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Luis Lopez (OPF)

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF:
THE APPLICATION OF YUCCA GROWTH INFRASTRUCTURE'S, LLC FOR AN AIR QUALITY PERMIT, NO. NSR 10883

AQB 26-57 (P)

CENTER FOR BIOLOGICAL DIVERSITY'S MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO MOTION TO VACATE

The Center for Biological Diversity (the "Center") files this Response in Opposition to the November 3rd Joint Motion to Vacate submitted by Applicant Yucca Growth Infrastructure, LLC ("YGI") and the New Mexico Environment Department (the "Department"). The Center additionally moves for dismissal of the Application.[1]

In a dramatic about-face, YGI and the Department have jointly moved for vacatur of the current schedule to solve a problem of their own making and to maintain the legal fiction that YGI's October 2026 Application is not in fact a new application. Recently published communications between YGI and the Department reveal the truth that the October Application constitutes an entirely new application that necessitates beginning New Mexico's clearly defined permit review and public participation processes anew. Vacatur of the schedule is not an adequate remedy for the burden YGI has visited on the Department, intervening parties, and the public. YGI and the Department should not be rewarded for their gamesmanship by allowing the October application to retain the procedural benefits and progress of the abandoned and now-unrecognizable April 2026 proposal.

[1] Pursuant to 20.1.4.200.D(3) NMAC, the Center did not seek concurrence on this motion because YGI and the Department have recently opposed motions seeking similar relief.

INTRODUCTION

On April 27, 2026, YGI submitted its second application for an air pollution permit to build an enormous methane power plant in Doña Ana County.

Thirty days later, on May 27, 2026, the Department finished its preliminary review of the application and declared the application administratively complete. This determination began the initial public comment phase of the Department's statutorily mandated public participation program that has led to this proceeding.

On August 26, 2026, Lindsay Leveen emailed the Department about significant errors in the April 2026 Application, identifying, among other issues, erroneous inputs in the air dispersion modeling that overestimated exhaust volume by a factor of ten. [AR 10833_011439-40]. This precipitated a series of emails between the Department and YGI, resulting initially in YGI supplying a purportedly corrected version of its air quality modeling on September 21, 2026. [*See, for example*, AR 10833_011498-503, 011683-701]. This updated modeling, however, showed that pollution from YGI's proposed plant would cause violations of health-based air quality standards, likely exposing people to harmful levels of toxic nitrogen oxides. [AR 10833_011728, showing a cumulative 1-hour concentration of nitrogen dioxide (NO_2) of 225.64 $\mu g/m^3$ in violation of the 1-hour health-based air quality standard of 188 $\mu g/m^3$].

On Friday, October 16, 2026, YGI submitted what it called a "revision" so sweeping and whole that it can only be described as an entirely new application (the "October Application"). [AR 10833_011978- 012225]. This October Application changed emissions characteristics at every single pollution source at the proposed plant, reduced the number of pollution exhaust stacks from 2,275 to 1,263, changed the height of the pollution stacks, significantly altered the

pollution levels, temperature, moisture content, and flow rate from every single stack, and included a promise to generate no more than 1,600 megawatts of electricity while still requesting permission to build the entire 2,461 megawatts of capacity. These sweeping changes necessitated entirely new air dispersion modeling, which YGI submitted alongside the October Application. [*See* AR 10833_ 012144-160 for YGI's modeling report, as modeling files themselves are voluminous and do not have bates numbers].

Following the submission of YGI's October Application, NMED has been in regular dialog with YGI about information missing from the October Application. [AR 10833_012226-288; 10833_012292-294; 10833_012322-541; 10833_012544-545]. The emails recently posted to the administrative record show that as recently as last week, YGI's October Application included insufficient information for the Department to conduct its technical review. [AR 10833_012292, Oct. 28th email from the Department to Jennifer Bradfute, in which the Department says, "I wanted to email you to check in on the outstanding information from the October 23, 2026, letter the Bureau sent. The Bureau has yet to receive that information, which is preventing the modeling team from beginning its review and subsequently delaying the Bureau's preparation of the draft permit."]. The Department paused its review for a week while awaiting information from YGI.

Less than one week ago, the Department informed YGI that it had "started a preliminary review of the information provided by [YGI]," and that "the Bureau requires additional information from YGI to move forward before it can begin any modeling verification runs and complete the technical review." [AR 10833_012544].

And even this week, YGI has continued to supplement its October Application with information responsive to the Department's numerous requests [10833_012546-557].

On November 3, 2026, the Department and YGI moved to vacate the current hearing schedule because the Department has not had adequate time to conduct its technical review of the October Application.

ARGUMENT

Because YGI's October 2026 Application is a new application, the Hearing Officer should recommend denial of the pending application and dismissal of this hearing.

New Mexico law provides a well-defined process for Department review of air pollution permit applications, with explicit requirements for applicants and the Department, along with mandatory opportunities for meaningful public participation.

By moving to vacate the current hearing schedule while preserving the option to resume at any time, YGI and the Department attempt to circumvent these requirements for what is, in fact, a new application. YGI seeks to improperly secure the benefits of prior public process regarding its April Application in order to speed review of its new October Application.

I. YGI's October Application is both new and incomplete.

Requirements for new applications are clearly laid out in statute and rule. Permit applications are required to include detailed information sufficient to evaluate the potential health impacts of the proposed air pollution. 20.2.72.203.A NMAC. As an initial step, new applications are subject to a preliminary review by the Department for completeness, to determine if the application includes all required information. 20.2.72.207.A NMAC. Applications that pass this preliminary review are deemed administratively complete, and are then published for the first mandatory public comment opportunity. 20.2.72.206.A(3) NMAC.

As outlined above, YGI submitted a new Application on October 16, 2026 that altered every pollution calculation for the thousand-plus pollution stacks in the new proposal. This new

Application material includes hundreds of pages of new pollution numbers and details and bears little resemblance to the YGI's April Application.

Beyond the facial differences, communications between the Department and YGI provide the most compelling evidence that the Department is dealing with an entirely new application. In these emails, the Department is asking the kinds of questions it asks during the preliminary, pre-completeness review described above. [AR 10833_012226-288; 10833_012292-294; 10833_012322-541; 10833_012544-545]. For example, the Department has identified numerous gaps in YGI's October Application related to pollution calculations, startup, shutdown, and maintenance assumptions, stack configurations, air dispersion modeling inputs including flow rate, temperature, and moisture content, and more. [AR 10833_012538-541].

Just this past Friday, October 30th, the Department stated that "NMED's Air Quality Bureau (Bureau) technical staff and legal team have started a preliminary review the information provided by Yucca Growth Infrastructure, LLC…" [AR 10833_012544]. This is critical information. The Department began its *preliminary* review just a few days ago. Also on Friday, the Department informed YGI that "The Bureau requires additional information from YGI to move forward before it can begin any modeling verification runs and complete the technical review." [AR 10833_012544]. It is clear from these emails that as of Friday morning, YGI's application remained incomplete.

These communications reveal that YGI's October Application was not in a condition where the Department could have ruled it complete and begun its technical analysis. The Department could not just pick up its review where it left off on its review of the April Application because, in reality, YGI abandoned its April Application. Behind the scenes, the Department similarly abandoned its technical review, statement of basis and draft permit for the

April Application, and, just a few days ago, began anew a preliminary review of the new October Application.

YGI's October Application is no minor update. Rather, it is a new application that has necessitated a total reboot of the Department's review process. YGI's choice to submit an entirely new application at this late stage far exceeds what even the most dynamic hearing process can be made to accommodate.

II. Becuase YGI's October Application is new, and not even complete, this proceeding must be dismissed.

As described above, the October Application is a new application. Any assertion to the contrary is a legal fiction designed to deprive the Department of adequate time to review the Application and the public of their legal rights to participate in the permitting process. The October Application demonstrably does not include sufficient information to comply with application requirements at 20.2.72.203.A NMAC. The October Application has not had a formal preliminary review by the Department or been declared administratively complete. 20.2.72.207.A NMAC. The October Application has not been subject to the initial notice and comment period for air pollution permit applications of its purported type. 20.2.72.206.A(3) NMAC. These are not optional parts of permit review in New Mexico, but necessary steps that must precede any administrative hearing.

As recently as last week, YGI and the Department continued to aggressively defend the untenable December 7th hearing schedule over the protests of the Center and other parties. The Center, along with other parties, have expended considerable resources trying to stay abreast of YGI's changing proposals. And now, email exchanges between the Department and YGI show

that it is simply not possible for them to proceed because the new application remains incomplete.

At this point, given the clear record that the application is new and remains incomplete, it is time to call a spade a spade and dismiss this application so that this gamemanship is brought to an end. When the Department is ready, it can declare YGI's new application complete and the administrative process can begin in compliance with Department regulations. That is the only outcome that respects New Mexico law and basic principals of due process and fairness.

CONCLUSION

Because YGI's October Application is a new application, which remains incomplete, and because neither YGI nor the Department has followed the proper procedure for a new application, we request that the Hearing Officer recommend that this proceeding be dismissed without prejudice. Alternately, we request that the Hearing Officer require the parties to comply with the requirements for a new application prior to scheduling any hearing, including a determination of completeness by the Department, an initial public comment opportunity, and a decision deadline 180 days following the new determination of completeness.

DATED: November 5, 2026

Respectfully submitted:

By: */s/ Colin Cox*
Colin Cox
Gail Evans
Climate Law Institute
PO Box 31417
Santa Fe, NM 87594
(832) 316-0580
gevans@biologicaldiversity.org
ccox@biologicaldiversity.org

Counsel for Center for Biological Diversity