

STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF:

PROPOSED NEW RULE 20.6.8 NMAC  
GROUND AND SURFACE WATER  
PROTECTION – SUPPLEMENTAL  
REQUIREMENTS FOR WATER REUSE

WQCC 23-84 (R)

**JOINT RESPONSE TO  
SUBMISSIONS FILED AFTER THE CLOSE OF THE RECORD**

The New Mexico Oil and Gas Association (“NMOGA”) and Select Water Solutions, Inc. (“SWS”) (“Joint Respondents”) hereby file this consolidated response in opposition to the following submissions which were filed after the close of the hearing record in violation of the governing regulations at 20.1.2 NMAC: 1) WildEarth Guardians’ Motion to Clarify Hazardous Waste Regulation (filed Apr. 28, 2025); (2) New Energy Economy, WildEarth Guardians, Samuel Sage, Daniel Tso, and Mario Atencio’s Joint Notice and Request to Prevent Plain Error (filed April 25, 2025; and 3) Amigos Bravos and Sierra Club’s Motion for Reconsideration from Commission Deliberations (filed May 5, 2025).

Consistent with the governing rulemaking procedures, the hearing record for this Rulemaking closed following filing of participants’ post hearing submissions on December 6, 2024. The Water Quality Control Commission’s deliberations on the proposed regulatory changes and the law does not authorize the NGO’s interjections in the Commission deliberation process simply because they are unsatisfied with the Commission’s evaluation of the proposed rule. Rather than preventing error, the NGO Submissions invite the Commission to commit error by considering matters outside of the record. For the reasons stated, the Commission should not consider the unauthorized NGO Submissions.

## **ARGUMENT**

### **I. THE NGO SUBMISSIONS CANNOT BE CONSIDERED BECAUSE THE RECORD IS CLOSED**

The WQCC regulations at 20.1.6 NMAC “govern the procedures to be followed by the Commission, and by participants before the Commission, in connection with [this rulemaking]”. 20.1.6.2 NMAC. The rulemaking procedures define the term “document” to mean: “any paper, exhibit, pleading, motion, response, memorandum, decision, order or other written or tangible item that is filed in a proceeding under this part, or brought to or before the commission for its consideration.” 20.1.6.7(F) NMAC. The rulemaking procedures identify the procedure and timing for submitting “documents” to the Commission for inclusion in the hearing record as follows: *First*, 20.1.6.204 addresses participation by the general public, and allows members of the general public to either testify at hearing or file a written statement for the record in lieu of providing oral testimony at hearing. Pursuant to 20.1.6.204, the oral or written statement is required to be “file[d]... *prior to the hearing or submit[ted] at the hearing*.”

*Next*, 20.1.6.301 and .302 identify the procedures for participants to offer exhibits and testimony “*at hearing*.” (Emphasis added). 20.1.6.304 then grants discretion to the hearing officer to “allow the record to remain open for a reasonable period of time following the conclusion of the hearing for written submission of additional evidence, comments and arguments, revised proposed rule language, and proposed statements of reasons.” Once authorized post hearing submissions are filed, the record closes and the Commission moves to deliberation and issuance of a decision. “If, during the course of its deliberations, the *Commission* determines that additional testimony or evidence is necessary for a proper decision on the proposed regulatory change,” [20.1.6.306(D)] allows the Commission, “consistent with the requirements of due process, [to] reopen the hearing for such additional evidence only”. 20.1.6.306(D).

Here, as pointed out in the Hearing Officer Report, parties were “given a reasonable opportunity to submit data, views or arguments orally and in writing,” an opportunity “to examine witnesses testifying at hearing,” and an “extended post-hearing process” to submit additional evidence, arguments, and revised proposed rule changes *before* the record closed. Indeed, each of the NGO’s filed post hearing submissions presenting between 30 and 100 pages of evidence and arguments to support their respective positions in this rulemaking. Following those submissions, the record closed and the controlling regulations simply do not allow for submission of further arguments, evidence, or proposals. If the Commission considers the NGO Submissions, presented outside the record in the midst of Commission deliberation, in any way shape or form it will have committed reversible error. *See e.g. Gila Resources Information Project v. New Mexico Water Quality Control Comm’n*, 2005-NMCA-139, ¶ 42, 138 N.M. 625 (characterizing Commissioner’s vote for dismissal based on matters outside the record as “serious enough concern about the validity of the outcome of the vote to add support to our view that the Commission’s dismissal was arbitrary and an abuse of discretion”).

## **II. THE NGO SUBMISSIONS DO NOT AID THE COMMISSION’S DECISION BECAUSE THEY OFFER NOTHING NEW**

Notwithstanding the Joint Respondents’ objections, the NGO submissions should also be dismissed because they fail to offer new information to aid the Commission’s consideration of the rule. Rather, the three NGO Submissions simply rehash the arguments already presented in post hearing submissions

These arguments do not change that the following facts in this proceeding remain unchallenged. As NMOGA pointed out in its Closing Brief, by the Department’s own admission produced water has been sufficiently characterized and can be treated to satisfy water quality

standards. *See* NMOGA Closing Brief at 23-26 (*citing* NMED Ex. 3, 9:1-3; Tr. Vol. 2 at 248:9-16).

NMOGA also pointed out in its Closing Brief that the uncontroverted evidence also demonstrates that produced water can be treated to a level suitable for any purpose and save for discharge. No party offered credible evidence to the contrary. Rather other witnesses corroborated Dr. Balch's testimony. *See* NMOGA Closing Brief at 26-29; *see also* Tr. Vol. 3 at 207:17 – 208:11 (testimony of Mr. Hightower); Tr. Vol. 9 at 17-20 (testimony of Mr. McCurdy); NMOGA Exhibits 75-127. Indeed, the Department concedes that produced water can be treated to satisfy existing water quality standards. *See* NMED Ex. 177 (Herman Reb.) at 9:1-3. It necessarily follows that because Produced Water "can be treated" to meet water quality standards, a prohibition cannot be justified.

Finally, NMOGA's Post Hearing Brief demonstrates that the existing discharge permitting process is protective of human health and the environment. Pilot projects, authorized by the Commission Rule, will be required to go through the discharge permitting process provided for under the existing regulations. No discharges will be allowed unless it can be proven to the Department that the discharges will meet all applicable requirements. And if the Department has concerns, it can require additional conditions to ensure that the discharges are protective of human health and the environment. Before a discharge permit is approved, there is an established process for public notice, participation, and a public hearing. 20.6.2.3108 NMAC; 20.6.2.3109 NMAC; 20.6.2.3110 NMAC. For added measure, there are sampling and monitoring requirements that ensure that if there is any problem, the applicant and Department identify the problem early. 20.6.2.3107 NMAC.

This process is well designed to ensure that any potential discharge will not be harmful to human health and environment. It allows the Department to address its expressed concerns about both the characterization of raw produced water and its concerns about the efficacy of treatment. There is no evidence for why the discharge permit process is not protective of human health and the environment.

The issues raised in the NGO submissions amount to attacks on the Commission's post-hearing deliberative process that hasn't concluded and prematurely argues against the Commission's yet-to-be-made final decision before it is even voted on or finalized a concise explanatory statement. These arguments usurp the orderly procedural rules governing participation in rulemakings and attempt to inject public participation into a separate deliberative step in the rulemaking process.

Whether participants or parties to the rulemaking are opposed to or concerned with the deliberations of the Commission following the public hearing, there is no legal basis to insert opinion or offer supplemental argument until after the Commission has voted and issued its written decision and concise explanatory statement. After the concise explanatory statement has been issued, the parties may appeal to the court of appeals for further relief. *See* §74-6-7. *See also* 20.1.6.401 (parties may also seek a stay of an adopted rule from the commission while pending appeal).

### **III. CONSIDERING MATERIAL OUTSIDE OF THE RECORD WILL CAUSE PREJUDICE**

Finally, the Commission should strike the NGO Submissions from the May 13, 2025 Commission Meeting Agenda, because the consideration of the Submissions which were filed without authority in the midst of the Commission's deliberations, would be prejudicial to other participants. The NGO's arguments should not be considered because they have not identified any

authority authorizing their filings at this late stage. *See, e.g., In re Adoption of Doe*, 1984 NMSC-024, 100 N.M. 764 (Unsupported arguments of counsel are not considered). Additionally, opposing parties were not afforded the time under the Rulemaking Procedures to consider the Submissions and file a response prior to consideration by the Commission. *See* 20.1.6.207(D) (providing any party “shall have 15 days after service of the motion to file a response.”).

### **CONCLUSION AND REQUEST FOR RELIEF**

For the reasons stated, Joint Respondents respectfully request the Commission deny the unauthorized NGO submissions.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that on May 12, 2025 a copy of the foregoing pleading was emailed to the following:

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