

**STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION**

IN THE MATTER OF PROPOSED NEW  
RULE 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.

**MOTION TO REQUIRE PETITIONER TO PROVIDE SCIENCE THAT UNDERGIRDS  
ITS NEW RULE**

New Energy Economy (“NEE”), respectfully moves the Water Quality Control Commission (“WQCC” or Commission”) to require Water Access Treatment and Reuse Alliance (“Petitioner”) to state with reasonable specificity the scientific basis supporting its proposed rule. The WQCC may only “adopt water quality standards for surface and ground waters of the state that are **based on credible scientific data and other evidence appropriate under the Water Quality Act.**” NMSA 1978, § 74-6-4(D) (2009). (Emphasis added). Under 20.1.6.200 (B), the Petitioner was required to allege in its petition the basis for the rule it is proposing to replace the scientifically formulated rule the Commission recently adopted. Instead, Petitioner pointedly failed to allege any sort of scientific basis for its petition, even in cursory form. By this Motion, NEE requests the Commission to require the Petitioner to now provide what it should have provided in its petition, i.e., a statement of the science on which it is relying. In its filing, Petitioner alleges only that it had unspecified “new evidence” but failed to identify any evidence in the previous case or any of the Commission’s factual findings in that case, WQCC 23-84 (R),

that are false or incorrect.<sup>1</sup> Ms. Bradfute, serving as both WATR Alliance’s Executive Director and its attorney of record in this proceeding, has claimed to have “new evidence”<sup>2</sup> that proves treated produced water can be safely discharged and reused but has given no hint of what this evidence is. In Petitioner’s last pleading Ms. Bradfute stated that she conducted a Google Scholar search for 2024-2025 peer-reviewed articles regarding “produced water.”<sup>3</sup> New Energy Economy is well aware that there is and will of course continue to be ongoing research on produced water, but that doesn’t mean that the existing science is close to or, for that matter, anywhere near establishing what it must: That treated produced water can be discharged and reused without endangering human health and/or harming our environment. NMSA 1978, § 74-6-4(D) (E) and (K) (2009).

Under its enabling legislation, this Commission may not entertain a new produced water petition without science-based evidence supporting it.<sup>4</sup> Furthermore, agency action is arbitrary and capricious when the agency departs from prior policy without explanation and a lawful basis

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<sup>1</sup> *Spring Valley Water Co., Inc.*, 30 N.Y.P.S.C. 1831 (Oct. 3, 1990) (“[A]n administrative agency may review its previous decisions *where there is an error of law or a manifest error of fact in the record of the earlier administrative proceeding.*”) (Emphasis added).

<sup>2</sup> This argument by attorneys was not proffered anywhere in the Petition. *See State v. Hall* 2013-NMSC-001, ¶28, 294 P. 3d 1235 (“It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence.”) (citing *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104)) The WATR Alliance has failed to specify *any* scientific evidence that it relies on that would warrant a new hearing. *United States v. Baker*, No. CV 09-20068, 2011 WL 13142576, at \*4 (W.D. Tenn. Dec. 1, 2011), *aff’d*, 562 F. App’x 447 (6th Cir. 2014) (“Courts that have addressed motions for reconsideration based on newly discovered evidence require defendants to identify, with particularity, the evidence to be offered and justify why that evidence was not provided earlier.”)

<sup>3</sup> Self-Affirmed Statement of Jennifer Bradfute, p. 4, ¶17, attached to Petitioner’s Response to Joint Motion to Dispose of the WATR Alliance Petition Outright, August 8, 2025.

<sup>4</sup> NMSA 1978, § 74-6-4 (D) (E) and (K).

for doing so. *Hobbs Gas Co. v. N.M. Pub. Serv. Comm’n*, 1993-NMSC-032, ¶¶ 8-9, 115 N.M. 678, 858 P.2d 54. Respectfully, this Commission already has done so, without explanation, by accepting the Petition seeking reconsideration and, apparently, moving forward to consider doing so. New Energy Economy respectfully requests, as a matter of fundamental fairness, the legal requirements of New Mexico law, and principles of due process, that the Commission require the Petitioners to state with reasonable specificity the science it relied on for its rule, if it has any. The Commission would act arbitrarily and capriciously if it entertained, or further entertained, the Petition without knowing what the scientific basis for it is.

## I. INTRODUCTION

After an exhaustive, 18-month rulemaking process, the WQCC issued its final decision in May 2025 rejecting discharges or reuses of treated or untreated produced water into the state’s lands and waters. *See* WQCC 23-84 (R), “Order and Statement of Reasons” adopting 20.6.8 NMAC, “Ground and Surface Water Protection – Supplemental Requirement for Water Reuse.”

That decision was rooted in the sworn testimony of five New Mexico Environment Department scientists, and a number of independent expert witnesses, extensive briefing, and over 100 public comments. **The Commission concluded that “there is insufficient scientific support for the proposition that any discharges of treated or untreated produced water would be protective of ground or surface water.”**<sup>5</sup>

The WATR Alliance—a reconstituted proxy for the New Mexico Oil and Gas Association (“NMOGA”) and the New Mexico Produced Water Research Consortium (“NMPWRC”)—now seek to relitigate the matter without presenting any new scientific rationale that produced water can be reused or discharged safely. Instead, Petitioner speculates that future

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<sup>5</sup> WQCC 23-84, Statement of Reasons, at 5, ¶21.

science might one day justify a different outcome. That is an insufficient basis for undoing the prior rulemaking. Under well-established administrative law principles, an agency may not disregard its prior science-based decision, relitigate final determinations through proxy petitioners, or substitute political expediency for scientific evidence.

## II. ARGUMENT

### 1. The Petition Must Be Supported by Specific, New Scientific Evidence

“Although a Commission should be able to change its procedure, it should not arbitrarily or capriciously do so without good reasons.” *Hobbs Gas Co.*, 1993-NMSC-032, ¶ 8 (quoting *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm’n*, 84 N.M. 330, 333, 503 P.2d 310, 313 (1972)). “Thus, regulatory treatment which ‘radically departs from past practice without proper notice’ will not be sustained.” *Hobbs supra*, (quoting *General Tel. Co. v. Corporation Comm’n*, 98 N.M. 749, 755-56, 652 P.2d 1200, 1206-07 (1982)). Here notice includes the basis for the departure, which is, in this case, the scientific basis. “The [Commission] is bound by, and limited to, its existing rules and regulations, proper application of the law, compliance with the [legislative] mandate, and by previously established methods ... [and] absent a change in circumstances peculiar to the [issue]... and the pending case, making it necessary that there be a departure from established method. *Hobbs supra*, (quoting *General Telephone*, 98 N.M. at 755, 652 P.2d at 1206.). “[T]he Commission is not free to disregard its own rules and prior ratemaking decisions or ‘to change its position without good cause and prior notice to the affected parties.’” *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm’n*, 2019-NMSC-012, ¶11, 444 P.3d 460 (quoting *PNM Gas Servs.*, 2000-NMSC-012, ¶ 9, 129 N.M. 1, 1 P.3d 383 and *Hobbs*, 1993-NMSC-032, ¶ 12, 115 N.M. 678, 858 P.2d 54). Thus, the

Commission is still bound by prior decisions requiring new scientific evidence that proves that treated produced water may be discharged and reused *before* proceeding with a new hearing – because without that proof the WQCC’s apparent reversal of its own rule is arbitrary and capricious.

The Administrative Procedure Act and New Mexico law, NMSA 1978, § 74-6-4(D) (2009), require agencies to ground their actions in reasoned decision-making supported by the “best available science.” See *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 52, 103 S.Ct. 2856, 2871 (1983); *Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115, 118–19 (2d Cir. 2005) (agency action arbitrary and capricious where agency failed to apply the “best available science” standard); *N.M. Mining Ass’n v. NM Water Quality Control Commission*, 2007-NMCA-010, ¶34, 141 N.M. 41, 150 P. 3d 991 (substantial evidence exists based on credible scientific data; so long as the record is supported by a body of reputable scientific thought, the agency is free to act).

In WQCC 23-84 (R), NMED experts testified that the department cannot issue a produced water discharge permit without scientific standards, and the department can’t develop those standards without credible scientific data and because that evidence does not yet exist, as is required by statute<sup>6</sup> and legal precedent,<sup>7</sup> a rule that permits issuance of treated produced water discharge is contrary to law and would also result in plain error. This position was also adopted by the Commission in its final rule. 20.6.8.400(A) NMAC.

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<sup>6</sup> Water Quality Act, NMSA 1978, § 74-6-4(D), (E) and (K).

<sup>7</sup> *N.M. Mining Assn. v. Water Quality Control Comm’n*, 2007-NMCA-084, ¶ 12, 142 N.M. 200, 205 (citing *Bokum Res. Corp. v. N.M. Water Quality Control Comm’n*, 93 N.M. 546, 553, 603 P.2d 285, 292 (1979)).

In the recently-concluded prior rulemaking, WQCC 23-84 (R), *every* NMED expert witness testified in favor of no discharge because there is no credible scientific proof<sup>8</sup> that discharge will not pose a threat to public health and the environment.<sup>9</sup> With all due respect to the Commission, it is alarming that it is proceeding with this case even though Commissioner Kenney, Secretary of the Environment Department, has told the Commission that he will not allow these scientists to testify in this case, apparently without regard to what theory or theories

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<sup>8</sup> According to the leading scientists studying Permian Basin produced water, the peer-reviewed laboratory results establish only that New Mexico has taken the very “first step” to assessing the toxicity and risk to human health and the environment: **“to properly assess risk, having an *a priori* understanding of the ecotoxicity effects of PW [produced water] to different organisms is necessary for both risk management and in helping to define the most toxic components and necessary treatment strategies prior to PW [produced water] discharge and reuse.”** WQCC 23-84, Xu, P., Zhang, Y., Jiang, W., Hu, L., and Xu, X., 2022. *Characterization of Produced Water in the Permian Basin for Potential Beneficial Use*, Available at: <https://tinyurl.com/yc57swkx>.

<sup>9</sup> WQCC 23-84, NMED Bates Labeled Exhibits, NMED Exhibit 2, Written Direct Testimony Fullam, at 43 (“Because effective treatment methodologies are inherently dependent on the source water characteristics, unlike with domestic wastewaters, the types of methodologies to attain a consistent effluent quality for treated produced water are highly variable and site-specific. . . . The Department does not have the data necessary to fully evaluate the characterization of raw produced water, appropriate treatment methodologies, potential effluent quality, safe handling practices, or safe disposal practices of the waste streams.”); NMED Exhibit 3, Written Direct Testimony Herman, at 85 (“the Department has not been provided with the necessary research and data and therefore has not considered the possibility of a discharge permitting process associated with treated produced water.”); NMED Bates Labeled Exhibits, NMED Exhibit 4, Written Direct Testimony Murphy, at 111-112 (“The limited availability of produced water quality data and the even more sparse information on treated produced water increases the uncertainty to a level that presently makes development of regulations for the discharge of treated produced water infeasible. **Without defensible, scientific evidence that produced water treatment is reliably safe and treatment technologies are effective at removing all known and unknown constituents, the Department is left with only one option which is to develop and propose a regulation that is restrictive and does not allow for the discharge of treated produced water in any manner. Until such time as there is meaningful, scientific proof that a use, application, or discharge will not pose a threat to the public, the restrictive nature of the proposed regulation is the only method of oversight that is supported by the Department.**” (Emphasis added.)

the Petitioner comes up with to justify the adoption of the rule it is proposing. (Comments of Secretary Kenney and his chief counsel, WQCC open meeting, August 12, 2025.)

Here, Petitioner has failed to identify, much less submit, any new scientific evidence that reuse and discharge is safe. In fact, Petitioner has admitted that it does not *yet* have any scientific proof to submit to the Commission. See, Exhibit A. The petition instead rests on speculation that technology “may someday” evolve, but under Section 74-6-4(D), that hypothetical possibility is insufficient to redo the entire rulemaking proceeding.<sup>10</sup> Courts have repeatedly held that conjecture cannot substitute for evidence. Without new evidence, the WQCC has no rational basis to reopen or revise 20.6.8 NMAC. The law requires evidence before policy—not speculation which is guaranteed to result in dangerous pollution.

**2. The Commission’s Failure to Assess Risk Due to Lack of Ecotoxicological Standards in WATR’s Proposed Rule Will Cause Irreparable Harm to Human Health and the Environment**

The Commission failed to properly assess the risks posed by the Petitioner’s proposed rule. Risk assessment requires more than speculation—it requires an a priori understanding of the ecotoxicological effects of produced water on a wide range of organisms and ecosystems. Such understanding is indispensable both for risk management and for identifying the most toxic constituents and treatment methodologies necessary before any reuse or discharge of produced water. Absent this baseline science, the Commission had no rational basis to evaluate the consequences of the Petition.

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<sup>10</sup> The Commission is authorized to adopt water quality standards, which “shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act.”

Petitioner’s proposed rule is deficient on its face. It addresses only approximately **300 constituents** of produced water, even though scientific research submitted into the record of the prior, recently-concluded rulemaking identified **1,198 unique chemicals with CAS numbers** in Permian Basin produced water.<sup>11</sup> Worse still, industry secrecy around hydraulic fracturing chemicals means that the full inventory of constituents is unknown, as operators – including Petitioner’s members– have refused to disclose the chemical composition of their fracking fluids. Thus, the number of constituents is almost certainly higher. The Petition therefore excludes the majority of known and unknown contaminants from its scope, and it proposes **no toxicological standards** for even a quarter of the known constituents. Such an omission makes the rule scientifically meaningless, based on the testimony of NMED’s own experts, and legally inadequate as a basis for regulation.

The record underscores this deficiency. NMED testified unequivocally in WQCC 23-84 (R) that “the science has not reached a point at which protective regulations could feasibly be developed because without a complete characterization of Permian Basin produced water no standards can be set.”<sup>12</sup> NMED’s expert, Lei Hu, Ph.D., further testified that “[c]omprehensive characterization of Permian Basin-produced water is scant,” noting that radioactive materials such as radium-226 and radium-228 occur at concentrations nearly 100 times the state’s surface

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<sup>11</sup> WQCC 23-84, (Murphy), NMED Exhibit 4, at Bates Stamp 000108-109.

<sup>12</sup> WQCC 23-84, TR., 5/16/2024, (Fullam), at 119-121. (At 120: There are no standards.”) (At 84-85, Kamat: there are unknown chemicals in treated produced water that we may not have standards for. ... we don’t have a complete characterization of produced water, to perform a complete antidegradation analysis based on the water quality standards.”) WQCC 23-84, TR., 5/16/2024, (Fullam), at 197. (Dodd: “We don’t know the degree of risk that produced water, whether treated or untreated, poses to health, welfare and the environments? Ms. Fullam: That would be correct.”)

water criteria, and that BTEX and VOCs are present in abundance at levels known to pose risks to human health.<sup>13</sup>

NMED experts Fullam and Murphy explained that “known and unknown constituents associated with produced water... are complex” and that “research to characterize the water is needed to determine if there are viable and effective treatment methodologies for protective reuse applications.”<sup>14</sup> Murphy’s research further documented that although 1,198 chemicals have been identified, only **290 (24%)** have standard analytical methods, and only **14%** have any toxicity values associated with them.<sup>15</sup> This means that for the overwhelming majority of constituents, neither detection methods nor toxicity benchmarks exist.

According to one of the few relevant studies included in the Google Scholar “list” presented by the Petitioner in the Self-Affirmed Statement of Jennifer Bradfute, p. 4, ¶17, attached to Petitioner’s Response to Joint Motion to Dispose of the WATR Alliance Petition Outright, August 8, 2025, “**about 96.78% of the organic fraction present in the distillate remained unidentified.** This outcome highlights the limitations of current standard extraction techniques, such as liquid-liquid extraction, and detection methodologies such as using GC/MS, when it comes to thoroughly characterizing the organics in treated PW [produced water], as well as underscores the need for the use of advanced, comprehensive targeted and non-targeted

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<sup>13</sup> WQCC 23-84, TR., 5/16/2024, (Hu), at 250-253.

<sup>14</sup> WQCC 23-84, (Fullam), NMED Exhibit 2, at Bates Stamp 000013; (Murphy), NMED Exhibit 4, at Bates Stamp 000108-109.

<sup>15</sup> WQCC 23-84, (Murphy), NMED Exhibit 4, at Bates Stamp 000108-109.

chemical characterization together to reveal and enhance our understanding of “unknown” chemicals in PW [produced water].”<sup>16</sup> (Emphasis added.)

Another peer-reviewed study (in Ms. Bradfute’s list) had this to say about the produced water composition of numerous organics (natural and synthetic), inorganics, metals, and radioactive materials: **“PW composition is not fully identified or understood, and many unknown constituents are likely yet to be discovered. Indeed, the majority of the compounds identified in the current study (~94% of the compounds identified in total along with predicted molecular formula and structures) are not listed in existing PW databases, emphasizing the necessity of non-targeted chemical screening to unveil such unknowns. ... In addition, identifying unknowns using solely targeted techniques is nearly impossible due to the complex composition of PW, the lack of appropriate internal standards, and unreasonably high analytical costs for the multitude of potential constituents. Most of the existing literature on PW treatment technology evaluations is based on limited targeted analyte removals and therefore does not demonstrate human health and ecological safety in long-term reuse applications.”**<sup>17</sup> (Emphasis added.)

Shockingly, the Petition and proposed rule proposes to authorize the discharge of produced water where 94-97% of the chemical constituents are unknown. What more would it

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<sup>16</sup> Tarazona, Y., Hightower, M., Xu, P., Zhang, Y. (2024/2025). *Treatment of produced water from the Permian Basin: Chemical and toxicological characterization of the effluent from a pilot-scale low-temperature distillation system*. *Journal of Water Process Engineering*, 67, 106146. Available online 14 September 2024, <https://doi.org/10.1016/j.jwpe.2024.106146>.

<sup>17</sup> Delanka-Pedige, H.M.K., Young, R.B., Abutokaikah, M.T., Chen, L., Wang, H., ... (2024). *Non-targeted analysis and toxicity prediction for evaluation of photocatalytic membrane distillation removing organic contaminants from hypersaline oil and gas field-produced water*. *Journal of Hazardous Materials*, 471, 134436. Available online 26 April 2024, <https://doi.org/10.1016/j.jhazmat.2024.134436>.

take to convince this Commission that the body of scientific evidence has not yet advanced to a point where discharge and reuse is safe?

By advancing a rule that ignores three-quarters of the known constituents, fails to address disclosed and undisclosed constituents, and proposes no toxicological standards whatsoever, the Petitioner left the Commission with no scientific basis to conduct the required risk analysis. By accepting this deficient petition and disregarding the overwhelming evidence in the record, the Commission acted arbitrarily and capriciously and violated its duty under the Water Quality Act, NMSA 1978, § 74-6-4(E), to prevent degradation of surface and groundwater in New Mexico.

**3. As of July 2025, the State of the Permian Basin Produced Water Scientific Research Is: “The Science is Still Lacking”**

Dr. Pei Xu, Department of Civil Engineering, New Mexico State University, in her most recent peer-reviewed scientific work relevant to this issue, with other scientists and Michael Hightower, former Director of the New Mexico Produced Water Research Consortium who provided testimony in WQCC 23-84 (R), state: “Produced water (PW) *could be* an alternative water resource after treatment for fit-for-purpose applications. *However, comprehensive studies assessing the impact of treated PW exposure on human health are still lacking.*”<sup>18</sup> (Emphasis added.) That is the state of the science.

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<sup>18</sup> Wijekoon, Senuri. *Comprehensive cytotoxicity assessment of treated produced water from thermal distillation using human cell lines*, July 26, 2025, Available online, <https://doi.org/10.1016/j.ecoenv.2025.118726>.

**4. The WATR Alliance is in Privity with Past Participants/Litigants, thus the Commission has in effect granted a Motion for Reconsideration and is now in the Process of that Reconsideration, but Without any Explanation of Why it has done so and while an Appeal of the Existing Rule is Pending.**

As more fully stated in the *Joint Motion to Dispose of the WATR Alliance Petition Outright* (July 24, 2025), the WATR Alliance is in privity with NMOGA and NMPWRC, parties deeply engaged in WQCC 23-84 (R). The Petition, therefore, is properly treated as a motion for reconsideration of the WQCC's final order in 23-84 (R), which means the Commission would have to explain its about-face; granting a motion to reconsider and doing so without the explanation that the law requires is a due process violation. *Fed. Nat'l Mortg. Ass'n v. Churaman*, No. 612CV647ORL36KRS, 2012 WL 13102589, at \*1 (M.D. Fla. July 19, 2012). ("A motion for reconsideration must demonstrate why the court should reconsider its prior decision and 'set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" *Fla. College of Osteopathic Medicine, Inc. v. Dean Witter Reynolds, Inc.*, 12 F. Supp. 2d 1306, 1308 (M.D. Fla. 1998) (quoting *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 295 (M.D. Fla. 1993))). There are three grounds justifying reconsideration: 1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or manifest injustice. *Id.*)

The law hasn't changed and neither have the facts. The Petitioner has not availed itself of the opportunity under the month-old rule to conduct any pilot projects to prove that **discharges of treated or untreated produced water would be protective of ground or surface water.** 20.1.6.400 (B) and (C) NMAC. Not only did the Commission fail to require the Petitioners to provide proof of new evidence that would change the outcome of another hearing, it ignored its legal obligation to review the Petition for:

1. “reasons” provided by the Petitioner for making a change in 20.6.8 NMAC necessary, 20.1.6.200 (B);<sup>19</sup>

2. the credible scientific evidence that forms the basis undergirding how this new rule will “protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act,”<sup>20</sup> NMSA 1978, §§ 74-6-4(D); and

3. the technical sufficiency of the Petitioner’s proposed new rule, especially when NMED’s own experts testified regulations could not feasibly be developed without a complete characterization of Permian Basin produced water and their associated toxicity values.<sup>21</sup> See also, Argument, Point 2, above.

A reviewing court must be satisfied that the agency’s decision-making was the product of reasoned decision-making.<sup>22</sup> See *Motor Vehicle Manufacturers*, 463 U.S. at 52, 103 S.Ct. at

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<sup>19</sup> “The petition shall be in writing and shall include a statement of the reasons for the regulatory change.” While the Petition included a document entitled “Statement of Reasons” there is no actual “reason” stated for the reconsideration of the rule.

<sup>20</sup> *Geller v. Federal Communications Commission*, 610 F.2d 973, 1979, holding that agency rules could not be rewritten without a showing that they served the public interest. The applicable public interest standard in the WQCC context is an affirmative showing that WATR’s rule will “protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act.”

<sup>21</sup> WQCC 23-84, TR., 5/16/2024, (Fullam), at 119-121. (At 120: There are no standards.”) (At 84-85, Kamat: there are unknown chemicals in treated produced water that we may not have standards for. ... we don’t have a complete characterization of produced water, to perform a complete antidegradation analysis based on the water quality standards.”) WQCC 23-84, TR., 5/16/2024, (Fullam), at 197. (Dodd: “We don’t know the degree of risk that produced water, whether treated or untreated, poses to health, welfare and the environments? Ms. Fullam: That would be correct.”)

<sup>22</sup> *Am. Horse Prot. Ass’n, Inc. v. Lyng*, 812 F.2d 1, 6 (D.C. Cir. 1987).

2871. (There is no articulation of “the factual and policy bases for [the] decision.” *Professional Drivers*, 706 F.2d at 1221. We are adjured to take a critical view of an agency’s “post hoc rationalization,” see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 826, 28 L.Ed.2d 136 (1971), but under even the most charitable view the agency’s post hoc conclusory statement lacks substance.”) Here we have no evidence of reasoned decision-making, in fact, we have just the opposite: No written rationalization and no explanation of why NMED (and other) scientific testimony is being ignored.

This deficiency is even more suspect given that NMOGA’s appeal of WQCC’s recently promulgated rule is pending. See, *State ex rel. Bell v. Hansen Lumber Co.*, 1974-NMSC-051, ¶¶ 6-7, 86 N.M. 312, 313, 523 P.2d 810, 81. (During the pendency of an appeal, it is generally held that the district court is without power to grant relief.) *Zig Zag Spring Co. v. Comfort Spring Corp. et al.*, 200 F.2d 901 (3rd Cir. 1953); *Baruch v. Beech Aircraft Corporation*, 172 F.2d 445 (10th Cir. 1949), cert. denied 338 U.S. 900, 70 S.Ct. 251, 94 L.Ed. 554 (1949); 7 Moore, Federal Practice 60.30(2), 423 (2nd ed. 1974).

#### **5. The Agency’s Departure from Prior Findings Without Explanation Is Arbitrary and Capricious**

The Supreme Court has made clear that an “unexplained inconsistency” in agency policy renders its action arbitrary and capricious. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222, 136 S.Ct. 2117, 2126 (2016). The Commission may not reverse its science-based 2025 determination without identifying and explaining the new scientific basis for its change. No such basis has been provided.

## 6. Political Pressure Cannot Substitute for Science

Agency action driven by political influence, rather than application of statutorily required factors, is unlawful. *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981); *Connecticut v. U.S. Dep't of the Interior*, 363 F. Supp. 3d 45, 63 (D.D.C. 2019). (“[A]n agency’s decision may be arbitrary and capricious if political pressure influenced the decision in a manner not dictated by the relevant statutes and regulations.”) Here, the Governor’s replacement of WQCC members with appointees committed to advancing the WATR Alliance petition, combined with Secretary Kenney’s refusal to make Environment Department scientists available, demonstrate with little doubt that political loyalty and industry influence—not science—are dictating the process and likely the outcome. Such extraneous considerations violate the requirement of reasoned, science-based rulemaking. *Saget v. Trump*, 375 F. Supp. 3d 280, 354 (E.D.N.Y. 2019) (“Agency action is arbitrary and capricious when the agency departs from prior policy without explanation. See *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222, 136 S.Ct. 2117, 2126, (2016) (noting an “unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice”) (internal quotation marks, citation, and modifications omitted); *F.C.C. v. Fox*, 556 U.S. at 515, 129 S.Ct. 1800, (2009); *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32, 117 S.Ct. 350, (1996). Agency action may also be arbitrary and capricious when the action is the product of bad faith and improper political influence.”) The New Mexico Water Quality Control Commissioners may be appointed by the Governor, but they act for the public, including the health of people and the protection of the environment. The fact that the Governor has publicly committed to giving the oil and gas industry a way out of its produced water problem at the expense of the public health and environment is not a permissible consideration.

### **III. Position of the Parties:**

NEE sought the position of the parties and can state: The WATR Alliance, Select Water Solutions, Inc., NMOGA, IPANM, and PBPA, Oxy USA, Inc., and Nick Maxwell oppose the Motion. Center for Biological Diversity, WildEarth Guardians and Daniel Tso support the motion. State Land Office concurs with the motion. Bruce Wetherbee does not oppose. No other party responded.

### **IV. CONCLUSION**

New Energy Economy wishes to make clear that its fundamental position is that the Commission should not have acted on WATR's petition at all, given that it recently addressed this very same issue and given that there is no "new evidence" other than the new evidence, inserted in the record by the Petitioner (apparently without having read it), which we quote above at pp. 9-10, establishing that the chemicals in produced water are largely *unknown and that there are no* toxicity values associated with them. But the issue is once again before the Commission. All New Energy Economy is asking at this juncture, however, is for the Commission to recognize that Petitioner has claimed it has new evidence demonstrating that its proposed regulation is scientifically supported, but to date it has refused to disclose this evidence to the Commission or to any of the other parties. To comply with the law that governs this proceeding it must state what that new evidence is, and do so in a way that the Commission and the parties can understand. In other words, the Commission must require the Petitioner to provide credible scientific data that proves that treated produced water reuse and discharge can be conducted in a manner that protects public health and welfare and the environment because without such evidence, the Commission's reconsideration of 20.6.8 NMAC is unwarranted and would be

arbitrary and capricious. If the Commission will not require the Petitioner to do so, the public's and the parties' rights to due process of law will be violated.

Respectfully submitted this 4th day of August, 2025,

NEW ENERGY ECONOMY

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**Certificate of Service**

I hereby certify that on September 4, 2025, a copy of the foregoing Motion was emailed to the persons listed below.

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## EXHIBIT A

Thanks Mariel. As stated below and at the Pre-hearing conference, we will be providing this information. As you are aware, parties are almost always provided a reasonable amount of time to prepare materials for rulemaking hearings. We are preparing our materials for tge hearing and the materials for the outreach sessions

Sent from my Verizon, Samsung Galaxy smartphone  
Get [Outlook for Android](#)

---

**From:** Mariel Nanasi <mnanasi@newenergyeconomy.org>  
**Sent:** Monday, August 18, 2025 11:30:26 AM  
**To:** Jennifer Bradfute <jennifer@bradfutelaw.com>  
**Cc:** Jones, Pamela, ENV <Pamela.Jones@env.nm.gov>; Matthias Sayer <matthias@bradfutelaw.com>; fox@westernlaw.org <fox@westernlaw.org>; tdavis@wildearthguardians.org <tdavis@wildearthguardians.org>; mnanasi@seedsbeneaththesnow.com <mnanasi@seedsbeneaththesnow.com>; gevans@biologicaldiversity.org <gevans@biologicaldiversity.org>; ccox@biologicaldiversity.org <ccox@biologicaldiversity.org>; kathy@watralliance.org <kathy@watralliance.org>; AGRankin@hollandhart.com <AGRankin@hollandhart.com>; CAMulcahy@hollandhart.com <CAMulcahy@hollandhart.com>; LCJones@hollandhart.com <LCJones@hollandhart.com>; editor@thecandlepublishing.com <editor@thecandlepublishing.com>; jmccaleb@taylormccaleb.com <jmccaleb@taylormccaleb.com>; etaylor@taylormccaleb.com <etaylor@taylormccaleb.com>; sherbst@taylormccaleb.com <sherbst@taylormccaleb.com>; eugarte@nmdoj.gov <eugarte@nmdoj.gov>; jwechsler@spencerfane.com <jwechsler@spencerfane.com>; kaolson@spencerfane.com <kaolson@spencerfane.com>; sshaaheen@spencerfane.com <sshaaheen@spencerfane.com>; tpacheco@spencerfane.com <tpacheco@spencerfane.com>; detso49@yahoo.com <detso49@yahoo.com>; mpatencio@gmail.com <mpatencio@gmail.com>; Lopez, Luis, ENV <luis.lopez@env.nm.gov>; Felicia.L.Orth@gmail.com <Felicia.L.Orth@gmail.com>; Biernoff, Ari <abiernoff@nmslo.gov>; Alvarez, Clarissa A. <calvarez@nmslo.gov>; Nick Maxwell <inspector@sunshineaudit.com>  
**Subject:** RE: Follow-up, WQCC 25-34(R) Scheduling Conference

I saw "science" mentioned in your advisory committee outline but if you have the data why won't you give it to us? Plainly an agency's action is arbitrary and capricious if it departs from prior policy without explanation. As you know the Water Quality Act requires science-based evidence and unless you have science that proves that produced water can be safely reused and discharged this re-do is unlawful.

Mariel Nanasi  
Senior Attorney and Executive Director  
New Energy Economy  
422 Old Santa Fe Trail, Santa Fe, NM 87501  
Ogaa Po'ogeh - unceded occupied Tewa land  
505-469-4060 (cell)  
MNanasi@NewEnergyEconomy.org

On Monday, August 18th, 2025 at 11:16 AM, Jennifer Bradfute <jennifer@bradfutelaw.com> wrote:

> Thanks Mariel. I appreciate the follow up to your email sent on Thursday morning. It has been just around two business days since you made your request. The WATR Alliance will be providing a response. As stated during the scheduling conference last week, the Alliance will be sharing information regarding its basis for the Petition during our planned engagement sessions that were outlined in the plan that I circulated this morning.

>

> Thank you,

> Jennifer

>

> -----Original Message-----

> From: Mariel Nanasi mnanasi@newenergyeconomy.org

>

> Sent: Monday, August 18, 2025 11:11 AM

> To: Jennifer Bradfute jennifer@bradfutelaw.com

>

> Cc: Jones, Pamela, ENV Pamela.Jones@env.nm.gov; Matthias Sayer matthias@bradfutelaw.com; fox@westernlaw.org; tdavis@wildearthguardians.org; mnanasi@seedsbeneaththesnow.com; gevens@biologicaldiversity.org; ccox@biologicaldiversity.org; kathy@watralliance.org; AGRankin@hollandhart.com; CAMulcahy@hollandhart.com; LCJones@hollandhart.com; editor@thecandlepublishing.com; jmccaleb@taylormccaleb.com; etaylor@taylormccaleb.com; sherbst@taylormccaleb.com; eugarte@nmdoj.gov; jwechsler@spencerfane.com; kaolson@spencerfane.com; sshaheen@spencerfane.com; tpacheco@spencerfane.com; detso49@yahoo.com; mpatencio@gmail.com; Lopez, Luis, ENV luis.lopez@env.nm.gov; Felicia.L.Orth@gmail.com; Biernoff, Ari abiernoff@nmslo.gov; Alvarez, Clarissa A. calvarez@nmslo.gov; Nick Maxwell inspector@sunshineaudit.com

>

> Subject: Re: Follow-up, WQCC 25-34(R) Scheduling Conference

>

> Ms. Bradfute,

> This is my second request to you to provide any scientific evidence that you have the proves that treated produced water can be safely discharged and reused.

>

Mariel Nanasi

Senior Attorney and Executive Director

New Energy Economy

422 Old Santa Fe Trail, Santa Fe, NM 87501

Ogaa Po'ogeh - unceded occupied Tewa land

505-469-4060 (cell)

MNanasi@NewEnergyEconomy.org

On Monday, August 18th, 2025 at 9:45 AM, Jennifer Bradfute jennifer@bradfutelaw.com wrote:

>

>> All: Please see the attached plan from the WATR Alliance as discussed at last week's scheduling conference.

>>

>> Thank you,

> > Jennifer  
> >  
> > Jennifer Bradfute  
> > [jennifer@bradfutelaw.com](mailto:jennifer@bradfutelaw.com)  
> > [jennifer@watralliance.org](mailto:jennifer@watralliance.org)  
> > M 505.264.8740