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STATE OF NEW MEXICO
NEW MEXICO WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF PROPOSED
AMENDMENTS to 20.6.8 NMAC –
Ground and Surface Water Protection – Supplemental Requirements for Reuse of Treated Produced Water,

No. WQCC 25-34(R)

Water Access Treatment & Reuse Alliance,
Petitioner.

PETITIONER'S CONSOLIDATED RESPONSE IN OPPOSITION TO MOTIONS TO DISQUALIFY AND VACATE

The Water Access Treatment & Reuse Alliance (the "WATR Alliance") hereby responds in opposition to the three largely duplicative motions to disqualify and vacate filed September 25, 2025 by the Center for Biological Diversity and Mario Atencio, on the same date by New Energy Economy and Daniel Tso, and September 29, 2025 by Amigos Bravos, Sierra Club, and Western Environmental Law Center. Movants, with little variation in their argument, ask the Commission to disqualify statutorily designated commissioners and to vacate the Commission's July 8 vote setting the WATR petition for hearing and its August 12 votes on preliminary objections.

Movants attempt to convert routine administrative housekeeping into a due-process crisis. But, the July 8 and August 12 actions were procedural gatekeeping steps—whether to notice a petition for hearing and how to handle threshold objections—not merits decisions on any substantive standard. Expressions of policy urgency about moving a petition "over the finished line" to hearing do not demonstrate a closed mind on the substance and merits of the petition and the outcome of the rulemaking process. To the contrary, in the very messages Movants cite as damning, Secretary Kenney overtly communicated that, "[a]ny concerns about the petition" would be addressed during the eventual hearing. The communications cited by Movant's reflect the Commission doing its job to set matters for hearing, develop a record, and deliberate the merits.

The three motions continue Movants' now numerous attempts to avoid consideration of the petition and its scientific basis in a public hearing. Movants' newest arguments cast two intra-Executive emails as evidence of prejudgment of the merits, which they were not. There is zero evidence that any commissioner has prejudged the merits of the petition, had a disqualifying interest, or received off-record evidence of the kind that would defeat the presumption of regularity in a legislative rulemaking. The relief sought by Movants is extraordinary, unwarranted, and should be denied.

INTRODUCTION

The WATR Alliance petition is factually urgent. New Mexico is in a water-scarcity crisis. Meanwhile, Texas is advancing produced-water reuse permitting that will see millions of barrels of New Mexico produced water exported across the border for treatment and reuse. Continued delay on the development of a science-based permitting framework in New Mexico will result in the export of water, jobs, and technology to Texas. The Commission has already voted to set this matter for hearing, the proper course is to schedule the hearing, build the record, and allow the statutorily designated commissioners the opportunity to consider and debate the rule proposed in the WATR Alliance petition.

BACKGROUND AND PUBLIC-INTEREST URGENCY (WHAT MOVANTS IGNORE)

Movants' filings avoid the central reality the WATR Alliance petition addresses: New Mexico is in a water-scarcity crisis and science and technology exist that could help alleviate that crisis. The WATR Alliance petition does not seek to loosen protections or authorize unpermitted discharges; it seeks a transparent, science-based framework built on the same precautionary principle guiding water reuse frameworks in peer states. The proposed rule would reduce pressure on potable supplies and keep value-adding opportunities here in New Mexico, preventing a one-way export of produced water and associated economic opportunity to Texas. By urging

procedural disposal of the WATR petition (again, and again, and again), Movants ask the Commission to do nothing in the face of scarcity. Movants recklessly argue to foreclose the development of a public, science-driven record, the very approach that the Water Quality Act contemplates and the very process that the State has been following since at least 2018 in the context of produced water.

In 2018, the State of New Mexico entered into a Memorandum of Understanding[1] with the United States Environmental Protection Agency, in which the parties agreed to collaborate in the preparation of a white paper examining the regulatory landscape pertaining to produced water in New Mexico with an eye toward identifying legislative, regulatory, and technical / science gaps that would need to be addressed before New Mexico could pursue the reuse of treated produced water beyond the oil and gas field in any meaningful way. The parties to the MOU published the contemplated white paper in November 2018.[2]

On the heels of the 2018 White Paper, in early 2019, the New Mexico legislature passed the Produced Water Act.[3] The Produced Water Act filled so many of the gaps identified in the 2018 White Paper and further instructed the Water Quality Control Commission to "adopt regulations … for the discharge, handling, transport, storage, recycling or treatment for the disposition of treated produced water."[4]

In response to the Produced Water Act's mandate to adopt rules for the reuse of treated produced water, in the summer of 2019, the New Mexico Environment Department entered into a

[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.
[3] H.B 546, 54th Leg., 1st Sess. (N.M. 2019).
[4] Water Quality Act, NMSA 1978, § 74-6-4(P).

Memorandum of Understanding with New Mexico State University and collectively agreed to establish the New Mexico Produced Water Research Consortium (Consortium), the purpose of which was to, "fill scientific and technical gaps related to produced water treatment and reuse outside the oil and gas industry"[5]

Since its inception in 2019, the Consortium has been anxiously engaged in efforts to characterize produced water quality, evaluate treatment technologies, assess human and environmental risk and safety, and generally develop data and science-based information to support regulations and policies pertaining to the reuse of treated produced water, as mandated by the Produced Water Act.[6]

In 2023, the Environment Department began its effort to advance regulations governing the reuse of treated produced water when it drafted an initial rule and convened the Produced Water Advisory Committee (PWAC). The PWAC met twice—September 21, 2023, and October 12, 2023. The purpose of the PWAC was to provide background regarding produced water and discuss and solicit feedback regarding the Department's draft rule.[7] The Department specifically stated as part of its PWAC presentation that it intended to approach the adoption of rules governing the reuse of treated produced water in two phases. Phase 1 would prohibit discharge but would allow closed-loop demonstration projects and would be complete by 2024. Phase 2, which would commence sometime after 2024, contemplated updating the Phase 1 rule to allow reuse, "as defensible data becomes available."[8]

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[5] Memorandum Of Understanding Between The New Mexico Environment Department And Regents Of The New Mexico State University, 2019, updated 2022, *available at https://www.env.nm.gov/new-mexico-produced-water/wp-content/uploads/sites/30/2023/03/NMSU-NMED-MOU-0919-2019.pdf; updated version available at https://cloud.env.nm.gov/resources/_translator.php/NoP4Wd1EyorPC~sl~BWz~sl~H2+PXdCQEKefUZMa+xAlRrWuxlvdEEjyB6bjJPkpj1yU3Bt2cFBMIwVQ19OBCMclsysHruQsRjmDb2gQ05elHwbv116GIeyJgYIA5w8QZDtR9+.pdf*

[6] *See* New Mexico Produced Water Research Consortium website, available at: https://nmpwrc.nmsu.edu/index.html

[7] *See* Exhibit A, Produced Water Advisory Committee Agenda for September 21, 2023.

[8] Exhibit A, Produced Water Advisory Committee Agenda for September 21, 2023, p.10.

While NMED's Phase 1 rule was never intended to allow or support reuse, Movants continue to color Phase 1 / WQCC 23-84 as the final judgment on the science regarding reuse. It was never intended to be as much, and it was not. Regarding the record developed in WQCC 23-84, examination of the timing of the development of the record undoes Movants' recurring argument that the rule proposed in WQCC 23-84 was based on science developed after 2022 / early 2023.

The Department drafted its Phase 1 rule sometime in early / mid 2023. While we do not know the exact date(s), we know that the Department made the draft rule available to the PWAC in September 2023, which means that the rule would have been drafted sometime over the first half of 2023. [9] Thus, the only science that could have been relied upon in preparing the Phase 1 rule was science available to the Department by late 2022. This timeline is corroborated by a recent article, wherein Secretary Kenney was quoted saying that the Phase 1 rule was guided by, "2022 or earlier science."[10] Does this mean that later science could not have been introduced into the record later, no. Notices of Intent to Present Technical Testimony, were due April 15, 2024, and any rebuttal NOIs were due May 6, 2024.[11] Thus, later science could have been introdcued up to that point. But the Department had already determined to approach produced water rulemaking in two phases, and Phase 1 was never intended to be the phase when reuse or science supporting reuse would be introduced. Thus, the Department had no reason to introduce more recent science, science supporting reuse, in Phase 1, such was reserved for Phase 2.[12]

[9] *See* Exhibit A, Produced Water Advisory Committee, September 16, 2023...

[10] *See* Jerry Redfern, Capital & Main and Danielle Prokop, *New Mexico Governor puts finger on scale in oilfiled wastewater vote*, Source NM (Sep. 22, 2025), https://sourcenm.com/2025/09/22/new-mexico-governor-puts-finger-on-scale-in-oilfield-wastewater-vote/

[11] *See* Prehearing Order, February 13, 2024, *available at:* https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2024/02/2024-02-13-WQCC-23-84-Pre-Hearing-Order-pj.pdf

[12] *See* Exhibit A, Produced Water Advisory Committee, September 16, 2023...

Furthermore, while the Department never intended or attempted to introduce or rely on post-2022 science in support of the Phase 1 rule, efforts were made by other parties to introduce more recent science and data in WQCC 23-84, specifically data and research from the Consortium and Dr. Pei Xu supporting reuse. However, that evidence was disallowed because it arrived after the date by which technical testimony could be introduced.[13] This is not an error of the Commission's nor of the Hearing Officer, but the natural consequence of administrative proceedings, which rely on deadlines to facilitate the orderly notice and introduction of evidence and meaningful opportunity for parties to examine and cross-examine such evidence. Regardless, however, of the reason for the exclusion, the result is that in WQCC 23-84 the Commission did not and could not consider the most current technical evidence and testimony from the Consortium and Dr. Pei Xu.

In short, Movants' continued argument to the Commission and publicly that all relevant science was considered by the Commission in WQCC 23-84 is wrong. Testimony from Dr. Pei Xu and the Consortium was excluded,[14] and the Department never intended or attempted to rely on or introduce more recent science in WQCC 23-84 because such was reserved for Phase 2.

The upshot of the foregoing 2018-2025 background is that the State's policy and regulatory aim has been, since at least 2018, the potential reuse of treated produced water outside of the oil and gas field to help alleviate regional water stress. Movants have exhausted arguments that the Commission has heard the science and should now refuse to hear any more and now pivot their argument to an attack on the individuals and regulatory bodies pursing a policy contemplating reuse. Movant's new argument is that any commissioner appointed by the Governor can no longer

[13] *See* Hearing Officer's Report, March 24, 2025, available at: https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2025/03/2025-03-24-WQCC-23-84-HO-Report-pj.pdf

[14] *See* Hearing Officer's Report, March 24, 2025, available at: https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2025/03/2025-03-24-WQCC-23-84-HO-Report-pj.pdf

participate in any Commission matter pertaining to the reuse of treated produced water because the Governor's Office may have expressed that a hearing is an appropriate venue to present and deliberate the science supporting reuse. Movants' request is extreme and entirely unsupported by law. It is not novel nor offensive to considerations of due process that the Executive discusses policy matters with her appointees, even when that policy being considered in a rulemaking.[15]

The question for the Commission at this stage is whether the public gets a fair, on-the-record hearing examining the latest science pertaining to the reuse of treated produced water. The answer should be yes. The Commission should deny the pending motions and set a hearing schedule with venue(s) in Southeast New Mexico.

EXECUTIVE BRANCH COMMUNICATIONS

Movants have cited two emails as evidence that governor-appointed commissioners must be disqualified and the Commission's July 8 vote to set the petition for hearing vacated. Movants have been artful in their usage of hyperbole to describe the subject emails, using words such as "brazen",[16] "poison",[17] "rot",[18] and "rigged"[19] in attempt to turn the correspondence into something it is not.

Movants attack the July 8 decision to set the matter for a hearing as if it were the hearing and final agency action on the petition. It was not. Movants color the emails in question as if they instructed a particular position on the proposed rule. They did not. Review of the subject emails in

[15] *See, Sierra Club v. Costle*, 657 F.2d 298, 404 (D.C. Cir. 1981) (recognizing the basic need of the Executive, including White House / Governor's staff, to monitor the consistency of executive agency regulations with Administration policy and that it is possible that undisclosed Executive prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Executive involvement, but it is not intended that courts convert rulemakings into a technocratic process unaffected by political consideration or the presence of the Executive power).
[16] *CBD Motion to Disqualify Commissioners and Vacate Order Setting Hearing on "WATR Alliance" Petition*, Sep. 25, 2025, p.1
[17] *Id.* at 9.
[18] *Id.* at 9.
[19] *WELC Motion to Disqualify Cabinet Secretary Commissioners and Vacate July & August Orders*, Sep. 25, 2025, p.1

the context of the decision pending before the Commission on July 8 reveals that Movants' argument is misplaced. The emails are limited in their discussion to the vote to set or not the WATR petition for hearing and related hearing logistics, which vote did not remove or hinder in any way Movants' opportunity to introduce evidence into the record through the hearing process, and which vote has no bearing on a final action to adopt, or not, a rule.

Secretary Kenney's statements regarding the question of whether to set the petition for hearing were as follows:

- *The Commission will vote to accept or decline the petition and assign a hearing officer;*
- *The preferred location for the hearing is Lea or Eddy County;* and
- *Any concerns about the petition can be addressed during the fall hearing.*

None of these statements communicate prejudgment or otherwise direct prejudgment of the question of whether to set the petition for hearing. Secretary Kenney communicated that a vote to "accept or decline" would be held. He did not state, "the petition must be set for hearing." Secretary Kenney also identified that a preferred location for a hearing existed. He did not state that "a hearing must be set in Lea or Eddy County." Finally, if there were any doubt as to whether Secretary Kenney had prejudged the issue or otherwise compelled others to do so, he finishes his statement by highlighting the opportunity that a hearing would present for commissioners to address concerns regarding the petition. In short, Secretary Kenney's statement highlighted the WQCC process—we will vote to set or not the petition for hearing and a then at a hearing debate the merits of the petition.

Deputy Chief Buerkle's statement was

[a]s per our huddle discussion, we need everyone's commitment to get this over the finished line.

Movants assume "finish line" means final rule adoption. There is no support for nor reason to make that assumption. Where the "finish line" comment is in response to Secretary Kenney's email and a "huddle" that both emails reference, we should look to his email for an indication of what is meant by finish line and what was discussed at the huddle. Secretary Kenney notes the upcoming vote to "accept or decline" the petition and that "following petition acceptance" a hearing officer will be assigned. Finally, he notes that the hearing officer would be reaching out to commissioners to discuss hearing logistics and that the preferred hearing location was Lea or Eddy County.

Based on available information, the "finish line" is a vote to set or not the petition for hearing, appoint a hearing officer, and that each commissioner speak with the hearing officer regarding hearing date and location. In short, the finish line is voting on a hearing and its date and location. There is no more reason to conclude after having read the emails than before that any commissioner had or has prejudged the merits of the WATR petition.

The decision to set a WATR petition for hearing is nothing more than the establishment of a forum for consideration and deliberation. Secretary Kenney's message underscores this: "[a]ny concerns about the petition can be addressed during the fall hearing." Movants' position relies on an untenable interpretation of that communication—untenable given its text and context—and appears driven by a desire to avoid a public evidentiary process in which the latest science can be presented, examined, and debated.

ARGUMENT (Consolidated Response)

I. THE JULY VOTE WAS A PROCEDURAL, UNREVIEWABLE CALENDARING STEP—NOT A MERITS DECISION

At its July 8, 2025, meeting, the Commission decided whether to set the WATR petition for hearing. That is a threshold, procedural choice in this quasi-legislative rulemaking, not an adjudication of rights, and not a decision on the merits of any proposed rule.

No statute or regulation prescribes "set-for-hearing" criteria. Neither the Water Quality Act nor 20.1.6 NMAC imposes fact-finding criteria for deciding whether to set a petition for hearing. To the contrary, 20.1.6 NMAC treats a public hearing as the required predicate to a final decision on the merits, whether that be to adopt or not a proposed rule. The "set" vote simply opens the record-building process, it does not resolve policy.[20] Movants overlook this controlling fact and clearly hope that the Commission will do the same. The only action taken by the Commission on July 8 and affirmed on August 12 was to set the petition for hearing. While this decision created the opportunity for the development of a record pertaining to the petition, it did not diminish, foreclose, or in any way affect any parties' procedural rights pertaining to the petition.

A vote to set a petition for hearing is unappealable, non-final, and legally inconsequential. Unlike an appealable final decision on the merits, arrived at after a hearing and development of a record, the vote to set a petition for hearing is not appealable because it does not consummate decision-making nor fix legal consequences.[21] This juxtaposition is important because it elucidates when the rights of parties attach. There is no right to a hearing, thus, a vote not to set a petition for hearing is not appealable.[22] Depending on what final action the Commission takes after hearing, the rights of parties may be affected, which is why judicial review attaches to adopted regulations, not to calendaring decisions or notices.[23] A vote to set the WATR petition for hearing is not a decision on the merits, is not governed by any statutory or other criteria, and is not subject to

[20] See *Wylie Bros.,* 80 N.M. at 637–38 (459 P.2d at 163–64) (rulemaking is legislative; agencies have broad discretion in initiating rulemakings).
[21] *See* Water Quality Act, NMSA 1978, § 74-6-7(A); *see also Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (finality requires consummation plus legal effects); 5 U.S.C. § 704 (preliminary/intermediate actions reviewable only upon review of the final action); *FTC v. Standard Oil Co. of Cal*., 449 U.S. 232, 241–43 (1980) (decision to initiate proceedings is nonfinal).
[22] Water Quality Act, NMSA 1978, § 74-6-6(B)
[23] *Id.* 74-6-7(A); *and see N.M. Cattle Growers' Ass'n v. N.M. Water Quality Control Comm'n*, 2012-NMCA-040, ¶¶ 1–3, 277 P.3d 763 (appeal lies from adoption of rule).

reversal on grounds that the person who appointed a portion of the commissioners communicated support for setting the petition for hearing.

Movants' disqualification theory presumes a merits decision that never occurred. Every bias / recusal case cited by Movants concerns a final decision on the merits of the case. *Reid v. New Mexico Bd. of Examiners of Optometry*, concerns a final decision by the New Mexico Board of Examiners in Optometry revoking a license to practice.[24] *New Mexico Bd. of Veterinary Med. v. Riegger,* concerns a final decision by the New Mexico Board of Veterinary Medicine to discipline a veterinarian and assess costs.[25] *State v. Riordan* involved an appeal of a final trial court decision, where appellant argued the judge should have recused herself.[26] *Gila Res. Info. Project v. New Mexico Water Quality Control Comm'n,* concerns a final WQCC decision dismissing the appeal of an appeal of a petition granted by the Environment Department.[27] *Los Chavez Cmty. Ass'n v. Valencia Cnty.* concerns a final action of the Valencia County Board of County Commissioners authorizing a zoning change for a planned residential subdivision.[28]

There is no final decision in this matter because a hearing on the petition has not yet occurred. The doctrines discussed in the cases relied on by Movants do not convert a procedural scheduling vote in this matter, which has yet to progress to a hearing let alone a final action, into a merits adjudication. In other words, none of the cases relied on by Movants provide any support for their argument that the Commission's vote to set the petition for hearing was in any way legally objectionable.

Because the hearing vote created no legal obligations and preserved all parties' opportunities to present evidence and argument at the hearing, Movants cannot show prejudice.

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[24] *Reid v. New Mexico Bd. of Examiners of Optometry,* 1979-NMSC-005, 92 N.M. 414, 589 P.2d 198.
[25] *New Mexico Bd. of Veterinary Med. v. Riegger,* 2007-NMSC-044, 142 N.M. 248, 164 P.3d 947.
[26] *State v. Riordan*, 2009-NMSC-022, 146 N.M. 281, 209 P.3d 773.
[27] *Gila Res. Info. Project v. New Mexico Water Quality Control Comm'n,* 2005-NMCA-139, ¶ 1, 138 N.M. 625, 626, 124 P.3d 1164.
[28] *Los Chavez Cmty. Ass'n v. Valencia Cnty.,* 2012-NMCA-044, 277 P.3d 475.

The appropriate course is to proceed to hearing and decide the merits there—not to abort the rulemaking at the gate.

II. Caselaw cited by Movant does not apply to Non-Final Decisions in a Rulemaking

All three motions contend that the emails preceding the vote to set the petition for hearing establish prejudgment and require mandatory recusal under 20.1.6.102 NMAC. That contention misstates both the posture and the law. This proceeding is legislative in nature and the decision in question is a preliminary docketing decision, not a final action to which judicial review attaches. The cited emails are limited to comments about the setting of the petition for hearing and say absolutely nothing about the merits of the petition, reserving that discussion for the eventual hearing. Adherence to relevant caselaw requires the Commission to examine whether parties retain the opportunity to participate in the development of the record on equal footing. They do, consequently, there is no reason to disrupt the vote to set the petition for hearing.

Movants rely on *Reid v. N.M. Bd. of Optometry Exam'rs* for the proposition that "*administrative tribunals* must follow procedures traditionally associated with the judicial process" and that "a fair and impartial tribunal requires that the *trier of fact* be disinterested and free from any form of bias or predisposition regarding the outcome of the case."[29] However, *Reid* is not a rulemaking case. *Reid* pertains to an adjudication. In *Reid*, the administrative body was sitting as an adjudicator, a "trier of fact," making decisions affecting the "life, liberty, or property" of a person. That is not the role of the WQCC in this matter. Here, the WQCC sits not as an adjudicator but in quasi-legislative capacity. Movants have cited no cases discussing disqualification of a commissioner sitting in a quasi-legislative capacity, because little to no such case law exists.

[29] *Reid v. New Mexico Bd. of Examiners of Optometry*, 1979-NMSC-005, ¶ 7, 92 N.M. 414, 416, 589 P.2d 198, 200.

One of if not the only New Mexico case examining impartiality in the context of a rulemaking, as opposed to an adjudication, is *Kerr-McGee Nuclear Corp. v. New Mexico Env't Imp. Bd*. In *Kerr-McGee*, the Environmental Improvement Board (EIB), sitting in its rulemaking / quasi-legislative capacity, set a rulemaking petition for hearing, conducted a hearing, and adopted a rule. Parties opposed to portions of the rule challenged it on grounds, amongst others, that the hearing was not fair and impartial.[30] In the rulemaking, the Environmental Improvement Division (EID), a division of the precursor to the New Mexico Environment Department, had drafted the proposed regulation and submitted it to the EIB to be presented to the public and considered at a public hearing.

At the hearing, the EID appeared and presented as public comment, data, views, and argument in support of the rule. But, the EID also sat as counsel to the EIB during the hearing. In this role, the EID, provided legal guidance through which it was able to shade the rule it had drafted as reasonable, effectively transmitting its prejudgment of the rule to the EIB. The Court held that the EIB should not have allowed the EID to both present comment and sit as its counsel. These dual roles created an uncurable conflict of interest. In short, the court found the outcome impermissible because the other parties did not stand on equal footing with the EID in their ability to present evidence and argument in the development of the record.[31]

The examination of fairness in *Kerr-McGee* occurred in the context of a hearing. A hearing where data, argument, and other evidence was introduced into a record, which record created the basis on which a rule could be adopted or not. It was the development of that record that was objectionable on grounds of fairness. Following *Kerr*-McGee, the question to the Commission is do Movants sit on unequal footing in their ability to present data, argument, evidence, etc. at

[30] *Kerr-McGee Nuclear Corp. v. New Mexico Env't Imp. Bd*. 1981-NMCA-044, ¶ 46, 97 N.M. 88, 96, 637 P.2d 38, 46.
[31] *Id*.

hearing in the development of the record? They do not. Movants sit on entirely equal footing and maintain every ability and opportunity to present evidence in this matter at hearing.

III. Recusal Is Not Required or Appropriate Under 20.1.6.102 NMAC

Even if adjudicatory standards concerning recusal were applicable to non-merits / calendaring decisions (which they are not), the governing doctrine presumes the honesty and integrity of decision-makers and requires a showing of a "probability of unfairness," to disqualify.[32] New Mexico law likewise treats bias remedies as member-specific and proportional—not wholesale vacatur of a docket.[33] A more careful examination of relevant case law reveals that neither of the emails cited by Movants reveal a probability of unfairness or the impartiality required to support recusal under 20.1.6.102 NMAC.

As noted by Movants, the Commission has passed rules addressing issues of fairness. Those rules require that:

- *commission hearings are conducted in a fair and equitable manner*[34]
- *the hearing officer shall conduct a fair and equitable proceeding,* [35] *and*
- *[n]o commission member shall participate in any action in which his or her impartiality or fairness may reasonably be questioned, and the member shall recuse himself or herself … by announcing this recusal on the record.*[36]

What is clear from these rules is that <u>hearings</u> must be "fair and equitable." The focus is clearly on hearings because, as observed in the cases cited by Movants, it is the hearing and the resulting

[32] *See Withrow v. Larkin,* 421 U.S. 35, 47–55 (1975).
[33] *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n*, 2006-NMCA-115, ¶¶ 41-46, 140 N.M. 464, 475.
[34] 20.1.6.6 NMAC
[35] 20.1.6.100 NMAC
[36] 20.1.6.102 NMAC

decision which impact a party's rights, not docket management decision like whether to set a matter for hearing.

Beyond hearings, however, the recusal language at 20.1.6.102 NMAC, requires that a commissioner recuse themselves from "any action" in which their impartiality or fairness may be reasonably questioned. Relevant caselaw demonstrates that the email communications cited by Movants as grounds for disqualification come nowhere near the bar at which recusal would be required.

In *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n*, petitioner sought disqualification of a member of the New Mexico Mining Commission, sitting in its adjudicatory capacity, on grounds that the commissioner had previously taken a position demonstrating bias against petitioner. Upon consideration of petitioner's argument for disqualification, the New Mexico Court of Appeals stated that it has, "required disqualification when there is evidence that a particular commissioner *has made comments indicating that he or she has prejudged the case to be heard*."[37] The Court noted that there was evidence that a commissioner held a particular philosophy on environmental issues and had taken a position in a prior proceeding that was contrary to petitioner, however, there was no evidence of personal bias or prejudice sufficient to require disqualification.[38] The court focused its inquiry entirely on the existence of any specific comments made by a commissioner showing prejudgment / impartiality and found none.

In the present matter, there are no comments from any commissioner indicating prejudgment of the petition in this matter. The only statement made by a commissioner was by

[37] *Id. at* ¶ 45, 475.
[38] *Id.*.

Secretary Kenney, who did not express prejudgment of any issue. Movants ask the Commission to read language into his statements that does not exist.

In *Las Cruces Prof'l Fire Fighters*, the court identified various types of bias and discussed whether these different biases were grounds for disqualification:

1. A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification;
2. Similarly, a prejudgment about legislative facts that help answer a question of law or policy is not, without more, a disqualification; and
3. Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be.

Regarding the first type of bias, prejudgment of a question of law or policy, even when tenaciously held, the court noted that, "members of all courts (and administrative agencies) are human beings. They cannot avoid having histories or opinions; indeed they may well have been selected for their offices in part on that basis. Recognition of this reality counsels us against requiring that every decisionmaker start with a clean slate."[39]

As it pertains to the present matter, *Las Cruces Prof'l Fire Fighters* holds that even if Secretary Kenney or other commissioners entered the July 8, 2025 vote with an opinion that the use of treated produced water represented good policy, that is not grounds for recusal or disqualification.

To examine the second and third types of bias, the court looked to *Federal Trade Commission v. Cement Institute* and *United States v. Morgan*. In *Federal Trade Commission v.*

[39] *Las Cruces Pro. Fire Fighters v. City of Las Cruces,* 1997-NMCA-031, ¶ 24, 123 N.M. 239, 246, 938 P.2d 1384, 1391.

Cement Institute, the Federal Trade Commission (FTC) had investigated and prepared a report to Congress regarding a cement pricing system. After preparing the report, the FTC filed a separate and unrelated administrative action against various members of the cement industry alleging price fixing. The cement industry appealed the adverse administrative action and pointed to the earlier report as evidence that the FTC had prejudged the issue. The Supreme Court rejected the challenge, reasoning that even assuming that the entire membership of the FTC had formed a prior opinion on the pricing system, "one could not infer from the prior actions … that the members had made up their minds."[40] In short, it was enough to survive an allegation of bias and a closed mind (prejudgment) that the members of the cement industry had the opportunity, "to present their evidence and argument that the [pricing system] was legal."[41]

Application of the holding in *Federal Trade Commission v. Cement Institute* to the present matter supports the conclusion that neither the Water Quality Control Commission nor a reviewing court can infer from the emails cited by Movants that Secretary Kenney or any other commissioner had made up their minds on the issue. It is enough to survive Movants' allegation of bias and prejudgment that Movants retain their opportunity to present their evidence and argument pertaining to the petition at hearing.

In *United States v. Morgan*, appellants argued that the United States Secretary of Agriculture should have recused himself from reconsidering a case remanded from the United States Supreme Court because the Secretary had previously written a letter to the New York Times wherein he stated that the issue, "rightfully belongs to the farmers," effectively announcing his prejudgment of the dispute.[42] The United States Supreme Court held that it was not necessary for the Secretary to deny his bias or recuse. The Court stated, "[c]abinet officers charged by Congress

[40] *Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 701 (1948).
[41] *Las Cruces Pro. Fire Fighters v. City of Las Cruces,* at ¶ 24, 246, 1391.
[42] *United States v. Morgan,* 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be [persons] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption."[43]

The upshot of *United States v. Morgan*, is that even if the email communication cited by Movants communicated prejudgment of the issue, commissioners are presumed to be capable of judging the July 8 decision whether to set the WATR petition for hearing on the basis of the decision's own circumstances.

The above collection of caselaw, reveals that there is little room to argue that the email communications cited by Movants come anywhere close to an expression of prejudgment sufficient to disqualify Secretary Kenney or any other commissioner. Consistent with *Las Cruces Prof'l Fire Fighters*, Secretary Kenney and the other commissioners may very well have been selected for their positions as cabinet secretaries and thus commissioners based on their histories or opinions and recusal is not required because of any such history or opinion.[44] Following the holding in *Federal Trade Commission*, it is enough that Movants have the opportunity to present their evidence and argue the merits of the petition at hearing.[45] And, consistent with *United States v. Morgan*, Secretary Kenney and the other cabinet secretary commissioners must be "assumed to be [persons] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances and nothing presented by Movants disrupts that presumption.[46]

IV. The Governor's ability and authority to affect executive policy making is derived from the New Mexico Constitution

[43] *Las Cruces Pro. Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 28, 123 N.M. 239, 247, 938 P.2d 1384, 1392.

[44] *Las Cruces Pro. Fire Fighters* at ¶ 28.
[45] *Federal Trade Commission* 333 U.S. 683, 701 (1948).
[46] *United States v. Morgan* 313 U.S. 409 (1941).

The Commission's recusal rule, 20.1.6.102 NMAC, asks whether a member's impartiality in the matter to be decided can reasonably be questioned. The "matter" decided on July 8 was whether to grant a request for hearing; on August 12, how to address preliminary objections. Nothing in the emails cited by Movants shows a directive to adopt any specific standard or a refusal to consider contrary evidence. However, even if it did, general policy coordination in executive government does not equal an unconstitutional bias.

This position finds support in *Sierra Club v. Costle*. In *Sierra Club*, appellants, including the Sierra Club and the Environmental Defense Fund, sought review of a rule adopted by the Environmental Protection Agency (EPA) under the Clean Air Act.[47] Appellants argued that the EPA, sitting as the rulemaking body, had engaged in inappropriate communications during the pendency of the rulemaking. In particular, the Sierra Club argued that intra-executive meetings and informal communications between the EPA and White House staff, including the President, violated the Clean Air Act and principles of due process requiring reversal of the rule. While the provisions of the Clean Air Act at issue in *Sierra Club* do not apply to the instant matter, the court's underlying examination of fairness, due process, and prejudgment are readily applicable here.

In considering the issue of fairness and whether certain meetings with White House staff, including the President, violated principles of due process, the court discussed at length the necessary relationship between executive agencies and the President.

The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national

[47] *Sierra Club v. Costle*, 657 F.2d 298, 404 (D.C. Cir. 1981).

economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.

After all, any rule issued here with or without White House assistance must have the requisite factual support in the rulemaking record, and under this particular statute the Administrator may not base the rule in whole or in part on any "information or data" which is not in the record, no matter what the source. The courts will monitor all this, but they need not be omniscient to perform their role effectively. Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.[48]

The facts at issue in *Sierra Club* and the court's analysis are remarkably similar to and applicable to the issues raised by Movants here. Movants assert that the Governor's Office's message encouraging Governor-appointed commissioners to move the petition "over the finish line" to hearing demonstrates impermissible bias and prejudgment, triggering disqualification under 20.1.6.102 NMAC and violating due process. The court in *Sierra Club* leaves no room for Movants' argument, "the authority of the [Governor] to control and supervise executive

[48] *Id. at* 406.

policymaking is derived from the Constitution ... Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive.[49] In other words, it is our form of government, established by the U.S. and New Mexico Constitutions, that establishes the Executive / Governor's ability to engage her executive appointee commissioners, even exercising some degree of control over them.[50]

And, if that were not sufficient an answer, the court further answered Movants' argument when it stated, "any rule issued here with or without [Office of the Governor's] assistance must have the requisite factual support in the rulemaking record, and under this particular statute the Administrator may not base the rule in whole or in part on any "information or data" which is not in the record, no matter what the source."[51] In other words, regardless of what information the Governor or her staff have communicated to commissioners, the Commission's eventual final decision on the petition may only be based on the information found in the record.

Bottom line, 20.1.6.102 NMAC asks whether a member's impartiality in the matter to be decided can reasonably be questioned. The only "matters" decided here were procedural—July 8 (whether to grant a hearing) and August 12 (how to handle preliminary objections)—not the merits of any rule. The cited emails do not direct a particular substantive outcome or show a refusal to consider contrary evidence; at most, they reflect executive policy coordination to move a petition to a public hearing. Under *Sierra Club v. Costle*, such intra-executive communication in a legislative rulemaking is not per se improper; disqualification requires proof of an unalterably closed mind, which Movants do not show. And regardless of any off-record exchanges, the Commission's final decision must rest on the rulemaking record. Accordingly, the emails do not

[49] *Id.*
[50] The New Mexico Constitution adheres to the same principle of separation of powers, dividing government into legislative, executive, and judicial branches, as the United States Constitution. *Compare* NM Const. art. V; U.S. Const. art. II, § 1.
[51] Sierra Club, 657 F.2d 298, 406 (D.C. Cir. 1981).

trigger recusal or vacatur, and the proper course is to proceed to hearing and decide the merits on the evidence.

V. Movants' Remedy—Vacatur and Mass Disqualification—is Extreme and Unnecessary

Vacatur is an equitable last resort reserved for tainted merits outcomes where no lesser measure will cure. If the Commission has any appearance concerns, the proportionate response is prospective: reaffirm that all merits decisions will be made after notice, on the record, by a properly constituted panel. There is no legal basis to erase ministerial votes that merely set a petition for hearing.

CONCLUSION

Movants want this Commission to confuse a scheduling vote with a merits decision and to punish routine executive coordination by detonating the docket. That is not the law and it is not common sense. The July 8 and August 12 actions were procedural, non-final steps to open a public forum, nothing more. The cited emails don't direct an outcome or close anyone's mind, they reflect exactly what rulemaking requires—move to hearing and build a record. New Mexico is in a water-scarcity crisis. The public interest is served by testing the science in the sunlight of a hearing, not by serial attempts to shut the courthouse door.

The recusal rule, 20.1.6.102 NMAC, is member-specific and triggered by evidence of a probability of unfairness, not by policy alignment or logistics. Movants show neither prejudice nor a tainted merits record because there is no merits decision yet. Their bid for mass disqualification and vacatur of ministerial votes is an extraordinary overreach aimed at avoiding the debate they are worried they cannot win on the science. The Commission should deny all three motions in full; reaffirm that this is a quasi-legislative proceeding; and set an expedited hearing schedule with venues in Southeast New Mexico, where the facts, and the public, can be heard.

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2025, a true and correct copy of the foregoing *Consolidated Response in Opposition to Motions to Disqualify and Vacate* was sent by electronic mail to the following:

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/S/ Matthias Sayer
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New Mexico Environment Department

Produced Water Advisory Committee Meeting (PWAC)
September 21, 2023

Jennifer Fullam, GWQB Reuse Team Lead
Kathleen Murphy, GWQB Produced Water Project Manager
Lei Hu, SWQB Produced Water Project Manager

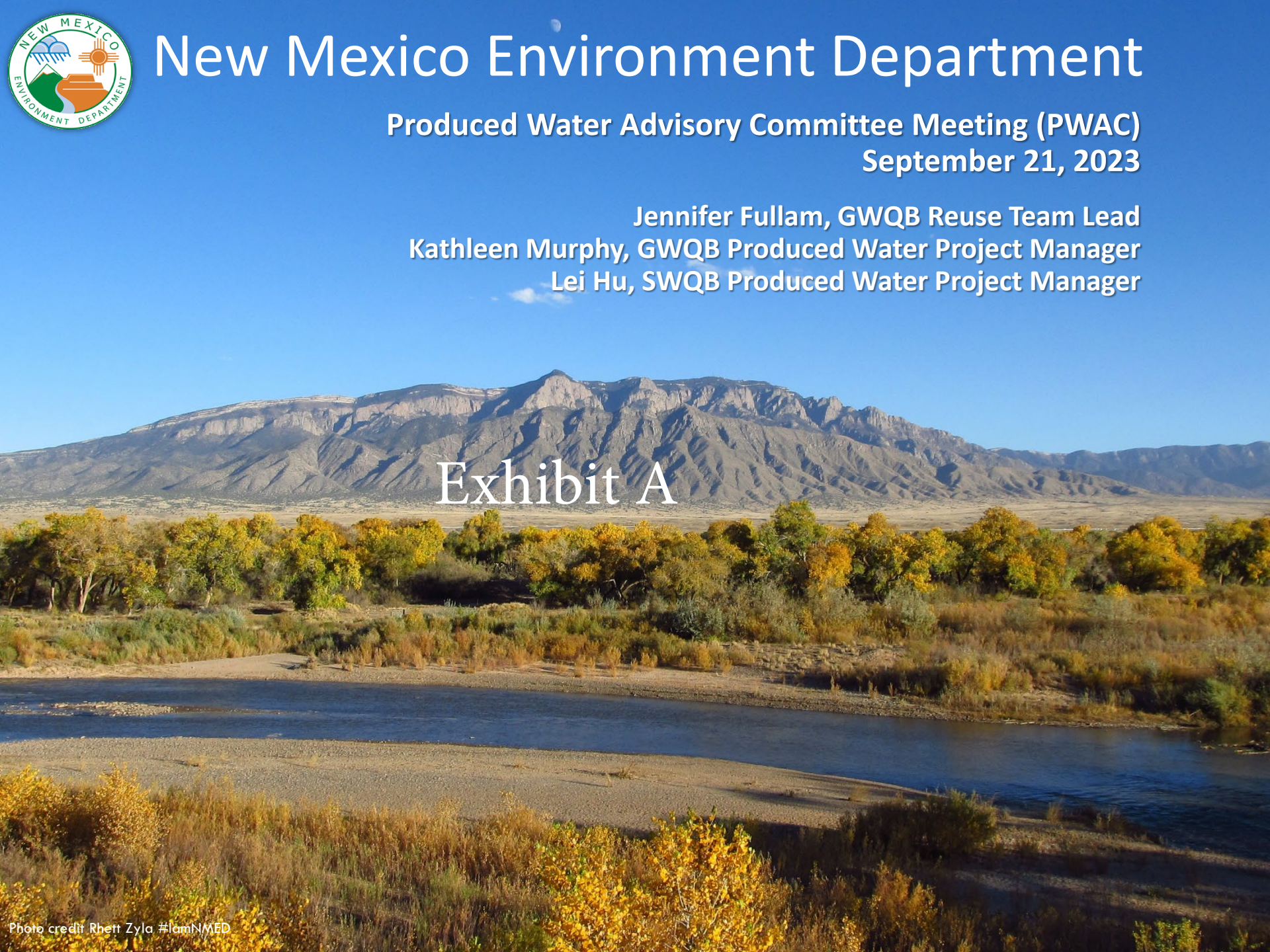

Exhibit A

Photo credit Rhett Zyla #IamNMED

Welcome and Ground Rules

Introductions

- When called on, unmute and provide:
  - Your name
  - Affiliation
  - Your level of expertise with produced water or water reuse
- Call on the next person to introduce themselves

Contact Information

- In the chat provide:
  - Your name
  - Title
  - Affiliation
  - Email address

Produced Water Advisory Committee
Agenda for September 21, 2023

- 9:00-9:15 am: Introductions, Goals and Guidelines (15 minutes)

- 9:15-9:30 am: Presentation by NMED on BACKGROUND
  - Brief history of Produced Water in NM
  - Priorities for Produced Water
  - Regulatory Landscape for Oil and Gas

  9:30 -9:45 am: Presentation by NMED on Foreground
  - Goals and Guidelines for PWAC
  - Rulemaking Process
  - Discussion items and input needs from PWAC

- 9:45-10:45 am: Open discussion of draft rule (60 minutes)

- 10:45-11:00 am: Next steps and Adjourn (15 minutes)

PWAC Goals and Guidelines

Goals

- Provide input on NMED's proposed Water Reuse Regulations (20.6.8 NMAC), specifically pertaining to Produced Water Reuse.

Guidelines

- Composition:
  - Industry experts and advocacy organization invitees
- Role: Advise on content of the proposed regulation.
- Focus: Restricted use of treated produced water outside of the oil and gas industry.

Regulatory Landscape in New Mexico

Within O&G

NM Energy, Minerals and Natural Resources Department

- Oil Conservation Division - Transport, storage, disposal (incl. UIC class II), recycling, EOR, spills

Outside O&G

NM Environment Department

- Discharge, handling, transport, storage, treatment *for use outside O&G* (under future regulations)
- Jurisdiction covers water quality protection related to produced water and byproducts of treatment process

Outside O&G

U.S. Environmental Protection Agency

- National Pollutant Discharge Elimination System (NPDES, no NPDES permits in NM for produced water discharge)

Water Reuse Basics

- **Partial Regulatory oversight for water reuse is managed through permits.**

Permitting

- **Ground Water Discharge Permit** - Issued through NMED's GWQB for discharges that could impact ground water; and
- **National Pollutant Discharge Elimination System (NPDES) Permit** - Issued through EPA and certified through NMED's SWQB for discharges to a surface water.

Applications for Permits

- Proposed discharges must *characterize* the influent, provide the treatment process, determine attainable effluent quality and monitor regularly to ensure permit limits are met.
- Data must be collected using approved methods, include QA/QC, and demonstrate the findings are repeatable and defensible.
- A key reason to identify constituents in produced water is not only to inform regulations but also to inform treatment objectives.

NMED and the Produced Water Act

- In 2019, the Produced Water Act (NMSA 1978, Section 70-13) and amended Water Quality Act (NMSA 1978, Section 74-6) authorizes NMED jurisdiction over treatment and use of produced water for purposes *outside* the oil and gas sector.

- In addition, the Act:
  - Requires a person to obtain a permit from the environment department before using the treated produced water
  - Requires the Water Quality Control Commission (WQCC) to adopt regulations for NMED to implement

Regulation Development under the WQA

- In adopting regulations, the Water Quality Act **requires** the WQCC to consider:
  - **Character and degree** of injury to or interference with health, welfare, environment and property;
  - **Public interest**, including the social and economic value of the sources of water contaminants;
  - **Technical practicability and economic reasonableness** of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;
  - **Successive uses**, including domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;
  - **Feasibility** of a user or a subsequent user treating the water before a subsequent use;
  - **Property rights** and **accustomed uses**; and
  - **Federal water quality requirements**.

Priorities for Produced Water Reuse

- Protect ground and surface water quality
  - Reduce use of saltwater injection wells for disposal.
  - Address leaks from impoundments, pipeline ruptures, and illegal dumping.
- Protect human health and wildlife
  - Reduce exposure to contaminants
- Increase New Mexico's Resource Resilience
  - Water
    - Conserve freshwater through increasing water recycling in Oil and Gas production.
  - Metals
    - Find feasible sources of raw materials for renewable energy.

Produced Water Rulemaking Efforts

NMED is approaching the development of regulations for the "discharge, handling, transport, storage, and recycling or treatment of [untreated or treated] produced water or byproduct[s] there of outside the oilfield" in two phases:

- **Phase 1**: Allowing, with limited conditions, the reuse of treated produced water in closed-loop demonstration projects with no discharge. *Timeline: 2023- 2024*

- **Phase 2:** Changing the rules, as defensible data becomes available, to expand the conditions for additional authorized uses as supported by the science. *Timeline: Post 2024*

Proposed Regulatory Structure

New Part 20.6.8 NMAC Supplemental to

20.6.2 NMAC Ground and Surface Water Regulations

And

20.6.4 NMAC Standards for Interstate and Intrastate Surface Waters

Ground and Surface Water Protection – Water Reuse
20.6.8 NMAC

- Required Elements
- General Provisions 20.6.8.100
- Domestic Water Reuse 20.6.8.200
- Industrial Water Reuse 20.6.8.300
- **Produced Water Reuse 20.6.8.400**
  - Unapproved Uses
  - Approved Uses
  - Notice of Intent
  - Effluent Quality

NMED's Water Reuse Regulation Tentative Timeline (Phase 1)

August/September 2023	Draft Rule	PWAC Input	Draft Public Involvement Plan (PIP)	Outreach & Solicitation
October 2023	Tribal Outreach	Stakeholder Outreach	Publish PIP	Revise Rule (as needed)
November 2023	30-day Public Comment Period of Draft Rule			
December 2023	Petition WQCC Rulemaking Hearing			
Winter 2024	Publish Hearing Notices 60-days prior to hearing			
Spring 2024	Public Hearing before the WQCC			
Summer 2024	WQCC Deliberations	WQCC Final Order		
Summer 2024	Publication of Rule in State Register			
Fall 2024	Effective Rule for State Purposes			

Input and Discussion

- Implementation and Functionality
- Structure to Allow for Future Amendments
- Needs and Priorities for Produced Water

Definitions

Produced Water Approved Uses

Produced Water Notice of Intent

- Additions
- Removals
- Amendments

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