RECEIVED Luis Lopez
By The Office Of The Secretary at 5:00 pm, Oct 28, 2026

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 MOTION TO REQUIRE WITNESS DISCLOSURES AND REINFORCE *EX PARTE* COMMUNICATION PROHIBITIONS

The New Mexico Environment Department ("NMED") Air Quality Bureau ("Bureau"), moves for a protective and case management order pursuant to NMED's Permit Procedures at 20.1.4.200(D)(4) NMAC.[1] The Bureau requests relief to addresses two immediate procedural and merits problems: 1) Bureau staff must know whether a person seeking information or providing technical comments is acting as a member of the public or connected to a party as a retained or potentially engaged expert, identified or potential witness or an agent acting on a party's behalf (together "party affiliates"); and 2) the Bureau, all other parties and the public must also be able to ascertain and have the opportunity to address whether communications concerning the merits of this administrative proceeding have reached the decisionmaker outside the hearing record. Waiting until technical testimony is filed with designations of witnesses will not address contacts occurring now nor allow for timely and appropriate intervention, including treatment of the

[1] The Bureau did not seek concurrence before filing this Motion because the communications giving rise to the requested relief occurred this morning, October 28, 2026, and were brought to Bureau counsel's attention shortly thereafter. See 20.1.4.200(D)(3) NMAC (requiring a statement of why concurrence was not sought). These developments raise immediate concerns regarding contacts by retained experts with the designated decisionmaker, warranting prompt consideration and enforceable procedural safeguards. Prior to filing this Motion, counsel for the Bureau contacted counsel for Center for Biological Diversity, provided the emails at issue, and requested responsive information.

communications on the record. Thus, the Bureau seeks disclosure of 1) the identities of party affiliates that have contacted the Bureau concerning matters in this proceeding; and 2) any communications by party affiliates that include Deputy Secretary of the Environment John Rhoderick; as well as other procedural safeguards reinforced in an order by the Hearing Officer.

INTRODUCTION

The Bureau learned at the October 26 motions hearing that a person it considered a generally interested member of the public that has been contacting the Bureau and others at the NMED is in fact an expert witness retained by party Center for Biological Diversity ("CBD"). On October 27 and again this morning, October 28, the Bureau learned that the same CBD retained expert witness emailed Bureau staff and Deputy Secretary John Rhoderick – the decisionmaker for this administrative proceeding. These recent events warrant the Hearing Officer issuing an order establishing disclosure obligations and prospective safeguards for this administrative proceeding in advance of the deadline to disclose witnesses in Statements of Intent to Present Technical Testimony. Absent such an order, the Bureau cannot determine whether persons that appear to be members of the public are actually party affiliates. The Bureau strongly objects to persons serving as an intermediary to obtain information from represented Bureau personnel that a party could not ethically obtain directly and has been unable to legally obtain through discovery in this administrative proceeding. Furthermore, the Bureau strongly objects to the impropriety of anyone attempting to obtain such information from the decisionmaker for this administrative proceeding through an *ex parte* communication. The Bureau seeks prompt procedural protection to ensure safeguards exist moving forward in this administrative proceeding; not remedial or punitive sanctions.

RELEVANT BACKGROUND

1. During the hearing on October 26, Bureau counsel learned that Lindsay Leveen had been retained as an expert for the CBD. Specifically, Colin Cox, legal counsel for CBD, identified Mr. Leveen as CBD's retained expert.

2. The disclosure occurred by CBD on the record after Bureau counsel noted that the new information submitted by Yucca Growth Infrastructure, LLC ("YGI") was prompted by comment from "a member of the public." Mr. Cox identified his retained expert, Mr. Leveen, as that "member of the public."

3. Counsel for CBD confirmed today, October 28, that it had retained Mr. Leveen but did not disclose the date it engaged Mr. Leveen when requested by Bureau counsel. Thus, the Bureau is not able to ascertain which communications may have occurred before or after that engagement.

4. The communications from Mr. Leveen to the Bureau do not disclose that he had been retained by CBD as an expert to testify in this administrative proceeding.

5. On October 27 and 28, following the disclosure at the hearing, Mr. Leveen again contacted Bureau technical personnel, including as well as Cabinet Secretary of the Environment James Kenney, concerning information he sought from the Bureau to support his testimony in this matter. Administrative Record NSR 10833_012289 to 012290; see Administrative Record NSR 10833_011463-011466 (email dated Oct. 7, 2026).

6. Those emails by Mr. Leveen also included and made requests for information from Deputy Cabinet Secretary of the Environment John Rhoderick, who is the Secretary's designated decisionmaker for this administrative proceeding. See *Notice of Docketing, Appointment of*

Hearing Officer, and Delegation of Final Decision Authority (entered July 2, 2026) [Dkt. No. 2]; *Notice of Substitution of Hearing Officer* (entered Oct. 2, 2026) [Dkt. No. 99].

7. The information sought by Mr. Leveen explicitly overlaps with information CBD has already requested in discovery. *Joint Request for Production*, pp. 3-5, attached as Appendix A to *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 [Dkt. No. 108]*, pp. 36-38 (filed Oct. 26, 2026) [Dkt. No. 132]. Mr. Leveen's inquiry directly overlaps with Joint RFP No. 15, is substantially related to Joint RFP No. 17, and may relate to Joint RFP No. 8.

8. The Bureau does not presently know whether other party affiliates have contacted Bureau personnel without identifying their capacity, or whether other party affiliates have communicated with the decisionmaker concerning this matter outside the hearing process.

9. Under 20.1.4.100(E)(2) NMAC, the Hearing Officer must "conduct a fair and impartial proceeding [and] assure that the facts are fully elicited[.]" That provision authorizes "measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues[.]" This authority necessarily includes including rulings on procedural requests and issuance of necessary orders for case management. 20.1.4.100(E)(2)(a), (c) NMAC. Section 20.1.4.300(A)(3) NMAC additionally authorizes prehearing orders "adopting special procedures for managing proceedings involving difficult or complex issues." The requested disclosures and no-contact order are concrete case-management measures responsive to conduct and harms already occurring.

10. The relief requested by the Bureau is not a discovery request. The Statement of Intent to Present Technical Testimony required by 20.1.4.300(B)(1) NMAC serves to identify

proposed technical witnesses and disclose the testimony and supporting materials to be presented at the hearing. The Bureau's requested early identification serves a different, immediate purpose: allowing Bureau personnel and its counsel to know who is approaching them and on whose behalf to avoid misattribution in an effort to maintain public transparency. Regardless, 20.1.4.300(B)(1) NMAC does not contain a prohibition on requiring early disclosure.

11. Section 20.1.4.100(G) NMAC prohibits *ex parte* communications concerning the merits with the Deputy Secretary during this administrative proceeding. See 20.1.4.7(A)(21) NMAC ("Secretary" includes the Secretary's designee under). The prohibition applies to any person, including a party's expert or other representative. 20.1.4.100(G) NMAC.[2] The communications by Mr. Leveen to Deputy Secretary Rhoderick raise a distinct concern because of his role as the decisionmaker.

12. Rule 16-402 NMRA prohibits a lawyer, in representing a client, from communicating about the subject of the representation with a person the lawyer knows is represented by counsel in the matter, absent consent or authorization by law or court order.[3] Although Comment 6 recognizes permissive communications with the government allowed by law, Comment 4 addresses prohibited communications through another person, invoking Rule 16-804(A), and Rule 16-503(C) extends obligations to nonlawyers. See Rule 16-804(C) (prohibiting

[2] The Bureau recognizes that 20.1.4.100(G) NMAC excludes communications with Bureau staff from its definition of ex parte communications. The requested disclosure is a safeguard resting on the Hearing Officer's case-management authority and the need to identify the capacity in which retained experts or other party affiliates are acting. The Bureau does not contend that every communication to Bureau staff constitutes an ex parte violation. The Bureau asserts that the public-participation process does not allow parties to bypass other procedural and ethical boundaries.

[3] While the Bureau invokes the New Mexico Rules of Professional Conduct to illustrate why procedural remedies are necessary, it does not assert allegations of professional misconduct or ask the Hearing Officer to resolve application of the ethical rules.

dishonesty, fraud, deceit, or misrepresentation). Read together, these provisions recognize that a communication otherwise prohibited does not become permissible merely because it is conveyed through an intermediary, including one whose role or affiliation is concealed or misrepresented.

13. Current disputes in this administrative proceeding involve the ability to access information through discovery. The recent disclosure of Mr. Leveen's relationship with a party to this administrative proceeding and his communications raise a substantial concern that a party is trying to obtain indirectly through an undisclosed intermediary the same substantive access to information that it is seeking through a contested motion.

14. In the civil context, this can be prohibited. See Rule 1-026(C)(1), (2), (4), and (5) NMRA (authorizing protective orders prohibiting disclosure or discovery, limiting its terms or conditions, requiring a different discovery method, and barring or limiting inquiry into specified matters); see also Rule 1-037(B)(2) NMRA (authorizing sanctions for failure to obey discovery orders).

15. A party cannot characterize its retained expert's inquiries as ordinary public participation when that characterization is useful to secure direct access to Bureau staff, while treating the same exchanges as litigation discovery or admissions by the Bureau when useful to support its case.

16. For the first procedural problem raised, the harms presented by undisclosed party affiliates seeking information from the Bureau as general members of the public when their counsel are demanding discovery and the Bureau is required to evaluate public comment necessitate immediate disclosure. Absent disclosure, the Bureau's ability to engage in the public process is chilled because it may learn after the fact that it has been engaged with a party affiliate. The identifying information the Bureau seeks is not protected from disclosure in the civil context

and should not be withheld here. Rule 1-026(B)(6) NMRA (opposing parties have an explicit right to discover the identity and broad foundational parameters of any witness or expert that may testify). The Bureau does not seek any requirements for disclosure of the expert's opinions, counsel's communications, litigation strategy, compensation terms, or work product. The date of engagement is necessary to identify when the person began acting for a party.

17. For the second procedural and merits problem raised, there are at least two known circumstances where a party affiliate has engaged in *ex parte* communication with the decisionmaker despite the express *ex parte* communication prohibition, which mandates procedural safeguards and requires disclosures for enforceability.

18. The Bureau reserves all rights and objections in this administrative proceeding concerning party affiliates' participation and qualifications.

Accordingly, the Bureau seeks an order from the Hearing Officer:

A. Requiring each intervening party to:

a. Identify every party affiliate it has retained or specially identified that has contacted Bureau staff regarding YGI's pending application, the Bureau's Draft Permit, Statement of Basis, and technical review, or this administrative proceeding;

b. Disclose the person's name, professional affiliation, the retaining or identifying party, and date first retained or identified; and

c. Disclosure of existing and known party affiliates within two days of entry of the order (whether oral or written) and identify within one day of a newly engaged or identified party affiliate that previously contacted Bureau staff; and

d. Identify if a party affiliate has communicated with Deputy Secretary Rhoderick concerning the application, proposed permit, Bureau staff technical review, or this

administrative proceeding and disclose the communication;

B. State the express prohibition in 20.1.4.100(G) NMAC against *ex parte* communications with the decisionmaker and explain the prohibition applies to all persons; and

C. Award all other relief the Hearing Officer deems reasonable and necessary.

Filed: October 28, 2026

Respectfully Submitted,

ROBLES, RAEL & ANAYA, P.C.

By: */s/* Kelsea E. Sona
Kelsea E. Sona
500 Marquette Ave NW, Suite 700
Albuquerque, New Mexico 87102
(505) 242-2228
kelsea@roblesrael.com

-and-

OFFICE OF GENERAL COUNSEL,
New Mexico Environment Department

Zachary Ogaz, General Counsel
Brian Yardman-Frank
5401 Watson Dr. Se, Bldg. B
Albuquerque, NM 87106
(505) 470-8151
zachary.ogaz@env.nm.gov
brian.yardman-frank@env.nm.gov

Counsel for the Bureau

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *New Mexico Environment Department Air Quality Bureau's Motion to Require Witness Disclosure and Reinforce Ex Parte Communication Prohibitions* was electronically filed and sent via electronic mail on this 28th day of October 2026 to the following:

Judge James O. Browning
james.oren.browning@gmail.com
Hearing Officer

Luis Lopez
Luis.lopez@env.nm.gov
Hearing Clerk

Jennifer L. Bradfute
David Kirmse
jennifer@bradfutelaw.com
david@bradfutelaw.com
- and -
Jennifer Biever
Carlos Romo
Corey Lim
Jbiever@williamsweese.com
Cromo@williamsweese.com
clim@williamsweese.com
Counsel for Applicant Yucca Growth Infrastructure, LLC

Colin Cox
Sarah Baer
Gail Evans
ccox@biologicaldiversity.org
sbaer@biologicaldiversity.org
gevans@biologicaldiversity.org
Counsel for Center of Biological Diversity

Maslyn Locke
Eric Jantz
Kayla Jankowski
mlocke@nmelc.org
ejantz@nmelc.org
kjankowski@nmelc.org
Counsel for Vivian Fuller and Jose Saldana Jr.

Esperanza Chairez
Zephyr Jaramillo
Esperanza@yuccanm.org
info@yuccanm.org
Youth United for Climate Crisis Action

Mariel Nanasi
Christopher Dodd
mnanasi@newenergyeconomy.org
chris@fayerbergdodd.com
Counsel for New Energy Economy

Yiwei Chen
yiwei.chen@edd.nm.gov
Counsel for the New Mexico Economic Development Department

Isaiah Zemke
izemke@smwlu49.org
Counsel for Sheet Metal Workers Local Union No. 49

Courtenay Eichhorst
courtenaye@ualocal412.org
Counsel for New Mexico Building and Construction Trades Council

Nicholas R. Maxwell
inspector@sunshineaudit.com
Pro Se

Bruce Wetherbee
editor@thecandlepublishing.com
Pro Se

Joe Cardillo
joe@progressnownm.org
Pro Se

Christine Dobbin
Dobbin.cc@gmail.com
Pro Se

Darrell Deaguero
Darrel.deaguero@liuna16.org
Cc: mlor@liuna.org
Representative of LIUNA Local 16

Nathaniel Chakeres
Nathaniel.chakeres@ose.nm.gov
Counsel for New Mexico Office of the State Engineer

Andre Makarski
andre@ualocal412.org
United Association Local 412

Mark Trujillo
Stephanie Maez
markgtrujillo@ibew611.org
smaeznm@gmail.com
Authorized Representatives for IBEW Local Union 611

Robert Aubert
robert.aubert@dc36.org
cc: uriel.apodaca@dc36.org
Authorized Representatives for IUPAT District Council 36, Local 823

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

Allison Johnson
Kalista Wilson
AJohnson@nmdoj.gov
KWilson@nmdoj.gov
New Mexico Department of Justice

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
Kelsea E. Sona