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Luis Lopez (OPF)
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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
RESPONSE IN OPPOSITION TO NEW ENERGY ECONOMY'S
MOTION TO DISMISS YGI'S APPLICATION
AS NOT RIPE FOR ADJUDICATION [Dkt. No. 52]

The New Mexico Environment Department ("NMED") Air Quality Bureau ("Bureau"), pursuant to the New Mexico Environment Department's Permit Procedures at 20.1.4.200(D)(4) NMAC, respectfully provides this response in opposition to *New Energy Economy's Motion to Dismiss YGI's Permit Application as Not Ripe for Adjudication* (filed Aug. 4, 2026) [Dkt. No. 52] ("*NEE's August Motion to Dismiss*"), as amended by *Errata to New Energy Economy's Motion to Dismiss YGI's Permit Application as Not Ripe for Adjudication* (filed Aug. 5, 2026) [Dkt. No. 57].

INTRODUCTION

This matter involves an administrative public hearing proceeding on a pending application for an air quality new source review construction permit by Yucca Growth Infrastructure, LLC ("YGI") for a particular set of regulated air pollutants from the fuel source for a data center; it is not a generalized data center referendum, nor is it a civil trial. The public hearing has a defined legal scope: the Bureau may evaluate and regulate emissions of air contaminants governed by the Air Quality Control Act, Sections 74-2-1 to 74-2-17 (the "AQCA"), through applicable state and federal standards. *NEE's August Motion to Dismiss* is based on unsupported statements about the data center development in its entirety – without limiting its narrative to the stationary source

subject to the air quality permit – and centers on claims about fuel supply and the Green Chile Lateral Pipeline.¹ NMED cannot use the air quality permitting process to prohibit pipeline construction, require a different electricity generation method, or address other matters committed to different agencies and statutory processes. Nor can NMED deny YGI a permit or impose permit conditions based solely on the public’s concerns for those matters absent an applicable emissions standard or regulatory requirement. Permit conditions must have a nexus to the matters within the scope of New Mexico’s air quality laws. The harms invoked by NEE fall outside the air quality permit decision and cannot supply an entitlement to expand this proceeding beyond the authority granted to the agency by law. Dismissal does not become appropriate merely because the underlying matter is large or controversial; the legal standards must be met and were set in place to protect all parties in scenarios exactly like the one.

BACKGROUND

On August 4, 2026, NEE filed its *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) [Dkt. No. 63] 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 but “dismissed[.]” See *Order* (entered Aug. 12, 2026) [Dkt. No. 77] (denying the *August Motion to Dismiss* and explaining the issues should be heard at the primary evidentiary hearing before the matter is decided). The prior Hearing Officer issued orders on *NEE’s August Motion to Dismiss* [Dkt. No. 52] without any meaningful opportunity for the Bureau to respond.

The *Notice of Hearing on Motions to Dismiss* (entered Oct. 16, 2026) [Dkt. No. 111] stated

¹ NEE incorrectly references the name of the pipeline as “Chili.”

it was for “the pending Motions to Dismiss.” The Bureau understands this to include *NEE’s August Motion to Dismiss* [Dkt. No. 52], based on the use of pluralized “motions” to dismiss and the discussion at the October 15 Status Conference that the law of case may not apply.

ARGUMENT

The requested relief confuses administrative completeness and denial, as well as fails to establish the factual basis for relief because NEE asserts it needs additional information to support its claim for dismissal.

I. THE LEGAL AUTHORITY FOR DENIAL AND SUMMARY PROCEDURES DO NOT SUPPORT NEE’S REQUEST FOR RELIEF

As a basic preliminary matter, the pipeline arguments presented in *NEE’s August Motion to Dismiss* [Dkt. No. 52] are beyond the scope of the air quality permitting process. The general authority and argument in *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))*, at pp. 11-14 (filed Oct. 19, 2026) [Dkt. No. 114] address this matter.² The Bureau has also addressed this in its *Motion for Correction of the Hearing Record* (filed Oct. 22, 2026) [Dkt. No. 124].

Additionally, the Bureau explains that Section 74-2-7(C) of the AQCA states regarding denial authority:

the department or the local agency may deny any application for: (1) a construction permit if it appears that the construction or modification:

- (a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal act; ~~[or any regulation adopted pursuant to either; or]~~
- (b) will cause or contribute to air contaminant levels in excess of a national or state standard or, within the boundaries of a local authority, applicable

² The Bureau has not evaluated the claims in the last paragraph of page 12 nor the assertion about the Administrative’ Record’s admission into the hearing record.

local ambient air quality standards; or
(c) will violate any other provision of the Air Quality Control Act or the federal act[.]

NMSA 1978, § 74-2-7(C). The regulation for construction permits adopted by the Environmental Improvement Board “(EIB”) states:

BASIS FOR DENIAL OF PERMIT: The department shall deny any application for a permit or permit revision if considering emissions after controls: . . . It appears that ***the construction of the new source*** will not be completed within a reasonable time[.]” (emphasis added).

20.2.72.208(G) NMAC (emphasis added). The terms used have specific meaning. “Construction” is defined as “fabrication, erection, installation or relocation of a stationary source, including but not limited to temporary installations and portable stationary sources.” 20.2.72.7(I) NMAC. “Stationary source” or “source” are defined as “any building, structure, equipment, facility, installation (including temporary installations), operation or portable stationary source which emits or may emit any air contaminant. Any research facility may group its sources for the purpose of this part at the discretion of the secretary.” 20.2.72.7(EE) NMAC.

The regulation states “construction” – not operation or “produced in a timely fashion” as asserted in *NEE’s August Motion to Dismiss*, at pp. 3, 6; *id.*, at p. 1 (“operated”). NEE’s conclusory argument also fails to recognize the regulatory provision allowing a permittee two years to “commence construction[.]” 20.2.72.211(B) NMAC. NEE’s asserted basis for denial does not have a basis in law. It is the most basic principle of law that a motion that fails to set forth an argument or legal standard cannot be granted. See Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (“We will not review unclear arguments, or guess at what a party’s arguments might be.” (alteration, internal quotation marks, and citation omitted)); Hall v. City of Carlsbad, 2023-NMCA-042, ¶ 16, 531 P.3d 642 (declining to consider claims unsupported by argument or authority); Lukens v. Franco, 2019-NMSC-002, ¶ 5, 433 P.3d 288 (stating that

“counsel should properly present this [C]ourt with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice[.]” (internal quotation marks and citation omitted); State v. Julg, 2021-NMCA-058, ¶ 25 n.3, 497 P.3d 678 (“We will not develop Defendant's arguments for him, nor will we guess at what his arguments might be.”) (citing Headley v. Morgan Mgmt. Corp., 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076). The EIB provided an avenue for relief should construction become a barrier.

Lastly, NEE’s proposed interpretation of 20.2.72.208(G) NMAC would transform the Bureau’s air-quality permitting process into a comprehensive determination that every aspect of a proposed project outside the authority of the Air Quality Control Act. That exceeds the role assigned to the Bureau. In Public Service Co. of New Mexico v. New Mexico Environmental Improvement Board, 976-NMCA-039, ¶ 10, 89 N.M. 223, the Court rejected the EIB’s attempt to use air-quality regulation to plan industrial development, explaining that effects on development should occur “as a consequence not by design.” Although that case concerned restrictions intended to accommodate future industry, its limitation on agency authority applies equally to an interpretation that would make an air permit contingent on the prior resolution of every other regulatory approval. NEE invites precedent outside of the Air Quality Control Act because of NEE’s expectation that every aspect of construction and operations must have existing authorization before NMED could issue an air permit. The Hearing Officer should decline to accept this theory as a matter of law, as well as because NEE has not met its burden to obtain the relief requested. The Bureau’s authority is defined by its governing law; it does not expand with the breadth of NEE’s objections to the project. Therefore, the Hearing Officer should reject NEE’s categorical requirement as contrary to law.

II. THE PUBLIC HEARING PROCESS AND RIGHT TO PUBLIC PARTICIPATION DOES NOT CONVERT PERMIT REVIEW AND THE OPPORTUNITY TO PRESENT AND TEST EVIDENCE INTO CIVIL LITIGATION

Invoking words like “adjudication,” “ripeness,” “impracticability,” “impossibility,” “judicial economy” are civil trial terms; this proceeding is a process with defined rules to afford the public a venue to convey its thoughts to the agency and test the applicant’s supporting information. The general authority and argument in *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))*, at pp. 14-16 (filed Oct. 19, 2026) [Dkt. No. 114] address this matter. There is no right to a permit yet established here. Adjudication comes through several opportunities after a decision has been made: The permit final decision may be appealed to the EIB, NMSA 1978, § 74-2-7(H)-(K); 20.1.4.500(E) NMAC; 20.2.72.207(F)-(G) NMAC; 20.1.2 NMAC; and a final decision by the EIB may be appealed to the New Mexico Court of Appeals, § 74-2-9; 20.1.2.404 NMAC; 20.2.72.207(H) NMAC. The appeal to the EIB remedy allows opposing parties to challenge NMED’s actual permit decision based on an established record rather than ask the Hearing Officer to predict how an unfinished proceeding will unfold. Recent precedent in Alto Coalition for Environmental Preservation, 2025-NMCA-018, confirms the AQCA’s ordinary review process (specifically the EIB appeal) can provide meaningful and effective relief from alleged legal, evidentiary, and procedural errors. See Shook v. Governing Body of City of Santa Fe, 2023-NMCA-086, ¶¶ 31-35, 538 P.3d 466 (challenges to ability to participate in an administrative proceeding appropriately progressed through district court and the Court of Appeals review). The opportunity to appeal to the EIB and later the Court of Appeals also places review in the forum selected by the Legislature for challenges to air permit decisions. Notably, there is

minimal prejudice to opposing parties waiting to make their arguments in the appropriate forum because Section 74-2-9(D) of the AQCA authorizes a process to stay an action being appealed. The AQCA also provides if the agency denies a stay or fails to act within 60 days, the Court of Appeals may grant one. § 74-2-9(D)(2); 20.1.4.500(E) NMAC.

III. NEE’S RELIANCE ON UNANSWERED FACTUAL QUESTIONS INDEPENDENTLY DEFEATS ITS REQUEST FOR DISMISSAL.

The request for compelled testimony to support a later dispositive motion contradicts the assertions that discovery is required to move forward in this proceeding. “[A]s a general rule, a court should not grant summary judgment before a party has completed discovery, particularly when further factual resolution is essential to determine the central legal issues involved or the facts before the court are insufficiently developed.” Sun Country Sav. Bank of New Mexico, F.S.B. v. McDowell, 1989-NMSC-043, ¶ 27, 108 N.M. 528 (internal citations omitted). The evaluation of whether summary judgment is premature is informed by “several critical factors” including:

[1] whether the party sought a continuance at the summary judgment motion hearing to complete its discovery; [2] whether, after the filing of the summary judgment motion until the grant of summary judgment, sufficient time existed for the nonmoving party to use discovery procedures and obtain necessary discovery; [3] whether an affidavit opposing summary judgment contained a statement of the time required to complete the discovery, the particular evidence needed, where the particular evidence was located and the methods used to obtain the evidence; and [4] whether the party moving for summary judgment gave an appropriate response to a discovery request from the nonmoving party.

Id. The case applies to civil proceedings but provides helpful factors for the Hearing Officer to consider here as a reason to deny the dispositive relief requested by opposing parties. Under the first factor, NEE and other parties have expressly requested a delay to obtain discovery. The robust record of discovery demands in this proceeding supports denial of *NEE’s August Motion to Dismiss* [Dkt. No. 52] on the independent basis of having failed to demonstrate undisputed material

facts to support the relief requested.; See *NEE's August Motion to Dismiss*, pp. 6-7 [Dkt. No. 52]; see also *Request for Hearing Officer to Order Discovery* (filed July 24, 2026) [Dkt. No. 29] (by CBD, Saldaña, and Fuller); *Request for Hearing Officer to Order Discovery* (filed July 27, 2026) [Dkt. No. 33] (by NEE); *Request for Hearing Officer to Order Discovery* (filed July 28, 2026) [Dkt. No. 35] (by NEE); *New Energy Economy's Response to YGI/Bloom Energy's Request for Denial of Discovery* (filed Aug. 3, 2026) [Dkt. No. 48]; *Maxwell's Motion for Expedited Prehearing Disclosure, Production of Identified Administrative Record Materials, Targeted Admissions, and, in the Alternative, Limited Discovery* (filed Aug. 3, 2026) [Dkt. No. 49]; *Center for Biological Diversity, Jose Saldana Jr. and Vivian Fuller's Reply in Support of Discovery Requests to Applicant and New Mexico Environment Department and Request for Hearing Officer to Order Expedited Discovery Responses* (filed Aug. 5, 2026) [Dkt. No. 56]; *Maxwell's Consolidated Reply in Support of Motion for Expedited Prehearing Disclosure, Production of Identified Administrative-Record Materials, Targeted Admissions, and, in the Alternative, Limited Discovery* (filed Aug. 10, 2026) [Dkt. No. 66]; *Reply in Support of Discovery Request to New Mexico Environment Department* (filed Aug. 12, 2026) [Dkt. No. 73] (by CBD, Saldaña, and Fuller); *Maxwell's Response in Substantial Support of Joint Emergency Motion for Disqualification and Stay, and Supplemental Motion for Expedited Disclosure Concerning the ERG Contractual Relationship* (filed Aug. 21, 2026) [Dkt. No. 91]; *Motion to Order Discovery Required by Due Process* (filed Oct. 13, 2026) [Dkt. No. 106]; *Motion for Hearing Officer to Order Discovery* (filed Oct. 14, 2026) [Dkt. No. 108]; October 15 Status Conference (oral orders for serving discovery by October 20 and suggesting a meet-and-confer with a deadline for objections by October 26); *Notice of Hearing on Motions for Discovery* (entered Oct. 16, 2026) [Dkt. No. 112]; *Joinder to October Motion to Dismiss by Mr. Saldaña Jr. and Ms. Fuller and CBD*,

at p. 5 [Dkt. No. 123] (describing the need for discovery as a justification for further delay). Under the third factor, both YGI and the Bureau are opposing summary relief based on the need to fully develop the evidentiary record to defend against the claims. The second and fourth factors do not easily apply in this administrative public hearing context. For the second factor, the time available is constrained by a statutory deadline unlike civil trial practice. For the fourth factor, YGI and the Bureau do not require discovery responses from the dispositive relief moving parties; the Bureau requires time to actually complete the technical review that the process requires. Therefore, the necessity of building out the evidentiary record in this proceeding precludes the requested dismissal.

CONCLUSION

The positions herein and requests for relief do not join the non-agency parties demand for an indefinite stay, concede authority exists to extend the statutory decision deadline, or relieve YGI of its burden to demonstrate entitlement to a permit by the statutory decision deadline absent a waiver within a period of time that enables the Bureau to conduct a meaningful technical review. The Bureau respectfully maintains that the Hearing Officer must:

- A. Resolve the procedural problems hindering notice, review and participation before going to hearing on and/or evaluating the *August Motion to Dismiss* [Dkt. No. 52];
- B. Deny the *August Motion to Dismiss* [Dkt. No. 52] for failing to establish a legal basis under which it is entitled to relief; and
- C. If review is undertaken, deny the *August Motion to Dismiss* [Dkt. No. 52] for failing to establish undisputed material facts under which NEE bases the request for relief.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *New Mexico Environment Department Air Quality Bureau's Response in Opposition to New Energy Economy's Motion To Dismiss YGI's Application as Not Ripe for Adjudication [Dkt. No. 52]* was electronically filed and sent via electronic mail on this 25th 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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