

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 & Reuse Alliance,

Petitioner.

**PETITIONER'S RESPONSE TO WELC'S MOTION FOR RECONSIDERATION OF
COMMISSION DECISION TO GRANT HEARING**

The Water Access Treatment and Reuse (“WATR”) Alliance hereby files this response to the Western Environmental Law Center’s (“WELC”) *Motion for Reconsideration of Commission Decision to Grant Hearing* (the “Motion”). The Motion must be denied because it is procedurally improper and asks the Water Quality Control Commission (the “Commission”) to act in contravention of its own procedural regulations.¹ Agencies must follow their own procedural regulations; as a result, WELC’s motion must be denied.

INTRODUCTION

On June 20, 2025, WATR submitted a petition for new rulemaking to the Water Quality Control Commission (“Commission”), seeking to establish a comprehensive regulatory framework for the use of treated produced water. The petition expressly covers “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

¹ WELC did not seek concurrence from all the parties in this case regarding the filing of its Motion in contravention of 20.1.6.207(B) NMAC. While WATR clearly opposes the motion, based on arguments made at the July 8 hearing, that did not excuse WELC from seeking the positions of the other parties in the case.

application of treated produced water to land, for activities unrelated to the exploration drilling, production, treatment of refinement of oil or gas,” as required by NMSA 1978 § 74-6-4(P).

Subsequently, on July 2, 2025, WELC filed its Opposition to WATR’s Request for Hearing, and a hearing was held on July 8, 2025. During that hearing, Commissioner Kenney stated that the New Mexico Environment Department (the “Department” or “NMED”) would participate in the hearing on the rulemaking petition.² Commissioner Kenney also indicated that the Department was still determining the form of its participation.³ After consideration of Commissioner Kenney’s statements, the Commission voted to proceed with setting the matter for a rulemaking hearing. On July 9, 2025, the Commission entered an order appointing a Hearing Examiner. There is no evidence in the record to suggest that Commissioner Kenney’s statements regarding the Department’s participation were inaccurate, nor is there any indication that the Department has since changed its position following the July 8 hearing and determined that it will not participate in the rulemaking.

On July 23, 2025, the Hearing Examiner notified the parties by email that a majority of the Commissioners were available for a hearing in December and reported that there was support for holding at least one week of the hearing in Hobbs, New Mexico—one of the communities most directly affected by the proposed rule. After this communication, the eNGO parties filed motions to dismiss WATR’s petition, raising many arguments that had already been presented and addressed at the July 8, 2025 hearing. These motions lack merit and should be denied.

In the present Motion, WELC asks the Commission to reconsider its decision to hold a hearing, relying entirely on the Department’s current lack of entry of appearance or notice of intent

² See WQCC July 8, 2025 meeting video, 1:19:23 – 1:20, <https://www.youtube.com/watch?v=VFEjljeMGDo>.

³ *Id.* at 1:12:26 – 1:13:40.

to present technical testimony.⁴ This argument ignores the Commission’s applicable rules and regulations concerning scheduling orders, deadlines for entries of appearance, and deadlines for the filing of technical testimony. There is no legal or factual basis to set aside the Commission’s decision on these grounds.

ARGUMENT

1. The Commission Must Follow Its Procedural Rules.

WELC contends that the WATR Alliance’s Petition cannot be set for hearing solely because the Department has not yet submitted an entry of appearance in this matter. However, WELC fails to identify any precedent, regulation, or statute requiring the Department to file such an entry as a condition for setting the matter for hearing. This is because no such procedural requirement exists under New Mexico law. In fact, WELC’s argument completely ignores the Commission’s procedural rules for rulemaking cases.

The Commission’s procedural rules for Rulemaking are set forth in Part 20.1.6 NMAC. *See* 20.1.6.2 NMAC (“This part governs the procedures to be followed by the commission, and by participants before the commission, in connection with all rulemaking hearings before the commission”). Concerning the procedure applicable to a petition for rulemaking, Commission regulations state that:

- Any person may file a petition with the commission to adopt, amend, or repeal any regulation within the jurisdictions of the commission;
- The petition shall be in writing and shall include a statement of reasons for the regulatory change...;

⁴Despite having access to all information cited in the Motion on or around July 8, 2025, WELC waited until Thursday August 7, 2025 to file its Motion – just a few business days prior to the Commission’s Hearing on August 12, 2025. WELC asked that the Motion be heard at the August 12 hearing, giving very little time or consideration to the Commission’s procedural rules or timelines for motion practice.

- The commission shall determine, at a public meeting occurring no later than 90 days after receipt of the petition, whether or not to hold a public hearing on the proposal; and
- If, the commission determines to hold a public hearing on the petition, it may issue such orders specifying procedures for conduct of the hearing.,, .⁵

That is it. Nowhere do the regulations require that the Department enter an appearance in a matter before the Commission can set a matter for hearing, or that the Department is a necessary party. In fact, the Water Quality Act specifically states that the Department, “shall not be given any special status over any other party.”⁶

Even if the Department were a necessary party, which it is not, there is no rule requiring that they enter an appearance before the Commission can set a matter for hearing. Under 20.1.6.100 NMAC, the Commission is authorized to appoint a Hearing Officer to conduct the hearing and establish a scheduling order. Pursuant to this rule, the July 9 Order did exactly that – it provides that: “The designated Hearing Officer shall issue a scheduling order setting the date, time, and location of the hearing[.]” No such scheduling order has been issued in this case, and as a result, there are currently no deadlines with which the Department—or any other party—must comply, including any deadline to file an entry of appearance.

In the absence of other deadlines set in a scheduling order, the Commission’s regulations establish clear deadlines for when parties—including the Department—must enter their appearance and submit technical testimony. Rule 20.1.6.202 NMAC provides that any person wishing to offer technical testimony has until 20 days before the hearing to file a notice of intent to present such testimony. Similarly, Rule 20.1.6.203 NMAC governs the deadlines for entries of appearance by any person seeking to participate in the case, setting comparable timelines. The

⁵ 20.1.6.200(A)-(D) NMAC.

⁶ NM Stat. 1978 § 74-6-9(G).

Commission's procedural regulations define "person" to include "an individual or any entity, including federal, state and local governmental entities, however organized." 20.1.6.7(N) NMAC. It is therefore evident that these procedural requirements apply to the Department. Nevertheless, WELC asks the Commission to disregard these established deadlines and to deny WATR's request for a hearing unless and until the Department files an entry of appearance in advance of what the rules require.

Further, WELC's focus is limited to the Department entering an appearance as a party, presumably to provide technical testimony. WELC's argument ignores other avenues of meaningful participation available to the Department. Under 20.1.6.204, the Department may present non-technical testimony at a hearing without entering an appearance and without any prior notification. Under the Water Quality Act, non-technical testimony can cover a broad range of evidence and discussion, including legal argument, general comments, and statements of policy or position concerning matters at issue in a hearing.⁷ Much of the discussion at the Commission's July 8 meeting regarding the Department's participation in this matter revolved around the Department's "position" on the rule, and whether the Department thought the rule administratively workable. The Department need not enter an appearance in the matter to provide this type of testimony.

Further, it is worth noting, that neither the Environment Department nor any of its staff acting in their current and official capacities are researching the treatment of produced water, including issues related to toxicology, treatment trains, water characterization, etc. The Department is not tasked with performing scientific research related to the treatment of produced water because advancing the science on water treatment is not its charge. Under the Water Quality Act, the

⁷ 20.1.6.7(U) NMAC.

Department's duty is to, "administer regulations adopted pursuant to the Water Quality Act, responsibility for the administration of which has been assigned to it by the commission."⁸ Which is precisely why the Department partnered with New Mexico State University to create the New Mexico Produced Water Research Consortium and why other states have followed New Mexico's lead and established similar research organizations in other states—to identify and fill scientific and technical gaps related to the reuse of produced water.

Thus, questions and technical testimony regarding the state of the science and whether that science supports the rule proposed by the petition in this matter are not questions the Department or its staff are well-positioned to answer. The technical testimony answering these questions will derive from the experts actively engaged in scientific research.

In short, WELC offers no legal authority supporting the notion that dismissal or delay is warranted. Dismissing WATR's Petition simply because the Department has not yet appeared—before any deadlines have even been established by the Hearing Officer—would be fundamentally unfair. The Commission is obligated to adhere to its own regulations. *See Narvaez v. N.M. Dep't of Workforce Solutions*, 2013–NMCA–079, ¶ 15, 306 P.3d 513 (“An administrative agency is bound by its own regulations.”), cert. denied, 2013–NMCERT–006, 304 P.3d. 425; *Stinebaugh v. New Mexico Racing Comm'n*, No. 32,840, 2015 WL 4874288, at *2 (N.M. Ct. App. July 9, 2015). Accordingly, the Commission must deny WELC's motion and proceed by setting a hearing date and establishing appropriate procedural deadlines.

CONCLUSION

For the foregoing reasons, the WATR Alliance respectfully asks that the Commission deny WELC's Motion for Reconsideration of Commission Decision to Grant Request for Hearing.

⁸ NM Stat. 1978 § 74-6-8.

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 Motion for Reconsideration of Commission Decision to Grant Hearing was sent by e-mail to the following:

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