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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 10883

AQB 26-57(P)

NEW MEXICO ENVIRONMENT DEPARTMENT AIR QUALITY BUREAU'S CONSOLIDATED RESPONSE IN OPPOSITION TO DISCOVERY MOTIONS [Dkt. No. 106] AND [Dkt. No. 108]

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 consolidated response in opposition to New Energy Economy's ("NEE") *Motion to Order Discovery Required by Due Process* (filed Oct. 13, 2026) [Dkt. No. 106] ("*NEE's Third Motion for Discovery*") and Center for Biological Diversity ("CBD"), Jose Saldaña, Jr. and Viviana Fuller's *Motion for Hearing Officer to Order Discovery* (filed Oct. 14, 2026) [Dkt. No. 108] (together the "*Discovery Motions*") ("*CBD, Mr. Saldaña, Jr. and Ms. Fuller's Second Motion for Discovery*").

INTRODUCTION

The matter of discovery in this administrative public hearing proceeding on a pending application for an air quality new source review construction permit has already been raised, addressed, re-raised numerous times, addressed, brought before and denied by the New Mexico Supreme Court and is now back again in this proceeding. Despite those prior proceedings and rulings, the parties have returned to the same issue and NEE, CBD, Mr. Saldaña, Jr. and Ms. Fuller again ask the Hearing Officer to authorize discovery. The Hearing Officer must deny the *Discovery Motions* in accordance with the law of the case, and on the grounds that neither the Air

Quality Control Act ("AQCA") nor 20.1.4 NMAC authorizes discovery because the laws themselves provide for sufficient process to allow meaningful participation. General case management authorities and due process principles also do not establish an independent right to discovery.

RELEVANT DOCKET ENTRIES

Pursuant to paragraph 9 of the *Supplement to Second Amended Scheduling Order* (entered Oct. 16, 2026) [Dkt. No. 110], the Bureau identifies the relevant prior filings – by docket number, name, and date received, and the specific pages in the table below for review by the Hearing Officer in preparation for the hearing on October 29, 2026:

Dkt. No.	Document	Date	Pages to Review
47	*New Mexico Environment Department Air Quality Bureau's Response in Opposition to Motion to Reset October 19 Hearing Schedule and Preserve Due Process*	August 3, 2026	All Pages
61	*New Mexico Environment Department Air Quality Bureau's Response to Maxwell's Motion for Expedited Prehearing Disclosure, Production of Identified Administrative Record Materials, Targeted Admissions, and, in the Alternative, Limited Discovery*	August 7, 2026	All Pages
62	*New Mexico Environment Department Air Quality Bureau's Response to Requests for Discovery*	August 7, 2026	All Pages
72	*Order [regarding requests for discovery]*	August 12, 2026	All Pages
79	*Order Denying Motion for Reconsideration and Ordering Expedited Briefing on a Corollary Issue*	August 14, 2026	All Pages

[CONTINUED ON NEXT PAGE]

82	*New Mexico Environment Department's Response Pursuant to the Hearing Officer's Order Denying Motion for Reconsideration and Ordering Expedited Briefing on a Corollary Issue in Mr. Maxwell's August 14, 2026 Expedited Motion for Reconsideration and Clarification of August 11, 2026 Order and, in the Alternative, for Limited Modification of Technical-Filing Procedure*	August 19, 2026	1-4
95	*New Mexico Environment Department Air Quality Bureau's Response in Opposition to the Joint Emergency Motion for a Hearing Consistent with Due Process Guarantees, Disqualification of Hearing Officer, and Stay, and to Maxwell's Supplemental Motion for Expedited Disclosure Concerning the ERG Contractual Relationship*	August 23, 2026	2-6, 7 n.3, 9-17 (end of preceding paragraph), 22

Additionally, the Bureau requests the Hearing Officer review in preparation for the hearing on October 29, 2026, all pages of the *New Mexico Environment Department, Secretary, and Deputy Secretary's Motion to Vacate Stay and Deny New Energy Economy's Emergency Petition and Request for Stay Regarding AQB 26-57(P) for Lack of Jurisdiction; and Response in Opposition to Petition* (attached hereto for public ease of access as **Exhibit A**) in *New Energy Economy v. Kenney et. al*, No. S-1-SC-41579 (N.M. Sept. 17, 2026). The Bureau does not enclose the Supreme Court filing as a matter where relief is being requested from the Hearing Officer. The purpose of identifying this filing is because it contains relevant context for air quality permitting and arguments responsive to the Bureau's authority, interpretation of the procedural rule, and lack of authority for discovery.

The Bureau incorporates by reference the previously briefed arguments as applicable here to the renewed requests for discovery, in addition to the arguments in this filing.

Furthermore, *Applicant Yucca Growth Infrastructure, LLC's Response in Opposition to Motions for Hearing Officer to Order Discovery Filed by New Energy Economy [Dkt. No. 106], The Center for Biological Diversity, Jose Saldaña Jr., and Viviana Fuller*, pp. 1-16 [Dkt. No. 108] (filed Oct. 26, 2026) [Dkt. No. 132] makes well-reasoned legal arguments to support denial of the *Discovery Motions*. The Bureau takes no position on the arguments set forth on pages 16 to 29 of [Dkt. No. 132] except to state they illustrate examples of the problems with unlimited discovery to support why the Hearing Officer must establish limitations and protections if discovery is awarded.

BACKGROUND

NEE waited nearly a month until after the New Mexico Supreme Court stay was lifted, two weeks after Judge Browning was appointed the Hearing Officer, and less than 48 hours before the October 15 status conference to renew its request for discovery. CBD, Mr. Saldaña, Jr. and Ms. Fuller waited to renew their request until 5 p.m. the day before the October 15 status conference which began at 11 a.m.

On October 16, a formal hearing notice was filed setting the *Discovery Motions* for hearing on October 29. See *Notice of Hearing on Motions for Discovery* (entered Oct. 16, 2026) [Dkt. No. 112].

On October 20, the Bureau received discovery requests only from Nicholas Maxwell. On October 26, the Bureau responded by stating its objection to discovery but, in the spirit of compromise, informed Mr. Maxwell that the documents responsive to his requests were already in the current version of the publicly-available Administrative Record. Asserting that the information requested is available already to the requestor and would be burdensome to expect the Bureau to re-product is a position supported by the black letter law principles for discovery. While NEE,

CBD, Mr. Saldaña, Jr. and Ms. Fuller served discovery requests on applicant Yucca Growth Infrastructure, LLC ("YGI") and operator Bloom Energy, those parties did not identify any discrete discovery requests to the Bureau. To the extent discovery was propounded on the Bureau, that was unclear. Regardless, any responsive documents and information from the Bureau would already be in the current version of the publicly-available Administrative Record. Prior filings in the docket for this proceeding indicate requests for discovery directed at the Bureau. None of those requests were renewed on October 20, 2026. Thus, the Bureau deems them withdrawn and asserts it was under no obligation to respond.

ARGUMENT

There are two main arguments for denying discovery: (1) the Air Quality Control Act and 20.1.4 NMAC do not provide for formal discovery in this public hearing; (2) due process does not create an independent right to prehearing discovery when not in provided for by law, particularly when the proceeding provides other means of participation. However, if the *Discovery Motions* are not denied and movants are granted the right to seek discovery, the Hearing Officer must establish protections and limitations to the requests and process.

I. GOVERNING LAW DOES NOT AFFORD PARTIES A RIGHT TO DISCOVERY IN AIR QUALITY PERMIT PUBLIC HEARINGS.

The Bureau opposes discovery in this public hearing, as it is not recognized as a matter of law. Substantial briefing has occurred on this matter and existing orders in the case confirm the Bureau's position. The AQCA does not provide for discovery in public hearings like other laws, such as the Solid Waste Act. See generally, NMSA 1978, § 74-2-1 to-17; compare § 74-9-29(A)(5) (requiring procedures for discovery in solid waste hearings); NMSA 1978, § 74-2-12 (allowing procedures for discovery in enforcement proceedings for air permits). Neither the AQCA nor the implementing regulation provide for discovery in appeals of a decision regarding an air permit.

NMSA 1978, §§ 74-2-7(H)-(K); 20.1.2 NMAC.[1] NMED cannot, through regulation, enlarge a hearing officer's authority to require discovery when the AQCA does not allow it.

Section 20.1.4.200(E)(2) NMAC addresses discovery under the special procedures for hearings under the Solid Waste Act. There is no corresponding discovery provision in 20.1.4 NMAC for the Secretary's public hearing on a pending air-quality permit. This is notable because the rule covers several proceeding types and some provisions are derived from specific statutory authority. The New Mexico Legislature provided for discovery in Solid Waste Act proceedings but did not provide the same procedure for an air permit hearing. For these reasons, the current scheduling order indicating a process for discovery in this air quality proceeding exists under 20.1.4.200(E)(2) NMAC must be amended. *Second Amended Scheduling Order*, ¶ 7 (entered Oct. 16, 2026) [Dkt. No. 109].

Under 20.1.4.100(A) NMAC, the New Mexico Rules of Civil Procedure and Rules of Evidence do not apply to proceedings under Part 4. The Hearing Officer may use the civil rules for guidance, but they do not replace the governing administrative procedures or extend his or the Secretary's authority. Due to the express limitations in 20.1.4 NMAC, parties cannot transform the permit hearing into a civil case by invoking civil discovery.

The prior Hearing Officer's earlier willingness to entertain discovery did not create a right to it; the later ruling corrected the Hearing Officer's interpretation of the applicable law to conclude discovery is not available, as asserted here.

As communicated to the New Mexico Supreme Court, case law involving a different

[1] 20.1.2 NMAC applies to other proceedings, including for the Uniform Licensing Act ("ULA"). Section 20.1.2.208 NMAC describes the procedures for discovery only in ULA Proceedings – not air quality or other proceedings – because the ULA, Section 61-1-9, includes powers of the board and hearing officer related to the nature of allowing discovery in ULA hearings.

agency, regulation, and stage of review does not support an existing right to discovery:

> The Court of Appeals decision in SWOP does not generally authorize discovery in a public hearing proceeding. That case involved a different air permit administrative procedure before a different decisionmaker, *i.e.,* the Albuquerque-Bernalillo County Air Quality Control Board ("Local Air Board") quasi-adjudicatory permit appeal proceeding *(i.e.,* post-decision) under the Local Air Board's regulation 20.11.81 NMAC, which expressly recognizes discovery. Id. ¶ 25 (discussing 20.11.81.14(1) NMAC, which states: "Formal discovery is not a right, and, therefore, is discouraged and shall only be allowed by order of the hearing officer if the following conditions exist."). This is not an NMED rule. The Local Air Board has separate and distinct regulations not applicable to NMED, EIB, or Secretary proceedings. See § 74-2-4; Title 20, Chapter 11 NMAC. SWOP involved a different government agency, is a dispute about a different step of the permit process and involves a regulation provision authorizing discovery. Acknowledgment and application of the proper regulatory scheme is critical in air quality matters.
>
> Due to this distinction, SWOP does not establish a general right to discovery in a public hearing before the Secretary, much less a due-process violation whenever discovery is denied.

Exhibit A, at pp. 57-58; id., at p. 58 ("Also, SWOP does not stand for a proposition that due process independently allows discovery."). The Legislature did not provide for discovery in the AQCA except for enforcement proceedings; the Environmental Improvement Board did not provide for discovery in 20.2.72 NMAC and does not include it in its permit appeals procedural rule; the Secretary did not provide for discovery in 20.1.4 NMAC implementing the AQCA and 20.2.72 NMAC; and the courts have not established discovery as a specific right in NMED air quality public hearings. Therefore, the absence of any authority in governing law supports denial of the Discovery Motions.

II. GENERAL DUE PROCESS PRINCIPLES DO NOT AFFORD PARTIES RIGHTS TO DISCOVERY IN THIS AIR QUALITY PERMIT PUBLIC HEARING.

Case law sets forth how there is no general constitutional right to prehearing discovery in an administrative proceeding and affirms that administrative due process does not require every

feature of a civil trial.[2] Public resources and administrative burdens are relevant to determining proper procedural balance. Specifically, as the Bureau has already pointed out, "the government's interest in conserving scarce fiscal and administrative resources" matters when assessing questions such as granting discovery requests. [Dkt. No. 62] at 4. Applied here, the Bureau argues that staff time already spent making materials available and responding to requests should be weighed against the benefit of further discovery. See 20.1.4.200(A)(2) NMAC (the Bureau already made public the Administrative Record here and is required to supplement it by the beginning of the hearing); Inspection of Public Records Act, NMSA 1978, §§ 14-2-1-12. Furthermore, allowing discovery here would set a precedent for opponents of every air quality permit application to assert a right to discovery. The Bureau cautions against opening the door to a new sweeping procedural entitlement that could fundamentally alter air permitting across New Mexico without the Legislature or governing regulations having provided one.

[2] The Hearing Officer does not have jurisdiction to decide whether the protections already afforded to participants under the law are sufficient to comport with constitutional due process principles. See Victor v. New Mexico Dep't of Health, 2014-NMCA-012, ¶ 24, 316 P.3d 213 ("Nothing in these regulations supports an inference that the hearing officer . . . may consider or rule upon the issue of the constitutionality of the process afforded by the regulations."); Shook v. Governing Body of City of Santa Fe, 2023-NMCA-086, ¶ 16, 538 P.3d 466 ("We disagree that a statutory directive to provide due process inherently includes the authority for the administrative agency to evaluate the constitutionality of the process that the administrative agency is itself providing or has provided."); see also Qwest Corp. v. NMPRC, 2006-NMSC-042, ¶ 20, 140 N.M. 440, as revised (Sept. 25, 2006) (citing PNM Elec. Servs. v. Pub. Util. Comm'n, 1998-NMSC-017, ¶ 10, 125 N.M. 302) ("Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes."). The Hearing Officer's role is for case management and fact-finding to make a recommendation to the Deputy Secretary. See Victor, 2014-NMCA-012, ¶ 24 ("The hearing officer is merely an arbiter of the factual question, whether a preponderance of the Department's evidence demonstrates that the nurse aide abused a resident."). Simply invoking the argument does not confer jurisdiction here. Maso v. State of New Mexico Tax'n & Revenue Dep't, Motor Vehicle Div., 2004-NMCA-025, ¶¶ 12-17, 135 N.M. 152, aff'd sub nom. Maso v. State, Tax'n & Revenue Dep't, Motor Vehicle Div., 2004-NMSC-028, 136 N.M. 161 (MVD's authority did not encompass constitutional question and consent could not supply the missing subject matter jurisdiction).

Furthermore, the AQCA and governing regulations deliberately allocate evidentiary burdens without providing for discovery as a prerequisite to carrying those burdens. See Alto Coal. for Env't Pres., 2025-NMCA-018, ¶ 24. Instead, the process relies on public notice materials, pre-filed technical testimony and witness disclosure, and procedural protections like oaths, cross-examination, objections, and rebuttal.

Therefore, robust pre-existing process affords meaningful opportunity to participate and there is no basis to impose additional procedures like discovery to ensure due process.

III. A GRANT OF DISCOVERY SHOULD BE LIMITED TO INQUIRIES DIRECTED TOWARDS THE APPLICANT, NOT THE BUREAU.

If limited discovery is granted, it should be limited to only YGI, as the applicant, and not the Bureau. Section 20.1.4.400(A)(1) NMAC states:

> The Applicant or Petitioner has the burden of proof that a permit . . . variance should be issued and not denied. This burden does not shift. The [Bureau] has the burden of proof for a challenged condition of a permit . . . which the Department has proposed. Any person who contends that a permit condition is inadequate, improper, or invalid, or who proposes to include a permit condition shall have the burden of going forward to present an affirmative case on the challenged condition.

See 20.2.72.207(D) NMAC ("The applicant has the burden of demonstrating that a permit or permit revision should be approved."). Applicants bear the burden of obtaining a permit whereas the Bureau only has the more limited role of defending its proposed permit conditions; the Bureau does not have the burden of proof for a condition it has *not* proposed. Furthermore, all technical materials upon which the Bureau's opinions are formed are made publicly available and contained in the Administrative Record. See 20.1.4.7(A)(22) NMAC (definition of technical materials); 20.1.4.7(A)(2) NMAC (definition of administrative record); 20.1.72.207(D) NMAC (NMED permitting decisions is based on the administrative record, as also denied in this provision). Discovery seeking a party's positions is not technical testimony. See 20.1.4.7(A)(23) NMAC (definition of technical testimony). Thus, even if limited discovery is available for YGI, the

Bureau opposes discovery requests to the agency.

Limitations on discovery requests to YGI are necessary. First, YGI's burden of proof does not make its obligations unlimited; this proceeding concerns only whether the application satisfies the applicable requirements for an air quality permit. The Bureau opposes attempts to expand discovery in an air quality public hearing into an investigation of an applicant's business or the project absent a clear nexus to the criterion for issuing or denying the permit. Anything is possible and a semblance of connections is not sufficient. Second, limitations are appropriate to comport the proceeding with 20.1.4.100(E)(2) NMAC, which instructs that the Hearing Officer will conduct the proceeding in "a fair and impartial" manner to "assure that the facts are fully elicited" that is "efficient" and "avoid[s] delay." See 20.1.4.300(A)(3) NMAC ("Orders for Conduct of Proceedings"). Uncontrolled discovery directed to YGI can create successive requests, objections, motions, responses, and scheduling disputes. Those collateral proceedings consume the time available to prepare technical testimony, complete the Bureau's review, and conduct the hearing. Third, any resulting production by YGI to a requesting party and served on all parties, including the Bureau, means the production becomes part of the Administrative Record and correspondingly will expand the Bureau's necessary technical review. Fourth, existing procedures and rights pertaining to evidence and participation set forth in 20.1.4 NMAC – adopted by the Secretary pursuant to directive from the Legislature – are already robust to develop and test the record. Lastly, even discovery in ordinary civil cases is supervised and subject to limits. See 20.1.4.100(A) NMAC (New Mexico Rules of Civil Procedure may serve as guidance).

Limitations and protections reasonable and necessary to protect the integrity of this proceeding and future public hearings, as well as the parties' interests, must include:

1. Prohibition on requests seeking non-technical testimony, including opinions,

conclusions, "legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing." 20.1.4.7(A)(22) and (23) NMAC (definitions of technical testimony and technical materials).

2. Prohibition on requests for evidence excluded under Sections 400(b)(1)(a) and (b) NMAC (settlement and recognized privileges) and recognized immunities under New Mexico law.

3. Exclude requests that are vague, ambiguous, overly broad, compound, unlimited in time or subject matter, or that require YGI to speculate or assume disputed facts. Evidence is already not admissible in the public hearing if it is not "relevant evidence" or is "unduly prejudicial or repetitious, or otherwise unreliable or of little probative value." 20.1.4.400(B)(1) NMAC.

4. Require each requesting party to identify each proposed request, the specific permit condition and factual issue involved, why the information is necessary to its affirmative case challenging "a permit condition or lack thereof as inadequate, improper, or invalid[,]" 20.1.4.400(A)(1) NMAC (burdens of persuasion), why it cannot reasonably be obtained elsewhere, and the expected burden on Bureau personnel. Similarly, discovery must be limited to only those matters that are within the scope of this proceeding, if related to permit conditions, and, if not, then must be limited to the grounds for denying a permit are whether the proposed permit, NMSA 1978, § 74-2-7; 20.2.72.208 NMAC. No discovery should be served or answered unless specifically authorized.

5. Prohibit discovery that is unreasonably cumulative or duplicative, obtainable from a more convenient or less burdensome source, available in the current publicly-available Administrative Record, or whose burden outweighs its likely benefit. Consider Bureau staff time necessary to conduct the technical review, the statutory schedule, the needs of the proceeding, and the importance of the issue.

6. Prohibit discovery that amounts to "harassment, intimidation, needless expenditure of time, or undue repetition." 20.1.4.400(B)(2) NMAC (cross-examination protections).

7. Continue to require discovery requests that are narrow "rifle shots" focused on the air permit and avoid requests for "any and all documents;"

8. Continue to require coordinated requests to prevent multiple parties from asking the same questions.

9. Continue to limit requests to documents, disfavor interrogatories, and prohibit requests for admission. Prohibit depositions, interviews, admissions, or compelled appearances absent a separate, specific order.

10. Nothing in the grant of discovery shall limit the responding partying having a reasonable opportunity to assert specific objections and seek a protective order before responding or producing a witness.

11. Despite inclusion of discovery responses into the Administrative Record, nothing shall limit its use on the hearing record due to objections to its admissibility, context, completeness, weight, etc.

In conclusion, if limited discovery is granted, it should be directed to only YGI, as the applicant, and not be propounded on the Bureau, and be subject to the limitations and protections listed above.

IV. IF THE HEARING OFFICER GRANTS DISCOVERY REQUESTS ON THE BUREAU, THE REQUESTS MUST BE LIMITED.

If limited discovery on the Bureau is granted, it should be limited. The protections and limitations raised as necessary for requests to YGI are equally applicable to the Bureau, as well as being necessary to have additional protections and limitations unique to the Bureau. First, as identified above, Bureau technical staff perform the regulatory review needed to evaluate the

application, verify technical submissions, and develop the Bureau's recommendation. The harms of discovery are not limited to the Bureau as a litigant but extend to the State. Every hour diverted to responding to unnecessary discovery (searching for documents, answering interrogatories, preparing for examinations, or responding to discovery disputes) is an hour unavailable for the Bureau's continuing responsibilities for statutory and regulatory review of other pending applications, and is time those same employees cannot spend completing that technical review for the application at issue here. Second, compelling staff to answer broad questions about the adequacy of the application before they complete their work risks generating information that is incomplete or easily mischaracterized as the Bureau's final position. It can also force staff to spend time defending preliminary observations instead of testing and resolving them. This harm has already been born at least once with *New Energy Economy's 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* (filed Oct. 20, 2026) [Dkt. No. 116]. Third, as also identified above, the Bureau's regulatory role includes developing an administrative record of the information the Bureau relied on in making the permit decision that is already public. Fourth, as indicated above, the Bureau has a distinct burden of proof for a challenged condition it has proposed, 20.1.4.400(A)(1) NMAC, which supports resisting requests that effectively ask Bureau staff to prove YGI's application, supply an opponent's technical case, or answer for information within YGI's possession. Lastly, government employees should be protected from adversarial examinations that prevent them from doing their jobs. See 20.1.4.400(B)(2) NMAC (prohibiting harassing and intimidating inquiries).

As discussed above for limitations on discovery to YGI, any such discovery propounded

on the Bureau should be permitted only upon a request-specific showing identifying the particular proposed or challenged permit condition, the factual issue to which the requested information relates, and why the information is necessary to the requesting party's affirmative case and cannot reasonably be obtained from the current publicly-available Administrative Record or another more convenient, less burdensome, or less expensive source. Discovery should not be permitted where it is cumulative, duplicative, vague, ambiguous, overly broad, or unduly burdensome, or where its burden on the Bureau and the timely completion of its technical review outweighs its likely benefit. All privileges and immunities recognized under New Mexico law and all applicable work-product protections must be preserved.

Additionally, specific limitations on discovery requests to the Bureau must be imposed:

1. The requesting party shall affirm that it has not and will not duplicate its request by filing an Inspection of Public Records Act ("IPRA") request seeking the same information or documents sought through discovery. If the requesting party has already submitted an IPRA request seeking the same or substantially similar information or documents, the requesting party shall identify the date of the request, the public body to which it was submitted, the records requested, and the status of the request, including whether any responsive records have been produced, to affirm that that IPRA process is not a more convenient, less burdensome, or less expensive means of obtaining the records.

2. The Bureau shall not be required to complete an analysis, conduct new modeling, formulate a final opinion or recommendation, or prepare testimony before it otherwise would do so. The Bureau shall not have to create new studies, calculations, summaries, document compilations, or analyses solely to answer discovery. Responses may permissibly reflect only information reasonably available at the time and identify any analysis as preliminary, although not

required. This is a tailored protection for air quality permit proceedings. See 20.2.72.207(D) NMAC (the record is identified and compiled as the review proceeds); see also 20.1.4.7(A)(2) NMAC; 20.1.4.200(A)(2) NMAC.

3. The Bureau may respond to a discovery request by stating that the responsive documents or information are contained in the Administrative Record, without identifying, locating, compiling, or producing the specific documents or information for the requesting party. Requiring the Bureau to search the Administrative Record and identify responsive materials for the requesting party would impose an undue burden and divert Bureau staff from completing the technical review and preparing for hearing.

4. The Bureau shall not be required to speculate or provide a conclusion it has not reached.

5. Provide that nothing identifies a response as the Bureau's final technical conclusion or permit recommendation, which the Bureau may correct or supplement as the process develops; but the Bureau shall have no obligation to supplement discovery.

In conclusion, if limited discovery is granted, it should be propounded only subject to the limitations and protections listed above.

POSITIONS

The Bureau has requested positions from the parties to determine if any of the proposed limitations are agreeable for unopposed adoption if discovery is ordered. However, the Bureau filed its response now in advance of the hearing to afford meaningful time to review. If the Bureau obtains positions that are relevant for simplified decision-making, the Bureau will communicate them before the hearing.

CONCLUSION

Governing law for an administrative public hearing proceeding on a pending application for an air quality new source review construction permit does not afford parties the right to demand or receive discovery, nor is this a right created by the courts or recognize as a general matter of due process. The Bureau respectfully maintains that the Hearing Officer must:

A. Issue an order finding there is no legal authority for the Hearing Officer to compel parties to answer discovery in this proceeding;

B. Deny NEE's *Motion to Order Discovery Required by Due Process* [Dkt. No. 106] and CBD, Mr. Saldaña, Jr. and Ms. Fuller's *Motion for Hearing Officer to Order Discovery* [Dkt. No. 108];

C. Amend the *Second Amended Scheduling Order*, paragraph 7 (entered Oct. 16, 2026) [Dkt. No. 109], to remove the provision regarding discovery;

D. Alternatively, if limited discovery is granted:

1. Issue an order setting forth the legal authority for the Hearing Officer to compel parties to answer discovery in this proceeding; and

2. Allow only for discovery requests from parties to be served on YGI, as the applicant – no discovery shall be sought from NMED, the Bureau or individual NMED employees; and impose the limitations identified by the Bureau in this filing; or

3. In another alternative, if limited discovery on the Bureau is granted, impose the limitations identified by the Bureau in this filing.

Filed: October 28, 2026

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *New Mexico Environment Department Air Quality Bureau's Consolidated Response in Opposition to Discovery Motions [Dkt. No. 106] and [Dkt. No. 108]* was electronically filed and sent via electronic mail on this 28th 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.

/s/Kelsea E. Sona
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Filed
Supreme Court of New Mexico
9/2/2026 9:11 PM
Office of the Clerk

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NEW ENERGY ECONOMY

Petitioner, **Case No. S-1-SC-41579**

v.

**THE SECRETARY OF THE ENVIRONMENT,
JAMES KENNEY, AND HIS DESIGNEE,
JOHN RHODERICK,
NEW MEXICO ENVIRONMENT DEPARTMENT,
HEARING OFFICER, MAX SHEPHERD,**

Respondents.

**REGARDING:
THE APPLICATION
OF YUCCA GROWTH INFRASTRUCTURE, LLC
FOR AN AIR QUALITY PERMIT NO. 10883
AQB 26-57(P)**

NEW MEXICO ENVIRONMENT DEPARTMENT, SECRETARY, AND DEPUTY SECRETARY'S MOTION TO VACATE STAY AND DENY NEW ENERGY ECONOMY'S EMERGENCY PETITION AND REQUEST FOR STAY REGARDING AQB 26-57(P) FOR LACK OF JURISDICTION; AND RESPONSE IN OPPOSITION TO PETITION

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Dated: September 2, 2026

EXHIBIT
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INTRODUCTION

James C. Kenney, in his official capacity as Cabinet Secretary ("Secretary") of the New Mexico Environment Department ("NMED"); John Rhoderick, in his official capacity as Deputy Cabinet Secretary of NMED and the Secretary's designee ("Deputy Secretary");[1] and NMED (collectively, "Respondents") respectfully submit this Response pursuant to Rules 12-504(C)(1) and 12-504(D)(1) NMRA and upon invitation from the Court in the *Order* (entered Aug. 23, 2026) to *New Energy Economy's Emergency Request for a Stay of Proceedings Pending a Determination on Verified Petition for Writ of Mandamus* (filed August 19, 2026) ("Petition") by New Energy Economy ("Petitioner") regarding *In the Matter of the Application of Yucca Growth Infrastructure, LLC for an Air Quality Permit No. NSR 10833, AQB 26-57(P)* ("AQB26-57(P)").[2]

As an initial and relevant matter, Max Shepherd recused himself as the hearing officer for the public hearing. AQB26-57(P), *Order* (filed August 22, 2026; served

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[1] Deputy Secretary Rhoderick is the Secretary's designee for final decision-making authority for the administrative public hearing on the pending air quality permit. AQB26-57(P), *Notice of Docketing, Appointment of Hearing Officer, and Delegation of Final Decision Authority* (entered July 2, 2026) ("*Secretary's Order*").

[2] As of filing, the Court has not accepted the conditionally filed *Brief of Amici Curiae Conservation and Environmental Caucus, and Members of the New Mexico Legislature, In Support of Petitioner's Request for Emergency Relief* (filed August 24, 2026), *Brief of Amicus Curiae Center for Biological Diversity In Support of Petitioner's Request for Emergency Relief* (filed August 28, 2026), and *Brief of Amici Curiae Jose Saldaña Jr. and Vivian Fuller In Support of Petitioner's Request for Emergency Relief* (filed August 28, 2026).

August 24, 2026, at 12:25 p.m.) ("*Recusal Order and Stay Denial*"). Thus, this Court cannot compel him with mandamus because he lacks authority to preside over the public hearing process.

MOTION TO VACATE STAY AND DENY PETITION FOR LACK OF JURISDICTION

With this motion, Respondents request this Court vacate the stay issued by the Court and deny the Petition for lack of jurisdiction due to improper service. Respondents seek to uphold their mission to serve the people of New Mexico and to ensure preservation of the integrity of the rules set by the Legislature and New Mexico courts. Here, the same Petitioner that purports to advocate for a rigorous process has neglected the first procedural step to obtain relief from this Court through a writ of mandamus and request for stay. The Court lacks jurisdiction to bind Respondents and stay the public hearing due to Petitioner's failure to serve the Secretary, Deputy Secretary, and New Mexico Attorney General in accordance with State statute and the New Mexico Rules of Appellate Procedure. See Petition, pp. 36-39 (Certificate of Service).

Well-established rules are important and must be followed. State statute requires that to effectuate proper service on a respondent that is a public department, such as NMED, and a respondent that is a public official, such as the Secretary and the Deputy Secretary, the Petitioner is required to serve the officials themselves, including the Secretary, as head of NMED, and the Attorney General. NMSA 1978,

§ 38-1-17(C) ("In any action in which a branch, agency, bureau, department, commission or institution of the state specifically authorized by law to be sued is named a party defendant, service of process shall be made on the head of the branch, agency, bureau, department, commission or institution and on the attorney general."); § 38-1-17(D) ("In any action in which an officer, official or employee of the state or one of its branches, agencies, bureaus, departments, commissions or institutions is named a party defendant, service of process shall be made on the officer, official or employee and on the attorney general."). The statute requires that service on the Secretary, as head of NMED, and the Attorney General must be made through hand delivery. § 38-1-17(H) ("Service of process on the governor, attorney general, agency, bureau, department, commission or institution or head thereof shall be made either by handing a copy of the summons and complaint to the head or to his receptionist.").

The New Mexico courts interpret the service requirements in Section 38-1-17 strictly, including for a writ of mandamus petition. Trujillo, 2005-NMCA-095, ¶¶ 1, 9, and 11 (the Court of Appeals considered whether the district court could issue a writ of mandamus when the petitioner did properly serve the respondent, the New Mexico Department of Motor Vehicles, and found the district court lacked jurisdiction due to improper service, including no hand delivery, and overturned the writ); Wirtz v. State Educ. Ret. Bd., 1996-NMCA-085, ¶¶ 13-14, 122 N.M. 292

(holding that service by mailing is not effective when delivery is expressly required by law).

Petitioner provided notice to the wrong attorneys. "[A]n attorney does not, merely by virtue of general employment, actually have authority to accept service of process on behalf of his client." State Sav. & Loan Ass'n of Lubbock v. Anderson, 1987-NMSC-123, ¶ 4, 106 N.M. 607. The Attorney General represents Respondents. NMSA 1978, §§ 8-5-2(A) and (C). The Petition was served only NMED's attorneys for the permit hearing, a limited, matter-specific representation that cannot reasonably be construed as blanket authority to accept service for NMED or its executive officials in "any" matter relating in some way to that hearing. Rule 12-307(C) NMRA states for "a party represented by an attorney, the service shall be made upon the attorney" and, similarly, Rule 12-307.2 NMRA permits electronic service on "the attorney for the party to be served[.]" The rules presuppose an existing attorney-client relationship in the relevant matter before the Court; the rules do not permit service on an attorney merely because that attorney represents a related governmental entity in a different proceeding.

Undersigned counsel's appearance does not waive the service defect. "New Mexico has long held that actual knowledge of a lawsuit is not a substitute for service of process." State ex rel. McGill v. Bassett, 2023-NMCA-033, ¶ 18, 528 P.3d 739 (citing Rodriguez v. Conant, 1987-NMSC-040, ¶¶ 10, 22-23, 105 N.M. 746

(affirming the district court's grant of a motion to set aside a default judgment where the defendant had knowledge of the suit, but was never properly served); Capco Acquisub, Inc. v. Greka Energy Corp., 2008-NMCA-153, ¶¶ 46, 49, 145 N.M. 328 (reversing a judgment against the defendant when the defendant was never properly served despite the defendant's previous involvement and actual knowledge of the suit); Ortiz v. Shaw, 2008-NMCA-136, ¶ 17, 145 N.M. 58 (reversing default judgment against the defendant who was never properly served despite the fact the defendant had actual knowledge of the suit)); Guthrie v. Threlkeld Co., 52 N.M. 93, 96, 192 P.2d 307 (1948) (an appearance to challenge jurisdiction is not consent to jurisdiction). Thus, Respondents challenge to jurisdictional due to Petitioner's failure to serve them does not cure the failure.

Similarly, the New Mexico Rules of Appellate Procedure require that to effectuate proper service on a respondent that is a public official, such as the Secretary and the Deputy Secretary, the petitioner is required to serve the Attorney General in addition to all respondents themselves. Rule 12-504(E) NMRA ("Service of all papers filed under the rule shall be made under Rule 12-307 NMRA on the petitioner, the respondent, any real parties in interest and, if the respondent is as described in Subparagraph (B)(1)(c) of this rule, the attorney general."); Rule 12-504(B)(1) NMRA ("The [verified] petition shall set forth the following: . . . (c) the name or names of the real parties in interest, if any, if the respondent is a justice,

judge, or other public officer or employee, court, board, or tribunal, purporting to act in the discharge of official duties[.]"). The Secretary and Deputy Secretary are public officials that Petitioner asserts are purporting to act in the discharge of official duties, which requires Petitioner to make service of the Petition on the Attorney General. As noted above, the same applies for Hearing Officer Max Shepherd. Furthermore, Rule 12-504(E) NMRA requires service upon NMED as a respondent.

The service requirement is not merely procedural; it is a necessary prerequisite for the Court to exercise its authority. A court is prohibited from exercising jurisdiction and rendering a binding judgment over a defendant unless "proper service of process" occurs. State ex rel. McGill, 2023-NMCA-033, ¶ 16; see Trujillo, 2005-NMCA-095, ¶ 8 ("It is well established in our cases that a court lacks jurisdiction to pronounce judgment over a defendant or respondent unless that defendant or respondent has been properly summoned into court."); Edmonds v. Martinez, 2009-NMCA-072, ¶ 9, 146 N.M. 753 ("A court has no power to bind a party to a judgment when that party has not been properly served with process.").

Here, there has been no service of the Petition on the Secretary or Attorney General, let alone hand delivery of the Petition, and no service of the Petition on the Deputy Secretary. The Court served the *Order* on the Attorney General. However, as explained in Trujillo, 2005-NMCA-095, the failure to properly summon a party to court is not cured by later service of an order, as the court reversed the peremptory

writ of mandamus and remanded with instructions to vacate the writ and final order, directing that further proceedings could only occur when and if proper service was made upon the respondent.

Thus, since Petitioner has not made service of the Petition on the Secretary, Deputy Secretary, and Attorney General as required by New Mexico law, this Court does not have jurisdiction to bind the Secretary, Deputy Secretary, or Department in this proceeding. The Court should vacate the *Order* granting a stay and deny the Petition for lack of jurisdiction due to improper service.

RESPONSE IN OPPOSITION TO PETITION

If the Court deems service proper and finds jurisdiction, with this response, Respondents request the Court deny the Petition.

This matter involves an administrative public hearing proceeding on a pending application for an air quality new source review construction permit ("Application") by Yucca Growth Infrastructure, LLC ("Applicant") for a particular set of regulated air pollutants from a data center; it is not a generalized data center referendum. The public hearing has a defined legal scope: NMED 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. NMED cannot use the air quality permitting process to adjudicate water rights, prohibit pipeline construction, require a different electricity generation

method, regulate land use, resolve economic development policy disagreements or local tax policy decisions, or address other matters committed to different agencies and statutory processes. Nor can NMED deny this permit or impose permit conditions based solely on greenhouse gas ("GHG") emissions given the absence of an applicable emissions standard or regulatory requirement. All the harms invoked by Petitioner fall outside the air quality permit decision and cannot supply a due process entitlement to expand this proceeding beyond the authority granted to the agency by law. To address the allegations would mean this Court legislating from the bench. Mandamus 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 before the Court. Petitioner does not follow such standards here.

In fact, Petitioner grossly misrepresents the applicable law and the nature of the air permit public hearing proceeding while seeking relief that never existed in the first place. By deliberately convincing others of its own distorted view, Petitioner invites this Court to "fix" legal and procedural aspects of environmental law legislatively enacted, judicially decided, and pending judicial review. This is not the purpose of mandamus or the Court's role.

In the guise of a due process claim conflating the law and exaggerating only selected facts, Petitioner asks this Court to stop an ongoing public hearing on an air

permit before any evidentiary record has been developed or permit decision has been made; summarily revise regulations for the public process adopted by NMED and the Environmental Improvement Board ("EIB") pursuant to authority granted by the New Mexico Legislature to implement the federal Clean Air Act, 42 U.S.C. Sections 7401-7671q ("CAA"); direct the process of a public hearing entrusted to the discretion of a neutral and independent hearing officer; and hinder NMED's ability to comply with the statutory deadline set by the New Mexico legislative body. The governing law, as confirmed in the hearing record for AQB26-57(P), deliberately assigns scheduling, discovery, evidentiary development, supplementation, and continuances to the hearing officer's discretion; mandamus cannot replace those discretionary rulings with Petitioner's preferred procedure and preferred decisions. Petitioner cannot establish a constitutional due process claim merely by showing that it desired even more process; it must first show the Constitution protects a liberty or property interest that triggers the constitutional due-process protection. The Petition fails to do this because Petitioner has no liberty or property interest at issue. The Petition also asserts statutory and regulatory violations based on the AQCA and the procedural law for the public hearing on the pending air quality permit, 20.1.4 NMAC (the "Rule") – not a constitutional matter – without ever actually identifying the mandatory duties with which NMED is purportedly failing to comply.

The governing regulations already provide the process Petitioner claims it has

been denied: advance notice; motion practice and reconsideration; continuances and extensions; disqualification of the hearing officer; prefiled direct and rebuttal technical testimony; disclosure of exhibits and the bases for expert opinions; sworn testimony; cross-examination; evidentiary objections and cures with prejudicial error review by the Secretary; public participation; post-hearing submissions; comments and exceptions to the hearing officer's report; further review by the Secretary; and review of the final permitting action by the EIB and Court of Appeals. Petitioner has participated extensively in that process and opposing parties have obtained relief, including Max Shepherd recusing himself.

The stay has already caused lasting damage and prejudice to the State by preventing NMED from performing functions like making timely permit decision assigned by the Legislature, which are embodied in federal law with NMED certification to the U.S. Environmental Protection Agency ("EPA") in New Mexico's state implementation plan ("SIP") for compliance with Section 110 of the CAA, 42 U.S.C. § 7410. With the extension, the statutory deadline to complete the hearing and issue a decision is November 23. Yet, this Court's stay prohibits every step necessary to reach that timely decision, which continues to approach, while also adding to the very compression Petitioner claims is a problem.

Continued judicial supervision also causes structural harm to separation of powers in the State. The Legislature assigned the pre-decision permitting process to

the executive branch and supplied administrative and judicial remedies after a permit decision. Maintaining a stay based on interlocutory scheduling and evidentiary disagreements prevents NMED from completing its work and maintaining a stay and issuing a writ risk transforming this Court into the continuing supervisor of administrative case management for NMED. That precedent would extend far beyond this permit and invite interruption of agency proceedings, not just for NMED but for every agency in the State, whenever a participant disagrees with an interlocutory ruling.

Petitioner seeks extraordinary relief that would grant it special treatment in a standard public hearing on a pending air quality permit proceeding instead of following the law as Respondents have done and continue to do by seeking judicial recognition of the foundational legal rules of service and leave to exercise executive discretion to implement a public hearing to enable compliance with the strict deadline set by the Legislature.

Petitioner presents neither a purely legal question concerning a nondiscretionary official duty nor a fundamental constitutional issue resolvable on virtually undisputed facts for which expeditious relief is unavailable through ordinary administrative and appellate channels. Mandamus should be denied. At every point moving through this Response, from jurisdiction to merits, the Court has ample authority to stop its analysis, lift the stay and deny the writ.

I. BACKGROUND[3]

A. AIR QUALITY PERMITTING PROCESS

It is critical to understand legally and contextually NMED's air quality permitting decision process, which requires examining the hierarchical framework established by the United States Congress under the CAA; enacted by the New Mexico Legislature through the AQCA; implemented by the EIB and NMED through regulations promulgated by each; and interpreted by New Mexico courts.

The CAA sets the floor for air pollution limits and requirements by giving states and their political subdivisions the right to adopt and enforce their own limitations and requirements not less stringent than under federal law through federally approved SIPs to achieve, maintain, and enforce National Ambient Air Quality Standards (NAAQS) for both primary (health-based) and secondary (welfare-based) pollutants. 42 U.S.C. § 7416; 42 U.S.C. § 7409(b). The CAA emphasizes cooperative federalism, where states take primary responsibility for air pollution control, subject to EPA oversight and approval. 42 U.S.C. § 7416. New Mexico carries out that responsibility through the AQCA, which sets federal law as the floor and allows for the adoption of more stringent state regulations if the EIB determines, after public hearing and substantial evidence in the record, that the more stringent standard is more protective of public health and the environment, is

[3] See generally, **Exhibit A** (Declaration of James C. Kenney).

technically practicable and economically reasonable, and prevents or abates air pollution. See §§ 74-2-5(D), (G).

The law requires an air quality new source review (also called construction) permit before construction of certain stationary sources of regulated air contaminants. § 74-2-7(A); 20.2.72.200 NMAC. The permit inquiry is legally defined: NMED determines whether the proposed source will comply with applicable emission limitations, air-quality standards, and other requirements imposed by the AQCA and implementing regulations. See §§ 74-2-7(B)-(C); 20.2.72.208 NMAC. An air quality permit is not a comprehensive approval of the entire underlying development; NMED's permitting authority (not to be confused with regulatory authority) is limited to air contaminants with standards and requirements regulated under applicable air quality law. NMED may impose in the permit air contaminant emission limits, operating restrictions, control-technology requirements, testing, monitoring, recordkeeping, and reporting conditions *only as necessary* to assure compliance with the AQCA and applicable regulations. § 74-2-7(D); 20.2.72.210 NMAC. NMED's permit denial authority is confined to the limits conferred by air quality laws: whether the source, considering emissions after controls, can comply with applicable emission limits, ambient air-quality standards, and other requirements of the AQCA and applicable regulations. §§ 74-2-7(C), (P); 20.2.72.208 NMAC.

Section 74-2-7(B)(2)(a) of the AQCA requires NMED to 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 permit final decision may be appealed to the EIB. § 74-2-7(H)-(K); 20.1.4.500(E) NMAC; 20.2.72.207(F)-(G) NMAC; 20.1.2 NMAC. Notably, discovery is entirely absent from the EIB's adjudicatory proceedings regulation at 20.1.2 NMAC.[4] 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.

New Mexico's air quality laws establish the narrow parameters of NMED's authority. "Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes." Qwest Corp. v. N.M. Pub. Regul. Comm'n, 2006-NMSC-042, ¶ 20, 140 N.M. 440; see Pub. Serv. Co. of

[4] 20.1.2 NMAC applies to other proceedings, including for the Uniform Licensing Act ("ULA"). Section 20.1.2.208 NMAC describes the procedures for discovery only in ULA Proceedings – not air quality or other proceedings – because the ULA, Section 61-1-9, includes powers of the board and hearing officer related to the nature of allowing discovery in ULA hearings.

New Mexico v. New Mexico Env't Imp. Bd., 1976-NMCA-039, ¶ 7, 89 N.M. 223. "Separation of powers principles are violated when 'an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own.'" Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, 2012-NMSC-039, ¶ 13, 289 P.3d 1232 (quoting State ex rel. Sandel v. N.M. Pub. Util. Comm'n, 1999-NMSC-019, ¶ 12, 127 N.M. 272) ("Sandel"); see N.M. Const. art. III, § 1. While an agency has powers that, while not expressly enumerated, are reasonably necessary to carry out its express statutory mandates, those implied powers do "not warrant allowing an administrative agency to amend or enlarge its authority under the guise of making rules and regulations." Pub. Serv. Co. of New Mexico, 1976-NMCA-039, ¶ 10.

The Secretary has a "duty to manage all operations of the department and to administer and enforce the laws with which he or the department is charged." § 9-7A-6(A); see § 9-7A-3; § 74-1-2. "To perform his duties, the secretary has every power expressly enumerated in the laws, whether granted to the secretary, the department or any division of the department[.]" § 9-7A-6(B). Specific environmental laws spell out NMED's regulatory and enforcement responsibilities, including the AQCA. § 74-1-7(A)(4). State agencies have considerable discretion in interpreting and implementing their enabling statutes, rules, and regulations. See

N.M. Mining Ass'n v. New Mexico Mining Comm'n, 1996-NMCA-098, ¶ 10, 122 N.M. 332; City of Albuquerque v. N.M. Pub. Regulation Comm'n, 2003-NMSC-028, ¶ 16, 134 N.M. 472.

The AQCA strictly defines NMED's permitting authority. An applicant who complies with all applicable statutory and regulatory requirements is entitled to a permit. § 74-2-7(C). Administrative agencies "have only such authority as is expressly conferred upon them by statute, or that which is necessary to carry out the duties expressly granted by the Legislature." Sandel, 1999-NMSC-019, ¶ 11. An agency may not deny or condition an air quality permit based on environmental or other considerations that fall outside the regulatory framework established by the Legislature. See State ex rel. Taylor v. Johnson, 1998-NMSC-015, ¶ 22, 125 N.M. 343 ("The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature.").

Relevant to matters raised in the Petition, the courts have specifically evaluated the bounds of air quality authority and the Legislature's inaction informs those limits. First, the scope of NMED's authority to address in the final permit concerns about quality of life and health and safety is limited to having a nexus with air quality laws. In Southwest Organizing Project v. Albuquerque-Bernalillo County Air Quality Control Board, the Court "conclude[d] that [NMED], during the application process, and the Board, at the later adjudicatory hearing, were not

required to address public testimony regarding quality of life issues in resolving the permit applications."[5] 2021-NMCA-005, ¶ 24, 482 P.3d 1273; see also id., ¶ 14 (the reasonable probability of injury standard does not apply to air permit decisions or appeals); id., ¶ 15 (same regarding generalized health or safety concerns). All but a few of the alleged harms in the Petition and attached declarations, as well as Amici claims, are outside the legal scope of the air-permit proceeding, including: permitting GHG emissions, water use/security, groundwater appropriation, agricultural harms, drought, wildfires, localized heat, noise, traffic, electricity use, land use (*e.g.*, loss of residential character and quality of life), disproportionate burdens on border and environmental-justice communities, public health, natural gas supply and pipeline siting, utility infrastructure and demands, economic and public-resource harms (*e.g.*, tax incentives and hiring promises), transparency, governance, and public-confidence about non-air quality aspects of Project Jupiter, and general data-center development. For the permit at issue, NMED has provided every opportunity for the public to express its thoughts – with the public comment portal still being open and NMED staff reading and evaluating every comment received.

[5] This occasion belongs to public commentors, SWOP, 2021-NMCA-005, ¶ 20 (using the term "public comment" and citing the regulation for non-technical testimony); it does not extend to experts providing technical testimony because the burden of persuasion of focused solely on the permit and its specific conditions, 20.1.4.400(A)(1) NMAC, so quality of life and generalized health or safety evidence has no probative value, 20.1.4.400(B)(1) NMAC.

However, the Legislature has not granted NMED authority to revise the air permit to address these many concerns.

Second, since the Legislature has never enacted an economy-wide limit, cap, or condition for stationary source GHG emissions and no EIB regulation contains a GHG emission standard, NMED lacks authority to deny or delay a permit simply because a source emits carbon dioxide. The absence of an enacted regulatory program governing GHG emissions from stationary fuel-cell facilities is the direct result of legislative choices regarding statutory mandates and agency appropriations necessary for development of implementing rules. While the EIB possesses broad, prospective rulemaking authority under Sections 74-1-8(A)(4) and 74-2-5 of the AQCA to adopt regulations to prevent or abate air pollution, implementing new comprehensive, economy-wide regulatory permitting standards for GHG emissions from stationary sources require dedicated administrative resources. The Legislature has repeatedly considered and declined to enact comprehensive statutory authority that would allow NMED or the EIB to limit, cap, or condition air quality construction permits on aggregate GHG emissions. For example, in 2022, the Clean Future Act (House Bill 6) would have amended the AQCA to create mandatory statewide declining GHG caps (50% by 2030; 90% by 2050) and a comprehensive offset mechanism across industrial sectors. See **Exhibit B**. In 2026, the Clear Horizons Act (Senate Bill 18) would have amended the AQCA and Environmental

Improvement Act to establish net-zero mandates by 2050 and required EIB to impose direct facility caps on stationary sources emitting greater than or equal to 10,000 metric tons per year of carbon dioxide equivalent. See **Exhibit C**. The $1,500,000 and $2,200,000 appropriations, respectively, contingent upon the passage of House Bill 6 and Senate Bill 18, respectively, would have provided NMED with the fiscal resources to develop rules implementing the GHG caps. See **Exhibits B and C**. Thus, despite the prospective rulemaking authority the EIB can exercise for particular source categories, NMED cannot get ahead of that authority by inventing or applying an unpromulgated GHG standard in an individual air quality construction permit proceeding.

B. PUBLIC HEARING LEGAL AUTHORITY AND BACKGROUND

The AQCA describes the administrative public hearing on the pending air quality permit in two places. First, the Legislature afforded NMED the opportunity to extend the deadline for issuing a permit decision when there is a need to have a public hearing:

> Regulations adopted by the [EIB] . . . shall include at least the following provisions: . . . 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) ninety days after the application is determined to be administratively complete, if the application is not subject to requirements for prevention of significant deterioration, unless the secretary or the director grants an extension not to exceed ninety days for good cause, ***including the need to have public hearings***[.]

§ 74-2-7(B)(2)(a) (emphasis added).[6] Second, the Legislature required the EIB to issue regulations with "provisions [for] . . . specification of the . . . public hearing, if any, required prior to the issuance of a permit[.]" § 74-2-7(B)(5). 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.

Based on this 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 Rule 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.

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[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 just cause, which expressly included public hearings. The law change reduced the construction permit decision timeframe from 180 days to 90 days with the possible extension, as well as reduced the time to appeal from 90 days to 30 days.

When the Legislature gives broad grants of power to an agency, the power comes with the understanding "that the [agency] would develop an appropriate test to fit the regulatory climate." Pub. Serv. Co. of New Mexico v. New Mexico Pub. Serv. Comm'n, 1991-NMSC-083, ¶ 11, 112 N.M. 379 (internal citation omitted). "It is a settled principle of administrative law that the Legislature, when 'through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.'" Gila Res. Info. Project v. N.M. Water Quality Control Comm'n, 2018-NMSC-025, ¶ 34, 417 P.3d 369 (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)). "Agencies and individuals with important responsibilities must have considerable discretion in order to fulfill their responsibilities effectively. Inadequate discretion probably is a larger problem than excessive discretion." Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n, 2003-NMSC-005, ¶ 25, 133 N.M. 97. For both the AQCA direction to the EIB to adopt public hearing regulations and the EIB's delegation to the Secretary, the broad grant of authorities carry with them discretion to adopt an appropriate public hearing process. See N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n, 2007-NMCA-010, ¶ 11, 141 N.M. 41 (upholding "presumptively valid" agency regulations against a facial challenge where the regulations were "reasonably consistent with the authorizing statutes").

However, the power granted in statute limits agency authority. Many of the requirements in 20.1.4 NMAC that generally apply to the administrative public hearing on the pending air quality permit stem not from the AQCA but from statutory requirements in other laws. The AQCA does not provide for discovery in public hearings or appeals like other laws, such as the Solid Waste Act. See generally § 74-2-1 to -17; compare § 74-9-29(A)(5) (requiring procedures for discovery). Thus, the Rule has no provisions regarding discovery in any proceeding other than those under the Solid Waste Act, NMSA 1978, Sections 74-9-1 to -43. 20.1.4.200(E)(2) NMAC. NMED cannot, through regulation, enlarge a hearing officer's authority to require discovery when the AQCA does not allow it.

The Rule states "[t]he Secretary may appoint one or more Hearing Officers[,]" 20.1.4.100(E)(2) NMAC, "to conduct a proceeding under this Part[,]" 20.1.4.7(A)(13) NMAC. The Rule assigns duties and case-management authority to the Hearing Officer to "conduct a fair and impartial proceeding, assure that the facts are fully elicited, and avoid delay" by authorizing the Hearing Officer to "take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising[.]" 20.1.4.100(E)(2) NMAC.

NMED and the Secretary utilize hearing officers for many administrative

proceedings that occur pursuant to the New Mexico statutes and regulations.[7] Those proceedings occur either before the Secretary (or their designee) as a decision-maker, boards or commissions; they are administrative and not the same as appearing before a civil court judge in a state or federal court setting.

NMED also utilizes its Office of Public Facilitation ("OPF") to support administrative proceedings. For example, in administrative public hearings on pending air quality permits and the Office's paralegal staff to serve as the Hearing

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[7] Until quite recently, NMED has regularly had only one hearing officer – Felicia Orth. Ms. Orth cannot alone support the hearing officer needs of NMED and Secretary. Securing lawyers interested and capable of serving as hearing officers for NMED has been a decades long challenge. The bullying – both in the proceeding and publicly in the news, on social media, and during a protest (that included masked impersonations of Hearing Officer Shepherd and others) – from opponents of the permit will likely make finding hearing officers even more difficult. See Joshua Bowling, *Contested New Mexico hearing officer for Project Jupiter air quality permit hearing recuses himself*, SourceNM (Aug. 24, 2026) https://sourcenm.com/2026/08/24/contested-new-mexico-hearing-officer-for-project-jupiter-air-quality-permit-hearing-recuses-himself/ ("Shepherd told Source NM he left because of how polarizing the case had become. 'It just seemed like the better thing to do, just to step out of it because if I had stayed in and ruled in favor of the applicant, people would have thought, 'Well, he only did that because he was biased or because the governor told him to do it,' or something like that,' he said, adding that he's never spoken to the governor. 'None of which was true. So it seemed like maybe the best thing to do was step out and let somebody else take over. Start fresh, and they can accuse them of being biased.'"); *Joint Motion to Stay Hearing and Disqualify Hearing Officer* (presenting inflammatory and unsubstantiated accusations, such as "inexplicable," "arbitrary," "one-sided," "absurd," "nonsensical," "anemic," to undercut the administrative process as set forth under New Mexico law with hyperbolic accusatory rhetoric rather than provide any actual evidence of any impropriety or focus on what New Mexico law requires as established by New Mexico courts).

Clerk under 20.1.4.7(A)(11) NMAC. Although OPF is located within NMED, it should not be confused as being "NMED." OPF conducts its business with named parties in contested permit or enforcement actions and rulemakings in service to the applicable board, commission, or hearing officer. Staff with OPF facilitate docket management by accepting filings, serving documents and maintaining the website; coordinating scheduling; establishing in-person locations; managing audio/visual equipment and operating the virtual platform to expand participation opportunities; coordinating with court reporters and interpreters, and more.

The ability to participate in the administrative public hearing proceeding is defined solely by the AQCA and 20.1.4 NMAC. The Rule provides extensive opportunities for participation and procedural protections. The Rule is designed to "ensure due process" and "the ability to participate" within a "orderly structure[d]" proceeding, 20.1.4.6 NMAC, conducted by an appointed hearing officer who has robust discretionary authority to maintain order for "efficient, fair and impartial adjudication of" the issues that arise, 20.1.4.100(E)(2) NMAC, including specifically to rule upon procedural matter and "issue all necessary orders[,] 20.1.4.100(E)(2)(b)-(c) NMAC.

Therefore, the direction in the AQCA as adopted in regulation guides the administrative public hearing on the pending air quality permit.

C. PERMITTING PROCESS AND HEARING DOCKET BACKGROUND

To contextualize where the Application sits in the process, Respondents explain the permitting process before the stay was issued and what can be expected once the stay is lifted.

The NMED Air Quality Bureau ("Bureau") received an application for an air quality construction permit from the Applicant on April 27, and 30 days later the Bureau deemed the Application administratively complete, while also making the determination public with the full set of the Application materials submitted by the Applicant. The administrative completeness determination is not an approval of the permit. The Bureau decides completeness after determining whether the application contained sufficient information to begin technical and public review. The Bureau issued public notice on the Application and opened a public comment period from May 31 to July 6, then began its technical review.

Following this public notice and comment period, on July 1, the Secretary determined the level of public interest warranted an administrative public hearing on the pending air quality permit to supplement the administrative record after reviewing such recommendation from the Bureau. The Secretary's determination initiated the process for the administrative public hearing on the pending air quality permit process to be completed before the expiration of the November 23 deadline for a decision whether to approve the permit, approve it with conditions, or deny it.

See § 74-2-7(B)(2)(a); 20.2.72.207(C)(1) NMAC. As part of that process, the Secretary delegated final decision-making authority to NMED's Deputy Secretary, and appointed Max Shepherd as the independent hearing officer. AQB26-57(P), *Secretary's Order*. Additionally, the Bureau notified the Applicant of the 90-day extension to the deadline for a final decision by NMED. See § 74-2-7(B)(2)(a).

As the permitting process progressed along its usual timeline, the Bureau made additional materials available for public review on July 29, 2026, including its draft permit, statement of basis, and modeling report. On August 7, the Bureau also opened a second opportunity for public comment on the draft permit and statement of basis – which continues to be open – and will remain open until the hearing is complete.

NMED provided amended notice on August 12 that the public hearing on the pending air quality permit would begin on September 14. AQB26-57(P), *Amended Notice of Public Hearing*. The Hearing Officer then set a status conference, proceeded to set a schedule for filings, and resolved a number of prehearing motions.

The parties would have filed their direct evidentiary cases on August 24 – including Applicant and NMED – making available most of the information Petitioner claims is absent; rebuttal testimony would have been filed on September 3; and the hearing would have started on September 14 as planned. AQB26-57(P), *Amended Scheduling Order* (entered July 29, 2026).

Once the process resumes, direct and rebuttal testimony will still need to be filed, and the public hearing will continue to develop the evidentiary record to become part of the administrative record upon which a final decision on the permit will be made. See 20.2.72.207(D) NMAC. Following the hearing and before the expiration of the deadline on November 23, the Deputy Secretary is tasked with determining whether to approve the permit, approve it with conditions, or deny it based on the administrative record. Id. The permit final decision may be appealed to the EIB and then up to the New Mexico Court of Appeals. § 74-2-9(A); 20.2.72.207(F) - (H) NMAC.

Although the hearing date changed, the amended schedule did not make August 24 the final opportunity to address the case; it provided multiple later protections such as rebuttal testimony; cross-examination at the hearing; the ability to correct prefiled testimony when adopting it under oath; post-hearing submissions; and comments and exceptions to the hearing officer's report and recommended decision. AQB26-57(P), *Amended Scheduling Order*; 20.1.4 NMAC. Also, despite the stay being in place, and to facilitate the early review of the administrative record (as NMED committed to doing weeks before the Petition was filed), NMED published the administrative record on August 24 for public review, with additional documents provided the following day.

II. ARGUMENT

The allegations presented in the Petition are not mandamus; they are an interlocutory appeal or an unripe claim of unfairness that ask the Court to decide abstract procedural disputes and prescribe rules for a proceeding that is currently stayed. This Court should not enter the policy debate that Petitioner has brought to its doorstep. However important the underlying project, climate policy, or public controversy may be, those subjects do not enlarge the Court's mandamus jurisdiction. The broader consequences reinforce the need for restraint.

However, the Petition challenges a procedural framework that no longer exists. The Petition sought intervention in such a way as to prevent Hearing Officer Shepherd from conducting a September 14 hearing. This Court stayed every aspect of the administrative proceeding, including the August 24 testimony deadline, making all subsequent deadlines difficult to meet, if not inoperable. In addition, Hearing Officer Shepherd has recused himself, making the September 14 hearing date unworkable. The delay caused by Petitioner's manufactured "emergency" and this Court's subsequent stay mooted all their alleged participatory harms. Petitioner selectively invokes the Hearing Officer's duties, while disregarding his concurrent duty to avoid unnecessary delay and manage the proceeding so NMED may issue its permit decision within the statutory period. Further, NMED must appoint a replacement hearing officer, who must address a timeline and procedural posture

materially different and more constrained from the one presented by Hearing Officer Shepherd. Yet, this Court cannot presume that an unidentified successor will perpetuate the same alleged procedural deficiencies. Mandamus based on assumptions about nonexistent decisions constitutes an impermissible advisory opinion.

Since due process review looks at the whole record, not individual rulings, Respondents request this Court to take judicial notice of the entire docket for AQB26-57(P) with assistance from OPF's Hearing Clerk to transmit the certified record for such purposes in the same manner as for an appeal. See e.g., Shook v. Governing Body of City of Santa Fe, 2023-NMCA-086, ¶¶ 31-32, 538 P.3d 466 (explaining the court was obligated to review the entire record of proceedings and rejecting the argument that de novo review for legal challenges should be limited to only the specific hearing procedures being challenged).

A. IMPOSING JUDICIAL INSTRUCTION WITH MANDAMUS OR CONTINUING JUDICIAL SUPERVISION BY NOT LIFTING THE STAY WOULD VIOLATE SEPARATION OF POWERS.

Petitioner – supported by individual legislators – asks the Court to convert disputed and now-superseded case-management decisions into an occasion to redesign the procedures governing an executive-branch air quality permitting proceeding informed by federal law. That is not judicial review. It is continuing judicial oversight of a discretionary executive function, and it presents an immediate

and serious separation-of-powers danger. This is a court of law – the highest in New Mexico – not a not a substitute hearing officer, permitting agency, or forum for political debate. Mandamus is an extraordinary writ reserved for the most exceptional of legal circumstances that evade relief elsewhere.

The danger presented by the Petition extends beyond this permit public hearing. If a participant can invoke this Court's original jurisdiction to stay an ongoing administrative proceeding based on disputed allegations without proper service, obtain interlocutory review without exhausting the prescribed ordinary administrative process, let alone without a clear legal violation, and despite the issue being moot, then nearly every procedural ruling in a New Mexico administrative proceeding becomes a potential extraordinary-writ case. Discovery rulings, evidentiary decisions, and scheduling orders could all be recast as constitutional emergencies requiring this Court's immediate supervision. That result would erode agency authority and expand the role of the judiciary. Further for the judiciary, that result reduces extraordinary relief to an alternative appellate process and places this Court in continuing supervision of the executive's proceedings.

That course also raises serious separation-of-powers questions. NMED is a creature of statute. It possesses the authority conferred by the Legislature and must exercise that authority within the statutory and regulatory framework the Legislature prescribed. The Court may determine whether NMED has violated a clear legal

duty, but it cannot use mandamus to prescribe new procedures, override lawful exercises of procedural discretion, or supply procedural rights the Legislature did not enact. Those are legislative judgments, not judicial remedies.

The Legislature directed NMED to decide air-quality construction-permit applications within a defined period, § 74-2-7(B)(2)(a); provided for a public hearing when deemed necessary, id.; directed the EIB to adopt implementing regulations for the public hearing, § 74-2-7(B)(5) – which the EIB did, see 20.2.72.206(C) NMAC; and gave the Secretary broad authority to adopt procedural rules, § 9-7A-6(D) – which NMED did in 20.1.4 NMAC. The Legislature did not provide for discovery as of right in air permit proceedings and did not prescribe any procedural requirements for the public hearing. The Supreme Court has "decline[d] to read the Legislature's silence as embracing (implicitly or otherwise) any particular approach[.]" Gila Res. Info. Project, 2018-NMSC-025, ¶ 66. The Supreme Court went on to say "[r]ather, we construe that silence as a broad conferral of authority to the Commission allowing it to pursue the policies and regulatory approaches it deemed most wise. Id., ¶ 66.

Petitioner nevertheless ask the Court to displace that framework with their preferred one in the guise of a mandamus action while simultaneously ignoring the impact on NMED. The Court's ""equitable powers do not extend so far as to allow [it] to disregard procedures set forth by statute." State ex rel. Riddle v. Oliver, 2021-

NMSC-018, ¶ 40, 487 P.3d 815 (evaluation extraordinary circumstances for constitutional rights in elections during the Covid-19 pandemic). "To do so would violate the separation of powers" because "[t]he power to make law is reserved exclusively to the Legislature." Id. (quoting State v. Roy, 1936-NMSC-048, ¶ 73, 40 N.M. 397). The judiciary cannot compel NMED to administer an alternative permitting process constructed for this case that is not in statute or regulation, particularly one that contradicts the legislative direction that timely permit decisions are not optional. A process created through mandamus would not honor the Legislature's enacted approach; it would supplement and revise it.

The individual legislators' declarations do not alter that constitutional allocation of authority. Individual legislators cannot speak for the Legislature in its entirety, revise enacted law through post-enactment declarations, or enlist the judiciary to achieve policy outcomes the representative body has not enacted. Whitely v. N.M. State Personnel Board, 1993-NMSC-019, ¶ 16, 115 N.M. 308 ("The sovereign authority of the legislature is instilled in the representative body, not its individual members."); Regents of Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 32, 125 N.M. 401 (statements by individual legislators, particularly statements made after enactment, are not competent evidence of legislative intent). The Legislature speaks through legislation. Regents, 1998-NMSC-020, ¶ 30. The Court does not infer an unexpressed procedural mandate from legislative silence.

Gila Res. Info. Project, 2018-NMSC-025, ¶ 66. Rather, where the Legislature has conferred authority without prescribing a particular regulatory approach, that silence reflects discretion in the agency to pursue the lawful approach it deems most appropriate. Id. If New Mexico requires a different process or standards for projects presenting novel climate, infrastructure, or public-participation concerns, the Legislature must create them.[8] The absence of legislation addressing those concerns does not enlarge NMED's statutory powers, and it does not enlarge this Court's mandamus jurisdiction.

The judiciary cannot supply through an extraordinary writ the process or legislation that advocates or individual legislators have been unable to secure through the representative process.

B. PETITIONER HAS NOT SATISFIED THE REQUIREMENTS TO STAY AQB26-57(P) AND THE COURT SHOULD LIFT THE STAY PENDING BRIEFING.

Petitioner has not shown likely success, irreparable harm, a favorable balance of harms, or that a stay serves the public interest. The stay should be vacated, even if the Court finds some but not all the factors are met. Rule 12-504(D) NMRA allows this Court to stay proceedings while considering a mandamus petition, but it does

[8] For example, the Legislature has been unable to pass a climate bill that would confirm NMED authority to regulate GHG emissions through its air quality construction permitting process – one of the primary concerns raised in the public hearing. Unfortunately, Petitioner cannot convert years of unresolved policy debate into a clear ministerial duty through litigation.

not dispense with the showing required for such exceptional relief. The relevant factors are:

> whether there has been a showing of: (1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.

Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 1986-NMCA-033, ¶ 10, 105 N.M. 708. All four factors must be satisfied; a petitioner cannot obtain a stay by demonstrating only some of them. Id. Petitioner cites no New Mexico stay standard and makes no disciplined showing under these factors except for waiving into the writ of mandamus argument alleged irreparable and "irreversible" harms. Applying these factors to the allegations asserted results in each factor weighing against continued relief.

As an overarching matter, Petitioner asks for an indefinite stay "pending resolution" of the Petition without proposing any conditions protecting the statutory deadline for NMED to make a permit decisions, NMSA 1978, § 74-2-7(B)(2)(a), and the interests of other participants. That open-ended relief is disproportionate to its speculative allegations.

For the first factor, Petitioner is not likely to prevail on the merits of the request for a writ. Respondents discuss this extensively in the concurrently filed *New Mexico Environment Department, Secretary, and Deputy Secretary's Response*

in Opposition to New Energy Economy's Emergency Petition and Request for Stay Regarding AQB 26-57(P), explaining why the drastic remedy of mandamus is not authorized or warranted here to allow this Court to exercise original jurisdiction. First, Petitioner has failed to meet the threshold requirement because the Petition does not presented this Court with a purely legal issue concerning the non-discretionary duties of Respondents. See State ex rel. Egolf v. New Mexico Pub. Regul. Comm'n, 2020-NMSC-018, ¶ 16, 476 P.3d 896; State ex rel. Sandel v. N.M. Pub. Util. Comm'n, 1999-NMSC-019, ¶ 11, 127 N.M. 272. For the second part of the analysis, none of the three requirements are met: the matters raised in the Petition do not implicate fundamental constitutional questions of great public importance; the matters raised cannot be answered on the basis of virtually undisputed facts; and there are numerous channels through which Petitioner may present, preserve, correct, and obtain review of the alleged procedural injury. See State ex rel. Sandel, 1999-NMSC-019, ¶ 11.

For the second factor, the Petition did not make a showing of irreparable harm; in fact, the Court's stay has already prevented the only imminent injuries identified in the Petition. The prior hearing officer has withdrawn, AQB26-57(P), *Order* (filed August 22, 2026; served August 24, 2026 at 12:25 p.m.), the challenged deadlines have passed under the Court's stay, *Order* (entered Aug. 23, 2026), and the hearing is unlikely to occur as currently scheduled. Any new hearing officer will necessarily

establish a new schedule and determine what procedures remain necessary.

All but a few of the alleged harms in the Petition and attached declarations, as well as Amici claims, are outside the legal scope of the air-permit proceeding. See SWOP, 2021-NMCA-005, ¶ 24 (the scope of NMED's authority to address in the final permit concerns about quality of life and health and safety is limited to having a nexus with air quality laws); see also id., ¶ 14 (the reasonable probability of injury standard does not apply to air permit decisions or appeals); id., ¶ 15 (same regarding generalized health or safety concerns); Alto Coal. for Env't Pres. v. Roper Constr., Inc., 2025-NMCA-018, ¶ 12, 572 P.3d 268 (holding that NMED is a creature of statute). Specifically for the alleged GHG emissions, no enforceable regulatory limit or permitting requirement applies to GHG emissions from this source category. Petitioner premises much of its claim of "irreparable harm" for the stay and "extraordinary public importance" for mandamus on the assertion that the source will emit millions of tons of GHGs. While the projected volume of GHG from the source in the Application is undisputed as a factual matter and contrary to state climate goals supported by NMED, attempting to leverage those emissions into a basis for administrative delay, procedural paralysis, or permit denial given previous failure of the Legislature to pass legislation addressing GHGs over several years fails as a matter of law.

Petitioner's position is also internally inconsistent. It argues that post-hearing

review will come too late because construction will proceed if NMED issues the permit. Contra NMSA 1978, § 74-2-9(D) (authorizing requests for a stay); 20.1.4.500(E) NMAC. However, whether a permit will issue, on what conditions, and after what findings are unknown. Existing construction before a permit decision is not authorized by the permit under review and cannot establish irreparable injury from allowing the public hearing to occur.

For the third factor, Petitioner ignores the evidence that a stay will cause substantial harm to other interested persons. A stay would prejudice NMED, the Applicant, the numerous other parties, and the public by suspending a proceeding in which all have invested substantial time and resources. Continued delay prolongs uncertainty about a timely decision based on a developed record, increases public expense due to rescheduling, and disrupts preparations, such as travel logistics, witnesses, technical filings, etc. The Office of Public Facilitation has secured a hearing location, a court reporter, interpreters, security, and more that wait in limbo.

For the fourth and final factor, the Petion does not demonstrate that no harm will ensue to the public interest. The public has a substantial interest in a timely, orderly forum where competing evidence can be tested in public rather than litigated piecemeal through emergency petitions.

Relevant to both the third and fourth factors, NMED is attempting to carry out the precise permitting process and deadline the Legislature enacted. Section 74-2-

7(B)(2)(a) of the AQCA directs NMED to make a permit decision within the prescribed period. The Rule supplies the procedures through which NMED develops the record necessary for that decision. 20.1.4 NMAC. The stayed hearing is the process where NMED develops the evidentiary record necessary to make that decision lawfully since the Secretary determined significant public interest required a hearing to develop the record. 20.2.72.207(D) NMAC. The stay places NMED in an untenable situation in which the executive branch remains legally obligated to act by November 23 while being judicially prohibited from completing the process necessary to act.

Petitioner claims a stay merely preserves the status quo, but that framing omits the existing statutory and procedural commitments. The status quo is an active public proceeding moving toward a legislatively-required decision. Stopping it changed that status, disrupted all participants' reliance, and continuation risks making lawful completion impossible. The stay also creates a broader institutional harm by encouraging parties to seek extraordinary review whenever procedural disagreement arises with administrative hearing officer orders. Agencies cannot efficiently develop records and exercise delegated expertise if each interlocutory disagreement can halt the proceeding.

Therefore, Respondents respectfully request the Court dissolve the stay or, at minimum, deny the Petition on an expedited schedule to preserve the time remaining

for NMED's ability to perform its duties to hold a public hearing and meet the statutory permit decision deadline.

C. MANDAMUS RELIEF IS NOT AUTHORIZED OR WARRANTED.

"Mandamus is a drastic remedy to be invoked only in extraordinary circumstances." State ex rel. Coll v. Johnson, 1999-NMSC-036, ¶ 12, 128 N.M. 154 (quoting Brantley Farms v. Carlsbad Irrigation Dist., 1998-NMCA-023, ¶ 12, 124 N.M. 698). The purpose of mandamus is "to compel a public officer to perform an affirmative act where, on a given state of facts, the public officer has a clear legal duty to perform the act and there is no other plain, speedy, and adequate remedy in the ordinary course of the law." Mimbres Valley Irrigation Co. v. Salopek, 2006-NMCA-093, ¶ 11, 140 N.M. 168. The various mandamus considerations are summarized into "a multifactor test[.]" Riddle, 2021-NMSC-018, ¶ 24. Under Sandel, this Court's exercise of original mandamus jurisdiction will lie

> when the petitioner presents [A] a purely legal issue concerning the non-discretionary duty of a government official that [B](1) implicates fundamental constitutional questions of great public importance, [B](2) can be answered on the basis of virtually undisputed facts, and [B](3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

1999-NMSC-019, ¶ 11. The threshold requirement is a purely legal question concerning a nondiscretionary duty. State ex rel. Egolf v. New Mexico Pub. Regul.

Comm'n, 2020-NMSC-018, ¶ 16, 476 P.3d 896 ("Egolf").[9] Only after identifying such a duty does the Court consider the three additional Sandel criteria. Egolf, ¶¶ 16-19.

The Petition does not satisfy the threshold requirement or any of the remaining Sandel criteria. Nor can the Amici cure the deficiency; they must accept the issues presented by Petitioner and cannot assume Petitioner's burden to demonstrate mandamus is warranted. Montoya v. Moore, 1967-NMSC-003, ¶ 11, 77 N.M. 326 ("remind[ing] amici curiae that they are not parties and cannot assume the functions of a party. They must accept the case before the court with the issues made by the parties"); State ex rel. Castillo Corp. v. N.M. State Tax Comm'n, 79 N.M. 357, 362, 443 P.2d 850 (1968); Whittington v. State Dep't of Pub. Safety, 2002-NMSC-010, ¶ 3, 132 N.M. 169 (declining to evaluate "arguments" raised for the first time by amici and not in the petition for writ).[10] Nor should the Court conduct its own factual investigation or construct a legal theory that Petitioner did not plead.[11]

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[9] Egolf is not generally relevant to resolving the Petition because it involved a structural separation-of-powers question about executive encroachment on legislative authority. 2020-NMSC-018, ¶¶ 26, 30-33. The Petition identifies no comparable legislative command or agency usurpation of legislative power.

[10] For example, the Petition does not raise the issue of N.M. Const. art. XX § 21, so it cannot be considered. The Court must decline to pre-determine Atencio v. State, 2026-NMCA-011, ¶ 13, 584 P.3d 985, 995, cert. granted (Nov. 10, 2025), cert. granted, 2025-NMCERT-011, 583 P.3d 264, in this mandamus action.

[11] See Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("[w]e 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

1. Petitioner Has Not Presented This Court with a Purely Legal Issue Concerning the Non-Discretionary Duties of Respondents.

Although Petitioner catalogues several procedural rulings with which it disagrees on outcome, it never identifies any specific ministerial act the writ should compel. This Court's exercise of original mandamus jurisdiction will only lie "when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official[.]" Sandel, 1999-NMSC-019, ¶ 11.

As an initial consideration, the matter before the Court is Respondents' interpretation of 20.1.4 NMAC, which is not a legal issue. As discussed above, the Legislature delegated to the EIB and NMED broad policy-making authority to decide whether to have and, if so, how to conduct public hearings. New Mexico Supreme Court precedent does not consider this a legal question:

> When [the Legislature] drafts a statute that does not resolve a policy dispute that later arises under the statute, some institution must resolve that dispute. The institution called upon to perform this task is not engaged in statutory interpretation. It is engaged in statutory construction. It is not resolving an issue of 'law.' Rather, it is resolving an issue of policy.

Gila Res. Info. Project, 2018-NMSC-025, ¶ 34 (quoting I Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.3, at 160-61 (5th ed. 2010)). Thus, the subject-

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of Carlsbad, 2023-NMCA-042, ¶ 16, 531 P.3d 642 (declining to consider claims unsupported by argument or authority); Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth., 2014-NMCA-032, ¶ 77, 320 P.3d 492 ("we do not investigate facts or develop arguments inadequately presented to us for consideration.").

matter of the Petition is not "a purely legal issue" to support this Court's exercise of original mandamus jurisdiction.

The courts describe "non-discretionary duty" in several ways, none of which are identified in the Petition: "a ministerial duty that is clear and indisputable," Am. Fed'n of State, Cnty. & Mun. Emps. v. Martinez, 2011-NMSC-018, ¶ 4, 150 N.M. 132; as a "duty . . . [that] is clearly enjoined by law," Lovato v. City of Albuquerque, 1987-NMSC-086, ¶ 6, 106 N.M. 287; see § 44-2-4; and as "an act or thing" that a public official "is required to perform by direction of law upon a given state of facts being shown to exist, regardless of [the official's] own opinion as to the propriety or impropriety of doing the act in the particular case," El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty., 1976-NMSC-029, ¶ 5, 89 N.M. 313 (internal quotation marks and citation omitted). In application, the Supreme Court expressly holds that mandamus "cannot control discretion lawfully vested in the official functions of a state official." Egolf, 2020-NMSC-018, ¶ 14 (citing Territory ex rel. Castillo v. Perea, 1900-NMSC-026, ¶ 12, 10 N.M. 362 ("It is not the province of a writ of mandamus to control the discretion of an officer where a discretion is vested in him."); Mimbres Valley Irrigation Co., 2006-NMCA-093, ¶ 11. "'Discretion' . . . has been defined as the power or right conferred upon an individual to act according to the dictates of one's own judgment and conscience." Kerpan v. Sandoval Cnty. Dist. Att'ys Off., 1988-NMCA-007, ¶ 14, 106 N.M. 764. "In

determining whether mandamus will lie, the court must look to the purpose of the statutory scheme to discover whether the duty sought to be compelled is ministerial or discretionary." Matter of Grand Jury Sandoval Cnty., 1988-NMCA-007, ¶ 15, 106 N.M. 764.

Petitioner invokes only generalized duties to follow broadly listed law.[12] This is because there are no purely legal and non-discretionary duties at issue in AQB26-57(P) – except for the November 23 deadline NMED must follow per legislative directive. Respondents have implemented the public hearing option allowed by the Legislature, as informed by regulation of the EIB, and administered the public hearing in accordance with the procedure established by NMED's public hearing regulation and the Hearing Officer's exercise of discretion. Petitioner cannot establish a due process claim by isolating individual deadlines and procedural rulings from the opportunities afforded throughout the proceeding. See N.M. Indus. Energy Consumers, 1986-NMSC-059, ¶¶ 17-26 (evaluating the challenged preparation period considering prior access to information, participation, available testimony, and cross-examination). As explained, the docket reflects that parties participated extensively throughout the proceeding so far and have repeatedly exercised meaningful opportunities to present arguments, file motions, seek

[12] Aside from procedural matters, since no enforceable regulatory limit or permitting requirement applies to GHG emissions from this source category, Petitioner cannot establish NMED failed to perform a non-discretionary duty.

reconsideration, and preserve objections.

Nothing in the AQCA directs NMED to hold a public hearing before NMED makes a permit decision. See § 74-2-7(B)(2)(a) (no mandatory duty); compare NMSA 1978, § 12-2A-4(A) ("'Shall' and 'must' express a duty, obligation, requirement or condition precedent."). Instead, the AQCA only required the EIB to issue regulations with "provisions [for] . . . specification of the . . . public hearing, ***if any***, required prior to the issuance of a permit[,]" § 74-2-7(B)(5) (emphasis added), which is expressed in 20.2.72.206(C) NMAC. The EIB's rule requires "a public hearing if the secretary determines that there is a significant public interest." 20.2.72.206(C) NMAC. The Secretary is compliant with this mandatory analysis provision, having evaluated the public interest and deciding it is significant, and initiating a public hearing. The only relevant remaining duty in the AQCA is for NMED to timely decide the permit application, which is hindered by the stay. § 74-2-7(B)(2)(a)

Neither the Secretary nor Deputy Secretary have failed to perform any duty under the Rule. The Secretary has taken three actions: ordered the public hearing, appointed Hearing Officer Shepherd, and delegated final decision authority to the Deputy Secretary. Following Hearing Officer Shepherd's decision to recuse himself, the Secretary will need to address the vacancy but cannot do so while the stay is in effect. For the Deputy Secretary, the hearing has not occurred, so he has

not made a final permit decision yet. Similarly, the Court cannot compel the Deputy Secretary to act except to issue a decision on or before the statutory deadline, which is his only delegated authority and that will come at the close of the public hearing proceeding. Therefore, Petitioner cannot identify any permitting duty that either official presently has refused to perform.

The sole dispute is regarding the Hearing Officer's management of the proceeding. The Hearing Officer carried out all mandatory and discretionary duties for hearing officers under the Rule. Petitioner's sole dispute is whether Hearing Officer Shepherd exercised procedural discretion correctly and whether different case-management choices would have been preferable. Those are neither purely legal questions nor failures to perform clearly defined nondiscretionary duties.

Even the "mandatory" duties require exercising discretion because they are related to case management. The Rule provides: "The Hearing Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, and avoid delay." 20.1.4.100(E)(2) NMAC. Reconciling those responsibilities requires the Hearing Officer to balance the parties' preparation interests, the need for a complete evidentiary record, and prejudice, all within the timeframe between the Secretary's decision to hold a hearing and the Legislature's statutory decision deadline. Importantly, the Rule recognizes the need for flexibility in complicated proceedings: "the Hearing Officer may . . . issue pre-hearing orders . . . adopting special

procedures for managing proceedings involving difficult or complex issues and/or large numbers of parties." 20.1.4.300(A)(3) NMAC (noting the orders cannot be "inconsistent with these rules"); see State v. Chavez, 2025-NMSC-036, ¶ 26, 578 P.3d 1151 (discussing extensively recognized inherent authority of courts to ensure matters proceed in a timely and orderly fashion).

Every matter challenged by Petitioner is tied to the Hearing Officer's discretionary authority: The Hearing Officer selected a hearing date between competing requests; issued a scheduling order largely identical to 20.1.4 NMAC; ruled on the motions presented to him; reconsidered certain preliminary rulings – both when asked and *sua sponte*; decided the appropriate forum for presentation of evidence necessary to resolve the motion to dismiss; and determined that existing procedures provide an adequate opportunity to address new evidence (*i.e.*, rejecting discovery on legal grounds and declining to require early production of the administrative record). In fact, parties in the public hearing sought reconsideration of the Hearing Officer's orders at least four times. Each time, he took up the request and declined to issue a different decision favored by the movant. The allegations do not establish a lack of notice or an inability to be heard; they demonstrate access to meaningful participation. See Archuleta v. Santa Fe Police Department ex rel. City of Santa Fe, 2005-NMSC-006, ¶ 32, 137 N.M. 161.

These matters are precisely the kind of procedural discretion Egolf places

outside mandamus. The judiciary does not second-guess or supplement procedural decisions through mandamus. For example, in an election code case arising during the COVID-19 pandemic, the Court declined to "rely on our inherent equitable powers to craft a remedy that departed from the statutory scheme in order to protect public health" and limited relief to the procedures existing in statute. Riddle, 2021-NMSC-018, ¶¶ 38-40. Accepting Petitioner's theory here converts mandamus into interlocutory review of every scheduling adjustment, reconsidered legal ruling, and choice concerning how an administrative record should be developed – the very supervision of an ongoing executive-branch proceeding that extraordinary writ jurisdiction does not allow.

Furthermore, the process must be assessed as a whole, not by isolating and reviewing the merits of a few disputed rulings. Shook, 2023-NMCA-086, ¶ 31 ("Having declined to hold that any one procedure by itself establishes a due process violation, we consider the proceedings as a whole."). Looking at the AQB26-57(P) docket as a whole, it demonstrates that participants were afforded substantial procedural due process before the proceeding was stayed. The docket does not show a process in which parties were excluded, silenced, or denied an opportunity to raise objections or seek reconsideration. The docket shows unusually extensive participation, motion practice, responsive briefing, reconsideration requests, public comment, and procedural accommodations – all before the technical evidentiary

stage of the case even began.[13]

Petitioner does not identify any concrete ministerial act that a writ would command. Instead, Petitioner identifies only a general statement that NMED must comply generally with constitutional, statutory, regulatory, and procedural requirements and afford Petitioner a "meaningful opportunity" or "fair opportunity" to present its case. This broad request necessarily invites the Court to improperly decide the specific procedures for scheduling, discovery, evidence, disclosure, and motions, as well adjudicate the fuel-supply issue before the public hearing. The Petition fails to meet the threshold standard for obtaining a writ and seeks relief mandamus does not afford.

a. Discovery is not a recognized right in an administrative public hearing on a pending air quality permit; Petitioner cannot be deprived of what it was not entitled to receive.

Mandamus cannot be used as an interlocutory appeal from the Hearing Officer's discovery ruling. The AQCA and governing regulations deliberately allocate evidentiary burdens without providing for discovery as a prerequisite to carrying those burdens and instead rely on public-notice materials, prefiled technical testimony, and procedural protections like oaths, cross-examination, objections, and rebuttal. See Alto Coal. for Env't Pres., 2025-NMCA-018, ¶ 24. Petitioner and

[13] Between July 2 and August 22 (seven weeks), the docket accumulated at least 92 filings, including several efforts by parties styled as reconsideration.

Amici ask this Court to revise a procedural decision and dictate the case-management choices of a successor hearing officer who has not yet been appointed.

Relevant here, Petitioner and Amici confuse the law on discovery in NMED air permit proceedings, and their reliance on SWOP is misplaced. The ruling does not represent a failure to perform a clearly defined ministerial duty. The Court of Appeals decision in SWOP does not generally authorize discovery in a public hearing proceeding. That case involved a different air permit administrative procedure before a different decisionmaker, *i.e.*, the Albuquerque-Bernalillo County Air Quality Control Board ("Local Air Board") quasi-adjudicatory permit appeal proceeding (*i.e.*, post-decision) under the Local Air Board's regulation 20.11.81 NMAC, which expressly recognizes discovery. Id., ¶ 25 (discussing 20.11.81.14(J) NMAC, which states: "Formal discovery is not a right, and, therefore, is discouraged and shall only be allowed by order of the hearing officer if the following conditions exist."). This is not an NMED rule. The Local Air Board has separate and distinct regulations not applicable to NMED, EIB, or Secretary proceedings. See § 74-2-4; Title 20, Chapter 11 NMAC. SWOP involved a different government agency, is a dispute about a different step of the permit process and involves a regulation provision authorizing discovery. Acknowledgment and application of the proper regulatory scheme is critical in air quality matters.

Due to this distinction, SWOP does not establish a general right to discovery

in a public hearing before the Secretary, much less a due-process violation whenever discovery is denied. Also, SWOP does not stand for a proposition that due process independently allows discovery. Archuleta, 2005-NMSC-006, ¶ 31 ("there is no constitutional right to pre-trial discovery in administrative hearings."); accord Dente v. State Taxation and Revenue Dep't, 1997-NMCA-099, ¶ 6, 124 N.M. 93, overruled on other grounds by State Taxation & Revenue Dep't v. Bargas, 2000-NMCA-103, 129 N.M. 800) ("the vast majority of opinions we have read have held that a party to an administrative proceeding has no constitutional right to pre-hearing discovery, including depositions . . . we hold that there is no general constitutional right to pre-hearing depositions in an administrative proceeding."). Further, the rule expressly states, "the New Mexico Rules of Evidence, SCRA 1986, 11-101 to 11-1102 shall not apply to proceedings under this Part." 20.1.4.100(A) NMAC. The provision goes on to state: "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***." Id. No statue provides for discovery in an air quality public hearing. To find there is general authority would modify and extend authority the Legislature has not granted.

In fact, in the NMED air permit proceeding, discovery should never have been authorized in the first place; Hearing Officer Shepherd's corrected ruling to deny discovery represents the state of the law. Opposition argues that due process

required the hearing officer to perpetuate a ruling he concluded exceeded his statutory and regulatory authority. This Court should reject an interpretation requiring a hearing officer to act contrary to law. If opposing parties want a process that includes discovery, that is a matter to take up with the Legislature.

b. NMED's duty to produce the administrative record does not arise until the day of the public hearing; however, NMED has already made the initial set of record documents available.

By Rule, NMED must deliver the administrative record to the Hearing Clerk in OPF no later than the start of the administrative public hearing on the pending air quality permit. See 20.1.4.200(A)(2) NMAC. Petitioner's assertion otherwise misstates the law and the AQB26-57(P), *Amended Scheduling Order*, actually ensures NMED submits the administrative record before the day of administrative public hearing. Nothing in the Rule requires NMED to provide a complete administrative record before affirmative technical testimony is due.

NMED made the record, as it currently exists, public on August 24 and 25 in accordance with NMED's commitment during the administrative proceeding, which moots Petitioner's claims. If NMED makes available the administrative record well before the schedule public hearing, which it has done in this case, it has a duty to supplement the administrative record up until the hearing – including with updated public comment submissions. This future duty on NMED does not revive Petitioner's allegation that not having access to items that do not yet exist is

injurious.

The administrative record is not static or self-generating; it continues to develop as NMED completes its review and as relevant materials are generated, including through the public hearing itself with public comments during the hearing, technical filings, and the hearing transcript. See 20.2.72.207(D) NMAC. NMED's duty is to identify and compile any new and relevant materials throughout and often near the conclusion of the process. While there *might* be prior instances of NMED filing an early copy of the administrative record and supplementing as it continues to develop, as has happened here, the fact that NMED did not file the existing administrative record even earlier does not constitute a violation of a non-discretionary duty.

c. The Hearing Officer's pre-hearing scheduling and adjustment of the hearing date are discretionary duties to balance compliance with 20.1.4 NMAC and the AQCA permit decision deadline.

The Court cannot issue mandamus based on speculation about a future schedule that has not been established. Every basis asserted in the Petition for relief depended on the administrative proceeding continuing before this Court could act. The stay prevented each of those events. Petitioner cannot continue to premise extraordinary relief on an allegedly compressed schedule after that schedule became inoperable and the Court itself supplied the additional time Petitioner sought. When the stay is lifted and the public hearing part of the permitting process resumes, a new

hearing officer, a new scheduling order, and new hearing dates will be required.

Additionally, scheduling is inherently discretionary. Opposition's disagreement with the balance struck in the AQB26-57(P), *Amended Scheduling Order*, for setting the hearing date to accommodate pre-hearing and post-hearing activities does not convert scheduling into a nondiscretionary duty and does not evidence a due process violation. The Rule recognizes the need for flexibility in complicated proceedings and provides the Hearing Officer with discretionary authority: "the Hearing Officer may . . . issue pre-hearing orders . . . adopting special procedures for managing proceedings involving difficult or complex issues and/or large numbers of parties." 20.1.4.300(A)(3) NMAC. Furthermore, these outer-bounds of the statutory period NMED has between declaring a permit administratively complete (May 27), including the just cause extension to allow 90 more days to hold a hearing, and ending with NMED issuing its decision (November 23) directly inform the procedural decisions put to the hearing officer. The Hearing Officer balanced the public hearing process for complying with the advance notice and testimony requirements; considering the technical nature of case; allowing for a multi-day evidentiary hearing; and then transcript preparation, post-hearing submissions, and a hearing officer's report. See New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission, 1986-NMSC-059, ¶¶ 17-26, 104 N.M. 565 (finding that 23 days to prepare expert testimony was sufficient

because parties had access to the information; could foresee the direction of the proceeding; had the opportunity to prepare rebuttal evidence; and retained the ability to cross-examine witnesses, among other protections).

The Rule recognizes there may be an occasion where a continuance is requested and provides a standard for review – "for good cause shown, and after consideration of prejudice to other parties and undue delay to the proceeding[,]" 20.1.4.200(C)(3) NMAC – but nothing in the Rule allows an open-ended suspension of the entire proceeding. See also 20.1.4.100(F)(2) NMAC. This same standard applies to requests for extensions of time to file a document. Id. The hearing officer "may" grant the request based upon the standard, making it a discretionary duty. The word "may," the good-cause finding, and the required balancing foreclose Petitioner's characterization of the requested hearing procedures, deadlines, and dates as ministerial. Mandamus cannot compel the Hearing Officer to exercise that discretion in Petitioner's preferred manner.

d. New Mexico disfavors dispositive decisions, and it was within the Hearing Officer's discretion to deem the motion to dismiss premature and instead develop an evidentiary record before evaluating the fuel-supply issue.

The Hearing Officer withdrew his request for attorney briefing on the motion to dismiss and determined the disputed fuel-supply facts should instead be developed through sworn testimony and cross-examination. His decision changed the approach

for considering the issue; it did not prevent the issue from being heard. The Rule authorizes the Hearing Officer to manage motions, formulate issues, take evidence, examine witnesses, and allow cross-examination within the regulatory construct and statutory authority. Choosing to decide a fact-dependent issue on an evidentiary record rather than competing representations in attorney briefs falls squarely within discretionary case management authority. See Romero v. Philip Morris Inc., 2010-NMSC-035, ¶ 8, 148 N.M. 713 ("New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merit"). This is a discretionary and ordinary case management matter.

The Petition attempts to convert two incompatible procedural preferences into a due-process violation: faulting the Hearing Officer for declining to decide the motion to dismiss before the evidentiary hearing while simultaneously asserting the schedule for that hearing was impermissibly compressed. Those positions disregard 20.1.4.600(B) NMAC, which recognizes that summary disposition may only occur after an "expedited hearing." By choosing to receive the sworn expert testimony and allow cross-examination during the already scheduled hearing before addressing issues that depended upon the factual record, the Hearing Officer did not deny the motion a hearing out of some perceived bias – he acted in accordance with his authorities and the process in the Rule.

Furthermore, Petitioner insists the project's scale, fuel arrangements,

engineering assumptions, emissions, and feasibility require additional facts. Yet, it asked this Court to stop the very process designed to provide and test such information, including affirmative testimony and exhibit filings by Applicant and NMED, rebuttal, cross-examination, and post-hearing briefing on those matters.

2. The Sandel Requirements Are Not Satisfied to Allow This Court to Exercise Original Jurisdiction Here.

The threshold for this Court's exercise of original mandamus jurisdiction does not lie here because the Petition does not "present[] a purely legal issue concerning the non-discretionary duty of a government official[.]" Sandel, 1999-NMSC-019, ¶ 11. Since the Petition identifies no duty, the Court should not consider the three additional Sandel criteria. See Egolf, 2020-NMSC-018, ¶¶ 16-19. However, Respondents analyze them for the benefit of demonstrating why the factors are not met here.

a. The matters raised in the Petition do not implicate "fundamental constitutional questions of great public importance[.]"

Petitioner generically alleges due process concerns, as discussed above, and explains its concern as the entirety of all the processes composing the Project Jupiter development as a global referendum rather than the discrete air-permit proceeding before NMED. While doing so, Petitioner fails to actually identify any "fundamental constitutional questions of great public importance[,]" for the instant proceeding at issue, which means the Petition fails to satisfy the second criterion of the second

Sandel standard.

The Petition's reasoning is circular under controlling law: it treats the procedural protections it was allegedly denied as both the "constitutionally protected interest" and "the process required to protect that same interest," without actually identifying any underlying liberty or property interest that triggers due-process protection. Thus, the Petition fails to address the threshold question. See Riddle, 2021-NMSC-018, ¶ 34 ("The purpose of the writ of mandamus is to enforce performance of a public duty after it has been otherwise established, and not to establish legal rights and duties."). Although a statute or regulation can supply a state created constitutionally protected liberty interest, the statute or regulation must require particularized standards or objective criteria" for the decisionmaker to follow. Aragon v. Martinez, 2025-NMSC-046, ¶ 30, 580 P.3d 202 (citing Olim v. Wakinekona, 461 U.S. 238, 249 (1983) ("If the decisionmaker is not required to base its decisions on objective and defined criteria, but instead can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected liberty interest." (internal quotation marks and citations omitted)).

As discussed, the AQCA does not require a public hearing before NMED makes a permit decision, nor did the Legislature provide a statutory standard or process within the AQCA. Instead, the Legislature required the adoption of

implementing regulations to outline that process, which resulted in the adoption of the Rule. Thus, the AQCA does not create a constitutionally protected liberty interest.

For the Rule, while there are numerous uses of the word "shall" in the Rule, that is not dispositive because the mandates are procedural requirements that necessarily require the exercise of discretion to fulfill. The Hearing Officer exercised his discretionary regulatory authority to manage the public hearing proceeding by holding status conferences, directing briefing, issuing orders, determining scheduling, managing evidentiary requests, etc. such that all parties have had notice and a meaningful opportunity to participate. The Petition identifies no discrete Rule provision that Respondents have not followed; the Petition only challenges decisions made by the Hearing Officer – decisions made within the procedural framework of the Rule. Petitioner identifies neither a protected liberty or property interest nor an actual separation-of-powers violation, so the Petition presents no fundamental constitutional question.

Instead, Petitioner's focus for this legal factor centers on its asserted concern of Project Jupiter in its entirety. This ignores that the matter "of great public importance" is the "constitutional question." Caselaw demonstrates that where the court has exercised original mandamus jurisdiction to grant relief, it has pointed to a specific *constitutional* question itself – not the underlying subject matter – as the

object of the importance inquiry. Respondents do not dispute that Project Jupiter in its entirety, and by extension the Application, have generated substantial public interest, but Sandel does not authorize original mandamus jurisdiction whenever the underlying subject merely gains multi-faceted public attention. It must be the legal question at issue that meets this threshold.

Accepting Petitioner's approach to this legal factor would allow any participant in an administrative proceeding that has significant public interest to obtain immediate Supreme Court review, displace agency fact-finding, undermine the finality requirement, and convert mandamus into a routine interlocutory appeal. The magnitude of the underlying matter in an administrative proceeding cannot convert ordinary procedural disputes into a constitutional controversy. Mandamus turns on the character of the legal question presented, not the scale or public profile of the regulated project.

b. The matters raised cannot be answered based on "virtually undisputed facts[.]"

The second criterion of the second Sandel standard is also absent because many of the facts asserted lack evidentiary support, and there is significant dispute as to the facts alleged.

The Petition states that the undisputed facts are the public hearing docket. As the Petition is drafted, that is simply not true. Absent from the docket are transcripts of status conferences, leaving the attributions Petitioner makes about the status

conferences unsupported and disputed. Also absent from the docket is any evidence for the "facts" asserted in support of its claims for public importance and irreparable/irreversible harm (used interchangeably by Petitioner), including unsupported statements about Project Jupiter development in its entirety – without limiting its narrative to the stationary source subject to the air quality permit – and many claims about fuel supply and the Green Chile[14] Lateral Pipeline. The referenced newspaper articles are inadmissible hearsay. Although declarations are attached to support the "irreversible harm" claims, Petitioner fails to provide citations to them in the body of the Petition leaving the reader to sift through 78 pages of purported "evidence." See Response, at 50 n. 11 (courts do not investigate inadequately presented facts). Due to these detriments, nearly all of the Petition is merely argument of counsel.[15]

Respondents dispute the facts in the Petition asserted as the basis for relief. Mandamus serves to compel an action, and the Court cannot compel NMED to do

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[14] Petitioners and Amici incorrectly reference the name of the pipeline as "Chili."

[15] It is well-established law that argument of counsel is not evidentiary proof. See Cain v. Champion Window Co. of Albuquerque, LLC, 2007-NMCA-085, ¶ 14, 142 N.M. 209 ("Arguments by counsel are not evidence and cannot be used to create a material issue of fact to defeat summary judgment."); C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 163, 597 P.2d 1190 (Ct.App.1979) (stating that an assertion is not entitled to consideration absent support by affidavit or admissible evidence)). Ortiz v. Shaw, 2008-NMCA-136, ¶ 20, 145 N.M. 58 ("statements of counsel are not evidence."); Phillips v. Allstate Ins. Co., 1979-NMCA-146, ¶ 11, 93 N.M. 648 ("The arguments of counsel, no matter how erudite, are not evidence.").

something the Legislature has not authorized. Respondents dispute Petitioner's unsupported characterization of the docket, particularly the conclusory statements of fact about the effect of the Hearing Officer's decisions (e.g., whether the schedule provides sufficient preparation time; whether the requested discovery was "narrowly tailored" and not "burdensome nor peripheral"; that parties could introduce new evidence at the hearing (prohibited by the Rule); and that the first opportunity to respond to Applicant's and NMED's evidence would be at the hearing itself (there is opportunity for rebuttal)).

c. There are numerous channels where Petitioner may present, preserve, correct, and obtain review of the alleged procedural injury.

Petitioner does not satisfy the third criterion of the second Sandel standard ("calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal"), because relief is available through the normal process and utilizing it does not cause an imminent injury or defeat the purpose of later relief. Mandamus is not about preference but impossibility. See NMSA 1978, § 44-2-5 (1884) (stating that a writ of mandamus "shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law"). The standard is not satisfied because the AQCA and 20.1.4 NMAC provide numerous channels through which Petitioner may present, preserve, correct, and obtain review of the alleged procedural injury, as well as to address commencement of construction while

an appeal(s) is pending. Several of these available channels for relief have already been exercised before the Petition was filed and one within a matter of hours after the Petition was filed. Some of these avenues for relief were successful for Petitioner.. Petitioner's unfounded predictions that these procedures will prove inadequate does not establish that they are unavailable.

Sandel does not authorize extraordinary jurisdiction merely because a party prefers immediate Supreme Court intervention to the administrative and judicial review processes enacted by the Legislature. The existence of procedures capable of addressing the alleged errors defeats Petitioner's assertion that expeditious relief "cannot be obtained through other channels." Petitioner's assertions disregard the existing procedures specifically designed to identify, preserve, and allow review of the purported "irreversible" harms.

Petitioner's claims have numerous channels of relief, as follows:

Motion to Disqualify the Hearing Officer. The Rule expressly allows any party to seek disqualification of the Hearing Officer before the hearing "for cause" based on the enumerated grounds in 20.1.4.100(E)(3)(a)(i) NMAC for disqualification. 20.1.4.100(E)(3)(b)(i) NMAC. The Rule affords the request an expedited resolution: the hearing officer makes a recommendation within five days and the Secretary decision no later than five days from then; then, if the Secretary disqualifies the hearing officer, then he also names the replacement.

20.1.4.100(E)(3)(b)(ii) NMAC. Opposing parties used this procedure in a motion filed several hours after the Petition and Hearing Officer Shepherd ultimately recused himself. AQB26-57(P), *Emergency Motion for Hearing Consistent with Due Process Guarantees, Disqualification of Hearing Officer, and Stay* (filed Aug. 19, 2026, at 6:21 p.m.) ("*Joint Motion*"); AQB26-57(P), *Recusal Order and Stay Denial*. That result eliminates the Petition's premise that extraordinary Supreme Court intervention was the only means of preventing Hearing Officer Shepherd from conducting the hearing under the challenged procedures.

Motion for Extension or Continuance. A party may move for an extension of a filing deadline or continuance of the hearing upon good cause, subject to consideration of prejudice and undue delay. 20.1.4.100(F)(2) NMAC. Nothing in the Rule allows an open-ended suspension of the entire proceeding. Id. Whether to grant an extension requires discretionary balancing. Hours after the Petition was filed, opposing parties requested the Hearing Officer stay the hearing indefinitely – substantially the same relief as the Petition and the Hearing Officer denied the request. AQB26-57(P), *Joint Motion*; AQB26-57(P), *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); AQB26-57(P), *Recusal Order and Stay Denial*. Petitioner cannot transform dissatisfaction with that balancing into proof that no

ordinary channel existed.

Motions and Requests for Reconsideration. The Hearing Officer has express authority to rule on "motions, procedural requests, and offers of proof" and "issue all necessary orders[.]" 20.1.4.100(E)(2)(b)-(c) NMAC. Opposing parties repeatedly exercised the right to motion practice, including motions for reconsideration. The fact that the Hearing Officer did not grant the relief Petitioner preferred does not mean that no administrative remedy existed.

Affirmative and Rebuttal Technical Testimony. The Rule requires parties to file technical testimony, identify witnesses and exhibits, and make available the technical materials supporting their opinions in advance of the hearing. 20.1.4.300(B)(1) NMAC. The hearing sequence expressly contemplates both direct and rebuttal testimony, "as appropriate[.]" 20.1.4.400(A)(2)(e)-(f) NMAC. The Rule also preserves the right to introduce technical information for impeachment. 20.1.4.400(B)(2) NMAC. The stay caused the original deadlines to pass, so any resumed proceeding will require new deadlines. Once reset, the Rule ensures a party does not encounter opposing technical evidence for the first time at the hearing by requiring advance filing. The Rule then provides an opportunity for rebuttal to respond to evidence and assumptions, correct disputed facts, and expose weaknesses before any witness takes the stand.

Examination and Cross-Examination of Witnesses. All parties have an

opportunity to examine witnesses, who ordinarily testify orally and under oath. 20.1.4.400(B)(2) NMAC. This procedure directly addresses the Petition's claimed inability to probe the evidence or obtain meaningful answers concerning the permit application. Any remaining uncertainty or perceived deficiency in the prefiled evidence may be exposed and developed on the record through examination, without discovery or extraordinary judicial intervention.

Objections and Offers of Proof. A party may object orally or in writing to the conduct of the hearing, and the objection, grounds, and ruling become part of the record. 20.1.4.400(C)(1) NMAC. At hearing, the Hearing Officer may exclude unreliable, unduly prejudicial, or improper evidence; allow appropriate examination; receive rebuttal evidence; and take other action necessary to fully elicit the facts. 20.1.4.400 NMAC. If evidence is excluded, the party may make an offer of proof preserving the evidence and alleged error. 20.1.4.400(C)(2) NMAC. These provisions supply precisely the record needed to timely challenge an allegedly erroneous evidentiary or procedural ruling, contrary to the Petition's assertions.

Correction of Prejudicial Evidentiary Error by the Secretary. If the Secretary concludes the Hearing Officer erroneously and prejudicially excluded evidence, the Secretary can remand the matter for the Hearing Officer to accept that evidence, including subjecting it to examination and rebuttal. 20.1.4.400(C)(3) NMAC. That provision contradicts the Petition's assertion that the administrative

process cannot correct a Hearing Officer's evidentiary error before the final permit decision.

Proposed Findings, Conclusions, and Closing Argument. After the hearing, a party may submit proposed findings of fact, conclusions of law, and closing argument addressing the hearing record and governing authorities. 20.1.4.500(B) NMAC. Thus, Petitioner may preserve on the record for appeal why it believes the evidence fails to satisfy the permitting requirements, why the fuel-supply issue matters, and why any preserved procedural ruling affected the record.

Comments on the Hearing Officer's Report. The Hearing Officer's report contains proposed findings, conclusions, a recommended decision, and a proposed final order. 20.1.4.500(C)(1) NMAC. A party may file comments supporting or opposing the report or requesting its modification. 20.1.4.500(C)(2) NMAC. A party may also request oral argument before the Secretary, time permitting before the final order is due. 20.1.4.500(C)(3) NMAC. These procedures permit Petitioner to present alleged legal and procedural errors directly to the official responsible for the final agency decision.

Independent Review by the Secretary. The Hearing Officer does not issue the permit decision. The Secretary, or here the Secretary's designee the Deputy Secretary, may "adopt, modify, or set aside" the Hearing Officer's recommended decision and must explain the action taken. 20.1.4.500(D)(2) NMAC. The

Petition's claim that Hearing Officer Shepherd's rulings would irreversibly determine the proceeding ignores the Secretary's authority to correct the recommendation, reject findings, and address preserved errors.

Administrative Review before the EIB. A person who participated in the permitting action and is adversely affected by the permit decision may petition the EIB for review of the permit decision. § 74-2-7(H)-(K); 20.1.4.500(E) NMAC; 20.2.72.207(F)-(G) NMAC; 20.1.2 NMAC. This appeal remedy allows Petitioner to challenge NMED's actual permit decision based on an established record rather than ask this Court to predict how an unfinished proceeding will unfold. The opportunity to appeal to the EIB also places review in the forum selected by the Legislature for challenges to air permit decisions.

Judicial Review in the Court of Appeals. The EIB decision may be appealed to the Court of Appeals. § 74-2-9; 20.1.2.404 NMAC; 20.2.72.207(H) NMAC. This review encompasses whether the action is "arbitrary," "capricious," an "abuse of discretion," unsupported by "substantial evidence in the record," or "otherwise not in accordance with law." § 74-2-9(C). The Court of Appeals may reverse the EIB's decision or set aside such agency action and remand for further proceedings. 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, 2023-NMCA-086, ¶¶ 31-35 (challenges to ability to participate in an administrative proceeding appropriately progressed through district court and the Court of Appeals review). The appeal standards encompass Petitioner's allegations that Respondents violated governing statutes, regulations, due process, or evidentiary requirements. The opportunity to appeal to the court also place review in the forum selected by the Legislature for challenges to air permit decisions.

Statutory Stay Pending Appeal. The Petition's assertion that construction necessarily would continue throughout an appeal is speculative. Section 74-2-9(D) of the AQCA authorizes a process to stay an action being appealed. It 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. The availability of a statutory stay directly undermines the Petition's assertion that mandamus is necessary because construction inevitably will proceed while ordinary review remains pending.

As an additional matter, there is sufficient relief for the Court to reject authorizing judicial legislation. The Supreme Court decision in Riddle, 2021-NMSC-018, demonstrates why extraordinary circumstances do not authorize judicial legislation. That case arose during an unprecedented public-health emergency, when no timely legislative remedy was available and the Court was "the only governmental actor" capable of addressing the immediate danger. Id., ¶ 31.

Yet the Court still refused to order a procedure inconsistent with the governing statute. Id., ¶ 40. The circumstances here are far less compelling. The administrative proceeding remains pending; the challenged schedule is no longer operative; Petitioner may present its case under a new schedule; and the AQCA provides an ordinary avenue for EIB and judicial review after a final permit decision. There is neither an institutional vacuum nor an imminent injury without a path to relief requiring the Court to assume legislative or executive functions.

III. CONCLUSION

Since Petitioner has not identified a purely legal question involving an unperformed nondiscretionary duty, cannot rely on virtually undisputed facts, and has an adequate remedy through the administrative process and review of any final permitting action, Respondents respectfully request the Court deny the *Petition for Writ of Mandamus*. Respondents do not oppose oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The Court granted Respondents request regarding increased words. Order (entered Sept. 2, 2026, at 1:05 p.m.) (allowing a "combined response to all pleadings noted in the motion, which shall not exceed 18,000 words"). Thus, I certify that this *New Mexico Environment Department, Secretary, and Deputy Secretary's Motion to Vacate Stay and Deny New Energy Economy's Emergency Petition and Request for Stay Regarding AQB 26-57(P) for Lack of Jurisdiction; and Response in Opposition to Petition* complies with the Order and the Rule 12-504(G)(3) NMRA type volume requirements, as permissibly increased by the Order, having been prepared using a proportionally spaced typeface (Times New Roman) contains not more than 16,040 words in the body, per the word-count feature of Microsoft Word.

/s/ Kelsea E. Sona
Kelsea E. Sona

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the *New Mexico Environment Department, Secretary, and Deputy Secretary's Motion to Vacate Stay and Deny New Energy Economy's Emergency Petition and Request for Stay Regarding AQB 26-57(P) for Lack of Jurisdiction; and Response in Opposition to Petition* to be electronically filed and served through the Odyssey e-file and serve system with the Supreme Court of the State of New Mexico and served electronically this 2nd day of September 2026, and will promptly cause to be placed in the U.S. Mail tomorrow for delivery, to the following:

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- and –
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c/o Max Shepherd
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Pro Se Respondent Hearing Officer

/s/ Kelsea E. Sona
Kelsea E. Sona

Also, I certify that I caused the same to be sent electronically this 2nd day of September 2026 as a courtesy to the potentially interested parties identified in the Certificate of Service of the *Petition*, and shall cause the same to be promptly sent by U.S. Mail tomorrow, as follows:

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