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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 JOINT MOTION TO DISPOSE OF THE WATR ALLIANCE PETITION OUTRIGHT

The Water Access Treatment and Reuse (WATR) Alliance hereby files this response to New Energy Economy, the Center for Biological Diversity, Mario Atencio and Daniel Tso's (collectively "NEE") *Joint Motion to Dispose of the WATR Alliance Petition Outright Hearing* (the "Motion"). The Motion must be denied because it is procedurally improper and because long-established authority from the United States Supreme Court, United States Courts of Appeals, the New Mexico Supreme Court, and New Mexico Court of Appeals all hold that res judicata and collateral estoppel do not apply to rulemakings. NEE's Motion ignores these authorities and asks the Commission to do the same. The Commission cannot ignore well-established law and thus must deny NEE's Motion.

INTRODUCTION

NEE seeks an extraordinary and improper remedy: the summary dismissal of a rulemaking petition based on doctrines of preclusion—res judicata and collateral estoppel—that are inapplicable to this proceeding. It is well established that an entity such as the Water Quality Control Commission, acting in a rulemaking / quasi-legislative capacity, is not bound by judicial doctrines of preclusion, which only apply to adjudications. The WATR Alliance's petition is valid under the New Mexico Water Quality Act and Commission rules and the Commission's decision to set the Petition for hearing is equally valid under both statute and rule.

BACKGROUND

The rule proposed by the WATR Alliance Petition is not a hastily-crafted proposal cobbled together out of frustration in pursuit of, as NEE posits, "a second bite at the apple." The rule proposed by the WATR Alliance is the product of years of engagement and contribution from various stakeholders to identify and to the extent possible fill statutory, regulatory, and science gaps related to the reuse of a potential water source in New Mexico—treated produced water. Members of the WATR Alliance have been involved in various of these efforts and ultimately filed the Petition in this matter because so many of the gaps related to reuse have been filled, such that regulations contemplating reuse are ripe for consideration.

In July 2018, the State of New Mexico and the U.S. Environmental Protection Agency signed a memorandum of understanding (EPA / NM MOU), wherein the parties agreed to develop a white paper to examine and address opportunities under state and federal law to synthesize the regulatory and permitting frameworks related to produced water, identify data and policy gaps related to the use of treated produced water, identify possible uses of treated produced water, and identify any process or other improvement opportunities with respect to such uses.[1]

In November 2018, after accepting and reviewing public comment, the State and EPA published the white paper contemplated by the EPA / NM MOU, titled, "*Oil and Natural Gas Produced water Governance in the State of New Mexico*."[2] The nearly forty-page white paper clarified how the use of treated produced water could help alleviate water scarcity, provided a roadmap for navigating federal and state regulations, and identified gaps and opportunities to

[1] *See Memorandum of Understanding Between the State of New Mexico and the United States Environmental Protection Agency,* July 2018, available at: https://www.epa.gov/sites/default/files/2018-07/documents/epa-nm-mou_produced-water_07-16-2018.pdf?utm_source=chatgpt.com

[2] *Oil and Natural Gas Produced water Governance in the State of New Mexico,* November 2018*,* available at: https://www.epa.gov/sites/default/files/2018-11/documents/oil_and_natural_gas_produced_water_governance_in_the_state_of_new_mexico_draft_white_paper_508.pdf?utm_source=chatgpt.com

streamline existing frameworks.[3] The white paper also identified certain important gaps that needed to be addressed pertaining to the reuse of treated produced water, including water quality characterization, ownership and control of produced and treated produced water, regulations pertaining to the reuse of treated produced water, liability, etc.[4]

On the heels of the white paper, the Produced Water Act was introduced in the 2019 legislative session as House Bill 546. The Produced Water Act's stated purpose is to conserve New Mexico's limited freshwater supplies by encouraging the reuse of treated produced water where safe and feasible. The Produced Water Act filled many of the gaps identified in the white paper, e.g., it clarified issues of ownership and control, bifurcated jurisdiction over treated produced water between the Environment Department or Oil Conservation Division based on the purpose of the reuse (within or outside of the oil and gas field), and regarding the adoption of reuse rules, stated:

> [t]he Commission **shall adopt regulations** to be administered by the department of environment **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 of refinement of oil or gas.

NMSA 1978 § 74-6-4.P (emphasis added). The Produced Water Act, including its mandate that the Commission adopt regulations for discharge and other uses, passed unanimously in the House of Representatives and 32-6 in the Senate and was signed into law by Governor Lujan-Grisham on April 3, 2019.

Shortly after passage of the Produced Water Act, in September 2019, the Environment Department and New Mexico State University entered into a memorandum of understanding creating the New Mexico Produced Water Research Consortium, the sole purpose of which was to "better understand the scientific and technical challenges and opportunities surrounding produced water"

[3] *Id*. p.5.
[4] *Id.* p.31-33.

and "to fill scientific and technical gaps related to produced water."[5] Since its inception in 2019, the Consortium has been working with local stakeholders and state, national, and global experts to develop and enhance the state of the science pertaining to the reuse of treated produced water. Members of the Consortium have either published or contributed to dozens of peer-reviewed articles related to produced water characterization, treatment, toxicity, modeling, regulatory frameworks, risk, and economic feasibility. Thirty-four of those publications are available on the Consortium's website.[6]

In late 2024, shortly after the Consortium's 2024 State of the Science Symposium, members of the WATR Alliance observed that gaps in data and scientific understanding related to the treatment of produced water had been filled, sufficient to facilitate development of a regulation consistent with the Produced Water Act's mandate. Consequently, working with various technical and other experts, the WATR Alliance prepared and filed the rule proposed by the current Petition.

Over the last eight years, substantial progress has been made toward enabling the safe and lawful reuse of treated produced water in New Mexico. Statutory, scientific, and regulatory gaps that once posed significant barriers have been addressed. Risks associated with the use of treated produced water have been identified, assessed, and demonstrated to be capable of mitigation. The principal remaining gap is the absence of regulations governing the use and reuse of treated produced water—regulations that the Legislature expressly directed the Commission to adopt in the Produced Water Act. The Commission has not yet adopted the regulations contemplated by the Produced Water Act because no such petition has been brought to the Commission for consideration, until now.

The rule proposed and adopted in WQCC 23-84 was not at any point the rule contemplated

[5] *Memorandum of Understanding Between the New Mexico Environment Department and Regents of the New Mexico State University*, September 2019, available at: https://www.env.nm.gov/new-mexico-produced-water/wp-content/uploads/sites/30/2023/03/NMSU-NMED-MOU-0919-2019.pdf

[6] New Mexico Produced Water Research Consortium, Publications, available at: https://nmpwrc.nmsu.edu/research/publications.html

and required by the Produced Water Act—"a rule for the discharge, handling, transport, storage, recycling or treatment for the disposition of treated produced water."[7] The rule in WQCC 23-84 sought to prohibit the discharge or other reuse of treated produced water, not authorize it. Thus, the rule proposed in this matter, WQCC 25-34, will be the first time the Commission has had the opportunity to consider a rule like that mandated by the Produced Water Act.

In WQCC 23-84, the Commission recognized that the issue of reuse of treated produced water would necessarily come before it again, with additional scientific evidence in support.[8] There is no reason inherent to the rule adopted in WQCC 23-84 that a proposed rule, such as that proposed in WQCC 25-34, cannot be brought sometime before the eventual sunset of WQCC 23-84.

Although the Commission heard a collection of technical testimony in WQCC No. 23-84, it did not receive testimony from key experts at the New Mexico Produced Water Research Consortium—the very entity created to identify and fill scientific and technical gaps. Nor did or could the Commission have considered important scientific developments and studies published after the deadline for filings in that matter. In the past 12 to 24 months, the field of produced water treatment and reuse has advanced significantly.[9] When taken together with expert testimony that was available but not introduced in WQCC No. 23-84, this latest and emerging body of scientific evidence provides a substantially enhanced and more complete record in support of the Petition and proposed rule.

Accordingly, Petitioners respectfully submit that there is presently available, a robust and current scientific basis to justify a hearing on the Alliance Petition, and that, consistent with its obligations under the Produced Water Act and the Water Quality Act, the Commission should deny NEE's Motion and continue preparing for a December 2025 hearing on the WATR Alliance Petition.

[7] NMSA 1978 § 74-6-4(P).
[8] *See* WQCC 23-84, *Order and Statement of Reasons* ¶¶ 10, 11, 25, 68, 79, 121.
[9] *See* Exhibit A, Self-affirmed Statement of Jennifer Bradfute.

RESPONSE TO THE MOTION'S FACTUAL AND PROCEDURAL BACKGROUND

To the extent necessary, WATR denies all factual assertions in the Motion's Factual and Procedural Background that are unsupported or unsubstantiated by the record. NEE fails to cite where in the administrative record for WQCC 23-84 it derives the basis for many (if not all) of its procedural points.

WATR expressly denies the allegations raised in ¶¶ 5, 7, 8, 11, 12, 13, 14, 15 of the Motion's Factual and Procedural Background. WATR further denies any insinuation and allegation of privity or relationship with the New Mexico Oil and Gas Association ("NMOGA").

It is not reasonably subject to dispute that WATR has initiated a new and distinct rulemaking in WQCC 25-34. A quick read of the Petition and Statement of Reasons submitted in WQCC 23-84 compared with those filed in WQCC 25-34 demonstrates that the present proceeding is neither duplicative nor cumulative. In WQCC 23-84, the Department's primary objective was to establish a framework for safe water reuse practices throughout New Mexico, including establishing certain baseline parameters for indirect and direct potable reuse. In the context of produced water, the Commission's focus was limited to prohibiting discharge and establishing regulations for early-stage pilot projects involving the reuse of treated produced water. The resulting rule, 20.6.8 NMAC, provides general definitions encompassing various forms of wastewater reuse—including domestic, industrial, and produced water.

Pursuant to legislative direction set forth in the Produced Water Act,[10] WATR now petitions the WQCC to promulgate comprehensive regulations governing the discharge, handling, transport, storage, recycling, and treatment for the disposition of treated produced water in applications such as road construction and maintenance, roadway ice or dust control, and other construction or land application activities unrelated to the exploration, drilling, production, treatment, or refinement of oil

[10] NMSA 1978, § 74-6-4(Q).

or gas. These matters were not addressed in WQCC 23-84, and the need for such regulation is underscored by support from the New Mexico Chamber of Commerce, the Greater Albuquerque Area Chamber of Commerce, Senators Maestas and Tallman, and Representatives Pettigrew and Sanchez, as reflected in comment letters filed in the docket for WQCC 25-34.

In WQCC 25-34, WATR proposes a comprehensive and technically detailed regulatory framework specifically for the reuse of treated produced water. WATR's proposed rule builds upon the preliminary groundwork established in WQCC 23-84, advancing a robust permitting system, operational standards, monitoring protocols, financial assurance mechanisms, and closure requirements for full-scale reuse projects. Unlike the rule adopted in WQCC 23-84, which addresses only pilot projects, the rule proposed in WQCC 25-34 introduces a two-tier permitting structure, complete with rigorous application standards, public participation mechanisms, timelines, and procedures for renewal or modification. The proposed regulatory framework contemplates extensive water characterization, including chemical analysis, indicator compounds, and surrogate parameters, as well as stringent monitoring—such as continuous or frequent sampling and whole effluent toxicity (WET) testing where appropriate. Data collection, exceedance response, and reporting are also required and incorporated as enforceable permit conditions.

Further, the proposed rule mandates detailed operational plans addressing handling, transport, storage, spill prevention and response, waste management and disposal aligned with injection well requirements for disposal, and certification of operational plans by professional engineers. Closure plans must include cost estimates, Department inspections, and provisions for remediation or abatement in the event of contamination. Financial assurances—including surety bonds, letters of credit, or cash accounts—must be sufficient to cover closure, cleanup, and operational risks.

In sum, while 20.6.8 NMAC, as adopted in WQCC 23-84, provides a broad, introductory regulatory structure for water reuse in New Mexico, with an emphasis on pilot projects and

preliminary feasibility, the rule proposed in WQCC 25-34 would build on the framework established in WQCC 23-84 and establish a comprehensive regulatory regime governing the use of treated produced water, providing the technical specificity and operational detail required for safe and effective reuse at scale. Together, these proceedings establish a layered regulatory framework: WQCC 23-84 set the initial framework, and WQCC 25-34 would supply the necessary regulatory tools to manage treated produced water reuse across diverse applications.

Critically, the need for the proposed rule has become both warranted and necessary due to recent developments. As detailed in the attached sworn declaration from Jennifer Bradfute, the Executive Director of WATR (attached as **Exhibit A)**, significant new scientific data regarding treated produced water became available in 2024 and 2025. Additionally, major investments in neighboring states have and are creating incentives and regulatory frameworks facilitating the reuse of treated produced water. If New Mexico fails to adopt scientifically-grounded regulations in a timely manner, we risk losing millions of barrels of New Mexico's water resources to these neighboring states, without benefit to New Mexico. This new and otherwise unincluded scientific evidence renders the testimony cited from WQCC 23-84 in NEE's motion largely irrelevant and inapplicable. Simply put, even assuming for argument's sake that it was true a year to eighteen months ago that there was not sufficient data available to justify the promulgation of a treated produced water rule allowing discharge, that simply is not the case today based on new and previously unconsidered scientific data.

ARGUMENT

I. The Commission Must Deny NEE's Motion Because it is Procedurally Improper

At the outset, the Commission should deny NEE's Motion because it is procedurally improper. NEE has filed a so-called "dispositive" motion to terminate this rulemaking petition mere weeks after the Commission voted to initiate a rulemaking hearing and appointed a hearing officer.

This procedural move is premature and unsupported by Commission precedent. NEE offers no authority demonstrating that dispositive motions are appropriate at this early stage—specifically, after the Commission has decided to hold a hearing but before any evidence has been presented. Granting such a motion at this juncture would undermine the integrity of the rulemaking process and circumvent the opportunity for a full and fair hearing, contrary to established Commission procedures. As such, the Commission must deny the Motion.

Dispositive motions are strongly disfavored under New Mexico law, especially when filed before a petitioner has had the opportunity to present its case.[11] NEE's motion is notably devoid of any precedent where a rulemaking proceeding was dismissed at this early stage by way of a dispositive motion. Instead, NEE relies almost exclusively on authorities from civil litigation cases in district courts, which are inapplicable and do not govern the procedural context of administrative rulemaking. *See Reeves v. Wimberly*, 1988-NMCA-038, ¶ 2, 107 N.M. 231, 232, 755 P.2d 75, 76 (involving a district court landlord -tenant lawsuit in which a motion for summary judgement was filed); *Edwards v. First Fed. Sav. & Loan Ass'n of Clovis*, 1985-NMCA-015, ¶ 1, 102 N.M. 396, 398, 696 P.2d 484, 486 (involving a damages suit filed in district court in which a motion for summary judgement was filed); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 325, 99 S. Ct. 645, 648, 58 L. Ed. 2d 552 (1979)(involving a motion for summary judgment in a stockholder lawsuit); *State v. Hall*, 2013-NMSC-001, ¶ 1, 294 P.3d 1235, 1236 (involving a felony criminal charge); *Muse v. Muse*, 2009-NMCA-003, ¶ 1, 145 N.M. 451, 453, 200 P.3d 104, 106 (involving a divorce case that resulted

[11] *See*, *e.g.*, *Am. Fed'n of State v. State*, 2013-NMCA-106, ¶ 6, 314 P.3d 674, 676 ("Motions to dismiss are infrequently granted."); *Town of Mesilla v. City of Las Cruces*, 1995-NMCA-058, ¶ 4, 120 N.M. 69, 70, 898 P.2d 121, 122 ("granting a motion to dismiss is an extreme remedy that is infrequently used."); *Gila Res. Info. Project v. New Mexico Water Quality Control Comm'n,* 2005-NMCA-139, ¶ 40, 138 N.M. 625, 635, 124 P.3d 1164, 1174 ("dismissal with prejudice, being a drastic sanction, 'should be used sparingly.'"); *Jones v. City of Albuquerque Police Dep't*, 2020-NMSC-013, ¶ 16, 470 P.3d 252, 257 ("Summary judgment is a drastic remedy that is disfavored in New Mexico courts.") (citing *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280 (citing *Pharmaseal Labs., Inc. v. Goffe*, 1977-NMSC-071, ¶ 9, 90 N.M. 753, 568 P.2d 589)).

in litigation); *United States v. Baker*, No. CV 09-20068, 2011 WL 13142576, at *1 (W.D. Tenn. Dec. 1, 2011), aff'd, 562 F. App'x 447 (6th Cir. 2014) (involving a possession of a firearm claim); *Lewis v. Rio Grande Sun*, No. 29,184, 2009 WL 6677929, at *2 (N.M. Ct. App. Mar. 31, 2009) (involving breach of contract claims filed in district court); *Tunis v. Country Club Ests. Homeowners Ass'n, Inc.*, 2014-NMCA-025, ¶ 2, 318 P.3d 713, 714 (involving a lawsuit seeking indemnification for attorney's fees); *Deflon v. Sawyers*, 2006-NMSC-025, 139 N.M. 637, 137 P.3d 577, as corrected (June 29, 2006) (involving a lawsuit for intentional infliction of emotional distress); *Martucci v. Vitale*, No. CIV.A. 14-6311, 2015 WL 3465899, at *1 (D.N.J. May 29, 2015) (involving litigation under the Securities Exchange Act); *VitalGo, Inc. v. Kreg Therapeutics, Inc.*, No. 16-CV-5577, 2017 WL 1163741, at *1 (N.D. Ill. Mar. 29, 2017) (involving a lawsuit for copyright and trademark infringement and unfair competition claims); *Callison v. Naylor*, 1989-NMCA-055, ¶ 1, 108 N.M. 674, 675, 777 P.2d 913, 914 (involving a motion for summary judgment in a lawsuit under the Unified Parentage Act). As discussed below, none of these cases apply in a WQCC rulemaking matter.

Even assuming, arguendo, that the precedents cited by NEE were applicable—which they are not—NEE fails to adhere to the procedural requirements set forth in the very authorities it relies upon. Nearly all of NEE's cited cases concern motions for summary judgment, a procedural device that simply does not exist in the context of rulemaking proceedings. Similarly, motions to dismiss are rarely, if ever, granted in rulemaking cases and are fundamentally inapplicable here. Even though these two procedural tools do not apply to rulemakings, because NEE is attempting to summarily dispose of this matter it is nevertheless useful to examine how these devices are employed and how NEE has failed to adhere to or satisfy the most basic of requirements governing summary judgment or motions to dismiss.

New Mexico case law overwhelmingly favors adjudicating matters on their merits through evidentiary hearings or trials. *See City of Albuquerque v. SMP Props*., LLC, 2021-NMSC-011, ¶¶ 13-14, 483 P.3d 566, 570. Summary judgment is only appropriate where no genuine issue of material fact exists. *Id*. Dispositive relief is improper when reasonable minds could differ on the material facts in dispute. *Id*. Furthermore, on appeal, New Mexico courts are required to view the facts in the "light most favorable to the party opposing summary judgment" and to "draw all reasonable inferences in support of a trial on the merits." Dismissals are particularly disfavored when further factual development is necessary to resolve the central legal issues. *Sun Country Savings Bank*, 1989-NMSC-043, ¶ 27; *Sanchez v. Lujan*, No. A-1-CA-35721, 2019 WL 4419732, at *6 (N.M. Ct. App. Aug. 22, 2019). There has been no factual development in this matter because the only materials before the Commission are the Petition and Statement of Reasons, neither of which carry or are required to carry the facts supporting the proposed rule, but are the the only materials necessary for the Commission to determine whether to set a petition for hearing.

Similarly, New Mexico courts are reluctant to grant motions to dismiss, which are only proper when the law does not support the claim under any conceivable set of facts. *Villegas v. Am. Smelting & Ref. Co*., 1976-NMCA-068, ¶ 4, 89 N.M. 387, 388, 552 P.2d 1235, 1236. In considering a motion to dismiss, courts must accept the petitioner's allegations as true and may not rely on factual assertions from the opposing party. *Am. Fed'n of State v. State*, 2013-NMCA-106, ¶ 6, 314 P.3d 674, 676. This is because a motion to dismiss tests only the legal sufficiency of the complaint, not the underlying facts. *Id*. In this matter, the WATR Alliance asserts that there is scientific evidence and testimony supportive of the proposed rule, which allegation must be accepted as true, if we are operating in a motion to dismiss context.

NEE makes no attempt to align its Motion with the frameworks for either summary judgment or a motion to dismiss. In fact, NEE's motion follows no existing framework for summary dismissal.

Rather, NEE devotes nearly 23 pages of its Motion to baseless factual allegations—allegations that are, for the most part, unsupported by any evidence attached to the motion itself and which have zero bearing on the Commission's decision to set the Petition in this matter for hearing. The principal factual assertion NEE seeks to establish is that WATR and NMOGA are the same entity or are in privity; yet the only "evidence" NEE offers are NMOGA's 2023 tax return and letterhead from 2017-2018. None of these materials have any bearing on the legality of WATR's rulemaking petition, and WATR expressly denies any legal relationship or privity with NMOGA.

II. Res Judicata and Collateral Estoppel do not apply to rulemakings

NEE's Motion hinges on the applicability of res judicata or collateral estoppel. By statute, the Commission can function in either an adjudicatory or rulemaking capacity.[12] The difference between the two is important to understand and recognize because whether the Commission is acting in one or the other capacity controls whether res judicata and collateral estoppel apply. In both this case, WQCC 25-34, and in WQCC 23-84, the Commission is and was acting in a rulemaking not adjudicatory capacity, consequently, neither res judicata nor collateral estoppel apply and NEE's Motion necessarily fails.

a. Distinguishing an adjudication from a rulemaking

Commission adjudications are distinguished from rulemakings by the substance of the request made by the initial filer. The nature of the requested Commission intervention, adjudication or rulemaking, is typically first communicated in and by the caption and then by the language and substance of the request.

Absent from the caption in this matter and in WQCC 23-84 is the well-known "v", which appears in the caption of adjudications, such as in WQCC 24-35, *NMED v. City of Santa Fe*, and WQCC 23-65, *NMED v. Karlee, LLC*. The "v" communicates the presence of a concrete dispute

[12] *See* NMSA 1978 § 74-6-5 and 74-6-6.

between specific parties that requires the intervention of a decision-maker with authority to resolve the dispute. In the present matter, WQCC 25-34, and in the earlier matter of WQCC 23-84, both are styled as, "In the Matter of Proposed Amendments to … ." There are no adversarial parties on opposite sides of a "v" in the caption because there is no concrete dispute. This because both WQCC 25-34 and WQCC 23-84, are rulemakings, not adjudications.

Beyond the caption, whether a matter is an adjudication or a rulemaking ultimately turns on the substance of what is brought to the Commission and what the filer requests the Commission do. The Commission has adjudicatory authority under the Water Quality Act to resolve certain disputes.[13] In these adjudications, the Commission is asked to make determinations concerning, i.e. adjudicate, the facts involved in concrete disputes, and the rights and obligations of the respective parties involved. The Commission's conclusions will obligate the parties, and only the parties, to the respective matters.

As explained by the New Mexico Supreme Court,

> Two principal characteristics distinguish rulemaking from adjudication. First, adjudications 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. Tax'n & Revenue Dep't of State of N.M., 2002-NMSC-013, ¶ 42, 132 N.M. 226, 236, 46 P.3d 687, 697. Both this matter, WQCC 25-34 and WQCC 23-84, invoked the Commission's rulemaking authority by filing, consistent with the requirements of the Water Quality Act and implementing regulations a "Petition for Rulemaking and Statement of Reasons."[14] In both matters, the Commission was and is rulemaking, not adjudicating.

[13] *See e.g.* NM Stat. 1978 § 74-6-10(G).
[14] *See* NM Stat. 1978 § 74-6-6(B); 20-1-6-200 NMAC.

b. Res Judicata and Collateral Estoppel do not Apply to Rulemakings

While it is a relatively straightforward inquiry to determine whether the Commission is acting in a rulemaking or adjudicatory capacity, the consequence of that determination is significant. In the context of NEE's Motion, the distinction matters greatly because the answer determines whether or not NEE's preclusion arguments apply. They do not apply. Both New Mexico and federal courts have long held, without any ambiguity, that the doctrines of res judicata and collateral estoppel do not apply to administrative agencies when they are engaged in rulemaking. These preclusion doctrines are reserved for judicial or quasi-judicial, i.e. adjudicatory proceedings, not for the legislative, policy-driven functions characteristic of rulemaking.

In *Gila Resources Information Project v. WQCC*, 2016-NMCA-076, the New Mexico Court of Appeals recognized the distinction between a rulemaking and an adjudication, specifically noting that "rulemaking affects the rights of a broad class of individuals, whereas adjudication involves concrete disputes affecting specific individuals," and then held that "because the at-issue rulemaking proceeding was not an adjudication, the principle of collateral estoppel has no bearing"[15]

In *U.S. v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), the United States Supreme Court distinguished between rulemaking and adjudicatory roles and held that res judicata and collateral estoppel only apply when the agency is acting in an adjudicatory capacity.[16] Dozens of federal courts have adopted this precedent.[17]

In *Associated Industries of N.Y State, Inc. v. U.S. Dept. of Labor*, the United States Court of Appeals for the Second Circuit held, citing *U.S. v. Utah Construction & Mining Co.,*

"the short answer to any *res judicata* claim would be that administrative action

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[15] *Gila Resource Information Project v. WQCC,* 2015-NMCA-076, ¶¶ 43-44.
[16] *United States v. Utah Const. & Min. Co.,* 384 U.S. 394, 421, 86 S. Ct. 1545, 1560, 16 L. Ed. 2d 642 (1966).
[17] *See e.g. Tipler v. E.I. duPont deNemours & Co.,* 443 F.2d 125 (6th Cir. 1971); *Jet Air Freight v. Jet Air Freight Delivery, Inc*., 264 So. 2d 35 (Fla. Ct. App. 1972); *Roman Cleanser Co. v. Murphy, 366 Mich.* 351, 194 N.W.2d 704 (1972); *Standard Auto Parts Co. v. Michigan Employment Security Comm'n,* 3 Mich. App. 81, 143 N.W.2d 135 (1966); *Morin v. S.H. Valliere Co.,* 113 N.H. 436, 309 A.2d 153 (1973); *Walsh v. Pluess-Staufer, Inc.,* 67 Misc. 2d 855, 325 N.Y.S.2d 19 (Sup. Ct. 1971).

> operates as *res judicata* **only** "**[w]hen an administrative agency is acting in a judicial capacity** and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate."[18]

The Court continued,

> "only what is adjudicated can be res judicata. Administrative action other than adjudication cannot be res judicata. Even if an exercise of the rule-making power depends on a finding of facts, neither the rule nor the finding is regarded as res judicata."[19]

In other words, because WQCC 23-84 and WQCC 25-35 are rulemakings and not adjudications, res judicata and collateral estoppel cannot and do not apply and NEE's argument is entirely unavailing.

In an attempt to sidestep the weighty precedent on this issue, NEE cites one case, *Gila Resource Information Project v.* WQCC, and points to language in the Court's decision as if the particular language was the basis for the Court's holding, when in fact it was not. The Court in *Gila Resource* could not have been clearer in its holding that collateral estoppel does not apply to a rulemaking proceeding. The Court explicitly stated that, "the Commission's adoption of the Regulations at issue in this case was not an adjudicatory proceeding" and that "[b]ecause 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."[20]

NEE ignores the holding and asserts the opposite—that *Gila Resource* supports the position that "whether the preclusion doctrines of collateral estoppel and res judicata apply is not dependent on the type of proceeding involved, but instead on the purpose of the proceeding and whether it will result in a duplication of litigation."[21] This characterization fundamentally misrepresents the *Gila Resource* opinion.

To support its position, NEE does not quote the Court, but rather the State, one of the

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[18] *Associated Indus. of N. Y. State, Inc. v. U.S. Dep't of Lab.,* 487 F.2d 342, 350 n.10 (2d Cir. 1973) (emphasis added).
[19] *Id.* (citing Kenneth Culp Davis, 2 Administrative Law Treatise § 18.08 at 597 (1958).
[20] *Gila Res. Info. Project v. New Mexico Water Quality Control Comm'n,* 2015-NMCA-076, ¶ 44, 355 P.3d 36, 47, *aff'd*, 2018-NMSC-025, ¶ 44, 417 P.3d 369.
[21] WQCC No. 25-34, NEE *Motion to Dispose of the WATR Alliance Petition Outright Hearing* p.10 (emphasis added).

appellants in the case, which argued in favor of preclusion. Notably, the State had conceded in the case that the "issues … were not in fact [being] relitigated" and that the purpose of the rulemaking "was entirely different from the purpose of the Commission's proceedings on remand."[22] In other words, the State conceded that there was no re-litigation of facts but still proceeded to argue res judicata. The Court called the State out for its inconsistency:

> Appellants each argue that collateral estoppel precluded the Commission from "re[-]litigating" or "re[-]adjudicating" facts or issues that were resolved in the Commission's Decision and Order on Remand. **Yet, the State acknowledges that issues related specifically to the mine at issue in *Phelps Dodge* "were not in fact re[-]litigated in the Commission's rule[-]making" and that the purpose of rule-making proceedings…was "entirely different" from the purpose of the Commission's proceedings on remand**.

Gila Res. Info. Project, 2015-NMCA-076, ¶ 43. NEE attempts to reframe the Court's observation of this contradiction , citing the "purpose" language in particular, as if it were the Court's holding on the issues of preclusion. It was not and the Court did not leave room for NEE's argument. The Court followed its observation of the State's inconsistent position with its very clear holding on the applicability of preclusion:

> "because the at-issue rule-making proceeding was not an adjudication, the principle of collateral estoppel has no bearing."[23]

NEE's argument is not merely incorrect, it directly contradicts the Court's clear and binding language. As noted by the Second Circuit, "only what is adjudicated can be res judicata." Where the Commission did not adjudicate anything in WQCC 23-84, because the matter was a rulemaking, res judicata cannot and does not apply in the present matter.

III. The Water Quality Act Expressly Authorizes New Petitions

The Water Quality Act provides that, "[a]ny person may petition in writing to have the

[22] *Gila Res. Info.* Project, 2015-NMCA-076, ¶ 43.
[23] *Gila Res. Info. Project v. New Mexico Water Quality Control Comm'n,* 2015-NMCA-076, ¶ 43, 355 P.3d 36, 47, *aff'd*, 2018-NMSC-025, ¶ 43, 417 P.3d 369.

[C]ommission adopt, amend or repeal a regulation or water quality standard" and that "[t]he [C]ommission shall determine whether to hold a hearing within ninety days of submission of the petition."[24] To accept NEE's preclusion argument would require the Commission to interpret language into the statute that is not there, language limiting the right of a petitioner to bring a petition only if the issue had not been previously considered and decided, i.e. if there were no rule already in existence. Under this construct, the Commission would be barred from amending or otherwise revisiting any adopted rule. A rule once adopted would be res judicata, permanent and unamendable. If the legislature had intended to so limit a petitioner's right and the Commission's authority as a rulemaking entity, it could and would have done so. It did not.

The statute does not align with NEE's interpretation because rather than limiting a petitioner's right or the Commission's authority to entertain rule proposals, the legislature empowered the Commission to exercise its own judgment as to whether a proposal was ripe or not for consideration via a hearing. The Commission acted entirely within its statutory power when it set the Petition in this matter for hearing.

CONCLUSION

NEE's entire argument for dismissal of the WATR Alliance Petition is that it is barred by res judicata and collateral estoppel. There is no caselaw that supports NEE's argument. To the contrary, it is well-established by all relevant courts that the preclusion doctrines of res judicata and collateral estoppel only apply in adjudications and thus have no bearing in rulemakings, like WQCC 23-84 and the present matter. Consequently, the Commission must, and the WATR Alliance respectfully requests that it, deny NEE's Motion and continue preparing for a December 2025 hearing.

[24] NM Stat. 1978 § 74-6-6(B).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2025, a true and correct copy of the foregoing Response to Joint Motion To Dispose Of The WATR Alliance Petition Outright was sent by electronic mail to the following:

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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.

SELF-AFFIRMED STATEMENT OF JENNIFER BRADFUTE

1. I am an attorney at Bradfute Consulting & Legal Services P.C. d/b/a Bradfute Sayer, P.C. and the Executive Director of the Water Access, Treatment & Reuse Alliance (the "WATR Alliance"). I am over the age of 18, have personal knowledge of the matters addressed herein, and am competent to provide this Self- Affirmed Statement.

2. The WATR Alliance is a newly formed trade association focused on maximizing the value and lifespan of every drop of water, with a special focus on the Southwest. Our mission centers generally on responsible water recycling, treatment, and reuse to help ensure the region's long-term water security through support of the water reuse and water treatment industry.

3. The WATR Alliance is building a diverse coalition of stakeholders, that includes entities like municipalities, desalination companies, technology and internet service companies, mining and oil and gas operators, investors, technology providers, associations representing water users, and landowners. We welcome a wide range of members who share our commitment to advancing water treatment, reuse, and conservation efforts.

4. Since its formation in the Fall of 2024, the WATR Alliance has partnered with organizations like the Albuquerque Hispano Chamber of Commerce to meet with New Mexicans in Las Cruces, Los Lunas, Albuquerque, and Santa Fe to discuss water treatment initiatives related to municipal wastewater reuse, brackish desalination, and treated produced water. We have also hosted events for regulators and stakeholders to tour water treatment facilities in Midland for both municipal water reuse/treatment and treated produced water.

5. The New Mexico Oil and Gas Association ("NMOGA") is not a member of the WATR Alliance and is not affiliated with the WATR Alliance. Matthias Sayer is the co-founder and Vice President of the WATR Alliance. Matthias and I do not serve on the board of directors for NMOGA and we do not serve on NMOGA's Executive Committee.

6. The WATR Alliance and NMOGA have different missions and different scopes. WATR's mission is centered on water resource sustainability, technological innovation for water treatment, and the water reuse and treatment industry in the Southwest. In contrast, NMOGA's mission focuses on promoting oil and gas development, ensuring regulatory and legislative support for the oil and gas industry, and promoting responsible energy production in New Mexico.

7. In my role as the Executive Director of the WATR Alliance, I have become familiar with many recent developments, research, and pilot projects related to the treatment and beneficial reuse of produced water in New Mexico and Texas during 2024 and 2025.

8. Between 2024 and 2025, multiple pilot projects have been conducted in both New Mexico and Texas resulted in robust amounts of new data and research.

9. In New Mexico, the Kanalis LLC Greenhouse Pilot completed a large portion of its research, focused on using treated produced water for greenhouse irrigation and other non-potable applications, as documented by the New Mexico Environment Department ("NMED") and the Produced Water Research Consortium. In January of 2025, I participated in an event held in Santa Fe where data from this pilot project was publicly presented. This pilot generated significant data, including water characterization information from the San Juan Basin.

10. Further, I am aware of six recent pilot projects conducted in the Permian Basin, all of which have resulted in data. In 2025, the WATR Alliance facilitated field visits to pilot projects conducted by Texas Pacific Water Resources and Aquafortis located in West Texas, and hosted technical presentations on data from the projects.

11. In Texas, recent legislative reports from the Texas Produced Water Consortium confirm the technical feasibility of produced water treatment, as demonstrated by six pilot studies and more than 12,000 third-party water quality records. These reports state that economic feasibility has also improved, with desalination costs reported as low as $1.32 per barrel. The Texas Produced Water Consortium reported to the Texas Legislature that several of these pilot projects feature water characterization, field trials, and advanced toxicity analyses, preformed in collaboration with the New Mexico Produced Water Research Consortium.

12. I am also aware that there are at least two applications currently pending before the Texas Commission on Environmental Quality ("TCEQ") to allow for the discharge of large volumes of treated produced water into the Pecos River or Red Bluff Reservoir, each applicant has submitted data regarding water characterization and testing

to TCEQ.

13. In 2025, the Texas legislature enacted several new laws to modernize the state's approach to produced water reuse.

14. The Texas Legislature and Governor have also approved funding the Texas Water Fund, with a proposed $20 billion in dedicated funding over the next two decades. This funding can be used for treated produced water projects, and it is intended to accelerate produced water reuse across Texas by supporting infrastructure, advanced treatment technologies, and pilot projects.

15. Taken together, these legislative and financial developments represent a significant overhaul of Texas's regulatory environment for produced water, supporting expanded reuse. These changes are expected to attract further investment and innovation in produced water reuse and will incent produced water treatment for reuse within the State of Texas.

16. Large amounts of data were obtained in 2024 – 2025 from pilot projects.

17. I have conducted online searches using Google Scholar for the terms "produced water," "produced water treatment," and relevant researchers, and found a substantial body of peer-reviewed articles released in 2024 and 2025. These publications cover a wide range of topics relating to produced water treatment, characterization, and reuse, including advances in membrane technologies, desalination methods, and public perception studies. Below is a list of some of the publications that I found:

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An overview and challenges. *Separation and Purification Technology*, 351, 128124.

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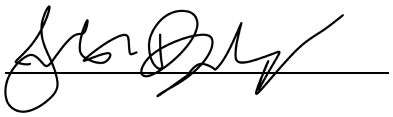
18. I have further confirmed with researchers that large quantities of unpublished data were generated 2024 and 2025 related to the study of produced water treatment.

19. Pursuant to Rule 1-011 NMRA, I declare and affirm under penalty of perjury under the laws of the State of New Mexico that the foregoing statements are true and correct to the best of my knowledge and belief.



Jennifer Bradfute

8/7/2025

Date