

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 EXPEDITED MOTION TO RECONSIDER AND VACATE AUGUST  
20, 2026 ORDER OR, IN THE ALTERNATIVE, TO AMEND AND CLARIFY ORDER**

Mr. Maxwell respectfully moves for expedited reconsideration and vacatur of the August 20, 2026 Order denying limited supplementation of his direct technical filing. This Motion is presented pursuant to the Hearing Officer’s authority under 20.1.4.100(E)(2) and the motion practice provided by 20.1.4.200(D) NMAC.

The Order finds that Maxwell “failed to explain” why rebuttal and cross-examination are insufficient; that the requested procedure “finds no support in statute, regulation, or precedent”; that the concern is “speculative and premature”; and that supplementation would prejudice the other parties. *August 20 Order* at 1.

Those stated grounds do not accurately or fully account for the record developed through Maxwell’s August 3 Motion, August 10 Consolidated Reply, August 11 Motion for Reconsideration and Clarification, and August 19 Brief. Maxwell does not seek through this Motion to relitigate the separate determination that formal discovery is unavailable under Part 4. He seeks reconsideration and vacatur of the August 20 Order because the narrower supplementation issue was presented on materially different premises than the Order reflects.

**I. THE RECORD SHOWS THAT MAXWELL EXPLAINED WHY REBUTTAL AND CROSS-EXAMINATION DO NOT SUBSTITUTE FOR HIS AFFIRMATIVE TECHNICAL CASE.**

The August 20 Order finds that Maxwell “failed to explain” why rebuttal and cross-examination are insufficient. The record contains that explanation at multiple stages.

The August 3 Motion explained that 20.1.4.400(A)(1) NMAC places upon a person challenging a proposed permit condition the burden of going forward with an affirmative case, while § 400(B)(2) generally limits technical information introduced during witness examination to information timely placed in the Hearing Record, except for impeachment and rebuttal. It therefore explained that later questioning does not cure an inability to obtain and use technical material needed for an affirmative case due August 24. *Aug. 3 Mot.* III.E, p. 11.

The Motion further explained that information first disclosed in NMED's or Applicant's August 24 filing cannot beforehand be reviewed, supplied to a witness, analyzed, incorporated into calculations, or used in Maxwell's filing due that same day. Cross-examination may test a disclosed basis, but it cannot provide the prefiling access necessary to develop the affirmative case. *Id.* V.E, pp. 18-19.

The August 10 Consolidated Reply again stated that rebuttal "follows, rather than substitutes for," the affirmative case required by § 400(A)(1), and that later cross-examination cannot supply the missing prefiling opportunity. *Aug. 10 Reply* II.A, pp. 7–8.

The August 11 Motion for Reconsideration then expressly relied upon that prior explanation. Section V cited the Reply at pages 7–8 for the concrete prejudice created by same-day disclosure and stated that "[r]ebuttal 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." *Aug. 11 Mot.* V, p. 7. Section V therefore cannot accurately be read in isolation from the prior record it expressly invoked. It was a reconsideration argument built upon the already-filed Reply, not an attempt to restate that briefing in full.

The August 19 Brief then directly addressed NMED's and Applicant's renewed reliance on rebuttal and cross-examination and expressly cited those prior arguments. *Aug. 19 Br.* at 4–5.

The explanation was thus presented in the August 3 Motion, developed further in the August 10 Reply, expressly invoked in the August 11 reconsideration motion, and presented again in the August 19 Brief. The Hearing Officer may reject that explanation. The record does not support a finding that Mr. Maxwell failed to provide it.

## **II. THE TIMING PROBLEM WAS CONCRETE AND TIED TO IDENTIFIED INFORMATION MAXWELL HAD ALREADY SOUGHT.**

The August 20 Order also characterizes the concern as “speculative and premature.” The record shows a specific timing problem.

On July 30, Maxwell filed a Notice of Second Request for Administrative Record, stating that he had submitted a second IPRA request seeking immediate inspection of seven identified categories, including the complete July 13–16 Applicant exchange, additional technical submittals supporting Condition A107, the complete modeling archive, permit-folder tracking and index records, and existing operational and monitoring plans. *Maxwell Notice of Second Request for Administrative Record* at 1.

The August 3 Motion then identified the relevant materials more specifically, including NMED’s July 13 communication, Applicant’s July 16 response and attachments, the native SSM calculation, existing CDS process information and purge procedures, and clarification of the per-CDS versus facility-wide quantities. *Aug. 3 Mot.* at 3.

Those materials related to identified issues in proposed Conditions A107 and A110. Among them, the public SSM worksheet used 95 CDS units to calculate 780,900 scf for startup and 520,600 scf for maintenance, while A107.D appeared to treat those same figures as quantities for an event at one CDS. *Id.* IV.A, p. 12. The Motion also identified unresolved assumptions underlying the proposed 0.34-tpy limitation. *Id.* IV.B, pp. 12–13.

The August 10 Reply additionally placed the August 24 deadline within Part 72's separate public-review timeline. It explained that 20.2.72.206(A)(3) and (B)(1)–(2) provide interested persons a thirty-day opportunity to review and comment on the Department's analysis and to request a public hearing, and that the Department's July 29 release of the Draft Permit, Statement of Basis, and Modeling Review Report placed the August 24 technical-filing deadline before that thirty-day period had run. Maxwell did not contend that the Part 4 proceeding could not begin during that period; his point was that requiring a complete affirmative technical case before the review opportunity expired could make that opportunity functionally hollow. *Aug. 10 Reply* at 8–9.

The record therefore presented both a concrete information-access problem and an separate regulatory timeline against which the August 24 deadline operated. Whether any particular later disclosure ultimately warranted supplementation remained for a particularized determination; the timing concern itself was not speculative.

### **III. THE ORDER DOES NOT ADDRESS THE REGULATORY AUTHORITY, RELEVANT PRECEDENT, OR PROTECTIVE PROCEDURES ACTUALLY PRESENTED.**

The August 20 Order states that supplementation “finds no support in statute, regulation, or precedent.” *August 20 Order* at 1. Maxwell's August 19 Brief expressly relied upon 20.1.4.100(F)(2), 20.1.4.100(E)(2), 20.1.4.300(A)(3), and the Part 4 definition of “document.” *Aug. 19 Br.* at 1–2. The August 14 Order itself described the proposed relief as a “limited modification of the August 24th filing deadline under 20.1.4.100(F)(2) NMAC” and set forth a specific procedure for briefing. *August 14 Order* at 2–3. The filed August 19 Brief specifically explained how those provisions operated together and why the requested procedure did not create an unrestricted second direct case. *Aug. 19 Br.* at 1–2.

The August 20 Order’s procedural recital identifies Maxwell’s request for limited supplementation and the responses filed by Applicant and NMED, but does not identify Maxwell’s August 19 Brief or Bruce Wetherbee’s August 19 Response to the expedited-briefing order. Although the Order states generally that the Hearing Officer reviewed “all of the pleading filed,” it does not discuss either filing. Maxwell’s Brief addressed the precise supplementation procedure ordered for briefing, while Wetherbee expressly supported Maxwell’s four limited modifications as a minimum procedural safeguard. *Aug. 19 Br.* at 1–6; *Wetherbee Resp.* at 1–2.

The record also repeatedly cited *Southwest Organizing Project v. Albuquerque-Bernalillo County Air Quality Control Board*, 2021-NMCA-005, ¶¶ 25–27 (“SWOP”). Maxwell expressly acknowledged that *SWOP* arose under a local procedural rule and therefore does not decide the precise scope of formal discovery under Part 4. *Aug. 3 Mot.* at 6–7.

The August 10 Reply identified the narrower relevance of *SWOP*: although the case did not establish Part 4 discovery authority, the Court rejected the contention that prefiled technical testimony necessarily made discovery unnecessary and recognized the function of filling information gaps and resolving underlying issues. *Aug. 10 Reply* at 13–14; *SWOP*, 2021-NMCA-005, ¶ 27.

The Hearing Officer has since determined that formal discovery is unavailable in this proceeding. Maxwell does not seek reconsideration of that issue here. But *SWOP*’s treatment of prefiled technical testimony remains relevant to the distinct premise now adopted in the August 20 Order—that later rebuttal and cross-examination are sufficient to address the information gap identified in Sections I and II.

The August 12 discovery Order did not substantively address *SWOP*. Neither did the August 14 Order when it separately recognized Maxwell’s affirmative-case concern and ordered

briefing on supplementation. The August 20 Order now relies expressly upon rebuttal and cross-examination but again does not engage that authority.

The related issue is also now before the New Mexico Supreme Court in New Energy Economy's extraordinary-writ proceeding arising from AQB 26-57(P). NEE expressly relies upon *SWOP* in challenging the categorical denial of discovery and identifies the resulting inability to obtain technical information before direct expert testimony is due. *NEE Emergency Writ* at 13–14.

Maxwell does not ask the Hearing Officer to anticipate the Supreme Court's disposition; the point is that *SWOP* is relevant authority already presented in this proceeding and directly bears upon the rationale now employed by the August 20 Order.

Finally, the August 14 procedure expressly protected the other parties by allowing NMED and Applicant to address supplementation in rebuttal or seek a correspondingly limited adjustment upon a particularized showing, while preserving the September 14 hearing date absent demonstrated prejudice. *August 14 Order* at 3. Maxwell's filed August 19 Brief accepted those protections and further explained that a qualifying supplement would remain confined to the August 3 subjects and would identify the qualifying information and basis for supplementation. *Aug. 19 Br.* at 5–6.

The Hearing Officer may conclude that the cited regulations, precedent, and safeguards are insufficient. The August 20 Order does not explain why.

**IV. THE AUGUST 20 ORDER SHOULD BE RECONSIDERED AND VACATED; AT MINIMUM, ANY DENIAL BASED UPON PREMATURETY SHOULD BE WITHOUT PREJUDICE.**

The defects above go to the stated grounds for the Order itself. Maxwell therefore requests that the August 20 Order be reconsidered and vacated and that the limited supplementation procedure identified for briefing in the August 14 Order be adopted, or that the

supplementation request otherwise be resolved upon the arguments and authorities actually presented.

Alternatively, if the Hearing Officer remains persuaded that prospective relief is premature because no particular qualifying late disclosure has yet occurred, that rationale supports denial without prejudice, rather than a categorical determination that later rebuttal and cross-examination will necessarily be sufficient.

The August 19 Brief expressly limited supplementation to materially responsive factual or technical information concerning the subjects of the August 3 Motion actually first made available too late for reasonable use. It further explained that any supplement could identify the particular information relied upon, when it was first made available, and why its timing prevented reasonable incorporation into the August 24 filing. *Aug. 19 Br.* at 2–3.

A particularized request following an actual disclosure would permit the Hearing Officer to determine good cause, prejudice, scope, and any corresponding protection on concrete facts rather than in advance. If the request is presently premature because the triggering disclosure has not yet occurred, the appropriate consequence is denial without prejudice to a particularized request upon an actual disclosure—not a categorical determination that rebuttal and cross-examination will necessarily provide an adequate cure regardless of what is later disclosed.

## **V. EXPEDITED DISPOSITION IS WARRANTED.**

Maxwell's complete direct technical filing is due August 24. Expedited disposition is therefore necessary if reconsideration and vacatur are to remain meaningful.

Maxwell does not seek postponement of the September 14 hearing. If this Motion cannot reasonably be resolved before August 24, Maxwell alternatively requests a limited adjustment of his August 24 filing deadline under 20.1.4.100(F)(2) NMAC sufficient to preserve meaningful

consideration of the requested relief, with corresponding protection for any other party upon a particularized showing of prejudice.

## **VI. CONCURRENCE.**

Pursuant to 20.1.4.200(D)(3) NMAC, Maxwell sought the positions of the parties and counsel. NMED and Applicant have indicated opposition to this Motion. No other party indicated a position.

The motion is opposed.

## **REQUEST FOR RELIEF**

WHEREFORE, Maxwell respectfully requests that the Hearing Officer:

1. reconsider and vacate the August 20, 2026 Order;
2. upon vacatur, adopt the limited supplementation procedure addressed in the August 14 Order, subject to appropriate protections for other parties;
3. alternatively, vacate and replace the August 20 Order with an order denying prospective supplementation without prejudice to a particularized motion based upon an actual qualifying late disclosure;
4. if the Hearing Officer declines vacatur, amend and clarify the August 20 Order to accurately address Maxwell's explanation concerning rebuttal and cross-examination, the concrete timing problem presented, the cited regulatory authority and *SWOP*, and the protective procedures already before the Hearing Officer;
5. correct the August 20 Order's reference to Permit No. 10833 to Permit No. 10883; and
6. grant such limited procedural adjustment as is necessary to permit meaningful disposition of this expedited Motion.

The request is based upon the stated grounds of the August 20 Order and their relationship to the arguments, authority, and record actually presented. The Hearing Officer

may ultimately reject Maxwell's position, but the ruling should do so upon an accurate account of that record and the reasons for rejecting it.

Respectfully submitted,

By -s- Nicholas Maxwell  
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### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of my Expedited Motion to Reconsider and Vacate August 20, 2026 Order, or, in the Alternative, to Amend and Clarify Order was served by email to the Hearing Clerk and all parties of record on August 20, 2026, with a hard copy mailed upon request.

-s- Nicholas Maxwell  
Mr. Nicholas R. Maxwell