

AUG 11 2025

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 &amp; Reuse Alliance,

Petitioner.

**ENERGY TRADE ASSOCIATIONS' RESPONSE IN OPPOSITION TO JOINT MOTION  
TO DISPOSE OF THE WATR ALLIANCE PETITION OUTRIGHT**

Pursuant to 20.1.6.207 NMAC, the New Mexico Oil and Gas Association (“NMOGA”), Independent Petroleum Association of New Mexico (“IPANM”), and Permian Basin Petroleum Association (“PBPA”) (together, NMOGA, IPANM, and PBPA are referred to as the “Energy Trade Associations”) hereby file this response in opposition to New Energy Economy, the Center for Biological Diversity, Mario Atencio and Daniel Tso’s (collectively the “NGOs”) Joint Motion to Dispose of the WATR Alliance Petition Outright (“Joint Motion”).

**ARGUMENT**

**I. The Doctrines of Res Judicata and Collateral Estoppel Cannot Be Applied to Dispose of this Rulemaking Proceeding**

The NGOs improperly invoke the doctrines of collateral estoppel and res judicata in an attempt to prematurely dispose of WATR Alliance’s proposed amendments to the Water Quality Control Commission’s (“Commission or WQCC”) Supplemental Requirements for Water Reuse at 20.6.8 NMAC.

Res judicata and collateral estoppel are “judicial economy measure[s] to prevent litigation of a [claim or] issue already judicially decided.” *International Paper Co. v. Farrar*, 1985-NMSC-

046, ¶ 10, 102 N.M. 739. “It is the burden of the movant invoking the doctrine of collateral estoppel to introduce sufficient evidence for the court to rule whether the doctrine is applicable.” *Id.*, ¶ 11. The NGOs contend that res judicata and collateral estoppel preclude the Commission from considering WATR Alliance’s Petition because the same issues were already “litigated” in the Commission’s previous rulemaking proceeding under WQCC No. 23-84(R). As explained in Petitioner’s Response (filed Aug. 8, 2025), there are two clear reasons that the doctrines of res judicata and collateral estoppel do not apply.

First, a fatal flaw in the NGO’s position is that the Commission’s adoption of regulations in the prior rulemaking proceeding is not litigation. The New Mexico Appellate courts have routinely held that administrative rulemaking is “quite distinct in ... application and function” from an adjudication. *Earthworks’ Oil & Gas Accountability Project v. New Mexico Oil Conservation Comm’n*, 2016-NMCA-055. “[A]djudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals. Second, because adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied.” *Rauscher, Pierce, Refsnes, Inc. v. Taxation and Revenue Dep’t*, 2002-NMSC-013, ¶ 42, 132 N.M. 226.

Consistent with the Court of Appeals’ holding in *Gila Resources Information Project v. New Mexico Water Quality Control Comm’n*, 2015-NMCA-076, ¶ 44, 355 P.3d 36, “because the at-issue rule-making proceeding was not an adjudication, the principle of collateral estoppel has no bearing on the Commission’s decision to adopt the Regulations.” *See also, In re Mokiligon*, 2005-NMCA-021, 106 P.3d 584 (rejecting the state’s argument that res judicata or collateral

estoppel can be applied to bar a petition for name change because “a petition for a name change does not ask the court to resolve a dispute between parties and, therefore, is not, in the strictest sense, litigation.”); *International Paper Co.*, 1985-NMSC-046, ¶ 8 (these doctrines can only be used “when an issue is actually and fully litigated”).

Second, the WATR Petition is distinct from the rulemaking petition filed by the New Mexico Environment Department (“NMED”) in late 2023 (“NMED Petition”). To be subject to the doctrines of res judicata or collateral estoppel, the same issue must have been “actually litigated in the prior adjudication.” *Ideal v. Burlington Res. Oil & Gas, LP*, 2010-NMSC-022, ¶ 9, 148 N.M. 228. Although the 2023 Petition generally addressed the subject of reuse of treated produced water, it did not litigate the same issues as are presented in the WATR Petition. Rather than the detailed standards proposed by the WATR Alliance, the NMED Petition sought to prohibit all reuse of treated produced water until standards were adopted by the Commission.

Because res judicata and collateral estoppel do not apply, the Joint Motion must be dismissed.

## **II. NMOGA and WATR Alliance Are Not in Privity**

The Joint Motion must also be rejected because the WATR Alliance is not in privity with NMOGA.<sup>1</sup>

The lynchpin of the NGO’s motion is that “NMOGA and WATR [Alliance] are in privity with each other.” Joint Motion at 4. To find privity, “a court must determine whether a party is so identified in interest with another that the party represents the same legal right. *Bounds v. Hamlett*, 2011-NMCA-078, ¶ 30, 150 N.M. 389. “Privity requires, at a minimum, a substantial identity

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<sup>1</sup> The NGOs assertions regarding a connection between WATR Alliance and the New Mexico Produced Water Research Consortium are not relevant to the privity analysis because the NMPWRC was not a participant in the prior rulemaking.

between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same.” *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 2, 139 N.M. 637; *see also Fogelson v. Wallace*, 2017-NMCA-089, ¶ 26, 406 P.3d 1012 (privity exists “when the interests of a corporate entity and members of its ownership group “fully coincide”).

The Joint Motion identifies purported ties between NMOGA and six members of WATR Alliance’s leadership team alleged in the Joint Motion. But these alleged ties, even if they were true, are not sufficient to find privity between the two organizations. NMOGA cannot represent the same legal right as WATR Alliance because the organizations do not serve the same interest. As described in the Petition, WATR Alliance is coalition of “water stakeholders” dedicated to “increasing water supplies in New Mexico and the broader Southwest.” Petition ¶ 4. The WATR Alliance’s diverse membership includes “municipalities, global and local engineering organizations and professionals, ranchers and other agricultural stakeholders, global and local water treatment organizations, water resource professionals, hydrogeologists, landowners, technology organizations, water infrastructure organizations, energy producers, water recycling organizations, and others”. *Id.*

NMOGA on the other hand is a coalition of oil and natural gas companies, individuals, and stakeholders dedicated to promoting the same and environmentally responsible development of oil and gas resources in New Mexico. NMOGA’s diverse membership includes 180 companies who account for 95% of the oil and gas activity in New Mexico and represent every aspect of the oil and gas industry in New Mexico. NMOGA’s members have a vested interest in protecting the environment including air quality and responsible use of water resources in the state.

Without basis, the NGOs assume that NMOGA and the WATR Alliance are in privity since both generally support reuse of treated produced water. But NMOGA had no role in the

development of the WATR Alliance Petition whatsoever. In short, the WATR Alliance and NMOGA are different entities, with different constituents, different interests, and no legal connection.

**III. This Rulemaking Proceeding Presents New Issues That Should Be Considered by the Commission**

Finally, the NGO's claim that the pending rulemaking proceeding merely "revisits" the issues previously considered by the Commission in the NMED Petition, WQCC 23-84(R), wildly misrepresents the substance of WATR Alliance's proposal. Rather than the outright ban at issue in the WQCC 23-84(R), the WATR Alliance Petition proposes a detailed permitting program to allow for the discharge, treatment, and certain reuse of produced water outside of the oil and gas sector, consistent with statutory mandate at Section 74-6-4 of the Water Quality Act and the action items identified by the Governor in the 50-Year Water Action Plan.

The Energy Trade Associations are still evaluating the specific provisions of the WATR Alliance Petition. While the Energy Trade Associations have not taken a position on the merits of the specific amendments, they generally support amendments to the Rule, including adoption of scientific based water quality standards that protect human health and the environment, while at the same time encouraging reuse and promoting New Mexico's continued leadership in reuse of treated produced water.

**CONCLUSION**

For the reasons stated herein, and the detailed arguments in Petitioner's Response, the Commission should deny the Joint Motion and proceed with setting a procedural schedule in preparation for a December 2025 hearing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on August 11, 2025 a copy of the foregoing Energy Trade Association's **Response in Opposition to Joint Motion to Dispose of the WATR Alliance Petition Outright** was emailed to the following:

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