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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.

PETITIONER'S RESPONSE TO THE JOINT MOTION FROM CENTER FOR BIOLOGICAL DIVERSITY, NEW ENERGY ECONOMY, WESTERN ENVIRONMENTAL LAW CENTER, AND WILDEARTH GUARDIANS' FOR COMMISSION TO COMPLY WITH ADVISORY COMMITTEE REQUIREMENTS AND TO HOLD HEARING IN SUMMER 2026

The Water Access, Treatment & Reuse Alliance (the "WATR Alliance") hereby responds to the *Joint Motion from Center for Biological Diversity, New Energy Economy, Western Environmental Law Center, and WildEarth Guardians' (collectively the "eNGOs" or "eNGO parties") for Commission to Comply with Advisory Committee Requirements and to Hold Hearing in Summer of 2026* (the "Motion"). The eNGO parties primarily reassert three arguments filed in the Joint Response in Opposition to Rulemaking Petition and WELC Opposition to WATR Request for Hearing, argued before the Commission at the July 8, 2025 hearing. At the July 8 hearing, the Commission voted to set the WATR Alliance's rulemaking petition for hearing and to issue an order appointing a Hearing Officer. The Commission indicated that the Hearing Officer would enter a Prehearing Order determining the date and location of the hearing.

Subsequently, the eNGO parties filed motions to dismiss the petition and asking the Commission to reconsider its position. This Motion focuses on asking the Commission to delay the hearing of this case by approximately one year. As discussed below, this request is unprecedented, without merit, and fails to comport with the Commission's current precedents and

must be denied. Additionally, the eNGOs ask that the hearing be set in Santa Fe because it is more convenient and less expensive for the eNGO attorneys to attend a hearing in that location. Santa Fe, however, is not a community impacted by this rulemaking. This rulemaking is limited to 13 counties, located in the southern and northern parts of the State. The Water Quality Act indicates that it is appropriate to hear rulemaking hearings in the communities most affected by the proposed rule when the proposal is not one of statewide application. The Water Quality Act is designed to ensure that local voices are heard when a rule's impact is felt primarily at the local or regional level. Because the WATR Alliance's proposal would have its greatest effects in southeastern New Mexico, holding the hearing in Jal / Lea County—the heart of the affected region—not only follows the letter of the Act, but also upholds its commitment to genuine public participation.

I. THE ADVISORY COMMITTEE REQUIREMENTS DO NOT APPLY IN THIS CASE.

The eNGO's argue that the Water Quality Act requires the New Mexico Environment Department (the "Department") to hold an advisory committee for the proposed rule before a hearing is set. This interpretation of the Water Quality Act is incorrect. The WATR Alliance is a third party that has a statutory right to petition the WQCC for rulemaking. NMSA 1978, § 74-6-6 provides that:

> A. No regulation or water quality standard or amendment or repeal thereof shall be adopted until after a public hearing.
>
> B. **Any person may petition in writing** to have the commission adopt, amend or repeal a regulation or water quality standard. . . (emphasis added).

Nothing within § 74-6-6(B) qualifies or limits the right of any person to file rulemaking petitions. Had the Legislature intended to limit or somehow qualify the rights of third parties to file rulemaking petitions, it would have clearly done so through express statutory language. New

Mexico courts have repeatedly held that agencies should not read language into statutes 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.").

Despite the express language contained in § 74-6-6, the eNGO parties argue that third parties must first convince the New Mexico Environment Department to hold an advisory committee on their proposed rulemaking language before the Commission is statutorily allowed to set the matter for hearing. Essentially tying the hands of third parties to file rulemaking petitions to a limited set of circumstances. This, however, is not what the law states.

NMSA 1978, § 74-6-4(L) is focused on industry-specific rulemakings and provides that the Commission:

> shall specify in rules the measures to be taken to prevent water pollution and to monitor water quality. The commission may adopt rules for particular industries. The commission shall adopt rules for the dairy industry and the copper industry. The commission shall consider, in addition to the factors listed in Subsection F of this section, the best available scientific information. The rules may include variations in requirements based on site-specific factors, such as depth and distance to ground water and geological and hydrological conditions. The constituent agency shall establish an advisory committee composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders to advise the constituent agency on appropriate rules to be proposed for adoption by the commission. The rules shall be developed and adopted in accordance with a schedule approved by the commission. The schedule shall incorporate an opportunity for public input and stakeholder negotiations;

(emphasis added). The Legislature added this language to the Water Quality Act specifically to facilitate adoption of the dairy and copper rules. The advisory committee requirement was tailored

for those rulemakings. The dairy rule, for instance, applies exclusively to dairy facilities (see 20.6.6.2 NMAC), while the copper rule is directed solely at copper mine facilities and their operations (see 20.6.7.2 NMAC). By contrast, the present rulemaking does not create an industry-specific rule. Instead, it proposes amendments to Part 20.6.8 NMAC, which deals with "reuse water."

Reuse water, as defined by the Commission, is not confined to any one industry. The term is defined to mean "a treated wastewater originating from domestic, industrial, or produced water sources, that has undergone a level of treatment appropriate for an application such as agriculture, irrigation, potable water supplies, aquifer recharge, industrial processes, or environmental restoration. Reuse water has a water quality, based on application, determined to be protective of the environment and human health. For purposes of this Part, reuse is categorized by the source of the water." Here, WATR's proposed rule addresses the use of treated produced water—a form of reuse water—which is intended for use by a range of industries for various purposes.

Nothing in the proposed rule restricts its application to oil and gas facilities or any single industry. In fact, the Commission does not have jurisdiction to issue a rule confined to use within the oil and gas industry. In 2019, amendments to both the Oil and Gas Act and the Water Quality Act assigned jurisdiction over the use and reuse of produced water in "the exploration, drilling, production, treatment or refinement of oil or gas" to the Energy Minerals and Natural Resources Department. NMSA 1978, § 70-2-12.B(15). The Water Quality Control Commission, meanwhile, was charged with issuing rules for the use or reuse of treated produced water in all other, non-industry specific contexts. *See* NMSA 1978, § 74-6-4(Q) (requiring the commission to "adopt rules to be administered by the department for the discharge, handling, transport, storage, recycling or treatment for the disposition of treated produced water, including disposition in road construction

maintenance, roadway ice or dust control or other construction, or in the application of treated produced water to land, for activities unrelated to the exploration, drilling, production, treatment or refinement of oil or gas"). Thus, eNGOs' argument that this rulemaking targets a particular industry is misplaced. This is not an industry-specific rule governed by § 74-6-4(L), and those requirements are inapplicable.

Even if § 74-6-4(L) were relevant (which it is not), it provides only that "the constituent agency shall establish an advisory committee … to advise [it] on appropriate rules to be proposed for adoption by the commission." (emphasis added). This directive is aimed at constituent agencies, not at private petitioners, and does not provide that (1) a rule may not be adopted absent an advisory committee or (2) private petitioners must convene such a committee. Reading those requirements into the statute would require adding language that simply does not exist.

The Water Quality Act sets out the requirements for rule adoption and rulemaking petitions in Section 74-6-6. Section 74-6-6(A) states plainly that "no regulation … shall be adopted until after a public hearing." This is a clear, explicit prerequisite. Compare this to the language in Section 74-6-4(K):

> "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]

If the Legislature wanted to make the creation of an advisory committee a prerequisite to adoption of any regulation—including non-industry rulemakings and those initiated by third parties—it would have done so expressly, just as it did with public hearings.

Further, even if the advisory committee requirement applied to all agency-initiated rulemakings, it would still apply only to constituent agencies, not to private parties. Section 74-6-6(B) makes clear that "[a]ny person may petition in writing to have the commission adopt, amend

or repeal a regulation." The eNGO's argument that private petitioners are bound by Section 74-6-4(L) cannot be reconciled with the plain text of the Act, which assigns the advisory committee requirement to constituent agencies. Imposing this requirement on private petitioners would be to read language into the statute that the Legislature did not include.

Even assuming, for argument's sake, that the Department were required to convene an advisory committee before a third party could petition for rulemaking (which is not required), that step has already been taken. As the eNGOs acknowledge, the Department created an advisory committee in 2023 to review proposed produced water rules. During those proceedings, committee members and stakeholders urged the Department to pursue broader regulations for treated produced water, but the Department at that time opted for a narrower rulemaking focused on prohibiting discharges.

The Department's choice to limit its own rulemaking does not and cannot preclude private parties from exercising their statutory right to submit later or different petitions to the Commission for consideration. Had the Legislature wished to prohibit third-party petitions, absent agency formation of an advisory committee, it would have said so. It did not. The eNGO's position is unsupported by the statute and inconsistent with New Mexico Supreme Court precedent. *See 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…"). As a result, the Commission must deny the eNGO's request to delay setting this matter on the basis that an advisory committee was not held.

II. IT WOULD BE DETRIMENTAL TO NEW MEXICO TO WAIT UNTIL SUMMER 2026 TO HEAR THIS MATTER.

Under the recently issued Part 20.6.8 NMAC, effective July 12, 2025, all proposed pilot projects for produced water research in New Mexico now require a permit under a new regulatory process. At this time, the Department has not determined when or how the necessary forms for this

permitting process will be prepared. The Department has informed the WATR Alliance that it may take up to a year for both existing and new pilot projects to receive permits.

In practical terms, this means that scientific research on produced water in New Mexico may be forced to pause—potentially for a full year. While this outcome was likely not the Commission's intention, it leaves New Mexico at a standstill. Meanwhile, neighboring states are moving forward: Texas, for example, has authorized $20 billion in investments for water reuse projects, and is permitting large-scale pilots that include the discharge of treated produced water into the Pecos River. With new scientific data supporting the safe treatment and reuse of produced water, these states are actively developing regulatory frameworks and moving ahead with permitting programs.

In contrast, New Mexico's regulatory uncertainty and delay mean that the state risks missing out on opportunities to beneficially use or reuse treated produced water for non-potable purposes. The current legal status, especially compared to the encouragement of similar projects in states like Texas, puts New Mexico at a significant disadvantage.

Despite these risks, the eNGO parties are going to great lengths to delay or dismiss the WATR Alliance's petition for rulemaking. The eNGO parties argue that they only have four months to prepare their case. However, they have known about the petition ***since June***. As a result, all parties to the case have already had nearly a month and half to commence working on their respective materials. The eNGO's, nonetheless argue that holding a hearing in December—six months after the petition's June filing—is too soon. This claim is not supported by precedent. The Commissions procedural rules for rulemaking proceedings instruct that the Hearing Officer is to "avoid delay" and to "take all measures necessary" for an efficient, fair and impartial

consideration of issues. 20.1.6.100(B) NMAC. It would unduly delay this rulemaking to grant the eNGO's request to delay it for nearly one year.

Historically, both the Commission and Environmental Improvement Board ("EIB") have scheduled hearings and deadlines for notice of intent ("NOI") to present testimony within three to four months of a petition's filing with hearings set approximately 6 – 7 months after the petition was filed. For example:

Case	Filing Date	NOI To Present Testimony Due
EIB 23-52	6/19/2023	10/27/2023
EIB 23-56	7/7/2023	10/24/2023
WQCC 23-84	12/27/2023	4/15/2024
WQCC-24-46	8/30/2024	12/6/2024
WQCC 24-65	10/23/2024	4/14/2025
EIB 25-23	5/16/2025	9/2/2025

Many of these cases involved complex, technical issues and required expert testimony. In the recent water reuse rulemaking (WQCC 23-84), eNGO parties were able to locate expert witnesses on treated produced water within approximately four months. There is no clear reason why they now claim to need nearly a year to do the same for the current case. Recognizing that EIB and WQCC typical practice is not in their favor, the eNGO's cite to a rulemaking case pending before the Oil Conservation Commission. However, that is an entirely different regulatory body that handles hearings and rulemaking negotiations very differently from the Department. As a result, precedent from the Oil Conservation Commission scheduling is less helpful here as compared to schedules in WQCC and EIB cases.

The urgency of moving forward is further underscored by the Governor's 50-Year Water Action Plan, which prioritizes the development of new water supplies—including treated produced water and brackish groundwater—and calls for the expansion of non-potable water reuse. The Plan

set a goal of adopting preliminary water reuse rules by 2024 to establish a consistent, science-based regulatory program for produced water treatment and reuse outside the oil and gas sector. The WATR Alliance's rulemaking petition directly advances this goal.

In sum, there is no reasonable justification for waiting until the summer of 2026 to begin a hearing on this critical issue. Further delay will only worsen New Mexico's competitive disadvantage, stall important research, and slow progress toward the state's own water supply goals.

1. *The Affidavits from ENGO Counsel Confirm That They Are All Available for Hearing in Early December.*

As a separate point, the eNGOs argue that, given their counsel's busy schedules, it is "not humanly possible" to prepare a direct case before December. They further contend that the Commission should accommodate their schedules since there is "no reason to rush or prioritize this rulemaking." In doing so, the eNGOs reference the effort required to develop their case and their purportedly limited resources, proposing a timeline that would push the hearing into the summer of 2026.

These arguments do not justify such an extraordinary extension. First, the declarations submitted by eNGO counsel confirm that all five attorneys who have entered appearances are available for a hearing in early December. While they are undoubtedly busy, managing multiple cases is a common feature of legal practice. Websites for the eNGO parties show that their side is well-resourced: The Western Environmental Law Center employs multiple attorneys;[1] WildEarth Guardians has 26 staff, including four attorneys and additional employees with law degrees;[2] the

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[1] Some notable attorneys include: Erik Schlenker-Goodrich, Kyle Tisdel, and Melissa Hornbein, along with several other attorneys who list on various websites that they are employed by WELC. *See* Western Environmental Law Center: Erik Schlenker-Goodrich — Read The Dirt; Melissa Hornbein - Attorney at Western Environmental Law ...

[2] *See* Staff & Board | WildEarth Guardians

Center for Biological Diversity lists ***over 40 attorneys among its ~200 staff members***, along with numerous legal fellows and paralegals.[3] ***These groups all represent that exact same interests in the case.*** Indeed, the eNGO parties have already had time to write five different filings seeking to dispose of this case, totaling ~ 87 pages, all of which largely repeat duplicative and cumulative arguments. By contrast, the WATR Alliance has only three part-time contract staff, two of whom are attorneys who also have obligations to other clients.

Moreover, attorneys accept representation with the understanding that they are able to meet the demands of the engagement within ordinary timelines. If counsel truly lacked the capacity to handle this case, it would raise concerns under the Rules of Professional Conduct. Their willingness to accept and continue representation is itself evidence that they can proceed on a standard schedule.

As for the timeline, it is not unusual for it to take many months to draft a proposed rule. But it is almost unheard of for parties opposing a rulemaking petition to be given an equal or greater amount of time to prepare testimony and exhibits as was required for the agency/petitioner to draft the rule itself. Standard practice—regardless of the complexity of the rule or the number of parties involved—is to allow three to four months for preparation of testimony and exhibits. If extensions of time are needed due to negotiations between the parties, then a joint request for extension is then later typically filed. However, here, the eNGOs have not even attempted to engage on the substance of the proposed rule with the WATR Alliance, instead their sole focus is dismissing or delaying the hearing. The eNGOs' proposed schedule, which would delay the hearing until summer 2026, is out of step with established procedure and would needlessly prolong the process.

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[3] *See* www.biologicaldiversity.org/about/staff/

Finally, the Commission is tasked not only with considering the convenience of counsel, but also with ensuring the efficient administration of its proceedings. There is no evidence that this rulemaking is being "rushed" or "prioritized" inappropriately. Instead, what is proposed here is a timeline consistent with normal rulemaking practice—a timeline that eNGO counsel have the resources and, by their own affidavits, the availability to meet. For these reasons, the request for such an extended schedule should be denied.

III. VENUE IN JAL IS APPROPRIATE AND ACCESSIBLE.

The eNGOs ask that the hearing for this matter be held in Santa Fe – a community not impacted by the proposed rule. Water Quality Act's goal, however, is not focused on convenience or centralization of the parties; it is meaningful public participation, especially from those most affected.

This is in-part why the Water Quality Act distinguishes between rulemakings that are of "statewide application" and those that are not. The Act states: "[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." NMSA 1978, § 74-6-6(C). The fact that the WATR Alliance's proposed rule affects 13 counties—out of 33 in New Mexico—means the rules do not extend "throughout all parts of a state." The rules are instead targeted to specific regions where produced water is likely to be located, not the entire state. The suggestion that any rule affecting multiple counties automatically becomes "statewide" would erase the statutory distinction between rules of statewide application and those that are not and undermine the Act's intent.

The argument that the rules "could well extend beyond the counties where discharge is allowed" is speculative, at best, and does not change the targeted nature of the proposal. If the

mere possibility of broader impact made a rule "statewide," then no regulation would ever qualify as local, nullifying the Act's provision for hearings in substantially affected areas.

The Commission should further dismiss any claim that logistical hurdles or travel expenses for eNGOs should dictate the hearing's location. Holding a hearing in Lea, Eddy, San Juan, or any of the 13 counties included in the proposed rule would present equal logistical challenges for the WATR Alliance and its counsel as it would for eNGO parties and counsel, however, logistical convenience is rightfully not part of the calculus. These arguments overlook the primary purpose of the Act: to give those who are most immediately impacted—local communities and stakeholders in the heart of the affected area—a real opportunity to be heard. While hybrid hearings and virtual participation are valuable and should be part of the process, they cannot replace the value of holding the hearing in the community where the direct impacts will be felt most.

In determining the location of a hearing on a matter that is not of statewide application, the Commission should give primacy to the interests of the community most directly affected by the proposed action. Holding the hearing in that community ensures meaningful public engagement, while virtual participation can adequately accommodate other interested persons. The inverse arrangement—limiting the most affected community to virtual participation while affording in-person access to less-affected parties—would frustrate the principles of fairness, accessibility, and representative governance that underlie the Commission's hearing process.

As for venue logistics, it is not unusual for government bodies to make arrangements for hearings outside the state capital when local engagement is warranted. The administrative inconvenience of finding a suitable venue does not outweigh the statutory and democratic imperative to bring the process to the impacted community.

In short, the Water Quality Act provides a framework that prioritizes local input when the impacts of a rule are local or regional. The WATR Alliance's proposal most affects communities concentrated in the southeast part of the State. Holding the hearing in Jal or within the region most affected honors both the text of the Act and the principle of meaningful public participation. Virtual participation can supplement, but is an inadequate substitute for, the opportunity for those most impacted to attend in person and have their voices heard where the impacts will be felt.

CONCLUSION

For the foregoing reasons, the WATR Alliance respectfully requests that the Motion be denied and that the Hearing Officer or Commission set a hearing for the dates proposed in December at a location in southeastern New Mexico.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2025, a true and correct copy of the foregoing Response to Joint Motion from Center for Biological Diversity et al. for Commission to Comly with Advisory Committee Requirements and to Hold Hearing in Summer 2026 was sent by electronic mail to the following:

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