

JUL 29 2026
Luis Lopez (OPF)
LSLSTATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENTIN THE MATTER OF:
THE APPLICATION OF YUCCA
GROWTH INFRASTRUCTURE
LLC FOR AN AIR QUALITY PERMIT,
NO. NSR 10883

No. AQB 26-57 (P)

**MAXWELL'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL STATEMENT
OF AUTHORITY CONCERNING THE NOVEMBER 23, 2026 DECISION DEADLINE**

Mr. Maxwell respectfully moves, to the extent leave is necessary, for acceptance and consideration of the accompanying Maxwell's Supplemental Statement of Authority Concerning the November 23, 2026 Decision Deadline.

The Statement was prepared in response to the Hearing Officer's request at the July 27, 2026 status conference that the parties identify, within two days, legal authority addressing whether the October 19, 2026 hearing date could be maintained where an earlier hearing would impair opposing parties' ability to prepare and present their technical cases, even though final agency action might consequently occur after November 23, 2026.

The Hearing Officer did not establish a particular filing hour or state that responsive authority had to be received before 5:00 p.m. on July 29. The request was made orally during the conference and concerned a substantial legal issue involving the interaction among the Air Quality Control Act's decision deadline, the Department's hearing regulations, the Hearing Officer's case-management authority, mandatory but nonjurisdictional administrative deadlines, good cause, and constitutional due process.

Mr. Maxwell completed the accompanying Statement shortly after ordinary business hours on July 29 and is transmitting it to the Hearing Clerk and all parties on the evening of July

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29. Under 20.1.4.100(H)(1)(c) NMAC, a document received after the close of business is ordinarily deemed filed on the following business day. Mr. Maxwell therefore does not request that the document be backdated or deemed received before it was transmitted. He requests only that the Statement be accepted for filing and considered as his response to the Hearing Officer's July 27 request.

Good cause supports that relief. The Hearing Officer did not specify a 5:00 p.m. cutoff. The requested two-day period was unusually abbreviated in light of the legal inquiry and production of analysis required. Mr. Maxwell prepared the Statement as promptly as practicable while attending to preexisting professional obligations. The Statement was completed and served during the evening of the second day following the conference, and its acceptance will not delay the proceeding or prejudice any party.

Shortly before the Statement was ready for transmission, at approximately 4:55 p.m. on July 29, the Hearing Clerk served an Order and an Amended Scheduling Order. The Order changed the hearing date from October 19 to September 14, 2026, denied Applicant's request for an August 17 hearing, and stated that discovery would be allowed. The Amended Scheduling Order established August 24 deadlines for complete written technical testimony and prehearing motions, a September 3 rebuttal-testimony deadline, and a September 14 hearing date.

Those orders were served before the Statement had been substantially completed. Mr. Maxwell has not revised the Statement to transform it into a motion for reconsideration or a response to the newly issued orders. The Statement remains what the Hearing Officer requested: a presentation of authority concerning the relationship between the statutory decision deadline

and the need to preserve a meaningful opportunity for parties to prepare and present technical cases.

The intervening orders do not render that authority irrelevant. The Statement addresses the legal premise underlying the scheduling dispute, explains why November 23 should remain an important statutory objective without operating as a jurisdictional termination date or an absolute command to conduct an inadequately prepared hearing, and identifies procedures through which the remaining stages could be expedited. Those matters remain relevant to the legal basis for the amended schedule and to any later request for clarification, amendment, reconsideration, or other procedural relief.

Consideration of the Statement will also complete the record created by the Hearing Officer's July 27 request. The Hearing Officer expressly asked the parties to research the legal issue. The Statement reflects Mr. Maxwell's response to that request and should not be excluded merely because the necessary production of analysis extended beyond the ordinary business day.

Under 20.1.4.200(D)(3) NMAC, an opposed motion must state either that concurrence was sought and denied or explain why concurrence was not sought. Mr. Maxwell did not seek concurrence before filing because the Hearing Officer's two orders were served at approximately 4:55 p.m., this motion is being prepared and transmitted immediately thereafter, and delaying transmission to seek party positions would further postpone submission of the authority requested at the July 27 conference. The positions of the other parties are presently unknown. Mr. Maxwell therefore treats this motion as opposed for procedural purposes.

Mr. Maxwell respectfully requests that the Hearing Officer:

1. grant leave, to the extent leave is considered necessary, to file Maxwell's Supplemental Statement of Authority Concerning the November 23, 2026 Decision Deadline;
2. direct the Hearing Clerk to accept and docket the Statement upon receipt;
3. consider the Statement as Mr. Maxwell's response to the Hearing Officer's July 27 request for legal authority, notwithstanding its transmission after ordinary business hours and the intervening issuance of the July 29 Order and Amended Scheduling Order; and
4. grant such other procedural relief as is necessary to preserve the Statement as part of the record concerning the scheduling and decision-deadline issues.

Because the requested relief is limited to acceptance and consideration of authority the Hearing Officer expressly requested, and because the scheduling issues are developing rapidly, Mr. Maxwell respectfully requests prompt disposition of this motion.

Respectfully submitted,

By -s- Nicholas Maxwell
Mr. Nicholas R. Maxwell
P.O. Box 1064
Hobbs, New Mexico 88241
Telephone: (575) 441-3560
Email: inspector@sunshineaudit.com

CERTIFICATE OF SERVICE

I certify that a true and correct copy of my Motion for Leave to File Supplemental Statement of Authority Concerning the November 23, 2026 Decision Deadline was served by email on July 29, 2026 to the Hearing Clerk and to all parties of record in this matter, with a hard copy mailed upon request.

-s- Nicholas Maxwell
Mr. Nicholas R. Maxwell

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF:
THE APPLICATION OF YUCCA
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No. AQB 26-57 (P)

**MAXWELL'S SUPPLEMENTAL STATEMENT OF AUTHORITY
CONCERNING THE NOVEMBER 23, 2026 DECISION DEADLINE**

Mr. Maxwell submits this Supplemental Statement of Authority in response to the Hearing Officer's request that the parties identify authority addressing whether the October 19, 2026 hearing date may be maintained where an earlier hearing would impair opposing parties' ability to prepare and present their technical cases, even though final agency action may consequently occur after November 23, 2026.

Mr. Maxwell respectfully submits that November 23 remains an important and mandatory statutory objective. It should not, however, be construed as a jurisdictional termination date or as an affirmative command to hold the evidentiary hearing before the admitted parties can reasonably prepare. New Mexico authority recognizes that a mandatory statutory deadline may permit a narrowly prescribed postponement for good cause where strict compliance would defeat the meaningful hearing contemplated by the same statutory scheme.

The appropriate order is therefore not one declaring the statutory deadline irrelevant. It is an order finding that good cause and the requirements of a fair hearing support maintaining October 19, while directing the Department, Hearing Officer, and parties to complete all remaining proceedings as expeditiously as a fair and adequately developed record permits.

I. THE AIR QUALITY ACT'S DEADLINE MUST BE READ TOGETHER WITH ITS HEARING AND PARTICIPATION REQUIREMENTS.

Section 74-2-7(B)(2)(a) NMSA 1978 requires regulations specifying a final-decision deadline that ordinarily may not exceed ninety days after an application is determined administratively complete, subject to an extension not exceeding ninety additional days for good cause, including the need for public hearings. The corresponding regulation requires the Department to grant, conditionally grant, or deny a non-PSD construction-permit application within ninety days and authorizes the Secretary to grant an extension not exceeding ninety days for good cause. 20.2.72.207(B)–(C) NMAC.

Those provisions are mandatory and should be taken seriously. They are not, however, the only provisions governing the proceeding.

Section 20.2.72.206(C) NMAC requires that all interested persons receive a “reasonable chance” to submit data, views, and arguments and to examine witnesses. Section 20.2.72.207(D) further requires the permit decision to be based on an administrative record that includes the evidence submitted by interested persons and, where a hearing is held, the evidence submitted at the hearing. Applicant bears the burden of demonstrating that the permit should be approved.

Part 4 reinforces those obligations. It must be liberally construed to facilitate public participation, including participation by persons without counsel. The Hearing Officer must conduct a fair and impartial proceeding, assure that the facts are fully elicited, and take measures necessary for the efficient and fair adjudication of the issues. 20.1.4.100(B), (E)(2) NMAC. Part 4 also expressly authorizes the Hearing Officer to continue a hearing upon a timely motion, for

good cause shown, after considering prejudice to the parties and undue delay. 20.1.4.100(F)(2); 20.1.4.200(C)(3) NMAC.

These provisions should be harmonized. The decision deadline cannot reasonably be interpreted to require the Hearing Officer to disregard his express authority to continue a hearing for good cause or his obligation to provide a fair proceeding in which the facts are fully elicited. Nor should it be interpreted to reduce the “reasonable chance” to submit evidence and examine witnesses to a merely formal opportunity to appear on a hearing date without adequate preparation.

The statute and regulation do not state that expiration of the deadline automatically grants the permit, automatically denies it, divests the Department of jurisdiction, excludes later hearing evidence, or gives Applicant the right to select an earlier hearing date. They prescribe a deadline for agency action, but do not prescribe the destruction of the hearing process as the remedy for anticipated noncompliance.

II. COMPTON RECOGNIZES THAT A MANDATORY DEADLINE MAY YIELD TO A NARROWLY PRESCRIBED POSTPONEMENT FOR GOOD CAUSE.

At the status conference, Department counsel cited *New Mexico Department of Health v. Compton*, 2000-NMCA-078. The more directly controlling authority is the Supreme Court’s subsequent certiorari opinion, *New Mexico Department of Health v. Compton*, 2001-NMSC-032.

Compton concerned a statute providing a right to a civil-commitment hearing within seven days. The Supreme Court agreed that the deadline was mandatory, but rejected the proposition that the Legislature intended an inflexible requirement incapable of responding to the demands of an individual case.

The Court concluded that the Legislature intended sufficient flexibility to respond to circumstances in which adherence to the stated period would impair the ability of the court or the parties to conduct a meaningful hearing. *Compton*, 2001-NMSC-032, ¶¶ 19–21.

The Court relied particularly upon *In re Bunnell*, 1983-NMCA-095, 100 N.M. 242, 668 P.2d 1119. In *Bunnell*, counsel lacked sufficient time to obtain records, consult with the client, and secure necessary witnesses. The Court of Appeals held that the trial court was required to grant a short continuance when counsel established insufficient preparation time. Otherwise, the statutory rights to present evidence and cross-examine witnesses would become “hollow safeguards.” *Id.* at 244–45, 668 P.2d at 1121–22. The Supreme Court in *Compton* described *Bunnell* as balancing “the need for a prompt hearing with the importance of a meaningful hearing”. It then held that the statutory seven-day requirement was subject to postponement for good cause. 2001-NMSC-032, ¶¶ 21–22. The Court also relied upon *Redman v. Board of Regents*, 1984-NMCA-117, 102 N.M. 234, 693 P.2d 1266. *Redman* involved a mandatory statutory deadline for an administrative hearing. The deadline remained mandatory, but the administrative tribunal could extend it upon written waiver or a showing of good cause. *Compton*, 2001-NMSC-032, ¶ 22. Importantly, *Compton* did not treat the deadline as optional. The Court required that any postponement be “narrowly prescribed” and allowed only for so long as necessity demanded, while continuing to respect the Legislature’s purpose of prompt adjudication. *Id.* ¶ 24.

That is the appropriate model here. The October 19 hearing date represents a limited accommodation of demonstrated preparation needs, not an indefinite suspension of the permitting proceeding.

III. THE EXPRESS NINETY-DAY EXTENSION PROVISION DOES NOT REQUIRE AN EARLIER, INADEQUATE HEARING.

Mr. Maxwell recognizes an important distinction between this case and *Compton*. Section 74-2-7(B)(2)(a) expressly authorizes a good-cause extension “not to exceed ninety days,” and that extension has already been granted. Applicant may therefore argue that the Legislature expressly fixed the maximum permissible period and foreclosed any further departure.

That argument gives the statutory language substantial force, but it does not answer the separate question presented here.

The Hearing Officer is not being asked to grant a second ordinary administrative extension under Section 74-2-7(B)(2)(a). The immediate question is whether the existing deadline affirmatively requires him to advance the evidentiary hearing despite a record-based finding that the admitted parties cannot meaningfully prepare by the earlier date.

The statute does not establish the hearing date. It does not state that the final-decision deadline supersedes the express rights to present evidence and examine witnesses. It does not instruct the Hearing Officer to curtail those rights when the Department’s analysis, proposed permit conditions, administrative record, or other technical materials become available too late to permit adequate preparation.

The distinction is between the existence of the deadline and the asserted remedy. Even assuming the Department will technically exceed the prescribed period, it does not follow that the Hearing Officer must prevent that occurrence by conducting a hearing that fails to satisfy the other governing provisions.

Applicant's interpretation would convert a deadline directed to the Department's final action into an unwritten command governing the preparation time afforded every other party. Neither Section 74-2-7 nor 20.2.72.207 NMAC contains that command.

IV. THE PRESENT RECORD ESTABLISHES GOOD CAUSE FOR MAINTAINING OCTOBER 19.

The record made at the status conference was specific.

The opposing parties stated that they had begun reviewing the application, consulting experts, identifying technical omissions, and preparing their cases. They further explained that completion of their testimony depended upon receiving the Department's technical analysis, Statement of Basis, draft permit, administrative record, and information requested from Applicant.

The Center for Biological Diversity explained that, assuming responsive information became available near the end of August, its expert would require approximately one month to review the material and prepare technical testimony. Counsel characterized the October schedule as unusually expedited but workable. The New Mexico Environmental Law Center similarly stated that October 19 was the earliest date on which it believed a meaningful technical case could be presented.

The Department confirmed that its assertion of readiness referred only to NMED's own preparation. Department counsel acknowledged that NMED possessed an informational advantage and expressly disclaimed any representation that the other parties were ready. At that time, the draft permit and Statement of Basis had not yet been released. The Hearing Officer considered the project's complexity, the materials not yet available, the work remaining for

experts and counsel, Applicant's claimed economic prejudice, and the length of the requested accommodation. He found that Applicant's prejudice did not outweigh the opposing parties' need for sufficient time to prepare and present their cases. He therefore retained October 19.

That is precisely the kind of individualized determination contemplated by *Compton* and by 20.1.4.100(F)(2) NMAC. The continuance was based on identified preparation requirements, not generalized preference, convenience, or an attempt to delay.

V. NEW MEXICO PERMITTING PRECEDENT REQUIRES A GENUINELY MEANINGFUL HEARING.

In *Colonias Development Council v. Rhino Environmental Services, Inc.*, 2005-NMSC-024, the Supreme Court applied Part 4 to an environmental permit proceeding and emphasized that permit procedures must be construed to facilitate meaningful public participation.

The Court held that permitting parties to speak was not enough if the agency could disregard material issues or prevent the evidence from playing a meaningful role in the decision. Such treatment would render the right to be heard "illusory." *Id.* ¶¶ 41–42. The Court set aside the permit and required an additional hearing providing a reasonable opportunity to present evidence and conduct cross-examination. *Id.* ¶¶ 42–43.

Although *Colonias* arose under the Solid Waste Act, its construction of Part 4 is persuasive here. Part 4 governs this proceeding, and 20.2.72.206(C) separately guarantees a reasonable opportunity to submit evidence and examine witnesses.

A hearing held before parties can reasonably analyze the Department's technical conclusions, consult experts, and prepare responsive evidence would risk producing the same kind of illusory participation condemned in *Colonias*.

VI. CONSTITUTIONAL AVOIDANCE SUPPORTS THE SAME RESULT.

The Hearing Officer need not declare Section 74-2-7 unconstitutional or determine the full constitutional rights of every participant. The statutory and regulatory provisions themselves are sufficient to preserve the October 19 hearing date.

Nevertheless, those provisions should be construed, where reasonably possible, to avoid an application that would deprive admitted parties of a meaningful opportunity to be heard. The fundamental due-process requirement is an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976).

Here, meaningful participation depends upon the opportunity to understand and answer an unusually complex technical case. The Department's conclusions, proposed permit conditions, Applicant's supporting data, expert analysis, and responsive technical evidence constitute the substance of the adjudication. A schedule under which those materials become available too late for reasonable expert review would create a serious constitutional question.

Compton avoided such a problem by construing mandatory timing language flexibly enough to protect both prompt action and a meaningful hearing. The same approach should be applied here.

VII. THE ORDER SHOULD PRESERVE THE DEADLINE'S PURPOSE WHILE MAINTAINING OCTOBER 19.

Mr. Maxwell respectfully suggests that the written order clarify the oral ruling as follows:

The November 23 deadline remains a mandatory statutory objective and requires the Department and all participants to proceed without avoidable delay. It does not, however, compel an earlier hearing where the Hearing Officer has found, after considering the parties'

respective prejudice, that such acceleration would deny admitted parties a reasonable opportunity to prepare and present their technical cases.

The October 19 hearing date should therefore remain in place. Any departure from the statutory timetable should be limited to the period reasonably necessary to conduct the hearing, prepare the record, permit appropriately shortened post-hearing submissions, issue the Hearing Officer's report, and allow informed final agency action.

The Hearing Officer may further minimize delay by establishing an expedited transcript schedule, reasonable but shortened periods for proposed findings and conclusions, a prompt Hearing Officer's report, and expedited consideration by the final decision-maker. Part 4 already permits the ordinary thirty-day period for post-hearing submissions and related periods to be modified by order. 20.1.4.500(B)–(C) NMAC.

CONCLUSION.

The Hearing Officer should maintain the October 19, 2026 hearing date.

Section 74-2-7 establishes a mandatory final-decision deadline, but neither that statute nor 20.2.72 NMAC makes the deadline jurisdictional, grants a permit automatically upon expiration, or requires the Hearing Officer to conduct an earlier hearing at the expense of the participation rights guaranteed elsewhere in the same regulatory scheme.

Compton, Bunnell, Redman, and Colonias support a construction that preserves prompt agency action while allowing a narrowly prescribed postponement where necessary to provide a meaningful hearing. The present record establishes such necessity and good cause.

The written order should therefore retain October 19, recognize November 23 as a continuing statutory objective rather than an absolute command to compromise the hearing, and

require completion of all remaining proceedings as expeditiously as fairness and an adequately developed administrative record permit.

Respectfully submitted,

By -s- Nicholas Maxwell

Mr. Nicholas R. Maxwell

P.O. Box 1064

Hobbs, New Mexico 88241

Telephone: (575) 441-3560

Email: inspector@sunshineaudit.com

CERTIFICATE OF SERVICE

I certify that a true and correct copy of my Supplemental Statement of Authority Concerning the November 23, 2026 Decision Deadline was served by email on July 29, 2026 to the Hearing Clerk and to all parties of record in this matter, with a hard copy mailed upon request.

-s- Nicholas Maxwell

Mr. Nicholas R. Maxwell