N.M. 600, 747 P.2d 246; NMSA 1978, § 44-2-4. The remedy for a missed deadline belongs to the applicant. It is not a basis for the Department to deny the application.

Nor may NMED add a ground for denial that the Legislature did not. An agency's power is "limited to the . . . authority expressly granted or necessarily implied by those statutes." *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 13, 289 P.3d 1232 (citation omitted). Even legitimate policy concerns do not permit a departure from a statutory term. In *Camino Real*, the Court of Appeals held that the Secretary "lacks authority to deviate from" the Solid Waste Act's ten-year permit term, despite the community concerns raised. *In re Camino Real Env't Ctr., Inc.*, 2010-NMCA-057, ¶¶ 15-16, 26, 148 N.M. 776, 242 P.3d 343. The same principle applies to the AQCA's decision deadline. *See Sw. Org. Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd.*, 2021-NMCA-005, ¶¶ 13-14, 24, 482 P.3d 1273 (declining to read into the AQCA a permit standard the statute does not contain); *Alto Coal. for Env't Pres. v. Roper Constr., Inc.*, 2025-NMCA-018, ¶¶ 12, 14, 572 P.3d 268; *Duke City Lumber Co. v. N.M. Env't Improvement Bd.*, 1984-NMSC-042, ¶ 17, 101 N.M. 291, 681 P.2d 717.

The denial grounds are set by § 74-2-7(C) and 20.2.72.208 NMAC. None of them includes missing the statutory deadline, declining to waive it or withdraw an application, or an incomplete review by the Department. NMED itself ties denial to "the regulatory denial grounds." Motion at 34. The deadline is a duty on the Department. It cannot be turned into a penalty on the applicant.

The Motion goes further. If YGI does not waive, it says, the Hearing Officer "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." Motion at 35. That request sits uneasily with NMED's own statement that it "does not support premature dismissal or denial of the application." *Id.* at 4. The current hearing schedule removes any occasion for such a recommendation. But even without it, that course would fail for three reasons beyond the lack of a statutory ground.

First, pre-hearing dismissal would dispose of the application without the hearing procedures NMED itself says are mandatory. NMED argues that “public notice and an opportunity to participate before a decision are mandatory to avoid reversible error.” Motion at 3. A pre-hearing denial would repeat the defect in *Air Quality Permit No. 3135*, where the public was told it would be heard at a hearing that was “never held.” 2017-NMCA-011, ¶¶ 17-18. “[O]ur courts carefully protect the role of a meaningful public hearing.” *Colonias Dev. Council v. Rhino Env’t Servs., Inc.*, 2005-NMSC-024, ¶ 42, 138 N.M. 133, 117 P.3d 939. Part 4 provides no procedure for it. 20.1.4.500(B)-(C), 20.1.4.600(B) NMAC.

Second, a pre-hearing dismissal would lack substantial evidence. § 74-2-9(C)(2); *Duke City Lumber*, 1984-NMSC-042, ¶¶ 13, 20. Before December 7 there is no hearing record, and an incomplete review is not a finding that the application is not approvable. *See Chan v. Montoya*, 2011-NMCA-072, ¶ 9, 150 N.M. 44, 256 P.3d 987 (“It is not our practice to rely on assertions of counsel unaccompanied by support in the record.” (internal quotation marks and citation omitted)). Because the decision must rest on a record that includes the evidence presented at the hearing, that hearing may itself change the outcome, including through evidence the public presents. *See Air Quality Permit No. 3135*, 2017-NMCA-011, ¶ 21. NMED made the same point to the Supreme Court: “[a]gencies cannot efficiently develop records . . . if each interlocutory disagreement can halt the proceeding,” and the record “continues to develop . . . including through the public hearing itself.” NMED S. Ct. Resp. at 46, 59-60.

Third, denial would condition YGI’s hearing on surrendering a statutory right. NMED agrees that the Hearing Officer “cannot order YGI to waive the statutory decision deadline.” Motion at 34. A recommendation of denial because YGI declined to waive would do indirectly

what cannot be done directly. Part 4 permits procedural variations only if they do not “prejudice the rights of any party.” 20.1.4.100(E)(1) NMAC.

B. NMED has time to review the October 16 submission by the December 7 Hearing.

The October 16 submission answered questions NMED raised during its review about how the application aligned with the modeling. Motion at 6. The design choices in it were YGI’s, as NMED notes. *Id.* at 5 n.2, 7. YGI submitted it seven days after NMED’s October 9 request. *See supra* Background.

NMED has time to review the materials. It received the October 16 materials 32 days before its November 17 technical testimony is due, and much of the analysis builds on technical information and modeling NMED has already reviewed. That is roughly a third of the 90-day extension the statute allows for good cause.

NMED’s own practice shows that NMED does not need a final revised Draft Permit by November 17. It may present its review in testimony, refine it in rebuttal on November 30, and post any revised analysis before the hearing for public input at the hearing. 20.1.4.300, .400, .500 NMAC; 20.2.72.206(B)(2) NMAC. That is how NMED has proceeded before. It revised its draft permit within four days for the Cowboy facility in *XTO*, seven in *Willow Lake*, about fifteen in *Chevron*, and one in *LANL*. *In Harvest*, NMED’s hearing exhibit was its most recent revised draft permit. *See infra* Part IV.B.

III. NMED AND YGI AGREE THAT NO DISPOSITIVE RELIEF IS AVAILABLE ON OCTOBER 26.

YGI agrees with NMED that this application must be decided after the public hearing, not before it. Because the Secretary found significant public interest, a hearing is mandatory, and the decision must rest on a record that includes “the evidence submitted at the hearing.”

20.2.72.206(C), .207(D) NMAC. The hearing is where the public is heard: it gives community members “the opportunity to ask questions, offer their own technical evidence, cross-examine witnesses, and make nontechnical statements.” *Rhino*, 2005-NMSC-024, ¶¶ 2, 21. Dismissing the application at a motions hearing would not comport with the AQCA. *Air Quality Permit No. 3135*, 2017-NMCA-011, ¶¶ 15, 17, 23-25, 388 P.3d 287 (vacating summary judgment entered at a motions hearing held before the noticed public hearing). Part 4 points the same way. Summary disposition is limited to “a jurisdictional defect” or “legal arguments,” 20.1.4.600(B)(1) NMAC, yet NEE’s motions turn primarily on questions of fact, as its request to conduct direct examination of one of NMED’s witnesses confirms. *Cf. Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (summary judgment is unavailable where genuine issues of material fact remain). NMED “does not support premature dismissal or denial of the application.” Motion at 4. Neither does YGI.

The motion to compel should also be denied, for the reasons stated in YGI’s response [Dkt. No. 115] and those NMED gives. Motion at 9, 22.

IV. YGI’S APPLICATION HAS GONE THROUGH A HIGHLY TRANSPARENT PROCESS.

NMED’s request for a second comment period is conditional. If NMED revises the Draft Permit and its supporting analysis, it proposes to publish them and give the public “at least 30 days to review and comment” before the hearing. Motion at 3, 32-33, 35. YGI shares the goal of transparency and does not object to NMED posting any revised Draft Permit and analysis as soon as they are ready. Public comment will remain open through the hearing. What the rules do not require is a second 30-day period that must run before the hearing can begin. NMED misreads the rules to require it to post revised documents and publish notice by November 6 to keep the December 7 hearing. Motion at 32-33. But the Notice of Hearing need only say where the Draft

Permit may be obtained. 20.1.4.200(C)(2)(a)(iii) NMAC. The July 29 Draft Permit meets that requirement, and any revision can be posted alongside it when ready.

What NMED proposes is also the opposite of what it has done, and what its own witnesses have told hearing officers it does, in every contested air permit hearing whose record YGI could review. *See* Exhibit A (summarizing *Associated Asphalt*, *C&E Concrete*, *Willow Lake*, *Zia Hills*, *Harvest*, *XTO*, *Roper*, *DLK*, *Chevron*, and *LANL*). Those matters range from asphalt and concrete plants to oil and gas facilities and a national laboratory. *See infra* Part IV.B. NMED has even acknowledged that “it is not uncommon for applicants to submit revised applications and new supporting information throughout the permitting process,” and that “[a]s part of the normal review process, the Bureau routinely works with applicants to resolve such deficiencies.” Motion at 2, 7. In the docketed matters and archived docket records YGI was able to review, that routine did not require withdrawal and resubmission, or an additional comment period on revisions made after a hearing was requested.

A. The public has had full notice and an opportunity to comment.

The public has been informed and heard at every stage of this hearing, often beyond what Part 72 and Part 4 require. It began with the application itself. When NMED deemed the application complete on May 27, it made the full application public. YGI translated the application into Spanish, and NMED made that translation available. NSR Permit Part A_Spanish; NSR Parts B&C_10883_Spanish; Statement of Basis 10883_Spanish. NMED then issued notice and held a comment period from May 31 to July 6, during which its online portal received numerous comments. NMED’s Mot. to Vacate Stay & Resp. at 33, No. S-1-SC-41579 (N.M. Sept. 2, 2026) (“NMED S. Ct. Resp.”); AR NSR 10833_001355-001359; NMED Public Comment Portal 29,172 results

Participation expanded once the Secretary ordered a hearing. [Dkt. Nos. 1, 2]. The notice of hearing was published on July 17 and circulated through local media. It provided for participation in person in Sunland Park and virtually, with Spanish interpretation. *See* AR NSR 10833_002115–002118. On July 29, NMED posted its Draft Permit, Statement of Basis, and Modeling Report, and on August 12 it issued an amended hearing notice. NMED S. Ct. Resp. at 34. Public comment on the Draft Permit has been open since August 7, 2026, and will remain open until the hearing is complete. *Id.* Access to the record has kept pace. During the Supreme Court’s stay, NMED compiled the administrative record and posted its index online. The record holds 180 entries spanning more than 10,000 pages. AQB, YGI Microgrid Administrative Record Index (as of Aug. 24, 2026). NMED later filed the Administrative Record in the Docket and continues to update it. YGI has served its October 16 submission on every party. More opportunities are still ahead. The Hearing Officer has reserved the first day of the December 7 hearing for public comment, plus an hour on each day after. [Dkt. Nos. 109, 110]. The Hearing Clerk must also send the Notice of Hearing for publication, and mail it, no later than 30 days before the hearing. 20.1.4.200(C)(2)(b) NMAC.

That notice is sufficient. Notice is adequate if it “fairly apprise[s] the average citizen . . . with the general purpose of what was contemplated.” *Air Quality Permit No. 3135*, 2017-NMCA-011, ¶ 17 (quoting *Nesbit v. City of Albuquerque*, 1977-NMSC-107, ¶ 9, 91 N.M. 455, 575 P.2d 1340); Motion at 16. “New Mexico does not take such a strict view” of notice. The question is whether the public could “meaningfully participate.” *Sw. Rsch. & Info. Ctr. v. Sec’y of N.M. Env’t Dep’t*, 2025-NMCA-007, ¶¶ 36-37, 570 P.3d 217 (quoting *Nesbit*, ¶ 3, and *Martinez v. Maggiore*, 2003-NMCA-043, ¶¶ 13, 17, 133 N.M. 472, 64 P.3d 499); *see Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm’n*, 2019-NMSC-012, ¶ 102, 444 P.3d 460.

The notices here describe the applicant, the location, and a fuel-cell power facility subject to a public hearing. The October 16 submission changes none of that. It substantially lowers every pollutant and consolidates the stacks, as commenters asked. YGI Completeness Resp. at 7, 19-20 n.10 [Dkt. No. 115]. It also raises the stacks from 30 to 45 feet. Taller stacks release exhaust higher above the ground, so it disperses more before it reaches the places where people live and work. Ke Decl. ¶ 13(b), YGI Completeness Resp. Ex. A [Dkt. No. 115]. The refined modeling confirms it: with fewer, taller stacks and lower emissions, predicted concentrations remain below National Ambient Air Quality Standards ("NAAQS") and related increments. Ke Decl. ¶ 15, YGI Completeness Resp. Ex. A [Dkt. No. 115]. A notice describing a larger, higher-emitting facility fairly apprises the public of a smaller, lower-emitting version of the same facility.

Neither Part 72 or Part 4 require a new draft permit, a new notice, or a second comment period when an application is supplemented. Part 72 expects supplementation "[p]rior to a final decision." 20.2.72.203(E)(1) NMAC. The Secretary's hearing officer has held that accepting such revisions "complies with 20.2.72.203.E NMAC." *In re U.S. Dep't of Energy, Nat'l Nuclear Sec. Admin.* (Los Alamos Nat'l Lab'y), No. AQB 22-41(P), Hearing Officer's Report and Recommended Decision at 4 (Mar. 27, 2023) ("LANL HO Report").

The rule NMED cites does not say otherwise. Section 206(B)(2) provides that the Department shall "[n]ot issue the permit until at least thirty (30) days after the department's analysis is available for review." The 30 days run before the permit issues, not before the hearing. Section 206(B)(1) requires a single notification, sent to persons who asked in writing during the initial comment period, of "the date and location that the department's analysis was or will be available." 20.2.72.206(A)(3), (B)(1) NMAC. NMED made its analysis available on July 29. Neither provision requires a new draft permit or comment period each time the analysis is updated.

And the Notice of Hearing need only name a person “from whom further information, including a copy of the Draft Permit . . . may be obtained.” 20.1.4.200(C)(2)(a)(iii) NMAC.

Revising a facility design in response to public comment is exactly what public participation is meant to produce. The Court of Appeals has explained that “a total disregard of the information and views received at a public hearing would be arbitrary, capricious and an abuse of discretion.” *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd.*, 1969-NMCA-089, ¶ 35, 80 N.M. 633, 459 P.2d 159. For the same reason, the court held that, in a rulemaking case, the AQCA does “not contemplate that every change . . . requires another public hearing.” Requiring one “would discourage consideration . . . of the views, data, testimony and arguments presented at the public hearing.” *Id.* ¶ 39. The Clean Air Act likewise seeks “to encourage or otherwise promote reasonable . . . State . . . actions . . . for pollution prevention.” 42 U.S.C. § 7401(c).

B. NMED has consistently revised draft permits through the hearing without creating hearing delays.

NMED’s own witnesses have testified that “draft permits routinely undergo continuous revisions up until they are issued.” *In re Associated Asphalt & Materials, LLC*, No. AQB 20-12(P), NMED Statement of Intent, Direct Testimony of Kathleen Primm (NMED Ex. 1) at 21:5 (Mar. 1, 2021). Its Permit Program Section Chief testified that a draft permit “is a . . . dynamic document that changes depending on available information throughout the process,” and that “[t]his hearing is part of this process, which will result in this permit being further improved based on . . . suggestions from interested parties.” *Associated Asphalt*, No. AQB 20-12(P), Hr’g Tr. 434:13-19 (Mar. 23, 2021).

NMED’s permit writers have testified that “[a] draft permit is a dynamic working document which may be updated throughout the review process.” *In re DLK Black River Midstream, LLC*,

No. AQB 22-25, Air Quality Bureau’s Statement of Intent, Direct Testimony of Julia Kuhn at 7:8-9 (Aug. 29, 2022); *accord Acequia de Alto y los Martinez v. N.M. Env’t Dep’t*, Nos. EIB 24-51, 24-52, Written Testimony of Joseph Mashburn (NMED Ex. 2) at 14 (Dec. 17, 2024) (draft permit is “subject to updates throughout the review process”). In one case, when opponents objected to the original notice, NMED staff explained that, because “the initial 30-day comment period had concluded,” “the newspaper notice was not re-published and another 30-day comment initial notice was not done.” *In re XTO Energy, Inc.*, No. AQB 21-31 *et al.*, NMED Closing Argument and Proposed Findings of Fact and Conclusions of Law ¶¶ 105-106 (Dec. 3, 2021).

And NMED told another hearing officer that a hearing on a draft revised after notice “complied with all hearing procedures and allowed for full participation by the public and the parties.” *DLK*, Nos. AQB 22-25 to -27 (consolidated with *In re Chevron U.S.A. Inc.*), Air Quality Bureau’s Closing Argument, Proposed Findings of Fact and Conclusions of Law ¶ 205 (Nov. 7, 2022). NMED now asks the Hearing Officer to require the very re-publication its own staff and counsel have told other hearing officers was unnecessary. Courts defer to that kind of established practice of correcting pending applications rather than requiring refiling. *Augustin Plains Ranch, LLC v. D’Antonio*, 2023-NMCA-001, ¶¶ 29-33; *see Ram v. N.M. Dep’t of Env’t*, No. CIV 05-1083 JB/WPL, 2007 WL 5239192, FOF 77 (D.N.M. July 6, 2007) (Bureau instruction that a post-completeness update “does not restart the review process”).

NMED’s dockets bear this routine practice out. Its “Docketed Matters Archive” lists 10 contested air permit proceedings before the Secretary since 2020, covering 19 different applications. In each of the proceedings YGI reviewed, the application was revised after it was deemed complete, and the matter went to hearing without withdrawal and resubmission; even

revisions made after a hearing was requested went to hearing without an additional 30-day comment period:

1. ***Revised draft permits presented at or just before the hearing.*** In *Willow Lake*, NMED “supported the requested revisions and incorporated them into the Draft Permit,” and its hearing exhibit was a draft dated the first day of the hearing. *In re Crestwood N.M. Pipeline LLC (Willow Lake Gas Plant)*, No. AQB 21-38, Hearing Officer’s Report at 2, FOF 25, 36 (Dec. 27, 2021); *Willow Lake*, No. AQB 21-38, NMED Ex. 49 at A1 (“Draft-10-25-21”). In *Harvest*, NMED presented an updated draft permit at the hearing. *In re Harvest Four Corners, LLC*, Nos. AQB 21-37, 21-43, Hearing Officer’s Report and Recommended Decision, FOF 14-15, 23, 40 (Jan. 10, 2022). In *LANL*, NMED revised the Draft Permit and Statement of Basis twelve days before the hearing, and the hearing officer held that the public’s opportunity to comment and “cross-examine witnesses” at the hearing satisfied the notice rules. *LANL*, AQB 22-41 HO Report at 4, FOF 53-58, COL 13-14.

2. ***Revisions that increased emissions.*** In *XTO*, NMED requested a revised application and modeling that added emergency generators and increased startup, shutdown, and malfunction emissions; it issued a draft permit four days later and declined to republish. *XTO*, No. AQB 21-31 *et al.*, Hearing Officer’s Report, FO 40-41, 143-152 (Dec. 27, 2021). In *DLK*, the application itself sought to “increase permitted emissions,” including by raising engine hours from 2,190 to 8,760 per year. It was revised in September 2021 in response to NMED’s requests for updates and clarifications, and when an opponent asked for “another 30-day public review period,” NMED responded that the notice met regulatory requirements. *DLK*, No. AQB 22-25, DLK’s Statement of Intent, Direct Technical Testimony of Laura Worthen Lodes (Ex. 1) at 2, 4, Ex. 3 at 2-3 (Aug. 29, 2022); Air Quality Bureau’s Statement of Intent, Direct Testimony of Julia Kuhn

(Ex. 1) at 8-9 (Aug. 29, 2022); Final Order at 2, No. AQB 22-25 (Dec. 16, 2022). In *Chevron*, Chevron updated the Salado Draw 19 application several times during review in response to NMED inquiries, adding malfunction emissions in its July 20, 2022 version. *In re Chevron U.S.A. Inc.*, Nos. AQB 22-26, 22-27, Hearing Officer’s Report and Recommended Decision, FOF 12-14 (Dec. 8, 2022); Air Quality Bureau’s Statement of Intent, Ex. 3 at 3, 7:27-28, Ex. 5 at 4 (Aug. 29, 2022). Each permit issued.

3. *Revisions in response to NMED and the public.* In *C&E Concrete*, 10 updates at NMED’s request met “[a]ll public notice requirements.” *In re C&E Concrete, Inc.*, No. AQB 21-29(P), Hearing Officer’s Report, COL 32 (Oct. 27, 2021). In *Zia Hills*, NMED’s only re-notice added an email address. *In re ConocoPhillips Co. (Zia Hills Central Facility)*, No. AQB 21-36, Hearing Officer’s Report, FOF 37-38, 52 (Dec. 27, 2021). In *Associated Asphalt*, NMED made “responsive changes to Draft Permit in light of concerns expressed by interested parties” and lowered the SO₂ limits in its revised draft before the hearing; the permit issued, and the Board affirmed it 6-0. *Associated Asphalt*, No. AQB 20-12(P), Hearing Officer’s Report, FOF 234-236 (June 28, 2021); *id.*, Final Order at 3 (July 30, 2021), *aff’d*, *EarthCare N.M. v. N.M. Env’t Dep’t*, No. EIB 21-48, Final Order at 1, 4 (Aug. 26, 2022). In *Roper*, NMED posted an updated draft about six weeks before the hearing, and the hearing officer found the notice requirements met. *In re Roper Constr., Inc.*, No. AQB 21-57(P), Hearing Officer’s Report at 20-21, 52, FOF 14, 18-19, COL 5-6 (May 6, 2022). The Court of Appeals later reversed on an unrelated emissions-factor issue. *See Alto Coal. for Env’t Pres. v. Roper Constr., Inc.*, 2025-NMCA-018, 572 P.3d 268.

Against that record, NMED suggests that YGI’s original application “was not ready for primetime.” Motion at 7. But nothing meaningful distinguishes YGI from the applicants above. In nearly all of those dockets, NMED staff asked technical questions after completeness and

requested updates, often repeatedly and often to the modeling and equipment: 10 updates at NMED's request in *C&E*, a revised application and modeling "NMED requested" for the Cowboy facility in *XTO*, updates "[i]n response to NMED inquiries" in *Chevron*, and second revisions "[a]t NMED's request" in *Harvest*. AQB 21-29(P); AQB 21-31; AQB 22-26. NMED's own witnesses have testified that "[u]pdates to the original application are often required." *Associated Asphalt*, No. AQB 20-12(P), Direct Testimony of Kathleen Primm (NMED Ex. 1) at 2; *Chevron*, No. AQB 22-26, Air Quality Bureau's Statement of Intent, Direct Testimony of Todd Sherrill at 2 (Aug. 29, 2022). That is how review appears to work in practice based on public records in NMED's dockets.

In none of the proceedings YGI reviewed did an applicant withdraw and resubmit; each went to hearing on its revised application. The question is not whether YGI was ready for primetime. It is whether YGI should be penalized for going through the same process nearly every applicant in NMED's docket has gone through. It should not. The truth is that changes, updates and revisions happen regularly throughout the hearing process.

If anything, YGI's revision stands apart from these cases in the other direction. It is the largest post-notice emission reduction YGI has found in any of these dockets. The cap lowers NOx from 37.20 to 24.18 tpy, CO from 161.21 to 104.77 tpy, VOC from 124.01 to 80.59 tpy, and PM10/PM2.5 from 75.40 to 49.00 tpy, about 139 tons per year in all, and CO2e by more than 3.08 million tons per year. Ke Decl. ¶ 17, YGI Completeness Resp. Ex. A [Dkt. No. 115]. With the cap, YGI's facility would also emit less of most pollutants than at least one source NMED carried to hearing on a revised application. *Willow Lake's* revised draft permit estimated 165.08 tpy NOx, 131.3 tpy CO, 148.3 tpy VOC, and 11.9 tpy SO2. *Willow Lake*, No. AQB 21-38, Crestwood's Statement of Intent to Present Technical Evidence at 39 (Oct. 12, 2021). YGI's requested limits are 24.18 tpy NOx, 104.77 tpy CO, 80.59 tpy VOC, and 0.049 tpy SO2, roughly one-seventh of

Willow Lake's NO_x and half its VOC. Ke Decl. ¶ 17, YGI Completeness Resp. Ex. A [Dkt. No. 115]. Yet NMED now appears to propose for YGI alone a second pre-hearing review period and a possible pre-hearing denial.

Imposing greater burdens on a particularly protective revision has no rational basis, particularly when NMED has carried modifications that increased emissions to hearing without them. *See supra* Part IV.B.2 (*XTO*, *DLK*, and *Chevron*). Agency action is arbitrary “if it is unreasonable or without a rational basis,” *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm’n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806, or if “one [party] is treated differently compared with others who are similarly situated and no rational explanation is offered,” *Sais v. N.M. Dep’t of Corr.*, 2012-NMSC-009, ¶ 17, 275 P.3d 104; *see In re Petition of PNM Gas Servs.*, 2000-NMSC-012, ¶ 9, 129 N.M. 1, 1 P.3d 383; *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency that departs from its own practice must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Motion does neither. It does not mention the hearings described above or explain why YGI alone must clear a second comment period before reaching the hearing. Imposing that requirement would be error.

V. NMED’S 2002 INTERNAL PROCEDURE CANNOT REQUIRE WITHDRAWAL OR DENIAL.

NMED asks the Hearing Officer to rely on an internal 2002 document, AQB Procedure 02-013.00 (“Procedure”). It cites two sections:

- Section 2.3, for the statement that “[a]bsent 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.”
- Section 3.2, for the statement that a failure to demonstrate entitlement or uncorrected technical deficiencies “may support denial when connected to the regulatory denial grounds.”

Motion at 7, 34. The Procedure cannot carry that weight, for three reasons.

First, NMED itself calls the Procedure “guidance.” *Id.* at 34. Guidance “do[es] not have the force and effect of law and [is] not accorded that weight in the adjudicatory process.” *Princeton Place v. N.M. Hum. Servs. Dep’t*, 2022-NMSC-005, ¶ 28, 503 P.3d 319 (quoting *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015)).

Second, the Procedure does not say what NMED needs it to say. By NMED’s own description, Section 2.3 addresses cases “[a]bsent a public hearing,” and this case has one. Motion at 7. Even where Section 2.3 applies, it describes withdrawal as something the permit engineer may “request,” as one option among others. Motion Ex. A § 2.3. Section 3.2, as NMED reads it, points back to “regulatory denial grounds”, and none of those grounds has been found to apply here. *See supra* Part II.A. The non-binding Procedure cannot be used to circumvent mandatory statutory deadlines.

Third, if the Procedure were applied as binding, it would be an unpublished rule, and according to the State Rules Act an unpublished rule cannot be enforced. A “rule” includes any “standard” issued by an agency that affects persons outside it. NMSA 1978, § 14-4-2(F). “[N]o rule shall be valid or enforceable until it is published in the New Mexico register.” § 14-4-5(A). Standards that are not properly promulgated “have no efficacy, validity or enforceability.” *Bokum Res. Corp. v. N.M. Water Quality Control Comm’n*, 1979-NMSC-090, ¶ 42, 93 N.M. 546, 603 P.2d 285; *Princeton Place*, 2022-NMSC-005, ¶ 24.

New Mexico courts have applied this requirement strictly. *See Pineda v. Grande Drilling Corp.*, 1991-NMCA-004, ¶ 8, 111 N.M. 536, 807 P.2d 234 (“[T]he language of Section 14-4-5 is categorical.”); *State v. Joyce*, 1980-NMCA-086, ¶¶ 5-8, 94 N.M. 618, 614 P.2d 30 (long-standing policy unenforceable until filed); *Weldon v. Sanders*, 1982-NMSC-136, ¶¶ 34-35, 99 N.M. 160,

655 P.2d 1004 (unfiled directive void);_N.M. Att’y Gen. Op. No. 93-01 (1993)_ (“procedural standards, manuals, directives and requirements” affecting persons outside the agency are rules). The Procedure has not been published in the New Mexico Register.

The Procedure also intrudes on rulemaking authority the Legislature gave to the EIB, not NMED. The AQCA assigns the rules governing permit applications, deadlines, and public participation to the EIB. NMSA 1978, § 74-2-7(B)(1), (2), (5). The EIB’s rules require neither withdrawal nor refiling when an application is supplemented. 20.2.72.203, .206, .207, .208 NMAC. NMED has itself argued that imposing a standard the EIB “has not promulgated” would be “impermissible de facto rulemaking.” *Alto Coal.*, 2025-NMCA-018, ¶ 10.

Relying on the Procedure to require withdrawal, to restart the decision period, or to dismiss or deny the application would therefore be error.

CONCLUSION

The public commented, NMED raised technical questions, and YGI listened and lowered its emissions by approximately 35 percent. The December 7 hearing is where that result should be tested. YGI respectfully requests that the Hearing Officer grant the Motion in part and deny it in part, as follows:

1. **Grant** NMED’s request that the AQCA and Part 4 govern notice, dispositive motions, and public review, including that any hearing at which dispositive relief is likely to be granted be publicly noticed under 20.1.4.600(B)(2) NMAC;
2. **Deny** NEE’s motions to dismiss [Dkt. Nos. 52, 57, 107] and the October 22 joinder [Dkt. No. 123] or determine that relief is not likely to be granted, and deny the motion

to compel [Dkt. No. 116], which moots NMED's request for more time to prepare witnesses; and

3. **Deny** NMED's request for a recommendation by November 23 that YGI has not established entitlement to a permit, and decline to recommend withdrawal or denial before the December 7 hearing.

Respectfully submitted this 23rd day of October, 2026.

YUCCA GROWTH INFRASTRUCTURE, LLC

/s/ Jennifer L. Bradfute

Jennifer L. Bradfute

David Kirmse

P.O. Box 90233

Albuquerque, NM 87199

Telephone: (505) 264-8740

Email: jennifer@bradfutelaw.com

Jennifer L. Biever

Carlos Romo

Williams Weese Pepple & Ferguson, P.C.

1801 California Street, Suite 3400

Denver, CO 80202

jbiever@williamsweese.com

*Counsel for Applicant Yucca Growth
Infrastructure, LLC*

CERTIFICATE OF SERVICE

I certify that on October 23, 2026, I served the foregoing on all parties and counsel of record on the service list for AQB 26-57(P) by electronic mail.

Hon. James O. Browning
Hearing Officer

Brian Yardman-Frank
New Mexico Environment Department
Office of General Counsel
121 Tijeras Avenue NE, Suite 1000
Albuquerque, NM 87102
brian.yardman-frank@env.nm.gov
Counsel for NMED

Zachary E. Ogaz, General Counsel
New Mexico Environment Department
PO Box 5469, Santa Fe, NM 87502-5469
Zachary.ogaz@env.nm.gov
Counsel for NMED

Kelsea E. Sona
Robles, Rael & Anaya, P.C.
500 Marquette Ave NW, Ste. 700
Albuquerque, NM 87102
kelsea@roblesrael.com
Counsel for NMED

Bruce Wetherbee
60 Thoreau Street, 103
Concord, Massachusetts 01742
editor@thecandlepublishing.com
Pro Se Intervenor

Joe Cardillo
344 4th Street SW
Albuquerque, NM 87102
joe@progressnownm.org
Pro Se Intervenor

Nicholas R. Maxwell
P.O. Box 1064
Hobbs, New Mexico 88241
inspector@sunshineaudit.com
Pro Se Intervenor

Pamela Jones
Luis Lopez
Office of Public Facilitation
New Mexico Environment Department
Pamela.Jones@env.nm.gov
Luis.lopez@env.nm.gov

Nathaniel Chakeres, General Counsel
P.O. Box 25102
Santa Fe, NM 87504-5012
nathaniel.chakeres@ose.nm.gov
Counsel for New Mexico Office of the State Engineer

Yiwei Chen
P.O. Box 20003
Santa Fe, NM 87504-5003
yiwei.chen@edd.nm.gov
Economic Development New Mexico

Andre Makarski
510 San Pedro
Albuquerque, NM 87108
andre@ualocal412.org
United Association Local 412

Kayla Jankowski, Staff Attorney
Maslyn Locke, Senior Staff Attorney
Eric Jantz, Legal Director
New Mexico Environmental Law Center
kjankowski@nmelc.org
mlocke@nmelc.org
ejantz@nmelc.org
cc: kpalmer@nmelc.org
Counsel for Vivian Fuller and Jose Saldaña Jr.

Mariel Nanasi
Christopher Dodd
422 Old Santa Fe Trail
Santa Fe, NM 87501
MNanasi@NewEnergyEconomy.org
chris@fayerbergdodd.com

Isaiah Zemke
2300 Buena Vista SE, Suite 110
Albuquerque, NM 87106
izemke@smwlu49.org
Sheet Metal Workers Local Union No. 49

Colin Cox
Sarah Baer
Gail Evans
PO Box 31417
Santa Fe, NM 87594
ccox@biologicaldiversity.org
sbaer@biologicaldiversity.org
gevans@biologicaldiversity.org
Counsel for Center for Biological Diversity

Christine Dobbin
1 Cielo Azul
Anthony, NM 88021
dobbin.cc@gmail.com
Pro Se Intervenor

Courtenay Eichhorst
411 Arizona St.
Albuquerque, NM 87108
courtenaye@ualocal412.org
*New Mexico Building and Construction Trades
Council*

Allison Johnson
Kalista Wilson
Assistant Attorneys General
New Mexico Department of Justice
201 3rd St. Suite 300
Albuquerque, New Mexico 87102
AJohnson@nmdoj.gov
KWilson@nmdoj.gov
Counsel for New Mexico Department of Justice

Rocky Bacchus
Consultant
6501 Tarascas Drive
El Paso, TX 79912
rockybacchus@gmail.com
Pro Se Intervenor

Counsel for New Energy Economy

Esperanza Chairez
YUCCA Policy Campaign Manager
Zephyr Jaramillo
esperanza@yuccanm.org
info@yuccanm.org
Youth United for Climate Crisis Action

Alfonso "Fonze" Martinez, Jr.,
Business Manager/Financial Secretary
Mark Trujillo
Stephanie Maez
alfonso@ibew611.org
markgtrujillo@ibew611.org
smaeznm@gmail.com
IBEW Local Union 611

Darrell Deaguero, Business Manager
1030 San Pedro Drive NE
Albuquerque, NM 87110
darrell.deaguero@liuna16.org
mlor@liuna.org
LIUNA Local 16

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

/s/ Jennifer Bradfute

EXHIBIT A
CONTESTED AIR QUALITY PERMIT PROCEEDINGS BEFORE THE SECRETARY,
2020–2022

NMED’s [docketed-matters archive](#) lists ten contested air permit proceedings before the Secretary from 2020 through 2022 (counting DLK and Chevron, heard together, separately), covering nineteen applications. In each, the application or draft permit was revised after the application was deemed complete, and the matter went to hearing without withdrawal and resubmission. Revisions made after a hearing was requested went to hearing without a new public comment period on those revisions. There is a chart listing these cases; and a summary that describes the facility, the changes, how NMED proceeded, and relevant NMED testimony, and links to the documents relied on. Pin cites refer to each document’s internal pagination.

Proceeding	Docket	Changes after completeness	Latest revision before hearing	Withdrawal / new comment period	Outcome
Associated Asphalt	AQB 20-12(P)	Fifteen updates; draft revised for public concerns, incl. lower SO ₂	Feb. 4, 2021 draft; hearing Mar. 22–24, 2021	No / No	Permit issued; EIB sustained 6-0
C&E Concrete	AQB 21-29(P)	Ten updates, many at NMED’s request	Aug. 27, 2021 update; hearing Sept. 27, 2021	No / No	Permit granted
XTO Energy	AQB 21-31 to -35, -39 to -41	NMED-requested Cowboy revision adding generators and higher SSM	Draft Feb. 22, 2021; Jayhawk update Sept. 20, 2021	No / No	Approval recommended for all eight
Zia Hills	AQB 21-36	Updates Jan.–Sept. 2021 at NMED’s request	Statement of Basis Aug. 27, 2021; hearing Oct. 25, 2021	No / No*	Approval recommended
Harvest Four Corners	AQB 21-37, 21-43	Two revisions each; second at NMED’s request	Sept. 2021; hearing Nov. 15, 2021	No / No	permit granted
Willow Lake	AQB 21-38	Updated to reflect increase in condensate emissions	Draft Sept. 21, 2021; hearing Oct. 25, 2021	No / No	Permit granted
Roper	AQB 21-57(P)	Eleven updates, Aug. 2021–Jan. 2022	Draft Dec. 30, 2021; hearing Feb. 9, 2022	No / No	Reversed on appeal, 2025-NMCA-018

Proceeding	Docket	Changes after completeness	Latest revision before hearing	Withdrawal / new comment period	Outcome
DLK Black River	AQB 22-25(P)	Application revised in response to updates and clarifications from NMED	Statement of Basis Aug. 22, 2022; hearing Oct. 3, 2022	No / No	Permit granted
Chevron Salado Draw 19	AQB 22-26(P), 22-27(P)	Added Malfunction emissions to the 7/20/2022 version of the application	Drafts Aug. 4–5, 2022; hearing Oct. 3, 2022	No / No	Final order not located
LANL	AQB 22-41	Draft revised for comments; later application revisions prior to hearing	Draft Jan. 5, 2023; hearing Jan. 17, 2023	No / No**	Permit granted

**Zia Hills: NMED re-noticed once to add an email address for comments, which restarted the 30-day period; no re-notice followed the later revisions.*

*** LANL: NMED opened a second comment period on a revised draft in April 2022, before a hearing was requested; no new comment period followed the revisions made after the hearing was ordered.*

SUMMARIES & HYPERLINKS

1. Associated Asphalt & Materials, LLC, Permit No. 8585

No. AQB 20-12(P); No. EIB 21-48

Facility. Consolidated asphalt and aggregate operations in Santa Fe: a 200 TPH crushing and screening plant and two hot mix asphalt plants (150 and 300 TPH).

Changes. The application was ruled complete December 20, 2019, and fifteen dated updates followed through December 29, 2020. Primm Test. at 7:22, 8:21–9:17. Between October 2020 and February 2021, NMED made “responsive changes to Draft Permit in light of concerns expressed by interested parties,” including lower SO₂ limits in its revised draft. Hearing Officer’s Report, FOF 234–236 (June 28, 2021).

How NMED proceeded. The hearing was held March 22–24, 2021. The Deputy Secretary granted the permit in the form of the Draft Permit and found that the public had a meaningful opportunity to participate. Final Order at 3 (July 30, 2021). The Environmental Improvement Board sustained the permit 6-0. *Earth Care N.M. v. N.M. Env’t Dep’t*, No. EIB 21-48, Final Order at 1, 4 (Aug. 26, 2022).

Testimony. Kathleen Primm testified for NMED that “[u]pdates to the original application are often required” and that draft permits “routinely undergo continuous revisions up until they are issued.” NMED Ex. 1 at 2:1–2, 21. Ted Schooley, Permit Program Section Chief, testified that the hearing is part of a process that improves the permit based on suggestions from interested parties. Hr’g Tr. vol. 2, 434:13–19 (Mar. 23, 2021).

Documents:

- [NMED Statement of Intent, Ex. 1 \(Primm Testimony\)](#) (Mar. 1, 2021)
- [Hearing Officer’s Report](#) (June 28, 2021)
- [Final Order](#) (July 30, 2021)
- [Hearing Transcript, vol. 2](#) (Mar. 23, 2021)
- [EIB Final Order, No. EIB 21-48](#) (Aug. 26, 2022)

2. C&E Concrete, Inc., Gamarco HMA Plant, Permit No. 9027

No. AQB 21-29(P)

Facility. A 200 TPH hot mix asphalt plant co-located with a concrete batch plant at 208 Crystal Ave., Gamarco, McKinley County.

Changes. The application was received November 6, 2020 and ruled complete December 4, 2020. Ten updates followed between December 10, 2020 and August 27, 2021, including a complete revised application in PDF form on July 29, 2021. Sherrill Test., NMED Ex. 1, at 7:21–22, 9:23, 10.

How NMED proceeded. NMED addressed the updates in revised drafts sent to the applicant on February 23 and August 18, 2021, and revised permit conditions to match the application and modeling. Sherrill Test. at 16–17; Ex. 5 at 5. The Hearing Officer concluded that “[a]ll public notice requirements of 20.2.72 and 20.1.4 NMAC were met for this hearing.” Hearing Officer’s Report, COL 32 (Oct. 27, 2021). The Secretary adopted the report and granted the permit in the form of the Draft Permit. Final Order at 2 (Nov. 17, 2021) (reproduced at YGI Resp. to NEE’s Mot. to Dismiss as Incomplete, App. A (Dkt. No. 114), App. A-17 to A-18).

Testimony. Todd Sherrill testified that “[s]everal requests for updates were necessary in order to complete my review of the calculations” and that “other updates were requested due to deficiencies or inconsistencies observed while writing the permit draft.” Sherrill Test. at 9-10.

Documents:

- [NMED Statement of Intent, Ex. 1 \(Sherrill Testimony\)](#) (Sept. 13, 2021)
- [Hearing Officer’s Report and Proposed Order](#) (Oct. 27, 2021)
- [Final Order \(Nov. 17, 2021\)](#), reproduced at YGI Resp. to NEE’s Mot. to Dismiss as Incomplete, App. A (Dkt. No. 114), App. A-17 to A-18

3. XTO Energy, Inc. (Bulldog, Jayhawk, Longhorn, Cowboy CDP, Wildcat, Maverick, Spartan, Tiger)

Nos. AQB 21-31 to 21-35, 21-39 to 21-41 (Permit Nos. 8153-M1, 8152-M1, 8349-M2, 7877-M1, 7474-M2, 7565-M2, 7681-M2, 7623-M2)

Changes. For the Cowboy facility, NMED requested a revised application and modeling that added emergency generators and increased startup, shutdown, and malfunction emissions, and issued a draft permit four days later, on February 22, 2021. Hearing Officer’s Report and Recommended Final Order, FOF 143–152 (Dec. 27, 2021). For Jayhawk, NMED issued the draft permit May 25, 2021, and an updated application followed on September 20, 2021. *Id.*, FOF 90, 101.

How NMED proceeded. NMED did not republish notice or open a new comment period, and the matters went to hearing on the revised applications. *Id.*, FOF 40–41. The Hearing Officer recommended approval of all eight permits. *Id.* at 8.

Testimony. When opponents objected to the original Cowboy and Jayhawk notices, NMED staff explained that because “the initial 30-day comment period had concluded,” “the newspaper notice was not re-published and another 30-day comment initial notice was not done.” NMED Closing Argument ¶¶ 105–106 (Dec. 3, 2021) (quoting NMED Ex. 27 at 9).

Documents:

- [Hearing Officer’s Report and Recommended Final Order](#) (Dec. 27, 2021)
- [NMED Closing Argument and Proposed Findings](#) (Dec. 3, 2021)
- [Order Granting Joint Extension](#) (Dec. 1, 2021) (caption lists all eight dockets)

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

No. AQB 21-36

Facility. An oil and gas central gathering facility in Lea County; a minor source revision to raise production to 18,503 barrels of oil and 120 MMscf of gas per day. Hearing Officer’s Report, FOF 1–2, 7–8 (Dec. 27, 2021).

Changes. NMED ruled the application complete February 10, 2021. ConocoPhillips submitted updates “in response to NMED inquiries and requests” from January through September 2021. NMED issued the draft permit May 11, 2021 and updated the Statement of Basis August 27, 2021. *Id.*, FOF 27, 30–32, 52.

How NMED proceeded. NMED re-noticed once, in May 2021, only to add an NMED email address for comments. *Id.*, FOF 37–38. The August 27 Statement of Basis update was not re-noticed, and the hearing went forward October 25–26, 2021. *Id.*, FOF 13–14, 52. The Hearing

Officer found no credible evidence supporting denial and recommended approval. *Id.* at 5, COL 5, 16.

Documents:

- [Hearing Officer's Report and Recommended Decision](#) (Dec. 27, 2021)

5. Harvest Four Corners, LLC, Chaco and Carracas CDP Compressor Stations

Nos. AQB 21-37, 21-43 (Permit Nos. P239R3, P168R4)

Changes. Chaco was ruled complete November 25, 2019 and revised in April 2020, May 2020, and September 2021; the September revision added 14 pneumatic controllers “[a]t NMED’s request.” Hearing Officer’s Report and Recommended Decision at 3-4. Carracas was ruled complete January 29, 2020 and revised in March 2021 and September 2021; the September revision added 24 pneumatic controllers at NMED’s request. Hearing Officer’s Report and Recommended Decision, FOF 14, 23 (Jan. 10, 2022).

How NMED proceeded. The Secretary granted a hearing June 4, 2021. The September 2021 revisions followed, and the hearing went forward November 15, 2021 on NMED’s most recent draft (NMED Ex. 16), which removed an hourly truck loadout VOC limit, without withdrawal or a new comment period. *Id.* at 1, FOF 14–15, 23, 40.

Testimony. NMED modeler Eric Peters testified that the NAAQS compliance demonstration had been made and the permits may be issued. Hr’g Tr. 91:4–10 (quoted in Harvest Closing Argument).

Documents:

- [Hearing Officer's Report and Recommended Decision](#) (Jan. 10, 2022)
- [Harvest Closing Argument and Proposed Findings](#) (Dec. 29, 2021)

6. Crestwood New Mexico Pipeline LLC, Willow Lake Gas Plant, Permit No. 5142-M8

No. AQB 21-38

Facility. A gas processing plant about 2.7 miles southwest of Malaga, Eddy County. The modification added three compressor engines, a tank, and a glycol dehydration unit to increase gathering capacity. NMED Ex. 49 , p. 3.

Changes. NMED issued the Draft Permit March 18, 2021. Final Order at 2. On September 14, 2021, Crestwood revised the application for higher condensate volumes, and on September 15 it added four electric pumps and updated fugitive calculations. Wolfe/Smith Test. at 5–7.

How NMED proceeded. NMED “supported the requested revisions and incorporated them into the Draft Permit.” Hearing Officer’s Report at 2, FOF 25, 36 (Dec. 27, 2021). NMED’s

hearing exhibit was a draft dated the first hearing day. NMED Ex. 49 at A1 (“Draft-10-25-21”). The parties stipulated to the schedule and hearing procedures. Stipulation Regarding Scheduling Orders , at 1 (Oct. 6, 2021). The Deputy Secretary adopted the Hearing Officer’s Report and granted the permit. Final Order at 2 (Feb. 10, 2022) (reproduced at YGI Resp. to NEE’s Mot. to Dismiss as Incomplete, App. A (Dkt. No. 114), App. A-31 to A-32).

Testimony. Crestwood’s witnesses testified that NMED agreed with and incorporated each revision. Wolfe/Smith Test. at 6–7.

Documents:

- [Crestwood Statement of Intent and Testimony](#) (Oct. 12, 2021)
- [Hearing Officer’s Report](#) (Dec. 27, 2021)
- [NMED Ex. 49](#) (draft permit dated Oct. 25, 2021)
- [Stipulation re Schedule and Procedures](#) (Oct. 5, 2021)
- [Final Order](#) (Feb. 10, 2022), reproduced at YGI Resp. to NEE’s Mot. to Dismiss as Incomplete, App. A (Dkt. No. 114), App. A-31 to A-32

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

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

Facility. A 125 cubic-yard-per-hour concrete batch plant north of Ruidoso, Lincoln County. Saikrishnan Test., NMED Ex. 1, at 1, 3.

Changes. NMED ruled the application complete July 22, 2021. Eleven updates followed between August 5, 2021 and January 13, 2022. *Id.* at 6–8. An earlier motion to dismiss the application as incomplete was denied because “the omissions identified by Movants were addressed by Roper.” Order Denying Motion to Dismiss ¶¶ 16–18 (Dec. 27, 2021) (reproduced at YGI Resp. to NEE’s Mot. to Dismiss as Incomplete, App. A (Dkt. No. 114), App. A-52 to A-53).

How NMED proceeded. NMED posted Draft Permit Version 2021-12-30 with its Statement of Basis on December 30, 2021, 41 days before the February 9, 2022 hearing. Saikrishnan Test. at 11–13. The Hearing Officer found the notice requirements met, though he recommended denial on other grounds. Hearing Officer’s Report at 20–21, 52, FOF 14, 18–19, COL 5–6, 11 (May 6, 2022). Before the EIB, NMED described the application as one that “has been amended and is not ‘new.’” NMED Resp. to Mot. to Dismiss at 5, No. EIB 22-34 (Oct. 13, 2022) (reproduced at YGI Resp. to NEE’s Mot. to Dismiss as Incomplete, App. A (Dkt. No. 114), App. A-54 to A-55). The Court of Appeals later reversed on an emissions-factor issue. *Alto Coal. for Env’t Pres. v. Roper Constr., Inc.*, 2025-NMCA-018.

Testimony. Deepika Saikrishnan, NMED permit writer, testified that a draft permit “is a dynamic working document subject to updates throughout the review process.” Saikrishnan Test. at 14:9–10.

Documents:

- [NMED Statement of Intent, Ex. 1 \(Saikrishnan Testimony\)](#) (Jan. 19, 2022)
- [Hearing Officer’s Report](#) (May 6, 2022)
- Order Denying Motion to Dismiss (Dec. 27, 2021) and NMED Response, No. EIB 22-34 (Oct. 13, 2022), reproduced at YGI Resp. to NEE’s Mot. to Dismiss as Incomplete, App. A (Dkt. No. 114), App. A-52 to A-55

8. DLK Black River Midstream, LLC, Black River Gas Processing Plant, Permit No. 6567-M8

No. AQB 22-25(P)

Changes. NMED ruled the application complete May 25, 2021. The application increased permitted emissions, including by raising engine operating hours from 2,190 to 8,760 per year. An updated application was received September 15, 2021 and posted September 21, 2021. Kuhn Test., Bureau Ex. 1, at 2, 3:21–22, 4:12–14. NMED posted a revised draft permit and Statement of Basis on February 2, 2022, and a revised Statement of Basis on August 22, 2022. Bureau Closing Argument ¶¶ 3, 30–31 (Nov. 7, 2022).

How NMED proceeded. When an opponent asked for “another 30-day public review period,” NMED responded that the applicant’s notice met regulatory requirements. Kuhn Test. at 8–9. NMED told the Hearing Officer that the hearing “allowed for full participation by the public and the parties.” Bureau Closing Argument ¶ 205. The Secretary adopted the Hearing Officer’s Report and granted the permit. Final Order at 2 (Dec. 16, 2022) (reproduced at YGI Resp. to NEE’s Mot. to Dismiss as Incomplete, App. A (Dkt. No. 114), App. A-42 to A-43).

Testimony. Julia Kuhn, NMED permit writer: “A draft permit is a dynamic working document which may be updated throughout the review process.” Kuhn Test. at 7:8–9.

Documents:

- [Air Quality Bureau Statement of Intent, Ex. 1 \(Kuhn Testimony\)](#) (Aug. 29, 2022)
- [Air Quality Bureau Closing Argument and Proposed Findings](#) (Nov. 7, 2022)
- Final Order (Dec. 16, 2022), reproduced at YGI Resp. to NEE’s Mot. to Dismiss as Incomplete, App. A (Dkt. No. 114), App. A-42 to A-43

9. Chevron U.S.A. Inc., Salado Draw 19, Permit Nos. 6109-M8, 6832-M8

Nos. AQB 22-26(P), 22-27(P)

Changes. Salado Draw 19 was ruled complete January 5, 2022. Chevron then submitted several updates between February and July 2022, adding a flash gas compressor and, in the July 20, 2022 version, malfunction emissions. Sherrill Test., Bureau Ex. 3, at 6:1–2, 6:19–7:29.

How NMED proceeded. The updates came “[i]n response to NMED inquiries,” and NMED issued new drafts dated August 4, 2022 for Salado Draw 19 and August 5, 2022 for Salado Draw 23, about two months before the October 3, 2022 hearing. Hearing Officer’s Report and Recommended Decision, FOF 12–14 (Dec. 8, 2022); Bureau Closing Argument ¶¶ 54–55, 86. The closing argument describes no additional comment period on the August revisions.

Testimony. Todd Sherrill, NMED permit writer: “Updates to the original application are often required, and it is my responsibility to review all updates.” Sherrill Test. at 2:19–20.

Documents:

- [Air Quality Bureau Statement of Intent, Exs. 3, 5 \(Sherrill and Mashburn Testimony\)](#) (Aug. 29, 2022)
- [Hearing Officer’s Report and Recommended Decision](#) (Dec. 8, 2022)
- [Air Quality Bureau Closing Argument and Proposed Findings](#) (Nov. 7, 2022)

10. U.S. DOE / NNSA, Los Alamos National Laboratory, Target Fabrication Facility, Permit No. 632-M1

No. AQB 22-41

Changes. In April 2022, before any hearing was requested, NMED revised the draft permit in response to public comments and opened a second comment period that closed May 23, 2022. DOE/Triad Closing Argument, FOF 18–22 (Feb. 24, 2023). After the Secretary ordered a hearing, NMED made further revisions on December 6, 2022, and revised the draft permit and Statement of Basis again on January 5, 2023. *Id.*, FOF 24, 36–39.

How NMED proceeded. NMED posted the final proposed draft permit January 9, 2023, eight days before the January 17, 2023 hearing; the December and January revisions were not put out for a new comment period. *Id.*, FOF 40. DOE/Triad also made revisions to the Application prior to the hearing. Hearing Officer’s Report and Recommended Decision at 4, FOF 45 (Mar. 27, 2023). The Hearing Officer held that accepting the revisions “complies with 20.2.72.203.E NMAC” and that notice and participation were adequate, including the opportunity to “cross-examine witnesses.” *Id.* at 4, FOF 53–58, COL 13–14 (Mar. 27, 2023). The Secretary granted the permit in the form of the Draft Permit. Final Order (Apr. 2023).

Documents:

- [Hearing Officer's Report and Recommended Decision](#) (Mar. 27, 2023)
- [Final Order](#) (Apr. 2023)
- [DOE/Triad Closing Argument and Proposed Findings](#) (Feb. 24, 2023)