STATE OF NEW MEXICO
NEW MEXICO WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF PROPOSED
AMENDMENTS to 20.6.8 NMAC –
Ground and Surface Water Protection – Supplemental Requirements for Reuse of Treated Produced Water,

No. WQCC 25-34(R)

Water Access Treatment & Reuse Alliance,
Petitioner.

WELC'S MOTION FOR RECONSIDERATION OF COMMISSION DECISION TO GRANT REQUEST FOR HEARING

Preliminary Statement

Western Environmental Law Center (WELC) hereby moves for reconsideration of the Water Quality Control Commission's (Commission) July 8, 2025 decision to hold a hearing in this matter. During Commission deliberations on the request for hearing, a number of Commissioners raised concerns about moving forward with the Petition in this case if the New Mexico Environment Department (NMED) was not going to participate in the rulemaking. Against all precedent, NMED had not entered an appearance in this matter and NMED staff did not appear to give NMED's position at the Commission meeting.

While Commissioners raised concerns about holding a hearing without NMED participation, NMED Secretary Kenney, appearing as a Commission member for the first time, did not commit that NMED staff would participate in the rulemaking. *See* WQCC July 8, 2025 meeting video, 1:06:27 to 1:07:24, 1:09:58 to 1:14:40, 1:18:38 to 1:18:15, https://www.youtube.com/watch?v=VFEjIjeMGDo.

To date, NMED has not entered an appearance in this matter, and there is no indication it intends to do so.

NMED scientists spent several years analyzing the safety of discharge of treated produced water to ground and surface water, and spent the last year and a half vigorously supporting a rule to prohibit discharge of treated produced water, a rule that became effective only three weeks ago. NMED is the constituent agency that would implement any rule promulgated in this proceeding. The Commission should not move forward with the Petition in this matter – which would authorize discharge of treated produced water to New Mexico ground and surface waters – without the benefit of NMED expertise in the rulemaking. WELC respectfully requests the Commission reconsider its decision in light of NMED's absence from the rulemaking and not proceed with a hearing in this matter.[1]

Argument

I. THE HEARING SHOULD NOT GO FORWARD WITHOUT NMED'S PARTICIPATION

The Water Access Treatment & Reuse Alliance (WATR) proposes in its Petition to repeal most of the rule at 20.6.8 NMAC that the Commission just promulgated in WQCC No. 23-84(R). NMED staff had been working on a rule to prohibit discharge of treated and untreated produced water since at least 2022. NMED Ex. 2 at 14 (WQCC No. 23-84(R)). After NMED filed its petition for rulemaking in WQCC No. 23-84(R), five NMED scientists filed written testimony – totaling almost 300 pages -- in support of a prohibition against discharge of produced water to ground and surface water. NMED's experts were clear and unequivocal: Given the current state of the science and technology, discharge of even **treated** produced water is not safe. As NMED Surface Water Quality Bureau Produced Water Project Manager Lei Hu,

[1] WELC did not seek concurrence in this motion pursuant to Commission rules because WATR has already made its position clear that it opposes any objection to its Petition going to hearing. 20.1.6.207(B) NMAC.

Ph.D., put it:

> Overall, there is a significant lack of robust data regarding the characterization of untreated and treated produced water, treatment methodologies, effluent quality, and the management of treatment waste streams. **Given the variability and unknowns, the Department has determined that allowing the discharge of treated or untreated produced water into the environment is premature and cannot currently be done in a way that complies with the Water Quality Act.**

NMED Ex. 179 at 004662 (WQCC No. 23-84(R)) (emphasis added).[2]

Moreover, NMED permitting staff explained the practical and legal difficulties their bureaus would face if applications for permits to discharge treated produced water were submitted and no prohibition was in place. Both Ground Water Quality Bureau and Surface Water Quality Bureau staff faced permits being issued that, in their view, would not protect human health and the environment. NMED Ex. 3 at 34-35; NMED Ex. 6 at 12-15 (No. WQCC 23-84(R)). While in the opinion of NMED permitting staff, permits to discharge treated produced water would not be protective, NMED is the constituent agency that would issue discharge permits pursuant to any rule promulgated in this rulemaking.

During the Commission's deliberations whether to grant WATR's hearing request, several Commissioners voiced concerns about holding a hearing without NMED staff participation. Commissioners were concerned that the Commission would not have "full information" without NMED participation, that there wouldn't be "a point" to holding a hearing if NMED weren't a party, and that it was "odd" for NMED not to participate considering the rule places a lot of responsibility on NMED to implement it. WQCC July 8, 2025 meeting video,

[2] In fact, Rick McCurdy, an expert for the New Mexico Oil and Gas Association, agreed with this conclusion of Dr. Hu's, 8/9/24 Tr. 55:19 to 56:13 (No. WQCC 23-84(R)), as of course did the Commission, which found that, "Insufficient evidence exists at this time to ensure that discharges of untreated or treated produced water are protective of human health or the environment." WQCC SOR ¶ 19 (WQCC No. 23-84(R)).

1:09:58 to 1:12:32, 1:18:38 to 1:19:20, 50:40-48, https://www.youtube.com/watch?v=VFEjIjeMGDo.

Although asked several times by Commissioners whether NMED would participate in the hearing, Secretary Kenney would not commit that NMED staff would participate in the hearing. WQCC July 8, 2025 meeting video, 1:06:27 to 1:07:24, 1:09:58 to 1:14:40, 1:18:38 to 1:18:15, https://www.youtube.com/watch?v=VFEjIjeMGDo.

To date, NMED has not entered an appearance in this proceeding, and there is no indication it will do so.

The Commission cannot effectively move forward with this rulemaking without NMED's participation. It is imperative for the Commission to hear from NMED permitting staff on the efficacy of implementing the rule proposed by WATR. It is imperative that the Commission hear, again, from NMED experts whether, in their opinion, discharge of treated produced water to ground and surface water as proposed by WATR can be done consistently with the requirements of the Water Quality Act and Commission's rules at 20.6.2 and 20.6.4 NMAC.

NMED staff are charged with implementing the Water Quality Act and the Commission's rules and protecting human health and the environment. WATR is not. WATR is an industry-led organization fueled by its members' interests. It is not an independent scientific organization like NMED charged with ensuring that New Mexico water resources are protected. It is critical that the Commission – also charged with protecting human health and the environment -- hear from NMED staff whether, in their professional judgment, WATR's proposals adequately protect the state's water resources.

Upon information and belief, there has never been a rulemaking before this Commission in which NMED has not participated since the Commission's establishment 58 years ago in

1967. NMED's decision not to participate in this hearing is not only highly unusual, it is highly disturbing. NMED always participates in rulemakings before the Commission, either as a petitioner or a third party, when it is the implementing constituent agency. Why then – after successfully working for years on a prohibition against discharge of treated produced water, and after having submitted several hundred pages of technical testimony and thousands of pages of exhibits demonstrating that discharge is not safe – would NMED not participate in a rulemaking seeking the specific actions NMED staff has strongly and consistently opposed as a threat to human health and the environment?

NMED's failure to participate in this proceeding points in one direction and one direction only: NMED management is not allowing scientists to participate given that they are on record that discharge of treated produced water is not safe. NMED scientists should not be silenced.

However any individual Commissioner thinks about the issues raised by the Petition, no Commissioner should agree to move forward with the Petition – which raises serious risks to human health and the environment – without the participation of NMED staff scientists. It is not workable – or in the public interest – that this rulemaking go forward without the benefit of NMED staff's expertise.

Conclusion

For the foregoing reasons, WELC respectfully requests the Commission to reconsider its decision to hold a hearing in this matter and to deny the request for hearing.

Respectfully submitted,

/s/ Tannis Fox
Tannis Fox
Western Environmental Law Center
409 East Palace Avenue, #2
Santa Fe, New Mexico 87501
505.629.0732

fox@westernlaw.org

Attorney for Western Environmental Law Center

Certificate of Service

I certify a copy of the foregoing pleading was emailed to the following on August 4, 2025:

Pamela Jones
Commission Administrator
1190 Saint Francis Drive, Suite S2102
Santa Fe, New Mexico 87505
Pamela.jones@state.nm.us

Jennifer Bradfute
Matthias Sayer
Bradfute Consulting & Legal Services d/b/a
Bradfute Sayer P.C.
P.O. Box 90233
Albuquerque, New Mexico 87199
jennifer@bradfutelaw.com
matthias@bradfutelaw.com

Colin Cox
Gail Evans
The Center for Biological Diversity
1025 ½ Lomas NW
Albuquerque, New Mexico 87102
ccox@biologicaldiversity.org
gevans@biologicaldiversity.org

Mariel Nanasi
Senior Attorney and Executive Director
New Energy Economy
422 Old Santa Fe Trail
Santa Fe, New Mexico 87501
MNanasi@NewEnergyEconomy.org

Tim Davis
WildEarth Guardians
301 North Guadalupe Street, Suite 201
Santa Fe, New Mexico 87501
tdavis@wildearthguardians.org

Mario Atencio
mpatencio@gmail.com

Daniel Tso
detso49@gmail.com

Bruce Wetherbee
60 Thoreau Street, Unit 103
Concord, Massachusetts 01742
editor@thecandlepublishing.com

Nick Maxwell
P.O. Box 1064
Hobbs, New Mexico 88241
inspector@sunshineaudit.com

Adam Rankin
Chris Mulcahy
Lila C. Jones
Holland and Hart, LLP
110 North Guadalupe, Suite 1
Santa Fe, New Mexico 87501
AGRankin@hollandhart.com
CAMulcahy@hollandhart.com
LCJones@hollandhart.com

Jeffrey J. Wechsler
Kari E. Olson
Sharon T. Shaheen
Spencer Fane, LLP
P.O. Box 2307
Santa Fe, New Mexico, 87504
jwechsler@spencerfane.com
kaolson@spencerfane.com
sshaheen@spencerfane.com

Jolene L. McCaleb
Elizabeth Newlin Taylor
TAYLOR & McCaleb, P.A.
P.O. Box 2540
Corrales, New Mexico 87048-2540
jmccaleb@taylormccaleb.com
etaylor@taylormccaleb.com
sherbst@taylormccaleb.com

Eduardo Ugarte, II
Assistant Attorney General
New Mexico Department of Justice
P.O. Box 1508
Santa Fe, New Mexico 87504
eugarte@nmdoj.gov

/s/ Tannis Fox
Tannis Fox