

**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.

**AMIGOS BRAVOS, SIERRA CLUB, AND WESTERN ENVIRONMENTAL LAW
CENTER’S MOTION TO DISQUALIFY SEVEN COMMISSIONERS AND THEIR
DESIGNEES AND VACATE COMMISSION VOTE GRANTING
WATR’S REQUEST FOR HEARING**

Preliminary Statement

Amigos Bravos, Sierra Club, and Western Environmental Law Center (“WELC”) move to disqualify seven members of the Water Quality Control Commission (“Commission”) and their designees on the ground that their “impartiality [or] fairness may reasonably be questioned” and disqualification is required under the Commission’s rules. 20.1.6.102 NMAC; *accord Reid v. N.M. Bd. of Exam’rs of Optometry*, 1979-NMSC-005, ¶ 7, 92 N.M. 414; *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n*, 2006-NMCA-115, ¶ 40, 140 N.M. 464. Each of the seven Commissioners or their supervisor is a cabinet secretary appointed by the Governor and each has been directed by the Governor’s Office to make sure the Petition in this matter gets “over the finish[] line.” July 7, 2025 email correspondence between C. Buerkle, J. Kenney, *et al.* [Ex. 1].¹ This direction strikes at the core of each Commissioner’s duty of fairness and

¹ Movants move to disqualify Environment Department Secretary James Kenney, Department of Agriculture Secretary Jeff Witte, Department of Game and Fish Director Michael Sloane, Department of Health Secretary Gina DeBlassie, and State Engineer Elizabeth Anderson, along with Oil Conservation Division Director Albert Chang and State Parks Director Toby Velasquez, both of whom are supervised by Energy, Minerals and Natural Resources Department Secretary Melanie Kenderdine, who was part of the July 7 email chain and “huddle.” These

impartiality and their obligation not to prejudge the outcome of a rulemaking petition. 20.1.6.102 NMAC; *accord Reid*, 1979-NMSC-005, ¶ 7.

The direction from the Governor’s Office came one day before the Commission was scheduled to vote on Petitioner’s request for hearing. During the Commission’s July 8, 2025 meeting, all six executive branch Commissioners in attendance voted to grant the request for hearing.² But under the Commission’s own rule, those Commissioners were not impartial and should have recused themselves from the vote. The July 8 vote granting the request for hearing is irreversibly tainted and must be vacated.³

Background

I. THE COMMISSION’S FIRST PRODUCED WATER RULEMAKING

In WQCC No. 23-84(R) (“First Produced Water Rulemaking”), initiated December 2023, the New Mexico Environment Department (“NMED”) proposed to prohibit discharge of treated and untreated produced water to ground and surface water. Five NMED scientists supported the prohibition with hundreds of pages of robust technical testimony and thousands of pages of exhibits. Dr. Lei Hu, whose Ph.D. dissertation from New Mexico State University concentrated on characterization and treatment, succinctly summed up NMED’s position when he testified that:

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**

Commissioners are the statutorily designated Commission members within the executive branch. NMSA 1978, § 74-6-3(A)(1)-(7).

² [WQCC July 8, 2025 meeting video](#), 2:01:20 to 2:02:10.

³ Pursuant to 20.1.6.207.C NMAC, Movants contacted all parties: Center for Biological Diversity, New Energy Economy, and WildEarth Guardians support the motion; Mr. Atencio and Mr. Weatherbee do not oppose the motion; and Independent Producers Association of New Mexico, New Mexico Oil and Gas Association, OXY USA, Inc., Permian Basin Petroleum Association, Select Water Solutions, Inc., and WATR Alliance oppose the motion.

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 (emphasis added) (WQCC No. 23-84(R)). Even expert witness for the New Mexico Oil and Gas Association, Rick McCurdy, Vice-President of Select Water Solutions, Inc., agreed with Dr. Hu’s assessment. 8/9/24 Tr. 55:19 to 56:13 (WQCC No. 23-84(R)).

During the May 2025 deliberations, the Commission voted unanimously to uphold NMED’s proposed prohibition, disallowed “industrial projects,” authorized non-discharging pilot projects to study characterization and treatment of produced water pursuant to an NMED-issued permit, and sunset the rule in five years. *See generally* Commission SOR (WQCC 23-84(R)).

The Commission found:

Due to the complexity of produced water and remaining unknowns, at this time there is no scenario where a person could discharge treated produced water in a protective, predictable, and reliably safe manner that meets the requirements of the WQA and the PWA.

Id. ¶ 81. The Commission’s well-reasoned decision struck an appropriate balance between the current state of the science -- that discharge of treated produced water is not yet safe – and the recognition that the science and technology continue to evolve. The Commission’s new rule at 20.6.8 NMAC was to become effective July 12, 2025.

II. THE COMMISSION’S JULY 8 VOTE GRANTING WATR’S REQUEST FOR HEARING AND AUGUST 12 MEETING

The ink on the Commission’s new rule had not dried when, on June 23, 2025, the Water Access Treatment & Reuse Alliance (“WATR”), an oil and gas industry backed group, filed its Petition proposing a rule that would reverse the rule adopted by the Commission only weeks before. WATR proposes a rule that would allow discharge of treated produced water to both surface and ground water. In the Commission’s nearly 60 year history, there has never been a

petition, third-party or otherwise, filed seeking to overturn a rule just passed by the Commission, a rule that was the subject of an 18-month long complicated, time and resource intensive process.

The Commission set WATR's request for hearing to be heard during its July 8 meeting. WELC and other environmental non-profit organizations ("E-NGOs") filed objections.

Although a number of Commissioners expressed skepticism with moving forward with WATR's Petition during the July 8 meeting, Commission members -- including all those within the executive branch -- voted 10 to 0 to grant WATR's request for hearing. [WQCC July 8, 2025 meeting video](#), 2:01:20 to 2:02:10. The six executive agency Commissioners in attendance, constituting a majority of the vote, voted to grant the request for hearing. *Id.*⁴

Prior to the Commission's August 12, 2025 meeting, WELC and other E-NGOs filed more objections to WATR's Petition. Five cabinet secretaries appeared at that meeting: Secretary Kenney, Department of Agriculture Secretary Witt, Department of Game and Fish Director Sloane, Department of Health Secretary DeBlassie, and State Engineer Elizabeth Anderson, a first in Commission history as far as can be discerned. While these five are statutorily-designated Commission members, in practice, over the course of the Commission's history, cabinet secretaries routinely designate experienced staff to sit as Commissioners, as these cabinet secretaries have done over the course of the current administration. All five voted in lockstep to deny WELC's and the other E-NGOs' objections. [WQCC Aug. 12, 2025 meeting video](#), 4:02:53 to 4:04:16 & 4:52:13 to 4:54:00.

⁴ The executive agency Commissioners in attendance included statutorily designated Commissioners Secretary Kenney and State Parks Division Director Toby Velasquez and the following designees: Department of Agriculture designee Katie Laney, Department of Game and Fish designee Kirk Patten, Department of Health designee Chelsea Langer, and State Engineer designee Katie Zemlick. [WQCC July 8, 2025 meeting video](#), 2:01:20 to 2:02:10. (Oil Conservation Division Director designee Christopher Moander was absent.)

III. THE EMAILS BETWEEN THE GOVERNOR’S OFFICE AND THE CABINET SECRETARIES

What was not known publicly during the Commission’s July 8 and August 12 meetings was that the five cabinet secretaries; Energy, Minerals, and Natural Resources Department Secretary Melanie Kenderdine, who supervises two statutorily designated Commission members -- the State Parks Division Director and the Oil Conservation Division (“OCD”) Director; and the Governor’s Office had “huddled” to discuss the Governor’s support for WATR’s Petition. Email correspondence between the cabinet secretaries and high level officials within the Governor’s Office⁵ has since come to light. The day before the Commission’s July 8 meeting, Secretary Kenney wrote:

Good morning –

You (or your designee) or someone who works for you serve on the Water Quality Control Commission (WQCC). As discussed in the Climate, Energy and Natural Resources Huddle, the administration is supportive of the produced water reuse petition which the WQCC will administratively take up tomorrow. The Commissioners will vote to accept or decline the petition and assign a hearing officer. Following the petition acceptance, a hearing officer will be assigned. Currently, NMED has one hearing officer, Felicia Orth. Once the hearing officer is assigned, that person will reach out to WQCC members about scheduling the in-person hearing. The preferred location for the hearing is Lea or Eddy County for two weeks in late October or early November. **Per the GO, the statutorily named person to the WQCC will need to participate vs your designee. Please discuss this petition [with] your designee or those who work for you.** Any concerns about the petition can be addressed during the fall hearing. **Please reach out to me if your staff have concerns about the petition** or if you are asked to meet with industry or NGOs about it.

The agenda for the WQCC hearing is attached for your reference. There is a public comment portion of the agenda tomorrow where I would expect pro/con members of the public to speak. In addition, state legislators are already weighing in support of the petition and holding the hearing in Jal.

Thank you,
Secretary Kenney (he/him)

⁵ Those officials included the Governor’s Chief of Staff, General Counsel, Deputy Chief Operating Officer, and Infrastructure Advisor. *See* Ex. 2.

New Mexico Environment Department

July 7, 2025 email correspondence between C. Buerkle, J. Kenney, *et al.* [Ex. 1] (emphasis added). The Governor’s Deputy Chief Operating Officer responded:

Thank you, Secretary. **As per our huddle discussion, we need everyone’s commitment to get this over the finished [sic] line.**

Id. (emphasis added). The Governor’s Office clearly directed the five statutorily-designated cabinet members on the Commission and the EMNRD Secretary, who supervises two statutorily-designated members, to “commit” to approve WATR’s Petition.

Legal Standard

The Commission’s own rules set the standard by which the Commission must abide:

No commission member shall participate in any action in which his or her impartiality [or] fairness may reasonably be questioned, and the member shall recuse himself or herself in any such action by giving notice to the commission and the general public by announcing this recusal on the record.

20.1.6.102 NMAC; *accord* 20.1.6.100.B NMAC (hearing officer has authority to take all measures necessary for “fair and impartial consideration of issues” in Commission rulemakings).

The standard for recusal set by the Commission is an objective one, based on whether a reasonable person would question a commissioner’s impartiality or fairness, and is rooted in principles of due process.

The Commission’s standard in 20.6.1.102 NMAC has not been interpreted by New Mexico courts but is consistent with standards our state courts have applied in other administrative contexts. In *Reid v. N.M. Bd. of Optometry Exam’rs*, a seminal case in New Mexico administrative law, the New Mexico Supreme Court held that, “At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case.” 1979-NMSC-005, ¶ 7; *Phelps Dodge Tyrone*,

2006-NMCA-115, ¶ 40 (same).

Reid was a professional licensing case, but the touchstones of fairness and impartiality are the same as those in the Commission's rules. There, prior to a licensing hearing, a licensing board member stated that an optometrist before the board "would be losing his license soon anyway, or wouldn't be practicing soon anyway" *Id.* ¶ 4. The board member admitted making the statement, but testified he could render a fair and impartial decision. *Id.* The court was not convinced:

. . . our system of justice requires that the **appearance** of complete fairness be present. The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

Id. ¶ 7 (emphasis added). Despite the board member's testimony that he could be fair and impartial, the court found the appearance of "prejudgment" was not cured. *Id.* ¶ 9. While actual bias or prejudice renders a decision invalid; the standard is higher. Fundamental to this body of New Mexico law is the premise that "our system of justice requires that the **appearance** of complete fairness be present." *Id.* ¶ 7 (emphasis added). Public confidence in Commission decision-making is critical to its legitimacy.

Finally, Commissioners must base their administrative decisions on the record and the evidence before them; they may not base their decisions on matters outside the record. *See Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 42, 138 N.M. 625; NMSA 1978, § 74-6-7(B)(2) (Commission decisions must be based on "substantial evidence in the record").

Argument

I. THE SEVEN STATUTORILY DESIGNATED COMMISSIONERS MUST BE DISQUALIFIED

While the Governor has the authority to set policy for her executive agencies, her office does not have a right to direct how her cabinet secretaries or their subordinates will vote in a specific matter before the Commission or any other administrative tribunal charged with deciding issues fairly and impartially based on the evidence before them. In this case, the Governor's Office crossed the line between appropriately setting executive policy, and improperly interfering in an administrative rulemaking in which impartial Commissioners must base their decisions on the record.

Under the Commission's own rules, Commissioners' impartiality and fairness cannot "reasonably be questioned." This means Commissioners may not prejudge the outcome of a rulemaking prior to hearing, *Reid*, 1979-NMSC-005, ¶ 7, and may not base their decision on matters outside the record, *Gila Res. Info. Project*, 2005-NMCA-139, ¶ 42, as assessed by an objective, reasonable person standard.

In this regard, the July 7 emails between the Governor's Office and the cabinet secretaries leave no doubt that the Governor's Office directed the cabinet secretaries to approve WATR's Petition. Secretary Kenney made it clear – per their prior "huddle discussion" – that the Governor supports "the produced water reuse petition which the WQCC will administratively take up tomorrow." For the vote the next day, Secretary Kenney was clear that the cabinet secretaries must "discuss this petition [with] your designee or those who work for you" and vote the right way. And, if their designees had concerns, the cabinet secretaries were to discuss those with Secretary Kenney. July 7, 2025 email correspondence between C. Buerkle, J. Kenney, *et al.* [Ex. 1]. As it turned out, some designees did express concerns at the meeting, but the Secretary

had already advised that such concerns should be disregarded and could be addressed at hearing. *Id.*

For the hearing itself, Secretary Kenney was clear that the seven statutorily designated Commission members must attend the two week hearing, then anticipated to be held in October or November in Lea or Eddy County: “Per the GO, the statutorily named person to the WQCC will need to participate vs your designee.” *Id.* Requiring five cabinet secretaries and two division directors to attend a two week hearing in Jal is quite an order. Cabinet secretaries and division directors are busy people. This unusual directive to the seven statutorily designated Commission members underscores that they had no discretion but to approve WATR’s Petition. A decision on the Petition was not going to be left to lower level, classified state employees.

And, as if Secretary Kenney’s message weren’t clear enough, the Governor’s Deputy Chief Operating Officer gave marching orders for “everyone’s commitment” – no exceptions -- to get the Petition across “the finish[] line.”

There is no room for ambiguity interpreting the directive coming from the Governor’s Office. The statutorily designated Commission members were required to make sure WATR’s Petition was approved – regardless of the evidence at hearing, the basis upon which Commissioners are supposed to make their impartial and fair decisions. Each of the seven officials are Governor “exempt” employees who can be fired at will by the Governor. It is not reasonable to expect they would vote any other way but to approve WATR’s Petition. This is a clear cut case of prejudgment of the Petition that, like in *Reid*, cannot be cured by representations that the Petition will be judged impartially and fairly. The seven statutorily designated Commission members must be disqualified.

II. DESIGNEES OF THE STATUTORILY DESIGNATED COMMISSIONERS MUST BE DISQUALIFIED

Furthermore, the impropriety of the directive from the Governor's Office cannot be cured through delegation down to other executive agency employees. It is too much to expect that lower level employees, who report directly or indirectly to their cabinet secretaries would disregard or defy instructions from the Governor's Office and not approve WATR's Petition. In fact, it would be unreasonable to place lower level employees in such position, knowing the result their bosses and the Governor's Office want. Indeed, during the July 8 vote, all designees present voted to grant WATR's Petition to move forward,⁶ even those who expressed reservations about holding a second produced water rulemaking on the heels of the first.

The Commission's rule of recusal is not discretionary; it is mandatory: "No commission member **shall** participate in any action in which his or her impartiality [or] fairness may reasonably be questioned" 20.1.6.102 NMAC (emphasis added). It is not reasonable – or even fair – to expect lower level agency employees to buck directions coming from the Governor's Office. Commissioner designees cannot reasonably be expected to render a fair and impartial decision, free from prejudgment. Designees must also be disqualified.

III. THE JULY 8 COMMISSION VOTE GRANTING WATR'S REQUEST FOR HEARING MUST BE VACATED

Secretary Kenney had advised the cabinet secretaries on the July 7 email chain that they were to "discuss this petition" with their designees who would sit the next day. The six members from the executive branch were under instructions from the Governor's Office to move the Petition forward based on political influence, not the merits. The July 8 Commission vote, granting WATR's request for hearing, was predetermined and based on votes of Secretary

⁶ See n.4 above for July 8 vote.

Kenney and five designees who, rightfully, should have recused under 20.1.6.102 NMAC.⁷ Just like in *Reid*, their six votes – constituting a majority of the vote -- are not valid and the July 8 vote must be vacated.

Again, the Governor has the right to set policy for her executive agencies. No question. However, there is a line between directing policy at the executive agency level and unlawfully interfering with the decisions of an independent administrative agency charged with making impartial and fair decisions to protect human health and the environment. That line is crossed – not by pronouncing general executive policy – but by directing specific votes on specific matters from Commissioners. In this case, cabinet secretaries were charged the day before the vote to speak with their subordinates. The email correspondence between Secretary Kenney and the Governor’s Office can be read no other way than the designees were to move the Petition forward. If a line between lawful executive policy setting and unlawful interference with Commission action is to be drawn, it is to be drawn here.

By any reasonable standard, the six executive agency Commissioners who voted to grant WATR’s request for hearing all should have recused. The vote must be vacated in accordance with the Commission’s own rules. 20.1.6.102 NMAC.

Conclusion

For nearly six decades, the Commission has capably protected New Mexico’s most water resources. But now the Commission’s impartiality, integrity, and commitment to its fundamental mission to prevent and abate water pollution are being questioned and its reputation is on the line. There is not a way to continue with the current rulemaking without continuing to engender widespread skepticism from the public on the fairness of the proceeding.

⁷ See n.4 above for July 8 vote.

The rule now in place, 20.6.8 NMAC, fully protects the state's water resources, allows science to move forward, and gives the parties and NMED staff the opportunity to work together in a constructive fashion on any change to the current rule based on the developing science and technology.

For the reasons set forth herein, Amigos Bravos, Sierra Club, and WELC respectfully request the Commission, first, with a quorum of the Commission, to vote to vacate the July 8 vote granting WATR's request for hearing and, second, to vote to disqualify the executive branch statutorily designated Commission members and their designees from this proceeding.

Respectfully submitted,

/s/ Tannis Fox

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Certificate of Service

I certify a copy of the foregoing pleading was emailed to the following on September 29, 2025:

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/s/ Tannis Fox
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To: [Kenney, James, ENV](#); [Witte, Jeff](#); [Anderson, Elizabeth, OSE](#); [DeBlassie, Gina, DOH](#); [Sloane, Michael B., DGF](#); [Kenderdine, Melanie, EMNRD](#)
Cc: [Black, Rob, EDD](#); [Rodriguez, Stephanie, HED](#); [Schlegel, Daniel, GOV](#); [Agajanian, Holly, GOV](#); [Roose, Rebecca, GOV](#)
Subject: RE: Produced Water Reuse Petition Hearing Tomorrow
Date: Monday, July 7, 2025 8:25:52 AM

Thank you, Secretary. As per our huddle discussion, we need everyone's commitment to get this over the finished line.

Caroline Buerkle

Deputy Chief Operating Officer | Office of the Governor
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Subject: Produced Water Reuse Petition Hearing Tomorrow
Importance: High

Good morning -

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Eddy County for two weeks in late October or early November. Per the GO, the statutorily named person to the WQCC will need to participate vs your designee. Please discuss this petition your designee or those who work for you. Any concerns about the petition can be addressed during the fall hearing. Please reach out to me if your staff have concerns about the petition or if you are asked to meet with industry or NGOs about it.

The agenda for the WQCC hearing is attached for your reference. There is a public comment portion of the agenda tomorrow where I would expect pro/con members of the public to speak. In addition, state legislators are already weighing in support of the petition and holding the hearing in Jan.

Thank you,
Secretary Kenney (he/him)
New Mexico Environment Department
Mobile: (505) 470-6161

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