

**STATE OF NEW MEXICO
BEFORE THE 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.

PETITIONER’S REPLY TO JOINT RESPONSE AND WELC OPPOSITION

The Water Access Treatment and Reuse (WATR) Alliance files this reply to the Center for Biological Diversity, New Energy Economy, WildEarth Guardians, Mario Atencio and Daniel Tso’s *Joint Response in Opposition to Rulemaking Petition* and the *WELC Opposition to WATR Request for Hearing* (collectively WELC), both seeking to summarily deny the setting of this matter for hearing in order to deny Petitioner the opportunity to present and the Commission the opportunity to hear and consider the robust collection of scientific data and other technical evidence that support the June 20, 2025 Petition for Rulemaking.

Contrary to WELC’s primary argument, the WATR Alliance Petition proposes a different regulation than that filed by the New Mexico Environment Department in WQCC 23-84 (R), consequently, a hearing on the Petition will necessarily require consideration of issues not introduced or considered in WQCC 23-84. Where in WQCC 23-84 the Department proposed to prohibit discharge and use of treated produced water, in the current Petition, the WATR Alliance proposes to allow certain discharges and uses of treated produced water, subject to a number of terms and requirements, and will present scientific and technical testimony that supports these uses of treated produced water along with testimony in support of the proposed permitting framework.¹

¹ See *WQCC 23-84 (R) Petition for Rulemaking and Statement of Reasons, filed 12/27/2023*.

WELC also argues that the science was fully litigated in WQCC 23-84. It was not. Because of the limited scope of the rule proposed in WQCC 23-84 and WELC's efforts to exclude testimony from leading experts, the record lacked the robustness that will be brought in support of the Petition in this case.

For these and the reasons stated below, the Commission should reject WELC's urge to prevent the Commission from hearing the Petition and considering supporting data and science.

I. NEITHER THE PROPOSED RULE NOR SUPPORTING EVIDENCE HAVE BEEN LITIGATED

WELC incorrectly argues that the Petition should be dismissed because it rehashes issues settled by the Commission in WQCC 23-84. This is incorrect because the issue now before the Commission is distinct and so will be the evidence. Recall during its May 2025 deliberations, the Commission sought to construct a limited discharge pathway for pilot projects but ultimately declined to do so because it determined the record did not include sufficient supporting evidence. The record lacked this data and support because 1) NMED was not arguing to allow the use of treated produced water, rather to prohibit it as an initial step,² thus it had no reason to introduce robust or comprehensive evidence supporting discharge or use, and 2) because much of the scientific evidence and testimony demonstrating that treated produced water can be used in ways that are protective of human health and the environment was either not presented as evidence in the case or was otherwise excluded from the record. In this case, the WATR Alliance intends to present new and different technical evidence in support of the Petition.

a. The Petition Proposes a Rule That is Distinct from WQCC 23-84 (R).

WELC's argument mischaracterizes the relationship between the current Petition and the proposal considered in WQCC 23-84. The proposal in WQCC 23-84 was not to allow the discharge

² See NMED Exhibits in WQCC 23-84, pg. 25, available at <https://tinyurl.com/bdc4jcuc>.

or use of treated produced water but to prohibit as much. The Department’s initial petition included a six-page proposed regulation, four pages of which were definitions. The remaining two pages proposed to prohibit discharge and spelled out the process for pursuing a demonstration project. Nowhere in the Department’s initial proposal were discharging uses of treated produced water contemplated—they were expressly prohibited. Consequently, and not surprisingly, the Department then developed a record to support its proposal, not a record supportive of discharge or use.

The Petition now before the Commission builds upon the rule in WQCC 23-84 and proposes, over thirty-pages and a fifteen-page appendix, a permitting framework for certain uses of treated produced water. The proposed rule includes:

- a science-based permitting structure for non-potable uses of treated produced water;
- robust water quality monitoring and testing obligations;
- permit-specific effluent limitations;
- strict financial assurance and closure requirements; and
- statutory public transparency and participation obligations.

The Commission alluded to the limited scope of the Department’s proposal and associated record in WQCC 23-84, when it stated in its decision, “[a]n industrial application of treated produced water would not be approvable under the Rule because the evidence for protection of ground and surface water has not been demonstrated in the evidence presented to the Commission.³ The Commission was not able to consider permitting the use of treated produced water in the last rulemaking, not necessarily because the evidence did not or does not exist, but because such was not meaningfully proposed nor presented.

³ Joint Response at pg. 3, citing Order and Statement of Reasons, *In the Matter of Proposed New Rule 20.6.8 NMAC – Ground and Surface Water Protection – Supplemental Requirements for Water Reuse*, No. WQCC 23-84 (R) (May 24, 2025).

b. The Petition Proposes to Introduce Evidence Not Included in WQCC 23-84.

WELC also argues that the “science is just not there yet.” WELC is incorrect. Much of the most advanced science was not included in the record in WQCC 23-84 because WELC succeeded at excluding it from the record. While some evidence was introduced in WQCC 23-84 pertaining to the state of the science, much of it was excluded, particularly testimony and evidence from leading experts. Additionally, there is science and data that has been developed since the filing of the petition in WQCC 23-84 in 2023. Science that was not available then but is available now.

Regarding excluded evidence and testimony, WELC vigorously and successfully stood in the way of efforts to introduce evidence and testimony from world-renowned experts, like Dr. Xu, and Dr. Zhang.⁴ When testimony and evidence from Dr. Xu, Dr. Zhang, and others were attempted to be introduced into the record by parties other than the Department, WELC argued to exclude their testimony. In ruling to exclude this critical testimony and evidence, the Hearing Examiner noted, “I understand there’s a lot of interest in the potential testimony of others related to the Consortium, particularly where ... there’s some daylight between the petitioner and the scientific research group.”⁵ The Hearing Examiner as well as the parties and the Commission understood that the Department’s position was not fully-informed by the data and evidence held by individuals like Dr. Xu and Dr. Zhang and that there was interest in their testimony, but in response to WELC’s opposition, the experts and their testimony were excluded.

In this the present case, in support of the Petition, the WATR Alliance will introduce technical evidence that was not introduced in WQCC 23-84, thus allowing the Commission to adhere to the Water Quality Act’s instruction to establish standards based on credible scientific data.⁶

⁴ See WQCC 23-84 (R), *Amigos Bravos and Sierra Club’s Motion to Strike Hightower Notice of Intent to Provide Rebuttal Testimony*; and *Amigos Bravos and Sierra Club’s Response to NEE’s Motion Requesting the Commission to Issue Orders for the Testimony of Pei Xu*.

⁵ Transcript to WQCC 23-84, May 14, 2024, pgs. 37-39

⁶ NM Stat. § 74-6-4(D) (2024).

II. ADVISORY COMMITTEE REQUIREMENTS ARE NOT APPLICABLE TO PRIVATE PETITIONERS

WELC misinterprets language in the Water Quality Act and encourages the Commission to do the same. Section 74-6-4(K) provides that “the constituent agency shall establish an advisory committee ... to advise [it] on appropriate rules to be proposed for adoption by the commission.” This language does not state 1) that a rule cannot be adopted until after the creation of an advisory committee, nor 2) that a private petitioner must convene an advisory committee.

Section 74-6-6 of the Water Quality Act outlines what is necessary to adopt a rule and who may petition for rulemaking. Section 74-6-6(A) provides that “no regulation ... shall be adopted until after a public hearing.” This language clearly establishes a certain prerequisite for adopting a regulation—a public hearing. Note, however the difference between this language and the language cited by WELC:

- *no regulation ... shall be adopted until after a public hearing;*⁷

versus

- *the constituent agency shall establish an advisory committee ... to advise [it] on appropriate rules.*⁸

Had the legislature intended that an advisory committee be convened prior to the adoption of any regulation, it could have and would have said as much, like it did with public hearings. Rather, it instructed constituent agencies to convene an advisory committee to advise generally on what regulations may be appropriate.

Even if the advisory committee instruction were a prerequisite to all rulemakings initiated by a constituent agency, the instruction is nevertheless restricted to a constituent agency. As stated in Section 74-6-6 (B), “[a]ny person may petition in writing to have the commission adopt, amend or

⁷ NM Stat. § 74-6-6(A) (2024).

⁸ NM Stat. § 74-6-4(K) (2024).

repeal a regulation.” WELC would have the Commission interpret this language as being subject to the advisory committee instruction under Section 74-6-4 (K). However, that instruction is limited on its face to constituent agencies—“the constituent agency shall establish an advisory committee.” For the Commission to interpret Section 74-6-4 (K) as applicable to private petitioners, it would necessarily need to read words into the Act that are not present.

Both the New Mexico Court of Appeals and the New Mexico Supreme Court have cautioned that agencies should not read language into a statute that is not there. *See, e.g., Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad Inc.*, 2010-NMCA-065, ¶ 12, 148 N.M. 516, 522, 238 P.3d 885, 891 (“we will not read into a statute language which is not there”); *Coal. for Clean Affordable Energy v. New Mexico Pub. Regul. Comm’n*, 2024-NMSC-016, ¶ 26, 549 P.3d 500, 510 (“We will not read language into a statute that is not there, especially if the statutory language makes sense as written.”).

Even if we assume that the Department was required to hold an advisory committee *before a third party were able to exercise its statutory right to file a petition for rulemaking* (which is not a requirement or precursor expressly written into the statute) – the Department fulfilled that task (as indicated in WELC’s response). The Department formed an advisory committee to provide input on draft produced water rules in 2023. During that process, members of the advisory committee and other stakeholders encouraged the Department to draft a rule that would more broadly allow for use and the discharge of treated produced water. The Department, however, decided to pursue a more limited rulemaking in 2023 that focused primarily on prohibiting the discharge of produced water.

The Department’s decision to pursue a different rule scope should not and does not bar a third party from exercising its statutory right to file a petition for rulemaking with the WQCC. Indeed, had the Legislature intended to stop third parties from being able to successfully file rulemaking applications based on a prerequisite that the constituent agency first agree to hold an advisory

committee analyzing the third-party's proposed rule, the Legislature would have clearly done so in express statutory language. It did not. Consequently, WELC's argument is without merit and does not comport with New Mexico Supreme Court Precedent. *Coal. for Clean Affordable Energy*, 2024-NMSC-016, ¶ 26, 549 P.3d 500, 510 (“We will not read language into a statute that is not there…”).

Following the filing of its rulemaking petition and after putting on most of its testimony in WQCC 23-84, the Department later organized the State of the Science program in Las Cruces, New Mexico in coordination with the New Mexico Produced Water Consortium. During that conference, it was clear that data exists that was not introduced into the record in WQCC 23-84.⁹ Following the State of the Science 2024 conference, the Department then issued a strategic water supply feasibility study in November of 2024, which outlined several potential uses for treated produced water.¹⁰ However, the data presented at the State of the Science 2024 conference and within the feasibility study were issued after disclosure dates had passed in WQCC 23-84. Consequently, this data and information was not included in that administrative record. Nevertheless, that data (and new data developed since 2024) is now ready to be presented in this case. Several important pilot projects and studies have resulted in important new data that supports the WATR Alliance's Petition. This important information should be presented to and considered by the Commission.

III. THE COMMISSION HAS FULL AUTHORITY TO CONSIDER THE PETITION

Under 20.1.6.200(C) NMAC, the Commission is authorized to determine whether a petition merits a public hearing. The Petition presents a good-faith, non-duplicative request to advance regulations consistent with the Commission's statutory objectives and instructions. There is no legal or procedural barrier to the Commission hearing the Petition and considering it on the merits.

WELC argues that the Petition should be dismissed because the WATR Alliance's attorneys

⁹ See Recording of the: [Strategic Water Supply Symposium Part 1](#), [Strategic Water Symposium Part 2](#), and [Strategic Water Symposium Part 3](#).

¹⁰[NMED-Revised-Draft-Feasibility-Study-112224.pdf](#)

could and should have represented the WATR Alliance’s viewpoints when they were involved in New Mexico water matters in 2023 – 2024 or otherwise entered appearances in WQCC 23-84. This argument is without merit. Attorneys represent the positions of their clients, and they are not obligated or barred from appearing in a later case simply because they were not hired by a client to appear in an earlier-related case.

The WATR Alliance did not exist until late fall during 2024 – long after the timelines had run to present testimony in WQCC 23-84. As a result, the WATR Alliance could not have been a party in WQCC 23-84. It was impossible to represent the views of the WATR Alliance in 2023 – 2024 because the association did not yet exist. And, there are absolutely no legal precedents supporting the conclusion that the WATR Alliance is precluded or barred from filing its Petition in this matter.

III. THE PETITION SUPPORTS NEW MEXICO’S WATER POLICY OBJECTIVES

New Mexico's 50-Year Water Plan calls for diversification of water sources and advancement of water reuse technologies. The Petition furthers these goals by:

- Establishing a permitting pathway for limited non-potable applications;
- Creating regulatory oversight where no clear process currently exists;
- Supporting the responsible, science-based reuse of treated water to relieve pressure on freshwater resources.

IV. THE PETITION DOES NOT INTERFERE WITH ONGOING LITIGATION

WELC cites the pending appeal of WQCC 23-84 by the New Mexico Oil and Gas Association as a reason to delay the Petition. However, the viability of the rule proposed by the Petition in this case does not turn on the recently adopted rule. The Petition proposes to establish a permitting framework that can and would be viable with or without the recently adopted rule.

V. VENUE IN JAL IS APPROPRIATE AND ACCESSIBLE

WELC argues that setting a hearing in Jal would be inconsistent with the Water Quality Act and would hinder public participation. WELC is wrong on both counts. The Water Quality Act provides that:

[h]earings on regulations or water quality standards of statewide application shall be held in Santa Fe. Hearings on regulations or standards that are not of statewide application may be held within the area that is substantially affected by the regulation or standard.

WELC argues that the proposed rule is of statewide application because it applies in 13 counties, representing 47% of New Mexico’s landmass and 42% of its population. Statewide means “affecting or extending throughout all parts of a state.”¹¹ To argue that the proposed rule applies across anything less than 100% of New Mexico, as WELC has done, is to argue that the proposed rule is not of statewide application.

WELC also argues that all waters are connected, and therefore, the proposed rule is of statewide application. Once again, WELC ignores and does injury to the language of the Water Quality Act. The only regulations the Commission hears are those governing water.¹² Therefore, if the Commission were to accept WELC’s argument, it would effectively nullify the provision of the Water Quality Act allowing the Commission to hold hearings on regulations that are not of statewide application within the area substantially affected. Under the WELC construct, there could not be any Commission regulation that is not of statewide application. If indeed this were intended, it would seemingly be the legislature’s role to amend the Water Quality Act to require that all hearings be set in Santa Fe, versus the Commission interpreting language out of the Act.

¹¹ “Statewide” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/statewide>. Accessed 7 Jul. 2025.

¹² See NM Stat. § 74-6-4(E) (2024).

Holding a hearing in Jal—the heart of the region affected by produced water operations—ensures that the communities directly and most substantially impacted by the potential use of treated produced water have a voice.

VI. CONCLUSION

For the foregoing reasons, the WATR Alliance respectfully requests that the Commission deny WELC’s request and that it set the Petition for hearing in Jal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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