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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF
THE APPLICATION OF
YUCCA GROWTH INFRASTRUCTURE,
LLC FOR AN AIR QUALITY PERMIT
No. NSR 10883

AQB 26-57

RESPONSE IN OPPOSITION TO MOTION TO VACATE AND JOINDER IN MOTIONS TO DISMISS

The New Mexico Environmental Law Center, on behalf of Jose Saldaña Jr. and Vivian Fuller, (collectively, "Community members"), respectfully submit this response in opposition to the New Mexico Environment Department ("NMED" or "the Department) and Yucca Growth Infrastructure's ("YGI") Joint Motion to Vacate December 7, 2026 Hearing Date (hereinafter "Vacatur Motion"), Dkt. No. 150, and joinder in New Energy Economy's Renewed Motion to Dismiss Application without Prejudice as a Matter of Law, Response in Opposition to the Joint Motion to Vacate the December 7 Hearing Without Dismissal, and Request for Expedited Ruling Dkt. No. 153, and the Center for Biological Diversity's Motion to Dismiss and Response in Opposition to Motion to Vacate, (no docket number as of time of filing), (collectively "Motions to Dismiss"). Because the Vacatur Motion is nothing more than a last-ditch effort by the Department to avoid compliance with its statutory and regulatory obligation to deny permit applications when an applicant cannot demonstrate that it is entitled to an air pollution permit, Community members respectfully request the Hearing Officer instead recommend dismissal of YGI's permit application to Deputy Secretary Rhoderick after a correctly noticed expedited hearing on the Motions to Dismiss.

I. Background.

In their Vacatur Motion, YGI and the Department seek relief from a mess of their own making: this permitting process has been unnecessarily rushed since YGI, previously known as Acoma, LLC, submitted two separate air pollution permit applications for the East and West microgrid.[1] Public notice of these applications was published on January 26, 2026.[2] In response to significant public comments opposing the applications, NMED issued a hearing determination letter on March 24, 2026.[3] YGI withdrew these applications on April 27, 2026, replacing them with a new "YGI Microgrid" application (hereinafter "April application").[4] YGI claimed this was in response to resident pushback related to the pollution anticipated from the East and West Microgrid.[5] It was later announced by the Department that NMED had intended to deny the East and West Microgrid permit applications.[6]

One month after the April application was filed, on May 27, 2026, NMED issued a completion letter pursuant to 20.1.4.200.A(1) NMAC, initiating this hearing process on the April

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[1] *See* NMED Public Notices, Doña Ana County, "Acoma, LLC East Microgrid" and "Acoma, LLC West Microgrid," Accessible at: https://www.env.nm.gov/public-notices/. Last viewed November 4, 2026.
[2] *Id.* at https://service.web.env.nm.gov/urls/vgVpZOnn and https://service.web.env.nm.gov/urls/sxoXlJhu. Last viewed November 4, 2026.
[3] *Id.* at https://service.web.env.nm.gov/urls/xzLuWMrP and https://service.web.env.nm.gov/urls/pHPsYvyO. Last viewed November 4, 2026.
[4] *Id.* at https://service.web.env.nm.gov/urls/QxNGbkYh. Last viewed November 4, 2026.
[5] Oracle, "Oracle, BorderPlex, and Bloom Energy to Power Project Jupiter with Cleaner, Water-Efficient Fuel Cell Technology," April 27, 2026, Accessible at: https://www.oracle.com/news/announcement/oracle-borderplex-and-bloom-energy-to-power-project-jupiter-with-fuel-cell-technology-2026-04-27/. Last viewed November 4, 2026.
[6] Tom Perkins, The Guardian, "Datacenter developers accused of skirting key US pollution rules," September 27, 2026, Accessible at: https://www.theguardian.com/us-news/2026/sep/27/datacenter-developers-us-pollution-rules. Last viewed November 4, 2026.

application.[7] After a thirty-day public comment period, resulting in nearly 17,000 comments,[8] the Department filed a Notice of Docketing, Appointment of Hearing Officer and Delegation of Final Decision Authority on July 2, 2026,[9] despite failing to comply with 20.2.72.206.B NMAC, which further required NMED to also provide its analysis, including draft permit and technical information, requiring an additional thirty (30) days for public comment. On July 13, 2026, Community members and other parties learned of the Department's intention to hold a scheduling conference on July 15 between the Department and YGI – without providing notice to interested persons prior to the conference.[10] It was at this scheduling conference that YGI first asserted that any decision on the April application must occur on or before November 23, 2026.[11] The Department, at that time, did not take a position on the November deadline, but made it clear that it intended to hold a hearing on the April application on August 17, 2026 – a mere 33 days after the scheduling conference. Shockingly, NMED had already sent notice of the hearing to the newspapers, intending to notice a hearing to begin in August, prior to the former Hearing Officer's issuance of any scheduling order.[12] The former Hearing Officer ultimately set a hearing date for October 19, 2026.[13]

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[7] New Mexico Environment Department, letter to Amanda Marrufo, May 27, 2026, Accessible at: https://cloud.env.nm.gov/resources/_translator.php/ZjU5N2UyMGEzZDBhNTljMWRiMmNmNDZlOV8yMjk0NjI~.pdf. Last viewed November 4, 2026.

[8] Notably, many of the comments supporting the project have been determined to be fraudulent. *See* Joshua Bowling, Source NM, "New Mexico AG finds 'substantial share' of Project Jupiter public comments raise concerns," October 14, 2026, Accessible at: https://sourcenm.com/2026/10/14/new-mexico-ag-finds-substantial-share-of-project-jupiter-public-comments-raise-concerns/. Last viewed November 4, 2026.

[9] Dkt. No. 2.

[10] Dkt. No. 11.

[11] *E.g.* YGI Permit Matter AQB 26-57(P) Scheduling Conference Meeting Recording at 45:25 (July 15, 2026).

[12] Dkt. No. 86.

[13] Dkt. No. 16.

Five days later, YGI submitted a "Request of [sic] Emergency Status Conference,"[14] again asserting that any decision on the April application must occur no later than November 23, 2026. Here, again, the Department did not take a position on the issue of the final decision date, until the former Hearing Officer verbally ordered that the hearing date would remain October 19, likely resulting in a final decision occurring after November 23 – at which point counsel for the Department provided the Hearing Officer with a case citation supporting the Hearing Officer's ability to extend the hearing process beyond this statutory deadline.[15] On July 29, 2026, after representatives for Project Jupiter met with the Governor's office, the former Hearing Officer issued an amended scheduling order, inexplicably moving the hearing date up to September 14, 2026.[16] This decision, coupled with the former Hearing Officer's reversals on discovery requests, resulted in New Energy Economy's Petition for Writ of Mandamus to the New Mexico Supreme Court, which ultimately stayed this proceeding for nearly one month.[17] Hearing Officer Judge Browning was substituted for the former Hearing Officer on October 2, 2026.[18] Despite the Department's representations that the administrative record would be provided to all parties as early as July 17, 2026, the Department did not provide the record until ordered to do so on October 9, 2026.[19]

As explained in the Center for Biological Diversity's Motion to Dismiss, in connection with concerns raised by Lindsay Leveen to the Department on August 26, 2026 regarding errors and faulty assumptions in the April application,[20] YGI submitted revised modeling to the Department on September 21, 2026 that showed the microgrid, as envisioned in the April

[14] Dkt. No. 19.
[15] YGI Permit Matter AQB 26-57 Status Conference Meeting Recording at 58:28 (July 27, 2026).
[16] Dkt. No. 38.
[17] Dkt. No. 97.
[18] Dkt. No. 99.
[19] Dkt. No. 100.
[20] AR 10833_01143940.

application, would violate applicable ambient air quality standards.[21] YGI then submitted major revisions to its application on October 16, 2026 (hereinafter "October application").[22]

It was not until October 22, 2026 that the Department first began to assert that it did not have the time it needed to review YGI's October application and that, unless YGI waived the November 23 deadline, the Department would not be able to complete its review in time for the December 7 hearing.[23] What the Department failed to mention was that YGI's "updates" constitute significant revisions to the April application,[24] beyond just regular "permit revisions," such that the application should typically be treated as a new application pursuant to Department policy.[25] If treated as a new application, as it should be, the regulatory process would restart, subjecting YGI's October application to an entirely new notice and comment period prior to the Secretary issuing a hearing determination. 20.2.72.206 NMAC. Despite this, at a hearing on Monday, October 26, 2026, in response to Community members' and parties' requests for dismissal of the October application and alternative request for abeyance, both YGI and the Department argued against both forms of relief.[26] Then, at hearing on October 29, 2026, counsel for NMED again informed the Hearing Officer that the Department did not have sufficient time to comply with all notice requirements for the upcoming December 7 hearing, but inexplicably refused to ask the Hearing Officer to change the schedule. Only on November 3, 2026 – the deadline by which the Department needed to have submitted a hearing notice to be published in

[21] *See, e.g.*, AR 10833_011498-503, 011683-701, 011728.
[22] AR 10833_011978- 012225.
[23] Dkt. No. 125.
[24] Changes made in the October application include, but are not limited to, a proposed 1,600 megawatt generation cap, modifications to stack numbers, height, and parameters, and significantly altered pollution projections.
[25] NMED Policy AQB 02-013.00 Section 2.
[26] Dkt. Nos. 115 and 129.

order to comply with the December 7 hearing date – did NMED finally attempt to take responsibility for its actions.

The Department has ultimately appears to have created an untenable situation for itself – rushing an initial completeness determination seemingly to appease what is certainly one of the most well-resourced applicants NMED has ever dealt with, under the guise of an immutable statutory deadline of 180 days.[27] The parties should not now be expected to continue to chase a moving target in the form of new or "heavily revised" applications simply because the Department and YGI have finally decided to agree on an indefinite request for more time when the original April application has completely changed form. Indeed, the Hearing Officer was correct in his assessment on October 29: if NMED cannot comply with its deadlines, it must deny the application. The Department, however, appears entirely unwilling to do so, instead seeking an indeterminate extension to do the work that it should have, and in fact claimed to have, been doing since July. Ultimately, providing the Department an unknown amount of additional time will only allow YGI and NMED to circumvent notice and participation requirements that must apply to all new applications and, as a result, the Vacatur Motion should be denied and, instead, YGI's application should be dismissed without prejudice.

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[27] The Department's position that the 180-day review and decision deadline is solely waive-able by a permit applicant is inconsistent with NMED's regular practice, the plain language of the law, 20.1.4.200.C(3); 20.2.72.207.C NMAC, and has significantly contributed to the situation the parties find themselves in now. If the timeline is indeed exclusively under the control of YGI, it would seem that the fault does not lie with YGI in expecting "the Bureau to give YGI's amended air permit application and additional modeling data submission priority over other competing air permit applications or compress the review necessary to support a reasoned permitting decision." Dkt. No. 124 at 3. Indeed, the Department's construction of the law has created this situation whereby "non-agency parties [are] forc[ing] a Hearing Officer to disregard established and existing processes and procedure for air permit application hearings and the Bureau's review of air permit application [sic]." *Id.* If the Department were to simply do what it is authorized to do and deny the October application, the parties could move forward and reasonably engage in the typical permit proceeding process once YGI resubmits its application and the Department completes its analysis.

II. If the Department will not deny YGI's application, the Hearing Officer must recommend dismissal of the application.

Community members agree that the Hearing Officer does not have the authority to dismiss YGI's application on his own, but does have the explicit authority to recommend dismissal to Deputy Secretary John Rhoderick. In so doing, however, the Department must properly notice an expedited hearing, consistent with 20.1.4.200.C(2) NMAC. *See* 20.1.4.600.B NMAC. The Hearing Officer may then recommend summary disposition, such as dismissal, to the Secretary or, in this case, Deputy Secretary, who may issue a final order dismissing YGI's Application.

Community members note that, in the alternative, and contrary to NMED's startling admission that the Department does not deny permit applications, the Department could simply deny YGI's application or request withdrawal of the application now. Not only is denial well within the authority of NMED, see 20.2.72.207.D and .208 NMAC, Bureau policy is clear that, in instances where additional information provided by an applicant "goes beyond permit revisions," as is the case here, and:

> "If the application has changed substantially from what was originally submitted, the permit engineer may request a review by the Bureau Chief to determine if an extension by the Department Secretary is necessary or another action is more appropriate, such as: requesting the applicant withdraw the application, making a new completion determination that restarts the regulatory process, or issue the permit as originally requested, provided there is no adverse impact to ambient air quality standards or other applicable regulations."

NMED Policy AQB 02-013.00 Section 2.3.

Certainly this is a scenario where dismissal, denial or withdrawal is most appropriate. The Department's current position is contradictory at best – originally purporting to be ready for hearing as early as July 17, while now demonstrating that meeting that deadline was entirely impossible and its initial completeness determination was entirely premature. Rather than

exercise its authority, however, the Department asks the Hearing Officer to vacate the current hearing schedule indefinitely.[28] Doing so would allow YGI and the Department to avoid "restarting the regulatory process," and thus avoid additional public notice and due process requirements. As a result, Community members oppose the Vacatur Motion and instead join in the Motion to Dismiss.

III. If vacatur is granted, Community members request additional relief to ensure due process.

If the Hearing Officer does grant the Vacatur Motion, Community members urge this Hearing Officer to further order that the Department continue to regularly update the administrative record to ensure that all parties remain up-to-date on the conversations between YGI and the Department while this process is ongoing. Community members further request that, once the application is determined to be complete and the Department's technical analysis is available for review, that an additional public comment period, lasting at least thirty days, be implemented prior to the scheduling of any hearing on the October application in order to allow

[28] Community members further note that holding this permit application out indefinitely is contrary to the Department's regulations and the Hearing Officer's authority. Yes, the Department can request additional information from an applicant either before or after the administrative completeness determination but, in so doing, must "set a reasonable deadline for a response. The applicant shall submit the requested information in writing on or before the deadline set by the department." 20.2.72.203.E(2) NMAC; AQB 02-013.00 Section 2.1. The Department has set no such deadline. Instead, the Department and the Applicant are requesting this Hearing Officer allow a scenario whereby they can continue altering, revising, and ultimately rewriting a permit application and eliminating public processes.

Furthermore, while 20.1.4.300.C(3) NMAC allows for continuance of hearing, for good cause, after consideration of prejudice to the parties and undue delay to the proceeding, 20.1.4.100.E(2) requires the hearing officer to conduct a fair and impartial proceeding, assure that the facts are fully elicited and avoid delay. (emphasis added). As such, the Hearing Officer's recommendation of dismissal, rather than extending this process indefinitely, is the only appropriate option if the Department remains steadfast in its commitment to avoid permit application denial at all costs.

for all members of the public to participate in this process consistent with the requirements in 20.2.72.206 NMAC.

IV. Conclusion.

The request from YGI and the Department comes after months of obstinance from YGI, refusing to "waive" a 180-day deadline the Department believes to be exclusively within the applicant's purview, while NMED, for its part, only recently began to claim a need for additional time, after originally purporting to be ready for a merits hearing on YGI's Application to be held in August, 2026. Worse yet, when Community members and other application opponents made the same request, seeking abeyance of this permitting process due to the Department's self-proclaimed need for additional time to review the October application, both YGI and the Department stood in opposition. As a result, Community members and other opponents have been forced to chase a moving target: expending time, resources, and energy reviewing applications that change substantially while never knowing whether the application before them will actually be YGI's proposed plan. If YGI does not know what it intends to do from day to day, there is no reason why other parties, including the Department, should be expected to predict or respond to YGI's application. Until YGI can rest confidently on its proposal, it should not be permitted to avoid required notice and comment periods solely on the basis that it submitted one version of an application in April. Certainly YGI understands this, having withdrawn its East and West Microgrid applications and replaced them with the April application – restarting the public comment process after an earlier hearing determination had already been made. For this reason, and the reasons articulated above, Community members oppose the Vacatur Motion, and instead join the Motions to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify on November 5, 2026, a true and correct copy of the foregoing Response in Support was served by email to:

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