

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

<p>In the Matter of:</p> <p>PROPOSED NEW RULE 20.6.8 NMAC GROUND AND SURFACE WATER PROTECTION - SUPPLEMENTAL REQUIREMENTS FOR WATER REUSE</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>No. WQCC 23-84 (R)</p>
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**WILDEARTH GUARDIANS' MOTION TO CLARIFY HAZARDOUS WASTE
REGULATION**

WildEarth Guardians submits this Motion for Clarification to request that the Water Quality Control Commission (“Commission”) clarify how hazardous waste generated by produced water reuse projects under the Notice of Intent (“NOI”) process in the proposed rule will be regulated. The new waste stream generated by produced water treatment under the NOI process cannot be directed to Oil Conservation Commission (“OCC”) waste facilities in violation of hazardous waste law. While the Commission correctly recognized that the regulation of hazardous waste from produced water reuse projects that require a permit can be handled at the permitting stage, this is not possible where no permit is required under the NOI process.

This Motion is related to, but separate from, the Joint Notice and Request to Prevent Plain Error filed before his Commission on April 25, 2025 by several parties, including WildEarth Guardians (“Guardians”). Guardians agrees with and reiterates the arguments made in the Joint Notice. However, Guardians files this Motion separately to raise the issue that the hazardous waste management cannot be handled at the permitting stage where a permit is not required. Therefore, the Commission’s ruling on the permit requirement argument in the Joint Notice will affect whether the Commission must separately address the issue raised by this motion.

Any regulation that directs hazardous waste derived from produced water reuse projects back to Oil Conservation Commission (“OCC”) permitted facilities would violate hazardous waste law. Such a regulation would not be in accordance with law and would result in reversible error.¹ Therefore, if this Commission promulgates a rule that allows for produced water reuse projects to operate without a permit under the NOI process, Guardians asks the Commission to engage in deliberations to decide the discrete issue of how to regulate hazardous waste generated by NOI projects. Guardians also recognizes that if this Commission requires a permit as required by the Produced Water Act² for any produced water reuse project, then the hazardous waste question can be handled through a permit. As grounds for this request, Movant states the following:

I. Authority

1. This Commission’s regulations governing rulemaking proceedings provide that “The commission shall reach its decision on the proposed regulatory change within 60 days following the close of the record or the date the hearing officer’s report is filed, whichever is later.”³
2. The rulemaking regulations do not place limits on when or how the Commission deliberates as long as it reaches a decision within the sixty day time period. Here, the hearing officer’s report was filed later than the close of the record, on March 24, 2025. Sixty days from that date is May 23, 2025. Therefore, the Commission could engage in deliberations at its May 13, 2025 meeting, or anytime before May 23 to decide this issue.

¹ NMSA 1978 §74-6-7(B).

² NMSA 1978, Section 70-13-4(D) provides: “For *uses* regulated by the water quality control commission pursuant to the Water Quality Act, a person shall obtain a permit from the department of environment *before using* the produced water, the recycled or treated water or treated product or any byproduct of the produced water.” (emphasis added)

³ 20.1.6.306(C) NMAC.

II. The Notice of Intent process is not a permit.

3. During deliberations the Commission voted to adopt the Notice of Intent (“NOI”) Process in the New Mexico Environment Department’s (“NMED”) proposed rule, which was marked as NMED Exhibit 175.
4. The NOI process allows the use of produced water outside the oilfield when NMED determines that no discharge permit is required.⁴
5. However, the plain language of the Produced Water Act requires a permit for any *use* of produced water off the oilfield without consideration for whether that use will result in a discharge or not. NMSA 1978, Section 70-13-4(D) provides “For *uses* regulated by the water quality control commission pursuant to the Water Quality Act, a person shall obtain a permit from the department of environment *before using* the produced water, the recycled or treated water or treated product or any byproduct of the produced water.” (emphasis added).
6. The Commission has jurisdiction to regulate produced water for off-oilfield use as provided in the Water Quality Act.⁵
7. The Water Quality Act provides that permits are subject to conditions of approval or denial, and that proper notice must be given to the public and governmental entities “whose water may be affected” by the issuance, renewal or modification of a permit.⁶
The Water Quality Act further provides that there must be opportunity for a public hearing on permit applications.⁷

⁴ NMED Ex. 175

⁵ NMSA 1978 §70-13-3(B).

⁶ NMSA 1978 §74-6-5(E) and (F).

⁷ NMSA 1978 §74-6-5(G).

8. The NOI process does not satisfy the permit requirement in the Produced Water Act and Water Quality Act. The NOI process does not provide conditions of approval or denial, require notice, or allow for public participation in the approval or denial process.⁸
9. Therefore, by creating a process for off-oilfield use of produced water without requiring a permit, the adoption of the NOI process in NMED's proposed rule violates the Produced Water Act.

III. Directing the new waste stream generated by produced water treatment projects to OCD-permitted disposal facilities violates hazardous waste law.

10. The produced water reuse rule cannot direct the waste generated by treating produced water back to OCC regulated disposal facilities, because this new waste stream can contain hazardous waste that is not exempt from hazardous waste law.
11. During deliberations, Commissioner Brancard correctly pointed out that treatment of produced water will create a new waste stream containing "hazardous waste" as that term is defined by state and federal law. However, his concern about the disposal of this waste was alleviated by a provision in the proposed rule providing that the "department may consider alternative disposal options on a case-by-case basis" during the permitting process."⁹
12. However, the NOI process¹⁰ that the Commission voted to adopt would allow some produced water treatment projects to operate without a permit requirement. Because the NOI process would not require a permit for these treatment projects, the issue of disposal of the new waste stream cannot be addressed in a permit.

⁸ See NMED Ex. 175 Section 20.6.8.400(C).

⁹ See NMED Exhibit 175 Section 20.6.8.400(B)(8).

¹⁰ See NMED Exhibit 175 Section 20.6.8.400(C).

13. Both federal and state hazardous waste law exempt “Drilling fluids, produced waters, and other wastes *associated with the exploration, development, or production of crude oil, natural gas*” from the definition of “hazardous waste.”¹¹ Therefore, produced water, along with other exploration and production wastes, is exempt from regulation as hazardous waste, because it is associated with exploration and production of oil and gas. This exemption is commonly referred to as the “E&P Exemption.”
14. However, the Department’s proposed rule acknowledges that it “regulates the reuse of treated or untreated produced water *that is unrelated to the exploration, drilling, production, treatment, or refinement of oil or gas.*”¹² Therefore, any new waste generated by the treatment of produced water under the reuse rule is not entitled to the E&P Exemption. These produced water reuse projects could have any number of purposes in manufacturing as discussed at the hearing, but these purposes are not “associated with the exploration, development, or production of crude oil, natural gas” as required to be eligible for the E&P Exemption.¹³ Stated simply, “exempt” wastes can be regulated under OCC rules, but non-exempt waste generated by produced water reuse projects cannot.
15. As outlined in the Joint Closing Argument of the Center for Biological Diversity, WildEarth Guardians, Samuel Sage, Denial Tso, and Mario Atencio, multiple witnesses in the hearing testified that treating produced water will produce a new concentrated waste stream that can contain hazardous waste.¹⁴

¹¹ 40 CFR § 261.4(b)(5) and NMSA 1978 § 74-4-3(K) (emphasis added).

¹² NMED Exhibit 175 Section 20.6.8.400. (emphasis added).

¹³ 40 CFR § 261.4(b)(5) and NMSA 1978 § 74-4-3(K).

¹⁴ See *Joint Closing Argument* at 16-18.

16. As one example, Mr. Jacobi made this point in response to a question from Chair Thomson, who asked if the waste stream from treating produced water could be disposed of in a salt water disposal well. In his response, Mr. Jacobi stated, “I think not, because it would no longer be produced water. It would be effluents from a treatment system.”¹⁵
17. Therefore, this new waste stream cannot be directed back to the oilfield for disposal when it contains hazardous waste. Instead, it must adhere to the requirements of the federal Resource Conservation and Recovery Act (“RCRA”)¹⁶, the New Mexico Hazardous Waste Act (NMHWA)¹⁷, and their implementing regulations,¹⁸ which regulate the generation, transport, storage, handling, and disposal of hazardous waste. A regulation that directs hazardous waste to OCC facilities that are not permitted for hazardous waste will violate these statutes.
18. While permits for produced water treatment projects can determine disposal methods for the waste generated by those projects, this will not be possible for non-permitted NOI projects. Therefore, the Commission must promulgate a final rule that requires generation, transport, handling, storage, and disposal of hazardous waste to adhere to federal, state, and local hazardous waste laws as applicable. This can be outlined in the permitting process as discussed during deliberations; however, where no permit is required, this will not be possible.
19. Movant acknowledges that the proposed rule in NMED Exhibit 175 Section 20.6.8.400(B)(8)(i) provides that disposal “of the components of a demonstration or

¹⁵ Testimony of Lawrence Jacobi, Transcript 8/7/24 at 259:25-260:2.

¹⁶ 42 U.S.C. §6901 *et seq.* (1976).

¹⁷ NMSA 1978 § 74-4-1 *et seq.*

¹⁸ 40 CFR § 260 *et seq.* and 20.4.1.1 NMAC *et seq.*

industrial project[] must adhere to all local state, and federal regulations as applicable.”

However, the Commission voted to remove all references to demonstration and industrial projects from the proposed rule. Therefore, it is not clear whether this provision, if adopted by the Commission, applies to pilot projects requiring a permit, projects authorized pursuant to an NOI, or both.

20. In conclusion, the waste generated by produced water treatment projects under the proposed rule is not “associated with” oil and gas exploration and production, and is therefore not exempt from hazardous waste law.¹⁹ The Commission’s rules must account for this by ensuring that waste that is not covered by the E&P Exemption is properly handled, stored, transported, and disposed of pursuant to RCRA, the NMHWA and all hazardous waste regulations promulgated pursuant to those statutes. Promulgation of a rule that does not comport with these requirements would constitute reversible error, because it is not in accordance with law.²⁰

21. Movant requested the position of the parties to this proceeding prior to filing this motion, and they responded as follows:

- a. New Energy Economy supports this motion.
- b. The Center for Biological Diversity does not oppose this motion.
- c. Amigos Bravos and Sierra Club did not respond.
- d. The New Mexico Environment Department opposes this motion.
- e. Mario Atencio supports this motion.
- f. Samuel Sage did not respond.

¹⁹ 40 CFR § 261.4(b)(5) and NMSA 1978 § 74-4-3(K).

²⁰ NMSA 1978 §74-6-7(B) (providing that regulations that are “not otherwise in accordance with law” “shall be set aside.”)

- g. Daniel Tso did not respond.
- h. Mike Hightower did not respond.
- i. NMOGA opposes this motion.
- j. Select Water Solutions opposes this motion.
- k. Nicolas Maxwell opposes this motion.

WHEREFORE, in order to prevent error, Movant respectfully requests this Commission resume deliberations and adopt regulations that address the regulation of hazardous waste generated from projects where no permit will be required.

Movant reiterates its argument made in the April 25 Joint Notice that the Produced Water Act requires issuance of a permit prior to any off-oilfield use of produced water.²¹ Movant further acknowledges that if the Commission promulgates a rule that adheres to this permit requirement, then the question of hazardous waste can be addressed at the permitting stage as outlined in NMED's Exhibit 175.

Respectfully submitted on April 28, 2025,

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²¹ *Id.*

Certificate of Service

I hereby certify that on April 28, 2025, a copy of the foregoing Motion was emailed to the persons listed below.

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