

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NEW ENERGY ECONOMY,

Petitioner,

v.

No. S-1-SC-41579

**THE SECRETARY OF THE ENVIRONMENT
JAMES KENNEY AND HIS DESIGNEE
JOHN RHODERICK, and 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**

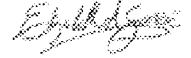
**RESPONSE OF THE ATTORNEY GENERAL IN SUPPORT OF NEW
ENERGY ECONOMY'S EMERGENCY REQUEST FOR A STAY OF
PROCEEDINGS PENDING A DETERMINATION ON VERIFIED
PETITION FOR WRIT OF MANDAMUS**

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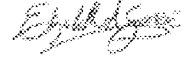
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I. INTRODUCTION

The Attorney General, on behalf of the State of New Mexico, respectfully submits this Response in Support of Petitioner's Emergency Request for a Stay of Proceedings Pending a Determination on Verified Petition for Writ of Mandamus (Petition), filed on August 20, 2026. This Response is submitted pursuant to Rule 12-504(C)(1), (D)(1) NMRA, which provides the Attorney General may file a response to the Petition and to the request for stay. The State respectfully requests the Petition be granted and the stay continued until resolution of the writ.

The New Mexico Environment Department (NMED) violated the constitutional due process rights of Petitioner in the underlying administrative matter subject to this action. In that matter, Applicant, Yucca Growth Infrastructure, LLC (YGI) sought an air quality permit authorizing the construction of a methane-fueled power plant consisting of 2,275 Bloom Energy solid oxide fuel cells—an unprecedented number of such fuel cells—to supply 2.46GW of electricity to Project Jupiter, large-scale data center campus, for its artificial intelligence (AI) data center. **[Pet 1]**. The administrative matter has several parties of interest including Petitioner, as well as other entities and pro se intervenors. **[See Pet Ex. B at 5-6]**. The NMED Hearing Officer initially, and on several occasions thereafter, made specific determinations as to the timeline of the application hearing and as to the extent discovery should operate in this complex and technical air quality permit case. This

complexity stems from, in part, the unprecedented nature of so many of these fuel cells in one location, which prohibit comparison to another facility already in operation as there are none—*in the world*.

But suddenly, despite the novelty and the complexity of the air quality permit application and following a meeting between the Governor's Office¹ and Project Jupiter representatives, the Hearing Officer reversed himself on the hearing timeline and on the permissibility of discovery, claiming to do so based upon "additional consideration." [YGI App122]. The Hearing Officer's reversal unconstitutionally expedited the timeline of the hearing to such a degree that the now fast-moving permitting matter threatens substantial and irreversible final action where there has not been proper notice or a reasonable opportunity for parties to be heard. The NMED Hearing Officer does not have discretion to expedite the hearing to this extent, even in an administrative context.

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

¹ [See Pet. Ex. C]; see also Calendar: Office of the Governor at <https://www.governor.state.nm.us/about-the-governor/calendar/> (last visited Sept. 2, 2026).

State ex rel. Riddle v. Oliver, 2021-NMSC-018, ¶ 24; *see also State ex rel. Sandel v. N.M. Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272 (same). As the Petition explains, these mandamus requirements are met. First, the Petition sets forth an important constitutional question of great public importance: Whether NMED must comply with its governing constitutional, statutory, and regulatory law while ensuring due process protection for every party before authorizing a project of this magnitude. **[Pet. 28]**. Second, the material facts giving rise to the legal claims in this Petition are not in dispute as they stem from an agreed-upon timeline of events. Finally, no other adequate remedy at law exists. NMED should be proscribed from expediting the air quality permit process at the cost of parties’ constitutional due process rights. For these reasons, this Court should accept mandamus jurisdiction and grant the Petition.

II. ARGUMENT

Prohibitive mandamus is proper because NMED has violated the due process rights of Petitioner and otherwise abdicated its non-discretionary duties as set forth in state statute and regulation—favoring expediting YGI’s air quality permit over its duty to protect the air quality in New Mexico pursuant to the New Mexico Constitution. Petitioner is entitled to transparency, notice, and a reasonable opportunity to participate in the air quality permit action. The NMED Hearing Officer’s order setting an expedited timeline to hold a hearing affords deficient due

process to Petitioner and without this Court’s intervention, risks an uninformed, incorrect, and otherwise unfair outcome in the permitting process. As there is minimal governmental burden in holding the hearing with sufficient notice and a reasonable opportunity for Petitioner to be heard—affording transparency in the form of a complete administrative record and an opportunity for discovery—Petitioner’s constitutional interests outweigh those of NMED.

A. Legal Standards

1. Prohibitory Mandamus

This Court has original jurisdiction in mandamus actions “against all state officers, boards and commissions” and the power to issue extraordinary writs to exercise of its jurisdiction. N.M. Const. art. VI, § 3. “Mandamus may be used either to compel the performance of an affirmative act where the duty to perform the act is clearly enjoined by law, or it may be used in a prohibitory manner to prohibit unconstitutional official action.” *Oliver*, 2021-NMSC-018, ¶ 23 (text only). Mandamus settles a purely legal issue concerning the non-discretionary duty of a government official when the case implicates fundamental constitutional questions of great public importance, which can be answered on the basis of virtually undisputed facts, and which calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal. *Id.* ¶ 24.

The governing standard for prohibitory mandamus is well-established: “In considering whether to issue a prohibitory mandamus, we do not assess the wisdom of the public official’s act; we determine whether that act goes beyond the bounds established by the New Mexico Constitution.” *State ex rel. Torrez v. Bd. of Cnty. Comm’rs for Lea Cnty.*, 2025-NMSC-011, ¶ 13. “This Court has never insisted upon a technical approach to the application of mandamus where there is involved a question of great public import and where other remedies might be inadequate to address that question.” *Id.* ¶ 15 (internal quotation marks and citation omitted).

2. Due Process

In New Mexico, constitutional due process and prohibitory mandamus operate in a mutually reinforcing relationship. Article II, Section 18 of the New Mexico Constitution provides no person shall be deprived of life, liberty, or property without due process of law. New Mexico recognizes both procedural and substantive dimensions of due process. Procedural due process requires notice and an opportunity to be heard before the government deprives a person of a protected interest. *Aragon v. Martinez*, 2025-NMSC-046, ¶ 25; *see also Archuleta v. Santa Fe Police Dep’t ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 32, 137 N.M. 161 (stating while “[c]onstitutional due process does not require an agency to afford a petitioner all elements of a traditional judicial proceeding[,] . . . the right to due process in administrative proceedings [does] contemplate[] . . . notice of the opposing party’s

claims and a reasonable opportunity to meet them” (emphasis, internal quotation marks, and citations omitted)). The importance of Petitioner’s interests and NMED’s interests, together with “the risk of an erroneous deprivation of such private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, dictates what additional process, if any, is due in an administrative proceeding.” *Archuleta*, 2005-NMSC-006, ¶ 32. The procedural due process inquiry is a two-step analysis where, first, this Court determines whether there has been a deprivation of a “constitutionally significant interest” and, second, whether the government’s procedures at issue “comport with due process.” *Aragon*, 2025-NMSC-046, ¶ 26.

Liberty interests protected by the Due Process Clause may arise from two sources: the Due Process Clause itself or the laws of New Mexico. *Id.* ¶ 29. The fundamental requirement of procedural due process is an opportunity to be heard “at a meaningful time and in a meaningful manner” in proceedings that safeguard the right for which constitutional protection is invoked. *Id.* ¶ 33. To determine whether administrative procedures comport with procedural due process, New Mexico courts apply the test set forth in *Mathews v. Eldridge*. *Id.* (citing 424 U.S. 319 (1976)). The *Mathews* factors consider: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural

safeguards; and, (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In addition, where governmental action is so egregious that it shocks the conscience and interferes with the rights implicit in the concept of ordered liberty, prohibitory mandamus relief is further warranted based on substantive due process. *See Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 50 (“Substantive due process cases inquire whether a statute or government action shocks the conscience or interferes with rights implicit in the concept of ordered liberty.” (internal quotation marks and citation omitted)).

B. Undisputed Timeline of Events

As set forth in the Petition, the timeline of events is undisputed. On July 15, NMED held a status conference at which, following argument, the Hearing Officer scheduled the hearing for October 19, 2026, due to the complexity of the matter and to avoid due process concerns.

Desiring a faster track, on July 20, 2026, YGI requested another status conference to take place as soon as possible because of “significant financial and operational consequences.” [Pet. 10]. NMED *concurred* in this request. Notably, YGI proceeded with construction or contracting for construction in the absence of an air quality permit. [Pet 10]; [see also YGI App12]. NMED also argued that it

would not have the ability to complete post-hearing tasks between October 19, 2026, and November 23, 2026. [**See YGI APP122**]. Another status conference was held on July 27, 2026, at which the Hearing Officer again rejected YGI and NMED's request for an accelerated hearing, noting that YGI's financial loss was the result of its own failure to wait until an air quality permit had issued and that financial concern did not outweigh due process considerations.

On that same day, representatives of Oracle, the anchor tenant for Project Jupiter, met with the Governor's Office. Two days later, on July 29, 2026, the NMED Hearing Officer ordered that the hearing, originally scheduled for October 19, 2026, be moved to September 14, 2026. The result of this reversal, discussed below, was that Petitioner was placed in a position where technical analyses became due with less than thirty-days' notice and before NMED had produced the administrative record as part of the administrative matter or pursuant to the Inspection of Public Records Act (IPRA).

C. Mandamus jurisdiction is proper when NMED has exceeded its authority under the governing laws and interfered with the Parties' fundamental Constitutional due process rights to the detriment of New Mexicans.

When the NMED Hearing Officer moved the air permit hearing from October 19, 2026, to September 14, 2026, he violated his non-discretionary duty to ensure hearings are conducted fairly and without prejudice. Within the administrative matter, the new hearing date meant the deadline for the complex technical evidence

and expert testimony was advanced from October 1, 2026, to August 24, 2026. *Compare [Pet Ex. B at 1-2], with [Ex. D at 1-2]*. The Hearing Officer's new order provided parties with *less than thirty days' notice* that the complex technical evidence and expert testimony associated with opposing the permit would be due almost forty days earlier than anticipated. Compounding this, on August 12, 2026, the NMED Hearing Officer further reversed course and determined that discovery would not be permitted—less than two weeks before the complex technical evidence and expert testimony were now due and just over thirty days from the date of the new hearing. Importantly, the only other place, outside of discovery, where the complex technical data may be found would be the administrative record—which was not ordered to be produced until August 24, 2026—the very day that the complex technical evidence and expert testimony was due. [*Compare Pet. Ex. E, with Pet. Ex. D*]. These actions do not amount to discretionary duties of an administrative hearing officer but instead constitute a significant departure from the Hearing Officer's non-discretionary duties under governing law.

1. NMED's Non-Discretionary Duties and Governing Law

Among NMED and its Hearing Officer's non-discretionary duties are the requirements they ensure the maintenance of order through the efficient, fair, and impartial adjudication of issues arising in permit matters before NMED through compliance with the Air Quality Control Act, NMSA 1978, §§ 74-2-1 to -17 (1967,

as amended through 2021) and NMED’s governing regulations. Specifically, NMED oversees the Air Quality Control Act through its administratively attached entity—the Environment Improvement Board (EIB). The Secretary is authorized to “exercise all powers and duties as prescribed under the Act . . . and not otherwise delegated[.]” 20.1.4.100(E)(1) NMAC. The Secretary may also “specify procedures in addition to or that vary from those provided [in this regulation] in order to expedite the efficient resolution of the action or to avoid obvious injustice, *so long as* such procedures do not conflict with the Act or the Regulations *or prejudice the rights of any party.*” *Id.* (emphases added). Following notice of the permit application, all interested persons may become a “party” for purposes of the administrative process. 20.1.4.300(A)(1) NMAC; *see also* 20.1.72.206 NMAC.

Additionally, the NMED Hearing Officer “shall exercise all powers and duties prescribed or delegated under the Act, the Regulations, or this Part. 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 (emphasis added). The Hearing Officer

shall have authority to take all measures necessary for the maintenance of order and for the efficient, *fair and impartial adjudication of issues* arising in proceedings . . . which include[. . .] authority to: (a) conduct hearings[;] (b) rule upon motions, procedural requests, and offers of proof; (c) issue all necessary orders[;] (d) issue subpoenas[;] (e) administer oaths and affirmations, examine witnesses and admit or exclude evidence; and (f) require parties to attend conferences for the

settlement or simplification of the issues, or the expedition of the proceedings.

Id. (emphasis added); *see also* 20.1.4.300(A)(3) NMAC (Hearing Officer “may conduct pre-hearing conferences and issue pre-hearing orders . . . adopting *special procedures for managing proceedings involving difficult or complex issues*[.]” (emphasis added)). Among the duties of NMED are requirements that it shall “institute legal proceedings to compel compliance with the Air Quality Control Act or any regulation of the environmental improvement board” and develop “a plan for the regulation, control, *prevention or abatement of air pollution*, recognizing the differences, needs, requirements and conditions in the different portions of the geographical area of the department’s responsibility [.]” Section 74-2-5.1 (emphasis added).

With respect to permit application processes, the governing regulations statutorily include

the deadline for a final decision by the department . . . may not exceed:
(a) ninety days after the application is determined to be administratively complete . . . unless the secretary or the director grants an extension not to exceed ninety days for good cause, *including the need to have public hearings*[.]

Sections 74-2-7(B)(1) (emphasis added). But the next subsection also identifies that

if the department or local agency fails to take final action . . . within the deadlines specified in Paragraph (2) of this subsection, the department . . . *shall notify the applicant in writing that an extension of time is required* to process the application and specify in detail the grounds for the extension.

Section 74-2-7(B)(3) (emphasis added).

The regulations authorized by these statutes are 20.2.72.207(B)(1) NMAC and 20.2.72.207(C) NMAC. Under 20.2.72.207(B)(1), (2) NMAC, NMED must render its final determination on the permit: “within ninety (90) days after the department deems the application administratively complete[.]” But under 20.2.72.207(C) NMAC, as under the associated statute, where NMED does not reach its final determination

within the deadlines specified in Subsection B of 20.2.72.207 NMAC, the department shall notify the applicant by certified mail that an extension of time is necessary to process the application and shall specify, in detail, the grounds for the extension. The secretary may grant an extension, not to exceed ninety (90) days, *to the deadlines* specified in Subsection B of 20.2.72.207 NMAC, if the secretary determines that good cause exists for the extension[.]

(Emphasis added.) Examples of good cause include, but are not limited to: “the need to have public hearings [and] the permit application requires review of unusually complex technical and regulatory issues[.]” 20.2.72.207 NMAC(C).

Subject to these governing statutes and regulations, any person intending to construct or modify any source must obtain an air quality permit. Section 74-2-7(A)(1). Per the Air Quality Control Act, an application for a permit may be denied if the construction “will cause or contribute to air contaminant levels in excess of a national or state standard.” Section 74-2-7(C)(1)(b). Regulation 20.2.72.208 NMAC enumerates those reasons for which a permit may be denied, which include

violations of the Air Quality Control Act, emission of hazardous pollution above national or state thresholds, emission of toxic air pollutants, and “construction of the new source will not be completed within a reasonable time.” *Id.* Due to the significant considerations required by law, parties in air permit proceedings—particularly those involving complex matters such as here—must be afforded a reasonable opportunity to be heard.

With respect to discovery, 20.1.4.100(A) NMAC relays that the Rules of Civil Procedure and the Rules of Evidence do not apply to air quality permit proceedings but that 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.” This Court has recognized, however, that in some administrative actions, discovery may be necessary. *See Archuleta*, 2005-NMSC-006, ¶¶ 31-32.

2. NMED’s failure to ensure constitutional due process is a purely legal issue of great public importance.

a. Procedural Due Process Violations

In this prohibitory mandamus action, premised on a due process violation, the *Mathews* factors determine whether Petitioner has a clear legal right to additional procedural safeguards and whether NMED has a nondiscretionary duty to provide those safeguards. The impending deprivation without the process required under *Mathews* is unlawful, and mandamus is appropriate to prohibit such action until

constitutionally adequate procedures are afforded. Administrative agencies must provide notice and opportunity to be heard in accordance with due process rights in *all* administrative proceedings, but especially those which involve projects of unknown magnitude such as this one in the present case.

Here, the New Mexico Constitution and the Air Quality Control Act clearly provide that the air in New Mexico is to be safeguarded for its people and the future. *See* N.M. Const. art. XX, § 21 (“The protection of the state’s beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.”); § 74-2-5.1(D), (G), (H) (collectively requiring NMED to hold entities accountable under the Air Quality Control Act, monitor those sources which may cause or contribute to air pollution, and develop plans for the regulation, control, prevention or abatement of air pollution); § 74-2-5.2 (designating NMED as the air pollution control agency under the federal Clean Air Act). As an exercise of its policy-making authority, the Legislature has determined that air permitting actions in New Mexico must comply with the provisions of the Air Quality Control Act and administrative regulations enacted by the EIB. *See generally* § 74-2-7.

As set forth in the Petition, the proposed project involves “one of the largest and most polluting industrial projects ever proposed in New Mexico[.]” **[Pet 7]**. The New Mexico State Land Commissioner—who is entrusted with the duty to control and care for public lands, N.M. Const. art. XIII, § 2—determined 400 million cubic feet of natural gas per day is anticipated to be transported to the Project Jupiter site to power its operation. **[Pet. Ex. G at 3]**. In twice rejecting Project Jupiter’s access applications (to build a natural gas pipeline), she noted that greenhouse gas emissions have a negative impact in driving climate change, which then affects the “health and productivity of state trust lands throughout New Mexico.” **[Id.]** Project Jupiter is expected to emit more than 10 million tons of greenhouse gases per year, according to its own permit applications. **[Id.]** The source of these emissions will be the more than 2,275 Bloom Energy solid oxide fuel cells, which represent such a massive number of cells that there is no comparison site as this number of cells has “never been previously deployed.” **[Pet. Rsp. to Mtn to Partially Vacate Stay of Proceedings at 7]**.

Perhaps initially appreciating the novel and complex nature of the proposed air quality permit, the NMED Hearing Officer’s first Scheduling Order, filed July 16, 2026, defined a process that would afford constitutional due process and which included an opportunity for discovery. **[See Pet. Ex. B]**. That order was upheld over a week later. Subsequently, two days after Project Jupiter representatives met with

the Governor's Office, the Hearing Officer reversed course and entered an order that suddenly expedited the timeline of the permit process at the expense of due process. Procedural due process requires "notice and an opportunity to be heard[.]" *Aragon*, 2025-NMSC-046, ¶ 25 (emphasis added). There was no reasonable notice here. Notice "should be more than a mere gesture; it should be reasonably calculated . . . to apprise interested parties of the pending action and afford them an opportunity to present their case." *Alb. Bernalillo Co. Water Util. Auth. v. NMPRC*, 2010-NMSC-013, ¶ 21, 148 N.M. 21. By advancing the hearing by almost forty days, with less than thirty-days' notice, the NMED Hearing Officer failed to provide reasonable notice. Additionally, the Hearing Officer's abrupt departure from his originally articulated position did not provide reasonable opportunity to be heard. *See Archuleta*, 2005-NMSC-006, ¶ 32.

The Hearing Officer's reversal does not flow from permissible discretionary action but rather is a clear departure from his non-discretionary duties. *See* 20.1.4.100(E)(2) NMAC (stating the NMED Hearing Officer "shall exercise all powers and duties prescribed or delegated under the Act, the Regulations[.] The Hearing Officer shall conduct *a fair and impartial proceeding, assure that the facts are fully elicited*, and avoid delay" (emphasis added)). 20.1.4.100(E)(2) NMAC further states the Hearing Officer must maintain "*fair and impartial adjudication of issues* arising in proceedings[.]" (Emphasis added.) New Mexico has long upheld

“that administrative agencies are bound by their own regulations.” *Saenz v. N.M. Dep’t of Human Servs., Income Support Div. ex rel. Human Servs. Dep’t*, 1982-NMCA-159, ¶ 14, 98 N.M. 805; *see also Law v. N.M. Human Servs. Dep’t*, 2019-NMCA-066, ¶ 23 (same). “Statutes create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute.” *Law*, 2019-NMCA-066, ¶ 23.

In short, the Hearing Officer is required to balance efficiency with ensuring that the proceedings are fair and the facts are fully elicited. Here, the undisputed facts, as set forth in the timeline and orders of the Hearing Officer, establish that the Hearing Officer violated his non-discretionary duties when he reversed himself mid-course, prioritizing expediting the hearing at the expense of a fair and impartial proceeding where all the facts could be fully elicited.

Going further afield of his non-discretionary duties, the Hearing Officer’s August 12, 2026 Order barred discovery, presenting yet another reversal, further compounding the violation of due process. **[Pet. Ex. E]**. Following *both* NMED and YGI failing to answer the discovery, the Hearing Officer subsequently determined that discovery would not be permitted after all—doing so less than two weeks before complex technical evidence and expert testimony was due to be filed into the administrative matter. The reversal on discovery would have left Petitioner with less than two weeks to compile the technical evidence and expert testimony in absence

of the full dataset required to do so. Without access to the administrative record, which was not to be available until August 24, 2026, or access via IPRA due to the administrative record not being “compiled,” Petitioner were barred from access to a full dataset. As the deadline for technical evidence and expert testimony was also August 24, 2026, what would have perhaps not been a problem under the original Scheduling Order became a problem under the expedited timeline. This is a clear departure from the Hearing Officer’s non-discretionary duty to conduct a fair and impartial proceeding, assuring that the facts are fully elicited. *See* 20.1.4.100(E)(2) NMAC.

YGI and NMED argued below there was no reason the administrative record could not have been accessed through IPRA. However, one of the interested parties below *did* attempt to access the administrative record through IPRA and was informed that “[t]he Bureau is preparing the administrative record [w]hile the documents are available via the IPRA process, the [administrative record] is not fully compiled.” [YGI APP143]. As the Attorney General understands the matter, the administrative record, even in part, was not thereafter produced in IPRA. But even if IPRA might generally be a viable option to obtain documents, it does not suffice here due to the shortened notice prior to the deadline for technical evidence and expert testimony and the response deadlines associated with IPRA. It certainly cannot operate in lieu of the originally permitted discovery.

Specifically with respect to discovery, the determination of the Hearing Officer is also not founded in established law. The Hearing Officer’s August 12, 2026, order stated that “discovery is not allowed in air quality permit proceedings.” **[Pet Ex. E at 1]**. That order pointed to an erroneous legal argument advanced by YGI, which is self-serving and otherwise flawed. **[See Pet Ex. at 2]**.

Here, the Hearing Officer initially permitted narrow discovery—balancing the interests of disclosure and burden pursuant to his duty to “*assure that the facts are fully elicited*[.]” *See* 20.1.4.100(E)(2) NMAC (emphasis added). But when neither YGI nor NMED answered discovery, instead of requiring accountability the Hearing Officer reversed himself. Where the hearing officer had adopted “special procedures for managing” this “difficult or complex” case, the sudden reversal was not in accordance with governing regulations. *See* 20.1.4.300(A)(3) NMAC. Our courts have, further, determined there is no constitutional right to “pre-trial discovery in administrative hearings,” but the rule is “not dispositive” because due process might require discovery. *Archuleta*, 2005-NMSC-006, ¶ 32.² Here, the Hearing Officer determined that due process required discovery and then flipped on that determination.

² The Attorney General takes no position on the relevancy, breadth, scope, or possible burden created by the discovery propounded in the administrative matter—discovery should not be barred and is necessary here.

Section 74-2-5.1 demands that NMED and its Hearing Officer “prevent[] or abat[e] air pollution.” *Id.* Where this unprecedented project may have the potential of creating 10 million tons of greenhouse gases per year, an expedited air permit proceeding—without proper notice, fully elicited facts, or a meaningful opportunity to be heard—prohibits NMED or its Hearing Officer from ascertaining the impact this air quality permit could have on air pollution in New Mexico. Additionally, where an air quality permit may be denied under 20.2.72.208(G) NMAC if “construction of the new source will not be completed within a reasonable time”—determination of that fact is critical. *Id.* Here, because the State Land Commissioner twice denied Project Jupiter’s applications to build a pipeline across New Mexico State Trust land, there is a valid question of whether and to what extent the construction as set forth in the air quality permit application would be completed within a reasonable time. In absence of discovery or information about how the construction of the new source would be completed on time, NMED and the Hearing Officer cannot properly engage in the considerations required by law. Failure to flesh out the necessary facts exemplifies how the expedited nature of this particular action results in NMED and its Hearing Officer violating their nondiscretionary duties. 20.1.4.100(E)(2) NMAC.

Considering the foregoing, the first *Mathews* factor weighs heavily in Petitioner’s favor because Petitioner has a clear and indisputable legal right to an

administrative process with constitutionally sufficient procedures. *See Aragon*, 2025-NMSC-046, ¶ 33 (citing the first *Mathews* factor being a private interest that will be affected by the official action). NMED has violated this right as their actions are not subject to agency discretion. *Id.* The second *Mathews* factor also weighs heavily in Petitioner’s favor because NMED Hearing Officer’s decision to reverse himself caused a high probability that an incorrect and unfair outcome will result through the absence of constitutional due process. *See id.* (setting out the second *Mathews* factor as the risk of an erroneous deprivation of private interest that will be affected by the official action through the procedures use). Because the New Mexico Constitution, the Air Quality Control Act, and the governing regulations all require a less expedited and more fulsome administrative process, the third *Mathews* factor also weighs in favor of Petitioner. Where there has been a procedural due process violation, prohibitive mandamus relief is proper to ensure that NMED is required to provide proper procedural safeguards.

To the extent that NMED might argue that the Hearing Officer’s reversal orders operate as “additional or substitute procedural safeguards” under the *Mathews* analysis, this conclusion is unsupported by the facts. *Id.* ¶ 33. Here, the Hearing Officer’s Amended Scheduling Order, filed July 29, 2026, and the subsequent, August 12th order, on their face: (1) accelerate the hearing timeline by nearly forty days, (2) give barely two-weeks’ notice of the deprivation of discovery prior to a

major deadline, and (3) permit the administrative record to be disclosed on the day the technical evidence and expert testimony are due where the Hearing Officer is otherwise aware that NMED has failed to produce the same, even in part, through IPRA. None of these undisputed facts support a determination of adequate “additional or substitute procedural safeguards.” *Aragon*, 2025-NMSC-046, ¶ 33.

Additionally, if NMED were to argue that the acceleration of the hearing date was required under Section 74-2-7(B)(2), that argument would be erroneous where under Section 74-2-7(B)(3) and 20.2.72.207(C) NMAC, NMED can extend the time required for a final decision on an application, if needed for good cause. The plain language of Section 74-2-7(B)(3) and 20.2.72.207(C) NMAC clearly broaden the time contemplated by Section 74-2-7(B)(2)(a) and 20.2.72.207(B)(1) NMAC. The statutory language “within the deadlines specified in [Section 74-2-7(B)(2)(a) and 20.2.72.207(B)(1) NMAC]” refers to the “deadlines” in prior section which totals 180 days. Further, YGI’s approval or concurrence in any extension is not required by statute or regulation, both of which only require notice by certified mail. Among the good cause reasons that the final decision deadline might need to be expanded past 180 days are the need for a public hearing and where the permit requires review of unusually complex technical and regulatory issues—both of which are present here. *See* 20.2.72.207(C) NMAC. NMED cannot manufacture urgency to the

detriment of the public—there is no statutory rush to finalize a determination on the air quality permit by November 23, 2026.

b. *Substantive Due Process Violations*

NMED has also violated the substantive due process rights of Petitioner. NMED ignored its own governing statutes to allow fast-tracking this air quality permit and concurred in YGI’s requested relief based upon *YGI’s* purported “significant financial and operational consequences” that would allegedly result if the hearing happened in October 2026. NMED’s interest is defined by its non-discretionary duties to New Mexicans—not by the profit margin of a private company.

Importantly, again, while the *target* date for a final determination by NMED on the air quality permit is November 23, 2026, this deadline is not a firm deadline and can be extended. *Compare* § 74-2-7(B)(1), *with* § 74-2-7(B)(3). There is no statutory mandate to finalize a determination on the air quality permit by November 23, 2026. Where NMED may argue that its concurrence in YGI’s motion was driven by a need to meet this statutory “deadline,” the governing statutes do not support such a position.

Rather, the concurrence in YGI’s request for an expedited hearing, followed by the Hearing Officer’s abrupt departure from his long-stated position only two days following the Governor’s Office meeting with Project Jupiter representatives,

lends itself to a conclusion that egregious and shocking actions have interfered with the substantive due process rights of Petitioner and other intervenors. *See Bounds*, 2013-NMSC-037, ¶ 50 (“Substantive due process cases inquire whether a statute or government action shocks the conscience or interferes with rights implicit in the concept of ordered liberty.”). Based upon the above facts and the governing law, this case implicates a purely legal and fundamental constitutional question of great public importance that can be resolved based on virtually undisputed facts.

3. Mandamus is proper where future appeal would not correct parties’ right to be meaningfully heard in the first instance—prior to final determination of the permit—and an appellate court would subsequently be constrained by the lack of a complete record.

Finally, this Court considers whether an expeditious resolution of this prohibitive mandamus action can “be obtained through other channels such as a direct appeal.” *Riddle*, 2021-NMSC-018, ¶ 24. The administrative record, discovery, and adequate notice and time are required to properly vet this unprecedented air quality permit application on behalf of New Mexico. Only through the administrative record and an opportunity for discovery will the parties and Hearing Officer be able to ascertain the extent and type of anticipated air pollution as well as whether the project can be completed in the provided timeframe. Where the project anticipates 2,275 Bloom Energy solid oxide fuel cells, intended to convert natural gas into electricity, the parties require technical information on the fuel cells

themselves, and which chemicals will be emitted as part of this conversion process. This is especially true when such a project scale as the one proposed does not exist.

Should this matter proceed as currently postured and is appealed, this critical information will not only have been unavailable to the parties, but it would also not be available to any reviewing court analyzing NMED's decision. When, as here, an agency fails to follow proper administrative procedures and rushes an important process, it not only violates due process but harms Petitioner both at the administrative level, even on appeal to the EIB, and on judicial appeal by depriving the courts of a full administrative record. Mandamus is therefore appropriate and necessary to ensure due process is satisfied.

CONCLUSION

The New Mexico Constitution mandates that the State's air be controlled for the maximum benefit of the people. NMED should be required to comport with constitutional due process, rather than bending to the self-imposed financial concerns of an applicant. A writ of prohibitory mandamus is proper here because NMED's actions went well beyond the bounds established by its governing law. The State respectfully requests that this Court grant Petitioner's Petition and request for stay.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-504(H) NMRA, I certify that this Response complies with the type-volume requirement of Rule 12-504(G)(3) NMRA. The body of this Response contains 5,876 words as calculated by Microsoft Word.

/s/ Serena R. Wheaton
Serena R. Wheaton

I. INTRODUCTION

The Attorney General, on behalf of the State of New Mexico, respectfully submits this Response in Support of Petitioner's Emergency Request for a Stay of Proceedings Pending a Determination on Verified Petition for Writ of Mandamus (Petition), filed on August 20, 2026. This Response is submitted pursuant to Rule 12-504(C)(1), (D)(1) NMRA, which provides the Attorney General may file a response to the Petition and to the request for stay. The State respectfully requests the Petition be granted and the stay continued until resolution of the writ.

The New Mexico Environment Department (NMED) violated the constitutional due process rights of Petitioner in the underlying administrative matter subject to this action. In that matter, Applicant, Yucca Growth Infrastructure, LLC (YGI) sought an air quality permit authorizing the construction of a methane-fueled power plant consisting of 2,275 Bloom Energy solid oxide fuel cells—an unprecedented number of such fuel cells—to supply 2.46GW of electricity to Project Jupiter, large-scale data center campus, for its artificial intelligence (AI) data center. **[Pet 1]**. The administrative matter has several parties of interest including Petitioner, as well as other entities and pro se intervenors. **[See Pet Ex. B at 5-6]**. The NMED Hearing Officer initially, and on several occasions thereafter, made specific determinations as to the timeline of the application hearing and as to the extent discovery should operate in this complex and technical air quality permit case. This

complexity stems from, in part, the unprecedented nature of so many of these fuel cells in one location, which prohibit comparison to another facility already in operation as there are none—*in the world*.

But suddenly, despite the novelty and the complexity of the air quality permit application and following a meeting between the Governor's Office¹ and Project Jupiter representatives, the Hearing Officer reversed himself on the hearing timeline and on the permissibility of discovery, claiming to do so based upon "additional consideration." [YGI App122]. The Hearing Officer's reversal unconstitutionally expedited the timeline of the hearing to such a degree that the now fast-moving permitting matter threatens substantial and irreversible final action where there has not been proper notice or a reasonable opportunity for parties to be heard. The NMED Hearing Officer does not have discretion to expedite the hearing to this extent, even in an administrative context.

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

¹ [See Pet. Ex. C]; see also Calendar: Office of the Governor at <https://www.governor.state.nm.us/about-the-governor/calendar/> (last visited Sept. 2, 2026).

State ex rel. Riddle v. Oliver, 2021-NMSC-018, ¶ 24; *see also State ex rel. Sandel v. N.M. Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272 (same). As the Petition explains, these mandamus requirements are met. First, the Petition sets forth an important constitutional question of great public importance: Whether NMED must comply with its governing constitutional, statutory, and regulatory law while ensuring due process protection for every party before authorizing a project of this magnitude. [**Pet. 28**]. Second, the material facts giving rise to the legal claims in this Petition are not in dispute as they stem from an agreed-upon timeline of events. Finally, no other adequate remedy at law exists. NMED should be proscribed from expediting the air quality permit process at the cost of parties’ constitutional due process rights. For these reasons, this Court should accept mandamus jurisdiction and grant the Petition.

II. ARGUMENT

Prohibitive mandamus is proper because NMED has violated the due process rights of Petitioner and otherwise abdicated its non-discretionary duties as set forth in state statute and regulation—favoring expediting YGI’s air quality permit over its duty to protect the air quality in New Mexico pursuant to the New Mexico Constitution. Petitioner is entitled to transparency, notice, and a reasonable opportunity to participate in the air quality permit action. The NMED Hearing Officer’s order setting an expedited timeline to hold a hearing affords deficient due

process to Petitioner and without this Court’s intervention, risks an uninformed, incorrect, and otherwise unfair outcome in the permitting process. As there is minimal governmental burden in holding the hearing with sufficient notice and a reasonable opportunity for Petitioner to be heard—affording transparency in the form of a complete administrative record and an opportunity for discovery—Petitioner’s constitutional interests outweigh those of NMED.

A. Legal Standards

1. Prohibitory Mandamus

This Court has original jurisdiction in mandamus actions “against all state officers, boards and commissions” and the power to issue extraordinary writs to exercise of its jurisdiction. N.M. Const. art. VI, § 3. “Mandamus may be used either to compel the performance of an affirmative act where the duty to perform the act is clearly enjoined by law, or it may be used in a prohibitory manner to prohibit unconstitutional official action.” *Oliver*, 2021-NMSC-018, ¶ 23 (text only). Mandamus settles a purely legal issue concerning the non-discretionary duty of a government official when the case implicates fundamental constitutional questions of great public importance, which can be answered on the basis of virtually undisputed facts, and which calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal. *Id.* ¶ 24.

The governing standard for prohibitory mandamus is well-established: “In considering whether to issue a prohibitory mandamus, we do not assess the wisdom of the public official’s act; we determine whether that act goes beyond the bounds established by the New Mexico Constitution.” *State ex rel. Torrez v. Bd. of Cnty. Comm’rs for Lea Cnty.*, 2025-NMSC-011, ¶ 13. “This Court has never insisted upon a technical approach to the application of mandamus where there is involved a question of great public import and where other remedies might be inadequate to address that question.” *Id.* ¶ 15 (internal quotation marks and citation omitted).

2. Due Process

In New Mexico, constitutional due process and prohibitory mandamus operate in a mutually reinforcing relationship. Article II, Section 18 of the New Mexico Constitution provides no person shall be deprived of life, liberty, or property without due process of law. New Mexico recognizes both procedural and substantive dimensions of due process. Procedural due process requires notice and an opportunity to be heard before the government deprives a person of a protected interest. *Aragon v. Martinez*, 2025-NMSC-046, ¶ 25; *see also Archuleta v. Santa Fe Police Dep’t ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 32, 137 N.M. 161 (stating while “[c]onstitutional due process does not require an agency to afford a petitioner all elements of a traditional judicial proceeding[,] . . . the right to due process in administrative proceedings [does] contemplate[] . . . notice of the opposing party’s

claims and a reasonable opportunity to meet them” (emphasis, internal quotation marks, and citations omitted)). The importance of Petitioner’s interests and NMED’s interests, together with “the risk of an erroneous deprivation of such private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, dictates what additional process, if any, is due in an administrative proceeding.” *Archuleta*, 2005-NMSC-006, ¶ 32. The procedural due process inquiry is a two-step analysis where, first, this Court determines whether there has been a deprivation of a “constitutionally significant interest” and, second, whether the government’s procedures at issue “comport with due process.” *Aragon*, 2025-NMSC-046, ¶ 26.

Liberty interests protected by the Due Process Clause may arise from two sources: the Due Process Clause itself or the laws of New Mexico. *Id.* ¶ 29. The fundamental requirement of procedural due process is an opportunity to be heard “at a meaningful time and in a meaningful manner” in proceedings that safeguard the right for which constitutional protection is invoked. *Id.* ¶ 33. To determine whether administrative procedures comport with procedural due process, New Mexico courts apply the test set forth in *Mathews v. Eldridge*. *Id.* (citing 424 U.S. 319 (1976)). The *Mathews* factors consider: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural

safeguards; and, (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In addition, where governmental action is so egregious that it shocks the conscience and interferes with the rights implicit in the concept of ordered liberty, prohibitory mandamus relief is further warranted based on substantive due process. *See Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 50 (“Substantive due process cases inquire whether a statute or government action shocks the conscience or interferes with rights implicit in the concept of ordered liberty.” (internal quotation marks and citation omitted)).

B. Undisputed Timeline of Events

As set forth in the Petition, the timeline of events is undisputed. On July 15, NMED held a status conference at which, following argument, the Hearing Officer scheduled the hearing for October 19, 2026, due to the complexity of the matter and to avoid due process concerns.

Desiring a faster track, on July 20, 2026, YGI requested another status conference to take place as soon as possible because of “significant financial and operational consequences.” [Pet. 10]. NMED *concurred* in this request. Notably, YGI proceeded with construction or contracting for construction in the absence of an air quality permit. [Pet 10]; [see also YGI App12]. NMED also argued that it

would not have the ability to complete post-hearing tasks between October 19, 2026, and November 23, 2026. [**See YGI APP122**]. Another status conference was held on July 27, 2026, at which the Hearing Officer again rejected YGI and NMED's request for an accelerated hearing, noting that YGI's financial loss was the result of its own failure to wait until an air quality permit had issued and that financial concern did not outweigh due process considerations.

On that same day, representatives of Oracle, the anchor tenant for Project Jupiter, met with the Governor's Office. Two days later, on July 29, 2026, the NMED Hearing Officer ordered that the hearing, originally scheduled for October 19, 2026, be moved to September 14, 2026. The result of this reversal, discussed below, was that Petitioner was placed in a position where technical analyses became due with less than thirty-days' notice and before NMED had produced the administrative record as part of the administrative matter or pursuant to the Inspection of Public Records Act (IPRA).

C. Mandamus jurisdiction is proper when NMED has exceeded its authority under the governing laws and interfered with the Parties' fundamental Constitutional due process rights to the detriment of New Mexicans.

When the NMED Hearing Officer moved the air permit hearing from October 19, 2026, to September 14, 2026, he violated his non-discretionary duty to ensure hearings are conducted fairly and without prejudice. Within the administrative matter, the new hearing date meant the deadline for the complex technical evidence

and expert testimony was advanced from October 1, 2026, to August 24, 2026. *Compare [Pet Ex. B at 1-2], with [Ex. D at 1-2]*. The Hearing Officer's new order provided parties with *less than thirty days' notice* that the complex technical evidence and expert testimony associated with opposing the permit would be due almost forty days earlier than anticipated. Compounding this, on August 12, 2026, the NMED Hearing Officer further reversed course and determined that discovery would not be permitted—less than two weeks before the complex technical evidence and expert testimony were now due and just over thirty days from the date of the new hearing. Importantly, the only other place, outside of discovery, where the complex technical data may be found would be the administrative record—which was not ordered to be produced until August 24, 2026—the very day that the complex technical evidence and expert testimony was due. [*Compare Pet. Ex. E, with Pet. Ex. D*]. These actions do not amount to discretionary duties of an administrative hearing officer but instead constitute a significant departure from the Hearing Officer's non-discretionary duties under governing law.

1. NMED's Non-Discretionary Duties and Governing Law

Among NMED and its Hearing Officer's non-discretionary duties are the requirements they ensure the maintenance of order through the efficient, fair, and impartial adjudication of issues arising in permit matters before NMED through compliance with the Air Quality Control Act, NMSA 1978, §§ 74-2-1 to -17 (1967,

as amended through 2021) and NMED’s governing regulations. Specifically, NMED oversees the Air Quality Control Act through its administratively attached entity—the Environment Improvement Board (EIB). The Secretary is authorized to “exercise all powers and duties as prescribed under the Act . . . and not otherwise delegated[.]” 20.1.4.100(E)(1) NMAC. The Secretary may also “specify procedures in addition to or that vary from those provided [in this regulation] in order to expedite the efficient resolution of the action or to avoid obvious injustice, *so long as* such procedures do not conflict with the Act or the Regulations *or prejudice the rights of any party.*” *Id.* (emphases added). Following notice of the permit application, all interested persons may become a “party” for purposes of the administrative process. 20.1.4.300(A)(1) NMAC; *see also* 20.1.72.206 NMAC.

Additionally, the NMED Hearing Officer “shall exercise all powers and duties prescribed or delegated under the Act, the Regulations, or this Part. 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 (emphasis added). The Hearing Officer

shall have authority to take all measures necessary for the maintenance of order and for the efficient, *fair and impartial adjudication of issues* arising in proceedings . . . which include[. . .] authority to: (a) conduct hearings[;] (b) rule upon motions, procedural requests, and offers of proof; (c) issue all necessary orders[;] (d) issue subpoenas[;] (e) administer oaths and affirmations, examine witnesses and admit or exclude evidence; and (f) require parties to attend conferences for the

settlement or simplification of the issues, or the expedition of the proceedings.

Id. (emphasis added); *see also* 20.1.4.300(A)(3) NMAC (Hearing Officer “may conduct pre-hearing conferences and issue pre-hearing orders . . . adopting *special procedures for managing proceedings involving difficult or complex issues*[.]” (emphasis added)). Among the duties of NMED are requirements that it shall “institute legal proceedings to compel compliance with the Air Quality Control Act or any regulation of the environmental improvement board” and develop “a plan for the regulation, control, *prevention or abatement of air pollution*, recognizing the differences, needs, requirements and conditions in the different portions of the geographical area of the department’s responsibility [.]” Section 74-2-5.1 (emphasis added).

With respect to permit application processes, the governing regulations statutorily include

the deadline for a final decision by the department . . . may not exceed:
(a) ninety days after the application is determined to be administratively complete . . . unless the secretary or the director grants an extension not to exceed ninety days for good cause, *including the need to have public hearings*[.]

Sections 74-2-7(B)(1) (emphasis added). But the next subsection also identifies that

if the department or local agency fails to take final action . . . within the deadlines specified in Paragraph (2) of this subsection, the department . . . *shall notify the applicant in writing that an extension of time is required* to process the application and specify in detail the grounds for the extension.

Section 74-2-7(B)(3) (emphasis added).

The regulations authorized by these statutes are 20.2.72.207(B)(1) NMAC and 20.2.72.207(C) NMAC. Under 20.2.72.207(B)(1), (2) NMAC, NMED must render its final determination on the permit: “within ninety (90) days after the department deems the application administratively complete[.]” But under 20.2.72.207(C) NMAC, as under the associated statute, where NMED does not reach its final determination

within the deadlines specified in Subsection B of 20.2.72.207 NMAC, the department shall notify the applicant by certified mail that an extension of time is necessary to process the application and shall specify, in detail, the grounds for the extension. The secretary may grant an extension, not to exceed ninety (90) days, *to the deadlines* specified in Subsection B of 20.2.72.207 NMAC, if the secretary determines that good cause exists for the extension[.]

(Emphasis added.) Examples of good cause include, but are not limited to: “the need to have public hearings [and] the permit application requires review of unusually complex technical and regulatory issues[.]” 20.2.72.207 NMAC(C).

Subject to these governing statutes and regulations, any person intending to construct or modify any source must obtain an air quality permit. Section 74-2-7(A)(1). Per the Air Quality Control Act, an application for a permit may be denied if the construction “will cause or contribute to air contaminant levels in excess of a national or state standard.” Section 74-2-7(C)(1)(b). Regulation 20.2.72.208 NMAC enumerates those reasons for which a permit may be denied, which include

violations of the Air Quality Control Act, emission of hazardous pollution above national or state thresholds, emission of toxic air pollutants, and “construction of the new source will not be completed within a reasonable time.” *Id.* Due to the significant considerations required by law, parties in air permit proceedings—particularly those involving complex matters such as here—must be afforded a reasonable opportunity to be heard.

With respect to discovery, 20.1.4.100(A) NMAC relays that the Rules of Civil Procedure and the Rules of Evidence do not apply to air quality permit proceedings but that 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.” This Court has recognized, however, that in some administrative actions, discovery may be necessary. *See Archuleta*, 2005-NMSC-006, ¶¶ 31-32.

2. NMED’s failure to ensure constitutional due process is a purely legal issue of great public importance.

a. Procedural Due Process Violations

In this prohibitory mandamus action, premised on a due process violation, the *Mathews* factors determine whether Petitioner has a clear legal right to additional procedural safeguards and whether NMED has a nondiscretionary duty to provide those safeguards. The impending deprivation without the process required under *Mathews* is unlawful, and mandamus is appropriate to prohibit such action until

constitutionally adequate procedures are afforded. Administrative agencies must provide notice and opportunity to be heard in accordance with due process rights in *all* administrative proceedings, but especially those which involve projects of unknown magnitude such as this one in the present case.

Here, the New Mexico Constitution and the Air Quality Control Act clearly provide that the air in New Mexico is to be safeguarded for its people and the future. *See* N.M. Const. art. XX, § 21 (“The protection of the state’s beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.”); § 74-2-5.1(D), (G), (H) (collectively requiring NMED to hold entities accountable under the Air Quality Control Act, monitor those sources which may cause or contribute to air pollution, and develop plans for the regulation, control, prevention or abatement of air pollution); § 74-2-5.2 (designating NMED as the air pollution control agency under the federal Clean Air Act). As an exercise of its policy-making authority, the Legislature has determined that air permitting actions in New Mexico must comply with the provisions of the Air Quality Control Act and administrative regulations enacted by the EIB. *See generally* § 74-2-7.

As set forth in the Petition, the proposed project involves “one of the largest and most polluting industrial projects ever proposed in New Mexico[.]” **[Pet 7]**. The New Mexico State Land Commissioner—who is entrusted with the duty to control and care for public lands, N.M. Const. art. XIII, § 2—determined 400 million cubic feet of natural gas per day is anticipated to be transported to the Project Jupiter site to power its operation. **[Pet. Ex. G at 3]**. In twice rejecting Project Jupiter’s access applications (to build a natural gas pipeline), she noted that greenhouse gas emissions have a negative impact in driving climate change, which then affects the “health and productivity of state trust lands throughout New Mexico.” **[Id.]** Project Jupiter is expected to emit more than 10 million tons of greenhouse gases per year, according to its own permit applications. **[Id.]** The source of these emissions will be the more than 2,275 Bloom Energy solid oxide fuel cells, which represent such a massive number of cells that there is no comparison site as this number of cells has “never been previously deployed.” **[Pet. Rsp. to Mtn to Partially Vacate Stay of Proceedings at 7]**.

Perhaps initially appreciating the novel and complex nature of the proposed air quality permit, the NMED Hearing Officer’s first Scheduling Order, filed July 16, 2026, defined a process that would afford constitutional due process and which included an opportunity for discovery. **[See Pet. Ex. B]**. That order was upheld over a week later. Subsequently, two days after Project Jupiter representatives met with

the Governor's Office, the Hearing Officer reversed course and entered an order that suddenly expedited the timeline of the permit process at the expense of due process. Procedural due process requires "notice and an opportunity to be heard[.]" *Aragon*, 2025-NMSC-046, ¶ 25 (emphasis added). There was no reasonable notice here. Notice "should be more than a mere gesture; it should be reasonably calculated . . . to apprise interested parties of the pending action and afford them an opportunity to present their case." *Alb. Bernalillo Co. Water Util. Auth. v. NMPRC*, 2010-NMSC-013, ¶ 21, 148 N.M. 21. By advancing the hearing by almost forty days, with less than thirty-days' notice, the NMED Hearing Officer failed to provide reasonable notice. Additionally, the Hearing Officer's abrupt departure from his originally articulated position did not provide reasonable opportunity to be heard. *See Archuleta*, 2005-NMSC-006, ¶ 32.

The Hearing Officer's reversal does not flow from permissible discretionary action but rather is a clear departure from his non-discretionary duties. *See* 20.1.4.100(E)(2) NMAC (stating the NMED Hearing Officer "shall exercise all powers and duties prescribed or delegated under the Act, the Regulations[.] The Hearing Officer shall conduct *a fair and impartial proceeding, assure that the facts are fully elicited*, and avoid delay" (emphasis added)). 20.1.4.100(E)(2) NMAC further states the Hearing Officer must maintain "*fair and impartial adjudication of issues* arising in proceedings[.]" (Emphasis added.) New Mexico has long upheld

“that administrative agencies are bound by their own regulations.” *Saenz v. N.M. Dep’t of Human Servs., Income Support Div. ex rel. Human Servs. Dep’t*, 1982-NMCA-159, ¶ 14, 98 N.M. 805; *see also Law v. N.M. Human Servs. Dep’t*, 2019-NMCA-066, ¶ 23 (same). “Statutes create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute.” *Law*, 2019-NMCA-066, ¶ 23.

In short, the Hearing Officer is required to balance efficiency with ensuring that the proceedings are fair and the facts are fully elicited. Here, the undisputed facts, as set forth in the timeline and orders of the Hearing Officer, establish that the Hearing Officer violated his non-discretionary duties when he reversed himself mid-course, prioritizing expediting the hearing at the expense of a fair and impartial proceeding where all the facts could be fully elicited.

Going further afield of his non-discretionary duties, the Hearing Officer’s August 12, 2026 Order barred discovery, presenting yet another reversal, further compounding the violation of due process. **[Pet. Ex. E]**. Following *both* NMED and YGI failing to answer the discovery, the Hearing Officer subsequently determined that discovery would not be permitted after all—doing so less than two weeks before complex technical evidence and expert testimony was due to be filed into the administrative matter. The reversal on discovery would have left Petitioner with less than two weeks to compile the technical evidence and expert testimony in absence

of the full dataset required to do so. Without access to the administrative record, which was not to be available until August 24, 2026, or access via IPRA due to the administrative record not being “compiled,” Petitioner were barred from access to a full dataset. As the deadline for technical evidence and expert testimony was also August 24, 2026, what would have perhaps not been a problem under the original Scheduling Order became a problem under the expedited timeline. This is a clear departure from the Hearing Officer’s non-discretionary duty to conduct a fair and impartial proceeding, assuring that the facts are fully elicited. *See* 20.1.4.100(E)(2) NMAC.

YGI and NMED argued below there was no reason the administrative record could not have been accessed through IPRA. However, one of the interested parties below *did* attempt to access the administrative record through IPRA and was informed that “[t]he Bureau is preparing the administrative record [w]hile the documents are available via the IPRA process, the [administrative record] is not fully compiled.” [YGI APP143]. As the Attorney General understands the matter, the administrative record, even in part, was not thereafter produced in IPRA. But even if IPRA might generally be a viable option to obtain documents, it does not suffice here due to the shortened notice prior to the deadline for technical evidence and expert testimony and the response deadlines associated with IPRA. It certainly cannot operate in lieu of the originally permitted discovery.

Specifically with respect to discovery, the determination of the Hearing Officer is also not founded in established law. The Hearing Officer’s August 12, 2026, order stated that “discovery is not allowed in air quality permit proceedings.” **[Pet Ex. E at 1]**. That order pointed to an erroneous legal argument advanced by YGI, which is self-serving and otherwise flawed. **[See Pet Ex. at 2]**.

Here, the Hearing Officer initially permitted narrow discovery—balancing the interests of disclosure and burden pursuant to his duty to “*assure that the facts are fully elicited*[.]” *See* 20.1.4.100(E)(2) NMAC (emphasis added). But when neither YGI nor NMED answered discovery, instead of requiring accountability the Hearing Officer reversed himself. Where the hearing officer had adopted “special procedures for managing” this “difficult or complex” case, the sudden reversal was not in accordance with governing regulations. *See* 20.1.4.300(A)(3) NMAC. Our courts have, further, determined there is no constitutional right to “pre-trial discovery in administrative hearings,” but the rule is “not dispositive” because due process might require discovery. *Archuleta*, 2005-NMSC-006, ¶ 32.² Here, the Hearing Officer determined that due process required discovery and then flipped on that determination.

² The Attorney General takes no position on the relevancy, breadth, scope, or possible burden created by the discovery propounded in the administrative matter—discovery should not be barred and is necessary here.

Section 74-2-5.1 demands that NMED and its Hearing Officer “prevent[] or abat[e] air pollution.” *Id.* Where this unprecedented project may have the potential of creating 10 million tons of greenhouse gases per year, an expedited air permit proceeding—without proper notice, fully elicited facts, or a meaningful opportunity to be heard—prohibits NMED or its Hearing Officer from ascertaining the impact this air quality permit could have on air pollution in New Mexico. Additionally, where an air quality permit may be denied under 20.2.72.208(G) NMAC if “construction of the new source will not be completed within a reasonable time”—determination of that fact is critical. *Id.* Here, because the State Land Commissioner twice denied Project Jupiter’s applications to build a pipeline across New Mexico State Trust land, there is a valid question of whether and to what extent the construction as set forth in the air quality permit application would be completed within a reasonable time. In absence of discovery or information about how the construction of the new source would be completed on time, NMED and the Hearing Officer cannot properly engage in the considerations required by law. Failure to flesh out the necessary facts exemplifies how the expedited nature of this particular action results in NMED and its Hearing Officer violating their nondiscretionary duties. 20.1.4.100(E)(2) NMAC.

Considering the foregoing, the first *Mathews* factor weighs heavily in Petitioner’s favor because Petitioner has a clear and indisputable legal right to an

administrative process with constitutionally sufficient procedures. *See Aragon*, 2025-NMSC-046, ¶ 33 (citing the first *Mathews* factor being a private interest that will be affected by the official action). NMED has violated this right as their actions are not subject to agency discretion. *Id.* The second *Mathews* factor also weighs heavily in Petitioner’s favor because NMED Hearing Officer’s decision to reverse himself caused a high probability that an incorrect and unfair outcome will result through the absence of constitutional due process. *See id.* (setting out the second *Mathews* factor as the risk of an erroneous deprivation of private interest that will be affected by the official action through the procedures use). Because the New Mexico Constitution, the Air Quality Control Act, and the governing regulations all require a less expedited and more fulsome administrative process, the third *Mathews* factor also weighs in favor of Petitioner. Where there has been a procedural due process violation, prohibitive mandamus relief is proper to ensure that NMED is required to provide proper procedural safeguards.

To the extent that NMED might argue that the Hearing Officer’s reversal orders operate as “additional or substitute procedural safeguards” under the *Mathews* analysis, this conclusion is unsupported by the facts. *Id.* ¶ 33. Here, the Hearing Officer’s Amended Scheduling Order, filed July 29, 2026, and the subsequent, August 12th order, on their face: (1) accelerate the hearing timeline by nearly forty days, (2) give barely two-weeks’ notice of the deprivation of discovery prior to a

major deadline, and (3) permit the administrative record to be disclosed on the day the technical evidence and expert testimony are due where the Hearing Officer is otherwise aware that NMED has failed to produce the same, even in part, through IPRA. None of these undisputed facts support a determination of adequate “additional or substitute procedural safeguards.” *Aragon*, 2025-NMSC-046, ¶ 33.

Additionally, if NMED were to argue that the acceleration of the hearing date was required under Section 74-2-7(B)(2), that argument would be erroneous where under Section 74-2-7(B)(3) and 20.2.72.207(C) NMAC, NMED can extend the time required for a final decision on an application, if needed for good cause. The plain language of Section 74-2-7(B)(3) and 20.2.72.207(C) NMAC clearly broaden the time contemplated by Section 74-2-7(B)(2)(a) and 20.2.72.207(B)(1) NMAC. The statutory language “within the deadlines specified in [Section 74-2-7(B)(2)(a) and 20.2.72.207(B)(1) NMAC]” refers to the “deadlines” in prior section which totals 180 days. Further, YGI’s approval or concurrence in any extension is not required by statute or regulation, both of which only require notice by certified mail. Among the good cause reasons that the final decision deadline might need to be expanded past 180 days are the need for a public hearing and where the permit requires review of unusually complex technical and regulatory issues—both of which are present here. *See* 20.2.72.207(C) NMAC. NMED cannot manufacture urgency to the

detriment of the public—there is no statutory rush to finalize a determination on the air quality permit by November 23, 2026.

b. *Substantive Due Process Violations*

NMED has also violated the substantive due process rights of Petitioner. NMED ignored its own governing statutes to allow fast-tracking this air quality permit and concurred in YGI’s requested relief based upon *YGI’s* purported “significant financial and operational consequences” that would allegedly result if the hearing happened in October 2026. NMED’s interest is defined by its non-discretionary duties to New Mexicans—not by the profit margin of a private company.

Importantly, again, while the *target* date for a final determination by NMED on the air quality permit is November 23, 2026, this deadline is not a firm deadline and can be extended. *Compare* § 74-2-7(B)(1), *with* § 74-2-7(B)(3). There is no statutory mandate to finalize a determination on the air quality permit by November 23, 2026. Where NMED may argue that its concurrence in YGI’s motion was driven by a need to meet this statutory “deadline,” the governing statutes do not support such a position.

Rather, the concurrence in YGI’s request for an expedited hearing, followed by the Hearing Officer’s abrupt departure from his long-stated position only two days following the Governor’s Office meeting with Project Jupiter representatives,

lends itself to a conclusion that egregious and shocking actions have interfered with the substantive due process rights of Petitioner and other intervenors. *See Bounds*, 2013-NMSC-037, ¶ 50 (“Substantive due process cases inquire whether a statute or government action shocks the conscience or interferes with rights implicit in the concept of ordered liberty.”). Based upon the above facts and the governing law, this case implicates a purely legal and fundamental constitutional question of great public importance that can be resolved based on virtually undisputed facts.

3. Mandamus is proper where future appeal would not correct parties’ right to be meaningfully heard in the first instance—prior to final determination of the permit—and an appellate court would subsequently be constrained by the lack of a complete record.

Finally, this Court considers whether an expeditious resolution of this prohibitive mandamus action can “be obtained through other channels such as a direct appeal.” *Riddle*, 2021-NMSC-018, ¶ 24. The administrative record, discovery, and adequate notice and time are required to properly vet this unprecedented air quality permit application on behalf of New Mexico. Only through the administrative record and an opportunity for discovery will the parties and Hearing Officer be able to ascertain the extent and type of anticipated air pollution as well as whether the project can be completed in the provided timeframe. Where the project anticipates 2,275 Bloom Energy solid oxide fuel cells, intended to convert natural gas into electricity, the parties require technical information on the fuel cells

themselves, and which chemicals will be emitted as part of this conversion process. This is especially true when such a project scale as the one proposed does not exist.

Should this matter proceed as currently postured and is appealed, this critical information will not only have been unavailable to the parties, but it would also not be available to any reviewing court analyzing NMED's decision. When, as here, an agency fails to follow proper administrative procedures and rushes an important process, it not only violates due process but harms Petitioner both at the administrative level, even on appeal to the EIB, and on judicial appeal by depriving the courts of a full administrative record. Mandamus is therefore appropriate and necessary to ensure due process is satisfied.

CONCLUSION

The New Mexico Constitution mandates that the State's air be controlled for the maximum benefit of the people. NMED should be required to comport with constitutional due process, rather than bending to the self-imposed financial concerns of an applicant. A writ of prohibitory mandamus is proper here because NMED's actions went well beyond the bounds established by its governing law. The State respectfully requests that this Court grant Petitioner's Petition and request for stay.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-504(H) NMRA, I certify that this Response complies with the type-volume requirement of Rule 12-504(G)(3) NMRA. The body of this Response contains 5,876 words as calculated by Microsoft Word.

/s/ Serena R. Wheaton
Serena R. Wheaton

CERTIFICATE OF SERVICE

I hereby certify that, on September 2, 2026, I filed the foregoing document electronically through the Odyssey E-File & Serve system, which caused all parties and counsel of record to be served by electronic means.

/s/ Serena R. Wheaton
Serena R. Wheaton