

**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**

AQB 26-57

NO. 10883

**NEW ENERGY ECONOMY’S MOTION TO RECONSIDER THE HEARING
OFFICER’S SUA SPONTE ORDER**

New Energy Economy (“NEE”) respectfully moves the Hearing Officer to reconsider the Sua Sponte Order because it unnecessarily postpones resolution of a narrow, threshold issue that may render a lengthy evidentiary hearing entirely unnecessary. The question presented by NEE’s Motion to Dismiss is not whether Project Jupiter satisfies every substantive requirement for issuance of an air quality permit. Rather, it is whether Applicants can lawfully construct and operate the project described in their own permit application after the Commissioner of Public Lands denied the rights-of-way and business lease necessary for the only natural gas pipeline identified as the project’s fuel source.

The Hearing Officer’s original August 5, 2026 Order correctly recognized that this threshold issue warranted expedited briefing and appropriately directed Applicants and the Department to answer five focused questions regarding the continued viability of the project. Those questions go directly to whether the Application remains legally capable of implementation. If Applicants have another legally obtainable means of delivering the approximately 400 million cubic feet of natural gas per day their Application requires, they should identify it. If they do not, then the mandatory language of 20.2.72.208(G) NMAC governs, and no amount of expert testimony concerning emissions, air modeling, or other technical matters can cure the absence of an *essential component* of the proposed source.

Dispositive motions exist precisely to resolve controlling legal or factual issues before the parties and the tribunal expend substantial public and private resources on an unnecessary hearing. Here, the dispositive issue is straightforward and uniquely within Applicants' knowledge. Applicants—not NEE—bear the burden of demonstrating that the permit application remains legally viable. Requiring Applicants to answer that threshold question now promotes administrative efficiency, conserves the resources of the Department, the parties, and the public, and ensures that an evidentiary hearing is held only if there remains a project capable of being constructed as proposed.

I. THE SUA SPONTE ORDER IMPROPERLY REQUIRES NEE TO PROVE A NEGATIVE RATHER THAN REQUIRING APPLICANTS TO ESTABLISH THAT THEIR APPLICATION REMAINS LEGALLY VIABLE.

Respectfully, the Hearing Officer's Sua Sponte Order reverses the burden of proof.

The Order concludes that NEE's Motion is "not ripe" because NEE did not establish that no alternative pipeline route, meter station, interconnection, or other fuel delivery arrangement exists.

That is not NEE's burden.

Applicants bear the burden of demonstrating that the permit application before the Department satisfies the applicable requirements of the Air Quality Control Act and the Department's regulations. *See*, 20.2.70.302 NMAC. (Permit Content includes all permit conditions.) NEE is not required to prove the nonexistence of every conceivable alternative fuel delivery system that Applicants have never disclosed, engineered, permitted, or incorporated into their Application.

Rather, NEE established the dispositive facts.

Applicants' permit application repeatedly represents that Project Jupiter's operational reliability depends upon "*its use of a robust natural gas pipeline system.*" YGI Application at 471, 517, and 520 of 648. The Green Chili Lateral pipeline was intended to be the means by which approximately 400 million cubic feet of natural gas per day will be delivered to the proposed source.

The Commissioner of Public Lands has now twice denied the rights-of-way and business lease necessary to construct that pipeline, concluding that issuance would not be in the best interests of the State Land Trust and that the project should not proceed over state trust lands.

Those facts are not in dispute.

At that point, the burden necessarily shifts to Applicants.

If Applicants contend that Project Jupiter can still be constructed as proposed, despite the denial of the only identified fuel supply infrastructure, they should be required to identify the legally obtainable alternative upon which they now rely.

If another pipeline exists, Applicants should identify it.

If another interconnection exists, Applicants should identify it.

If another lawful fuel delivery arrangement exists, Applicants should identify it.

If no such alternative presently exists, then the permit application no longer describes a source capable of construction and operation as proposed.

II. THIS IS A DISPOSITIVE LEGAL ISSUE THAT SHOULD BE DECIDED BEFORE AN EXPENSIVE EVIDENTIARY HEARING.

The very purpose of dispositive motions is to avoid unnecessary hearings where a threshold legal or factual issue renders further proceedings unnecessary.

New Mexico courts have repeatedly recognized that summary disposition and dismissal exist to conserve judicial and administrative resources by resolving controlling issues before trial

where no genuine factual dispute requires evidentiary development. Administrative agencies likewise possess inherent authority to resolve threshold dispositive issues before requiring parties, agencies, experts, and the public to expend enormous resources preparing for lengthy evidentiary hearings.

Here, the dispositive question is remarkably narrow. Can Applicants lawfully obtain the approximately 400 million cubic feet of natural gas per day that their permit application requires? If the answer is **no**, then the application cannot satisfy **20.2.72.208(G) NMAC**, which requires denial where the proposed source cannot be produced in a timely manner. If the answer is **yes**, Applicants should simply identify the alternative infrastructure upon which they rely. Neither circumstance requires days of technical testimony concerning emissions modeling, fuel cells, stack testing, climate impacts, or air dispersion modeling.

The Hearing Officer concluded that testimony under oath is necessary to resolve this issue. Respectfully, testimony is unnecessary unless Applicants dispute the relevant facts. The Commissioner of Public Lands' denial is a matter of public record. Applicants' permit application is already in evidence. The only remaining factual question is whether Applicants possess another legally obtainable fuel supply.

Applicants themselves possess that information. If they do, they should say so. If they do not, then the application cannot proceed pursuant to 20.2.72.208(G).

Should Applicants wish to submit an affidavit from a corporate officer, engineer, or other qualified witness identifying a legally obtainable alternative fuel supply, NEE has no objection to that procedure. An affidavit would provide sworn factual support without requiring every party to prepare for a multi-week evidentiary hearing merely to determine whether the project has fuel.

III. THE APPLICATION ITSELF ESTABLISHES THAT A NATURAL GAS PIPELINE IS NOT OPTIONAL.

Equally significant, the permit application itself makes clear that the pipeline is not merely one possible means of supplying fuel—it is an operational prerequisite incorporated into the design of the proposed source.

Applicants affirmatively represented:

“Our system operates at very high availability due to its fault-tolerant design and its use of a robust natural gas pipeline system.” YGI Application at pages 471, 517, and 520.

The Department’s regulations authorize permit conditions based upon the representations contained in an application, and specifically permit incorporation of application contents into permit conditions where necessary to assure compliance. 20.2.70.302(A)(7) NMAC. The plain language of the Department’s permitting regulations clearly indicate that facts related to an applicant’s ability to construct a source within a reasonable period of time are highly relevant to the Department’s ultimate decision. See *Wright v. Brem*, 1970-NMCA-030 ¶ 19 (Generally, whatever naturally and logically tends to establish a fact in issue is relevant).

Failure to consider whether the Applicant has a fuel source to power its facility—which is highly relevant to the issue of whether construction of the source will be completed in a reasonable amount of time – and instead hear and grant YGI’s Application will ultimately result in an arbitrary decision by the Department. See *McDaniel v. New Mexico Bd. of Medical Examiners*, 1974-NMSC-062, ¶ 11, 86 N.M. 447 quoting *Smith v. Hollenbeck*, 48 Wash.2d 461, 294 P.2d 921 (1956) (“An agency action is arbitrary and capricious when it is a “willful and unreasonable action, without consideration and in disregard of facts or circumstances.”); see also *Bass Enterprises Prod. Co. v. Mosaic Potash*, 2010-NMCA-065, ¶ 45, 148 N.M. 516 (An agency

action is arbitrary and capricious when it is unreasonable or without rational basis when viewed in light of the whole record, is not the result of the winnowing and sifting process, or if there is no rational connection between the choices made and the facts found or if necessary aspects of consideration or relevant factors are omitted) (citations omitted). Because all signs point to YGI's likely failure to construct its source within a reasonable period of time—if at all—Community Members and the Center support New Energy Economy's Motion and urge the Department to dismiss YGI's Application as it is not ripe for consideration.

Thus, Applicants themselves made the existence of a robust natural gas pipeline system part of the project they seek permission to construct. The issue therefore is not hypothetical. It is not speculative. It is not dependent upon expert opinion. It is a straightforward threshold question:

Can Applicants lawfully obtain the natural gas pipeline infrastructure that their own permit application identifies as essential to Project Jupiter?

If they cannot, then the Application no longer describes the project that is before the Department, and the mandatory language of 20.2.72.208(G) requires denial.

If they can, Applicants should identify that alternative immediately.

Nothing about that inquiry requires the Department, the parties, or the public to incur the enormous expense of preparing technical testimony on the merits of an application that may already be legally incapable of implementation.

VII. POSITION OF THE PARTIES

New Energy Economy sought the position of the parties on this Motion and can state:

Mr. Saldaña and Ms. Fuller concur with the Motion. Center for Biological Diversity and Mr. Wetherbee support.

NMED opposes.

No other party provided their position before the filing of this Motion.

VIII. CONCLUSION

Accordingly, NEE respectfully requests that the Hearing Officer reconsider the Sua Sponte Order, reinstate the August 5, 2026 briefing schedule, and require Applicants and the Department to answer the same threshold questions the Hearing Officer originally determined were appropriate:

1. Whether any legally obtainable alternative source of natural gas exists capable of supplying the approximately 400 million cubic feet of natural gas per day required by Project Jupiter;
2. Whether Applicants intend to administratively appeal the Commissioner of Public Lands' denial of the Green Chili Lateral rights-of-way and business lease;
3. Whether any alternative pipeline route or alternative fuel delivery system has been identified, engineered, or permitted;
4. Whether the project described in Air Quality Permit Application No. 10883 remains capable of being constructed as proposed in light of the Commissioner of Public Lands' decisions; and
5. Whether the proposed source can still be completed within a reasonable time as required by **20.2.72.208(G) NMAC**, notwithstanding the denial of the essential fuel infrastructure.

These are not merits questions. They are threshold questions. Their resolution will determine whether the Department should devote the extraordinary public and private resources necessary to conduct a full evidentiary hearing on an application that, as presently constituted, may no longer be legally capable of implementation. Resolving those questions now is consistent with the principles of administrative economy, fairness to all parties, and the efficient administration of justice.

Respectfully submitted this 10th day of August, 2026,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August 2026, a copy of the foregoing was sent to the following parties or counsel of record via electronic mail:

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