

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

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

No. AQB 26-57 (P)

MAXWELL'S BRIEF IN RESPONSE TO AUGUST 14, 2026 ORDER

Mr. Maxwell submits this brief in response to the Hearing Officer's August 14, 2026 Order ("Order"). The Order denied reconsideration but separately noted Maxwell's argument that denial of his request potentially creates affirmative-case prejudice in light of the August 24 filing deadline and ordered expedited briefing on the limited filing modification proposed in Section VI of Maxwell's reconsideration motion. *Order* at 2–3.

Maxwell preserves his prior objections but does not reargue discovery here.

Maxwell supports the supplementation procedure stated in the Order. The Order itself identifies 20.1.4.100(F)(2) NMAC as authority for the contemplated limited modification. *Order* at 2–3. Section 20.1.4.100(F)(2) authorizes the Hearing Officer, for good cause and after considering prejudice to other parties and undue delay, to extend the time for filing a document. Section 20.1.4.100(E)(2) further directs the Hearing Officer to conduct a fair and impartial proceeding, fully elicit the facts, avoid delay, and take measures necessary for the efficient, fair, and impartial adjudication of the issues. 20.1.4.100(E)(2), (F)(2) NMAC.

Applicant argues that Section 100(F)(2) permits only an extension and cannot support a supplemental technical filing. *Applicant Resp.* at 3–5. Part 4 does not expressly impose the single, immutable filing limitation Applicant asserts. A "document" includes any "other writing filed in a proceeding," 20.1.4.7(A)(8) NMAC; Section 300(B)(1) establishes the deadline and required contents of a Statement of Intent but does not state that a timely technical filing may

never be supplemented by order; and Section 300(A)(3) expressly authorizes prehearing orders adopting special procedures for managing difficult or complex proceedings, provided those orders are not inconsistent with Part 4. Those provisions operate with the Hearing Officer's authority under Sections 100(E)(2) and (F)(2). The proposed procedure does not create a second unrestricted direct case. It conditionally extends the August 24 technical-filing procedure only as to qualifying information first made available too late for reasonable use, while preserving corresponding protection for other parties.

The limitation underlying that procedure was included in Maxwell's August 3 Motion, which requested "limited supplementation of direct technical testimony and exhibits if materially responsive information is produced too late for reasonable use by August 24." *Maxwell Motion for Expedited Prehearing Disclosure* at 3. The Motion later reiterated that the supplementation provision "applies only to materially responsive information produced too late for reasonable use by August 24," with any supplement confined to the subject matter of the delayed production. *Id.* at 20.

The reconsideration motion carried that same limitation forward and stated it more precisely for the procedure now under consideration: supplementation would be permitted "to the extent, and only to the extent, materially responsive information concerning the subjects of the August 3 Motion is first made available too late for reasonable use in his August 24 filing." *Motion for Reconsideration* at 9. It then proposed the August 28 deadline for information first made available on or before August 24, the five-calendar-day procedure for later information, corresponding protection for NMED and Applicant, and preservation of the September 14 hearing date. *Id.*

Maxwell therefore requests that the final procedure preserve that existing threshold limitation: supplementation would be available only for materially responsive information

concerning the subjects of the August 3 Motion that is first made available too late for reasonable use in the August 24 technical filing.

“Made available” should mean that reasonable access sufficient for review and use has been provided. Mere existence of information, reference to it elsewhere, or a prior request for it should not by itself establish availability. Applicant’s reliance on 20.1.4.200(A)(2) NMAC addresses when the Administrative Record must be forwarded to the Hearing Clerk; that same subsection separately provides that “[t]he Administrative Record is available for public review at all times.” Likewise, “too late for reasonable use” should not turn on a fixed number of days. The relevant considerations are the timing of access and the nature, volume, and technical complexity of the information, including the work reasonably necessary to evaluate it and incorporate its significance into the technical filing. Paragraph (a) itself contemplates this distinction by allowing supplementation through August 28 for information first made available on or before August 24. *Order* at 3.

The procedure does not presume that qualifying late information will exist or authorize supplementation based on speculation. It operates only if materially responsive information actually is first made available too late for reasonable use. NMED itself states that the Administrative Record may continue to develop after August 24 and through September 13. *NMED Resp.* at 3–4.

Any supplement can identify the particular information relied upon, when it was first made available, and why its timing prevented reasonable incorporation into the August 24 filing. The contemplated procedure therefore permits a particularized determination from an actual disclosure rather than assuming in advance either that prejudice will occur or that later procedures will necessarily cure it.

NMED and Applicant have previously argued that simultaneous August 24 technical filings, followed by rebuttal and cross-examination, provide an adequate procedure. They renew that argument here. Applicant contends that Maxwell will receive the Administrative Record and the parties' technical cases on August 24 and can address later information through rebuttal and cross-examination. *Applicant Resp.* at 6–7. NMED similarly argues that rebuttal is the appropriate mechanism for responding to newly disclosed technical matters. *NMED Resp.* at 2.

Those procedures remain available and useful, but they do not perform the same function as Maxwell's affirmative technical filing.

Section 20.1.4.400(A)(1) NMAC places on a person challenging a proposed permit condition, here Maxwell, the burden of going forward to present an affirmative case on that condition. The Amended Scheduling Order requires that case to be filed by August 24 as full written technical testimony with exhibits, opinions, their bases, and technical materials relied upon; failure to file a timely and complete NOI precludes presentation of that technical evidence. Information first made available too late for reasonable use cannot be analyzed, supplied to a witness, incorporated into calculations or exhibits, and used to support that affirmative filing before the filing is due.

Rebuttal may answer material appearing in another party's case, and cross-examination may test that case after disclosure. Neither, however, eliminates the separate burden Part 4 places on Maxwell to affirmatively present his own technical challenge. Section 20.1.4.400(B) (2) NMAC also generally limits technical information introduced during witness examination to information timely placed in the Hearing Record, except for impeachment or rebuttal. Thus, later cross-examination cannot substitute for the opportunity to develop and support the affirmative case required by Section 400(A)(1), and the availability of rebuttal does not eliminate that separate affirmative-case obligation. Maxwell previously explained that “rebuttal and cross-

examination may respond to later-disclosed material, but they do not replace the affirmative case Section 400(A)(1) requires Maxwell to present.” *Motion for Reconsideration* at 7; see also *Maxwell Reply Supporting Motion for Prehearing Requests* at 7–8.

Nor does Maxwell construe the proposed procedure as creating the iterative cycle described by NMED. NMED hypothesizes that a later rebuttal could itself trigger another supplement, followed by another response and further supplementation. *NMED Resp.* at 3.

A new argument, opinion, conclusion, or litigation position does not itself trigger supplementation merely because it appears later or is adverse to Maxwell. The threshold remains materially responsive factual or technical information concerning the subjects of the August 3 Motion that is first made available too late for reasonable use in the August 24 filing. Any post-August 24 supplementation also remains subject to further order necessary to protect response rights, as paragraph (b) of the Order already provides.

The procedure likewise does not give Maxwell additional time at the expense of the other parties without protection. Paragraph (c) expressly allows NMED and Applicant to address qualifying supplementation in rebuttal or request a correspondingly limited adjustment upon a particularized showing. *Order* at 3. NMED’s own alternative proposals illustrate that a limited supplemental technical filing can be administered through subject-matter restrictions, identified supporting information, defined deadlines, and adjusted rebuttal rights. *NMED Resp.* at 4–6.

The precise response deadline may be adjusted if actual supplementation creates a demonstrated need; that possibility is built into Maxwell’s proposal rather than a defect in it.

The proposed supplementation procedure therefore addresses a narrow timing problem without altering the ordinary roles of direct testimony, rebuttal, or cross-examination. Maxwell must still file his August 24 case using information reasonably available for use by that deadline. Any supplement remains confined to materially responsive information concerning the August 3

subjects that became available too late for reasonable use and must identify the qualifying information and basis for supplementation. NMED and Applicant retain the response protections stated in paragraph (c), and the September 14 hearing remains unchanged absent the narrow adjustment contemplated by paragraph (d).

NMED also requests a status conference concerning this issue and several other prehearing matters. *NMED Resp.* at 6–8. Maxwell does not oppose a status conference, provided that it does not delay resolution of the supplementation procedure beyond the point at which meaningful relief can be afforded in relation to the August 24 technical-filing deadline.

NMED's concurrence objection provides no basis to deny the requested procedure. Paragraphs (D)(1) and (3) of 20.1.4.200 NMAC require a motion to state whether it is opposed or unopposed and, for an opposed motion, to state that concurrence was sought and denied or why concurrence was not sought; they prescribe no minimum waiting period after concurrence is requested. Maxwell sought the parties' positions by email at 7:10 p.m. on August 11, attached the contemplated motion, advised that it would be filed the following morning, and disclosed in the motion that concurrence had been sought. *NMED Resp.* at 6–7 & Exs. A–B. NMED identifies no inability to respond or other concrete prejudice caused by the interval between that request and filing; it has now filed a substantive response, proposed two alternative supplementation procedures, and requested a status conference. *NMED Resp.* at 4–8. Treating the concurrence requirement as imposing an unstated minimum consultation period, and denying otherwise available procedural relief because that unwritten period was not observed, would convert a rule requiring disclosure of the parties' concurrence posture into a procedural penalty not contained in Part 4. The concurrence provision should be applied according to its text, particularly where the motion sought expedited relief concerning an Order entered the same day

and an August 24 technical-filing deadline that was then imminent. 20.1.4.200(D)(1), (3) NMAC.

WHEREFORE, Maxwell respectfully requests that the Hearing Officer adopt the supplementation procedure stated in the August 14 Order and clarify that it applies to materially responsive factual or technical information concerning the subjects of Maxwell's August 3 Motion first made available too late for reasonable use in his August 24 technical filing; that information is "made available" when reasonable access sufficient for review and use has been provided; and that "too late for reasonable use" is determined from the timing, nature, volume, technical complexity, and work reasonably necessary to evaluate and incorporate the information. A qualifying supplement should identify the information relied upon, when it was first made available, and the basis for concluding that it could not reasonably have been incorporated by August 24. Maxwell otherwise supports the timing, response-right, and hearing-date provisions stated in the Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of my Brief in Response to August 14 Order was served by email to the Hearing Clerk and all parties of record on August 19, 2026, with a hard copy mailed upon request.

-s- Nicholas Maxwell
Mr. Nicholas R. Maxwell