

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

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

No. WQCC 25-34 (R)

Water Access Treatment & Reuse Alliance,

Petitioner.

**ENERGY TRADE ASSOCIATIONS’ CONSOLIDATED RESPONSE
IN OPPOSITION TO ENVIRONMENTAL NON-GOVERNMENTAL
ORGANIZATIONS’ THREE MOTIONS TO DISQUALIFY**

The New Mexico Oil and Gas Association (“NMOGA”), Independent Petroleum Association of New Mexico (“IPANM”), and Permian Basin Petroleum Association (“PBPA”) (together, NMOGA, IPANM, and PBPA are referred to as the “Energy Trade Associations”) hereby file this consolidated response in opposition to three overlapping motions¹: (1) New Energy Economy (“NEE”) Daniel Tso’s Motion to Disqualify Cabinet Secretary Commissioners and Vacate July & August Orders (filed Sept. 25, 2025) (“NEE Motion”), (2) the Center for Biological Diversity (“CBD”) and Mario Atencio’s Motion to Disqualify Commissioners and Vacate Order Setting Hearing on WATR Alliance Petition (filed Sept. 25, 2025) (“CBD Motion”), and (3) Amigos Bravos (“AB”), Sierra Club (“SC”), and Western Environmental Law Center’s (“WELC”) Motion to Disqualify Seven Commissioners and Their Designees and Vacate Commission Vote Granting WATR’s Request for Hearing (filed Sept. 29, 2025) (“AB Motion”) (together, NEE, CBD, AB, SC, and WELC are referred to as the “Environmental Non-Government Organizations” or “ENGOS”) (the NEE Motion, the CBD Motion, and the AB Motion are collectively referred to as

¹ The Energy Trade Associations filed a short Statement of Opposition on October 10, 2025 to the NEE Motion and CBD Motion. Because the three ENGO Motions contain nearly identical arguments, the Energy Trade Associations reserved the right to more fully articulate their position in this Consolidated Response.

the “ENGO Motions”). As discussed below, the Commissioners should reject the ENGOs attempt at intimidation, decline the unfounded requests for disqualification, deny the ENGO Motions, and admonish the ENGOs to focus all future efforts on the substance of the WATR Alliance Petition rather than the sideshows they seem intent to pursue.

INTRODUCTION

The Water Quality Control Commission (“WQCC” or “Commission”) has unanimously decided to evaluate the merits of the current rulemaking petition (“WATR Alliance Petition”). The ENGOs have the right to fully participate in the rulemaking process, including by articulating their positions, proposing changes to the rules, and offering evidence. Rather than address the merits of the proposed amendments to 20.6.8 NMAC (“Part 8”), however, the ENGOs appear determined to devolve these proceedings into a spectacle.

Their latest tactic is to improperly attack the integrity of Secretary of Agriculture Jeff Witte, State Engineer Elizabeth Anderson, Secretary of Health Gina DeBlassie, Secretary of Environment James Kenney, Secretary of Energy, Minerals, Natural Resources Melanie Kenderdine (together, Secretary Witte, State Engineer Anderson, Secretary DeBlassie, Secretary Kenney, and Secretary Kenderdine are referred to as the “Cabinet Secretaries”), Director of Game and Fish Michael Sloane, and State Parks Division Director Toby Velasquez (together, Director Sloane and Director Velasquez are referred to as the “Department Directors”), as well as their designees, Department of Agriculture designee Katie Laney, Department of Game and Fish designee Kirk Patten, Department of Health designee Chelsea Langer, Oil Conservation Division Director designee Christopher Moander, and State Engineer designee Katie Zemlick (together, Ms. Laney, Mr. Patten, Ms. Langer, Mr. Moander, and Ms. Zemlick are referred to as the “Commission

Designees”). But the ENGOs right to participate in the proceeding does not carry with it a right to impugn the integrity of the Commissioners or to create disrespect for the process and the agency.

“Such conduct, whether during the course of litigation or thereafter, is not only a gross violation of the duty of respect to the courts [and administrative agencies], but, if permitted to go unrebuked, would tend inevitably to bring the courts [and administrative agencies] and our whole system of administering justice into public disrepute. It has rightly been condemned by all courts that have had occasion to pass upon the question, and has generally been regarded as a ground for suspension or disbarment.”

In re Ades, 6 F.Supp. 467, 481 (D. Md. 1934). In the face of similar attacks on the integrity of judges and judicial decisions, United States Supreme Court Justice Ketanji Brown Jackson observed:

“The attacks are not random. They seem designed to intimidate those . . . who serve [on courts or tribunals]. . . . The threats and harassment are attacks on our democracy, on our system of government. And they ultimately risk undermining our Constitution and the rule of law.”

“*Ketanji Brown Jackson Condemns Trump Rhetoric ‘Designed to Intimidate the Judiciary,’*” Reuters (May 2, 2025). That observation applies to the ENGO Motions.

With nearly every decision from the Commission, there is a dissatisfied party who disagrees. No matter how important the decision, that is no cause to question the integrity of the system. In the present case, over the opposition of the ENGOs, the Commission docketed the WATR Alliance Petition to evaluate the proposed changes to Rule 8. Unfortunately, rather than accept the decision and work to create well-designed rules, the ENGOs have falsely attacked the process and the Commissioners themselves. The Commission should not let the ENGOs’ tactics succeed by bowing to unfounded intimidation. The slender reed on which the ENGOs base their specious accusations amounts to nothing more than normal communication within a functioning executive branch. As discussed below, the ENGO Motions should be summarily denied as legally and factually unsupported.

BACKGROUND

The ENGO Motions are rife with hyperbole and conspiracy theory. Once the accusations are removed, the ENGO Motions are based on the following straightforward facts:

1. In 2019, the Legislature adopted the Produced Water Act (“PWA”). A key objective was to allow the use of treated produced water for purposes outside of the oil and gas sector. To achieve this objective, the Legislature added Section 74-6-4(P) to the Water Quality Act unequivocally instructing the Commission to:

[A]dopt regulations to be administered by [the Department] for the discharge, handling, transport, storage, recycling or treatment for the disposition of treated produced water, including disposition in road construction maintenance, roadway ice or dust control or other construction, or in the application of treated produced water to land, for activities unrelated to the exploration, drilling, production, treatment or refinement of oil or gas.

2. The Commission first considered reuse for treated produced water in WQCC Case No. 23-84(R). The Commission determined in that case that additional evidence was necessary to support standards for the discharge and reuse of produced water.

3. The WATR Alliance Petition that initiated the current proceeding was designed, in part, to provide the additional evidence that the Commission thought was lacking in Case No. 23-84(R).

4. Even before the first rulemaking, Governor Lujan Grisham expressed her support for reuse of treated produced water. For example, the Governor’s 50-Year Water Action Plan called for adoption by 2024 of “preliminary water reuse rules to create a consistent and science-based regulatory program for treatment and reuse of produced water outside of the oil and gas sector.”

5. The WATR Alliance filed its Petition on June 20, 2025.

6. On July 7, 2025, Secretary Kenney sent the email attached to the AB Motion as Exhibit 1 to Secretary Witte, State Engineer Anderson, Secretary DeBlassie, Secretary Kenderdine, and Director Sloane (“July 7th Email”).

7. The ENGO Motions do not identify any other statements or communications from Commissioners, so for purposes of the present Motions, the only relevant communication is the July 7th Email.² The only recipients of the July 7th Email are identified in Paragraph 6, above; there were no communications sent to either Director Velasquez or to any of the Commission Designees (Ms. Laney, Mr. Patten, Ms. Langer, Mr. Moander, or Ms. Zemlick).

8. The July 7th Email requests that the Cabinet Secretaries or Department Directors, as opposed to the Commission Designees, attend the July 8th Commission meeting to decide whether the WATR Alliance Petition should be accepted. It then goes on to explain the anticipated hearing process, including that the Commission “will vote to accept or decline the petition and assign a hearing officer.”

9. At no point in the July 7th Email does Secretary Kenney express his personal opinion on the WATR Alliance Petition. Nor does Secretary Kenney express any opinion or offer any statements on the specific rule amendments proposed by the WATR Alliance.

10. No Commissioner responded to the July 7th Email. As a result, the July 7th Email from Secretary Kenney is the only statement from one of the Commissioners. The record reflects no statements or correspondence from Secretary Witte, State Engineer Anderson, Secretary DeBlassie, Secretary Kenderdine, and Director Sloane, either of the Department Directors, or any of the Commission Designees. Because no Commissioner responded, there is no expression of

² The ENGOs also point to an email from Caroline Buerkle dated July 7, 2025, but Ms. Buerkle is not a Cabinet Secretary, Department Director, or Commission Designee so her statements are no more relevant to the current ENGO Motions than the letters the ENGOs encouraged sympathetic Legislators to write to the Commission. *See* Public Comments from Pope (Aug. 11, 2025) and Stewart (Aug. 13, 2025).

opinion or position from any of the other Commissioners (other than Secretary Kenney) on the WATR Alliance Petition.

11. On July 8, 2025, the Commission considered the WATR Alliance Petition. Contrary to the request in the July 7th Email, the Cabinet Secretaries (other than Secretary Kenney) did not attend the meeting. In fact, not a single recipient of the July 7th Email attended the July 8th Commission meeting.

12. The Commission voted unanimously (10-0, with Commissioner Moander absent) to hold a hearing on the WATR Alliance Petition.

13. The Commission has not yet accepted evidence or considered the merits of the WATR Alliance Petition. A hearing is contemplated for the first half of 2026.

STANDARD OF DECISION

The ENGO Motions rely on principles of due process. Without conceding that due process attaches to a rulemaking, 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.” *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission*, 2006-NMCA-115, ¶ 40, 140 N.M. 464. The party seeking to disqualify a Commission member for a violation of due process must present “evidence” of bias, prejudice, or prejudgment to warrant disqualification. *Id.* ¶ 46; *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997–NMCA–031, ¶¶ 24, 28, 123 N.M. 239, 938 P.2d 1384. Those challenging the Commission member “have a duty to overcome the presumption of integrity in those serving as administrative adjudicators.” *Phelps Dodge*, 2006-NMCA-115, ¶ 51 (citing *Jones v. N.M. State Racing Comm'n*, 1983-NMSC-089, ¶ 13, 100 N.M.

434, (holding that there is a “presumption of honesty and integrity in those serving as [administrative] adjudicators”)).³

New Mexico appellate courts have adopted “a helpful framework for determining when a decisionmaker should be disqualified for bias.” *Fire Fighters*. 1997-NMCA-031, ¶ 24. That framework identifies five kinds of bias:

- (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.
- (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.
- (4) A personal bias or personal prejudice, that is, an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough; such partiality may be either animosity or favoritism.
- (5) One who stands to gain or lose by a decision either way has an interest that may disqualify; even a legislator may be disqualified on account of a conflict of interest.

Id. (internal quotation marks & citation omitted); see 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.8, at 847 (5th ed. 2010).

Thus, the law is clear that, even in an adjudication, an administrative decisionmaker is not disqualified merely because he or she holds firm views on policy issues or the underlying facts - so-called Type 1 or Type 2 bias. “[I]ndeed, they may well have been selected for their offices in part on that basis.” *Id.* ¶ 26. Therefore, “[o]ne should not infer . . . that a member of a tribunal is necessarily disqualified whenever prior conduct of the member indicates a view that would favor

³ As discussed in Part II of the Argument, the ENGOs also mistakenly rely on Rule 20.1.6.102 NMAC. Even under the ENGOs’ standard, however, the principles identified in this Standard of Decision section would apply since the ENGOs rely exclusively on cases interpreting due process.

one party or the other.” *Benavidez v. Bernalillo Cnty. Bd. of Cnty. Commissioners*, 2021-NMCA-029, ¶¶ 34-35, 493 P.3d 1024. To the contrary, “[m]embers of tribunals are entitled to hold views on policy, even strong views, and even views that are pertinent to the case before the tribunal.” *Fire Fighters*. 1997-NMCA-031, ¶ 29. Accordingly, “an official is not required to recuse himself simply because he has previously expressed support for a particular policy.” *Benavidez*, 2021-NMCA-029, ¶ 35.

More generally, “[m]ost cases support the conclusion that prejudgment statements by a decisionmaker are not fatal to the validity of the . . . determination as long as the statement does not preclude the finding that the decisionmaker maintained an open mind and continued to listen to all the evidence presented before making the final decision.” *McPherson Landfill, Inc. v. Bd. of Cnty. Commr's*, 49 P.3d 522, 531-32 (Kan. 2002). Rather, disqualification is required only when the challenger demonstrates that the decision maker's mind is “irrevocably closed” on a disputed issue. *Fire Fighters*, 1997-NMCA-031, ¶ 27 (citing *Federal Trade Commission v. Cement Inst.*, 333 U.S. 683, 701 (1948) as a “leading case”).

ARGUMENT

This Consolidated Response proceeds in two parts. Part I explains that even if the Commission were to apply the more stringent due process standards described above, there is no evidence of improper bias on the part of any Cabinet Secretary, Department Director, or Commission Designee. Only Secretary Kenney offered a statement on the WATR Alliance Petition, so the ENGOs have not overcome the “presumption of honesty and integrity” for any of the other Commissioners. *Jones*, 1983-NMSC-089, ¶ 13. As for Secretary Kenney’s July 7th Email, it simply does not include any inappropriate or biased statements. Instead, he described the process and appropriately identified the administration’s position, which is neither improper nor

suggests that his mind is “irrevocably closed” on the specific amendments proposed in the WATR Alliance Petition.

After showing that disqualification is not required even if the due process standards apply, Part II demonstrates that due process does not, in fact, apply. Instead, in this rulemaking hearing the Commission is acting in a legislative, policy-making capacity. As even the ENGOs recognize, AB Motion at 8, that policy-making function contemplates coordination with the Governor as head of the executive branch. Rather than due process, the Water Quality Act, the Governmental Conduct Act, and the Financial Disclosures Act supply the standard for what constitutes bias for purposes of Rule 20.1.6.102 NMAC.

I. THERE IS NO EVIDENCE THAT ANY COMMISSIONER HAS IRREVOCABLY CLOSED THEIR MIND ON THE WATR ALLIANCE PETITION

As discussed above, the slender reed on which the ENGOs base their motion is a single email from Secretary Kenney. There are three reasons why the July 7th Email is insufficient to require disqualification.

First, other than Secretary Kenney, none of the other Cabinet Secretaries, Department Directors, or Commission Designees have made any statements that are at issue in the ENGO Motions. Our courts have made clear that in evaluating the sensitive issue of bias, a statement may not be attributed to anyone other than the person from whom the statement originates. For example, in *Phelps Dodge*, the company sought to disqualify a member of the WQCC because she had supported and ratified statements made by another individual in a previous proceeding before the State Mining Commission. 2006-NMCA-115, ¶ 43. The Court of Appeals refused to disqualify the Commissioner based on statements made by the other individual. *Id.* at ¶¶ 45-46. Such

statements are “too attenuated” to support a claim for disqualification and do not “demonstrate[] personal bias or prejudice sufficient to require disqualification.” *Id.* at 45.

In this case, the only Commissioner who has issued any statement or communication is Secretary Kenney. The other Commissioners have made no statements or expressed any opinions at all on the WATR Alliance Petition, so the ENGOs have clearly not overcome the “presumption of honesty and integrity” for those Commissioners. *Jones*, 1983-NMSC-089, ¶ 13; *see also Phelps Dodge*, 2006-NMCA-115, ¶ 51. Put another way, Secretary Witte, State Engineer Anderson, Secretary DeBlasie, Secretary Kenderdine, Director Sloane, Director Velasquez, Ms. Laney, Mr. Patten, Ms. Langer, Mr. Moander, and Ms. Zemlick did not make any statements about the WATR Alliance Petition at all, so there is no evidence whatsoever of bias, and no cause for them to either recuse or be disqualified.

Second, the ENGO Motions are based on mischaracterizations and exaggeration. Looking with a fair eye at Secretary Kenney’s July 7th Email, it exhibits no bias and is nowhere near the line necessary for his disqualification. In their rush to accuse the Cabinet Secretaries, Department Directors, and Commission Designees of unethical behavior, the ENGOs attribute nefarious intent to every word from Secretary Kenney in the July 7th Email. But a careful and even-handed reading of the message reveals nothing more than coordination within a large executive branch of government. For example, the ENGOs complain that Secretary Kenney requests the Cabinet Secretaries and Department Directors to sit for the WATR Alliance Petition hearing but ignore that none of the recipients of the July 7th Email actually attended the hearing the next day. Nor is there anything remarkable about suggesting that the Cabinet Secretaries or Department Directors participate in an important rulemaking – it is their statutory obligation after all. NMSA 1978, § 74-6-3(A). Similarly, the ENGOs cry foul because the Cabinet Secretaries and Department

Directors were encouraged to discuss the WATR Alliance Petition with their staff, but it is simply good government to encourage decisionmakers to be educated and well informed.

Instead, Secretary Kenney's email offers a benign description of the upcoming rulemaking process. He explains that the Commission will vote on the petition and whether to assign a Hearing Officer, communicates who the Hearing Officer will be, identifies next steps, identifies the likely dates and location of the hearing, offers to discuss the process with other Commissioners, and describes the public comment process. While it is true that the July 7th Email indicates that "*the administration*" is generally supportive of the petition, he nowhere expresses his own position on the specific proposal. Disqualification requires evidence that Secretary Kenney had "prejudged the merits of a particular matter." *Los Chavez Cmty. Ass'n*, 2012-NMCA-044, ¶ 25, 277 P.3d 475. In other words, that Secretary Kenney had already made up his mind – not on the general issue of reuse of treated produced water – but on the specific changes to Rule 8 contained in the WATR Alliance Petition. But there is no indication that Secretary Kenney has made up his mind with regard to the WATR Alliance Petition or the detailed changes it proposes.

In *Cement Institute*, a case cited favorably in *Fire Fighters*, the United States Supreme Court considered a claim of bias where the Federal Trade Commission ("FTC") had previously issued a report and provided congressional testimony that the cement industry's point system was unlawful. 333 U.S. at 702-03. A subsequent case came before the FTC in which the respondent was accused of the exact same point system that the FTC had previously opined was illegal. The Supreme Court rejected the effort to disqualify the FTC, observing that the FTC's expression of those views did not mean that the commissioners' minds were "irrevocably closed" on the subsequent adjudication. *Id.* at 701. Similarly, nothing in the July 7th Email indicates that Secretary Kenney has "irrevocably closed" his mind to the WATR Alliance Petition. *See Fire*

Fighters, 1997-NMCA-031, ¶ 27 (citing *Cement Institute* as a “leading case”). To the contrary, he expressly acknowledges the possibility that the Commission “will vote to . . . decline the petition,” and he explains that changes to the proposed rule can be “addressed during the fall hearing.” AB Motion at Exhibit 1.

Third, to the extent it offers any position at all, Secretary Kenney’s July 7th Email offers no more than a general policy position of “the administration” that is permissible. The ENGOs rely heavily on *Reid v. New Mexico Board of Examiners of Optometry*, 1979-NMSC-005, 92 N.M. 414. In *Reid*, the issue before the Board of Examiners in Optometry was whether Dr. Reid should lose his license. Shortly before the adjudicatory hearing, an Optometry Board Member stated that “Dr. Reid would be losing his license soon anyway, or wouldn’t be practicing soon anyway . . .,” clearly demonstrating prejudgment of the specific charges brought against Dr. Reid. *Id.* at ¶ 4. There is nothing in the July 7th Email that remotely approaches that sort of statement.

In *Nichols v. Board of County Commissioners of Taos County*, No. 1A-1-CA-36002, mem. op. 2018 WL 7040212 (N.M. Ct. App. Dec. 31, 2018), the Court of Appeals considered an administrative permit for improvements to the Taos Regional Airport. *Id.* ¶ 1. The appellants claimed bias based on statements of two County Commissioners. The first Commissioner wrote an op-ed in which he expressed support for expansion of the airport at issue in the case. *Id.* at ¶¶ 11, 13. The second Commissioner, likewise “applauded” efforts to expand the airport and referred to such expansion as “a plus from a safety point of view.” *Id.* Despite these statements on the same airport that was before the County Commission, the Court concluded that the statements were of “general policy positions” on the desirability of airport expansion, rather than disqualifying prejudgment of a specific application. *Id.* at ¶ 15; *see also Skelly Oil Co. v. Fed. Power Com’n.*, 375 F.2d 6, 17-18 (10th Cir. 1967) (rejecting disqualification even though two

commissioners had given public address and entered the proceeding “with advance views on important economic matters in issue”) (reversed on other grounds in *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)). The same reasoning applies here.

At most, Secretary Kenney’s statements represent nothing more than “general policy positions” on the issue of the reuse of treated produced water. “Members of tribunals are entitled to hold views on policy, even strong views, and even views that are pertinent to the case before the tribunal.” *Fire Fighters*. 1997-NMCA-031, ¶ 29. Statements such as “the administration is supportive of the produced water reuse petition” simply do not represent impermissible bias and do not require disqualification. *See Benavidez*, 2021-NMCA-029, ¶ 35 (“an official is not required to recuse himself simply because he has previously expressed support for a particular policy”). There is nothing in the July 7th Email to support a contrary conclusion.

II. DUE PROCESS DOES NOT APPLY TO RULEMAKING BECAUSE IT INCLUDES GENERALLY APPLICABLE POLICY CONSIDERATIONS

There are two types of agency proceedings: rulemakings and adjudications. The United States Supreme Court has described the “basic distinction between rulemaking and adjudication” as a difference between “proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.” *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973). The New Mexico Court of Appeals, in *Earthworks’ Oil and Gas Accountability Project v. New Mexico Oil Conservation Comm’n*, 2016-NMCA-055, ¶ 5, stated “[t]hese two types of administrative authority are quite distinct in their application and function. While **rulemaking** creates generally applied standards to which an agency and individuals are held, **adjudication** is the resolution of particular disputes involving specific parties and specific problems, by applying such rules. *Id.*; *see also In re Application of Timberon Water Co.*, 1992–NMSC–047, ¶ 23, 114 N.M. 154, 836

P.2d 73 (categorizing administrative action as regulatory when it furthers the public interest under the state's police powers and adjudicatory when it is based on adjudicating a private right rather than implementing public policy).

The ENGOs disqualification argument relies on legal authority arising in the context of an adjudication. *See, e.g., Reid*, 1979-NMSC-005, ¶¶ 6-7 (analyzing whether a Board member's refusal to recuse from a disciplinary hearing based on statement of prejudgment deprived doctor of procedural due process rights under the constitution). That authority is inapposite because the Commission's promulgation and adoption of rules is quasi-legislative, not quasi-judicial action. "[U]nlike a rulemaking, an adjudicatory proceeding may deprive an individual of a protected liberty or property interest and therefore must satisfy constitutional due process." *Southwestern Public Service Company v. New Mexico Public Regulation Comm'n*, 2025-NMSC-013, ¶¶ 48-49, 572 P.3d 87.

By contrast, there is no constitutional guarantee of due process in a rulemaking. *Id.*; *see also Livingston v. Ewing*, 1982-NMSC-110, ¶ 14, 98 N.M. 685 ("There is no fundamental right to notice and hearing before the adoption of a rule"); *Miles v. Board of County Com'rs of County of Sandoval*, 1998-NMCA-118, ¶ 8, 125 N.M. 608 ("[p]rocedural due process does not apply when government makes a policy decision that has an adverse impact on an entire classification of individuals ..., even if the decision has the same adverse effect on the interests of the members of the group as would an individualized deprivation."). The Court in *Miles* explained, "[t]he distinction between individualized [fact-based] deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process ... underlies both the distinction between legislation and judicial trial and the distinction between rulemaking and adjudication." *Miles*, 1998-NMCA-118, ¶ 8. "The theory

is that citizens affected equally by general legislative enactments may not need quite the same protection as when government focuses on an individual or a small discrete group.” *Id.* at ¶ 9.

The distinction between a rulemaking and an adjudicatory proceeding defeats the ENGO Motions. The Commission is statutorily created under the Water Quality Act to serve as “the state water pollution control agency for this state.” NMSA 1978, § 74-6-3 (D). The fourteen (14) member Commission is established by statute and includes cabinet level officials that advise the governor on state health, environmental, and water issues; four Governor appointed representatives of the public; and one municipal or county government representative. NMSA 1978, § 74-6-3(A). In other words, the “composition of the Commission is statutory,” and an informed Commission is created by design. *Phelps Dodge*, ¶ 41; *see also* NMSA 1978, § 74-6-3(A). Individuals who have relevant experience are intended to be Commissioners. “By design, the Commission represents a variety of philosophies and perspectives,” *Phelps Dodge*, ¶ 41, and “[i]t is impractical to require commissioners to sit with an entirely clean slate.” *Id.* ¶ 50 (citing *Fire Fighters*, 1997-NMCA-031, ¶ 26).

The statutory make-up of the Commission includes members of the core executive team who have responsibility for carrying out the Governor’s policy objectives. The Water Quality Act thereby contemplates that the Commission will consider the Governor’s plans and policy objectives. For example, the Commission is administratively attached to the Environment Department. NMSA 1978, § 74-6-3(F). While the Commission nonetheless acts independently of the Environment Department, its budget requests are submitted through the Environment Department and it must submit reports as periodically required by the Governor. NMSA 1978, § 9-1-7(A). Understanding and receiving input from the Governor and her staff is thus no more problematic than receiving public comment from Legislators who have coordinated with the

ENGOS. *See* Public Comments from Pope (Aug. 11, 2025) and Stewart (Aug. 13, 2025). Indeed, the Commission is generally aware of the administration’s position on any rulemaking that is brought by the Environment Department.

This does not lessen the Commission’s duties and obligations, set forth in the Water Quality Act, with regard to rulemaking, including “to give weight it deems appropriate to all relevant facts and circumstances” when adopting or promulgating rules. NMSA 1978, § 74-6-4(F). Nor does it lessen the Commission’s obligations to follow its procedural rules in adopting or promulgating rules. What it does mean, however, is that there is nothing problematic with the Commission being informed of, or acting in furtherance of, the Governor’s plans and policies. Even the ENGOS concede that “the Governor has the authority to set policy for her executive agencies.” AB Motion at 8. The July 7th Email represents nothing more than that – Secretary Kenney’s understanding of the policy position of the executive branch.

The ENGOS rely on Rule 20.1.6.102, but that rule does not support their Motions. When Rule 20.1.6.102 speaks of “impartiality [or] fairness,” in a rulemaking context, the principles that animate “impartiality and fairness” are not general principles of due process for the reasons stated above. *See., e.g. Southwestern Public Service Company*, NMSC-013, ¶ 49 (“Unlike a rulemaking, an adjudicatory proceeding before an agency may deprive an individual of a protected liberty or property interest and therefore must satisfy constitutional due process.”). Instead, unfairness or impartiality in a rulemaking context is informed by the governing provisions of the Water Quality Act, the Governmental Conduct Act, and the Financial Disclosures Act, consistent with the plain text of the regulation. Specifically, Rule 20.1.6.102 NMAC does not leave to the imagination when a Commissioner’s “impartiality [or] fairness may reasonably be questioned” in a rulemaking proceeding. Rather, it specifies that a Commissioner should look to the Water Quality Act, the

Governmental Conduct Act, and the Financial Disclosures Act “in making a decision to recuse himself or herself.” Rule 20.1.6.102 NMAC.

For example, the Water Quality Act specifically addresses the circumstances under which disqualification is necessary. Section 74-6-3(B) states:

A member of the commission shall not receive, or shall not have received during the previous two years, a significant portion of the member's income directly or indirectly from permit holders or applicants for a permit. A member of the commission shall, upon the acceptance of the member's appointment and prior to the performance of any of the member's duties, file a statement of disclosure with the secretary of state disclosing any amount of money or other valuable consideration, and its source, the value of which is in excess of ten percent of the member's gross personal income in each of the preceding two years, that the member received directly or indirectly from permit holders or applicants for permits required under the Water Quality Act. A member of the commission shall not participate in the consideration of an appeal if the subject of the appeal is an application filed or a permit held by an entity that either employs the commission member or from which the commission member received more than ten percent of the member's gross personal income in either of the preceding two years.

(Emphasis added). Similarly, the guiding ethical principles set forth in Section 10-16-3 of the Governmental Conduct Act are focused on prohibiting financial gain to individual agency members, prohibiting public officials from using the office to “obtain *personal* benefits or pursue *private* interests” and “request[ing] or receiv[ing] ... any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act.” NMSA 1978, § 10-16-3 (emphasis added). The Financial Disclosure Act provides similar protections. *See* NMSA 1978, § 10-16A-4 (requiring financial disclosure statement for public officer who “has a financial interest that he believes or has reason to believe may be affected by his official act or actions of the board or commission to which he is appointed”). These safeguards against self-interest in no way prohibit the Commission as a whole, or any individual Commissioner from having advanced views on important policy issues in the State. *See, e.g., Corning Glass Works v. F.T.C.*, 509 F.2d 293, 303-304 (7th Cir. 1975) (rejecting “challenge to impartiality of the [Federal

Trade] Commission because of its consistent opposition to resale price maintenance in general and legislative exemptions from the antitrust laws for this form of pricefixing in particular.”).

The ENGOs fail to address correct standard, and as discussed above, nothing in the July 7th Email implicates the personal impropriety or unfairness contemplated by Rule 20.1.6.102 or the statutes it expressly identifies.

CONCLUSION

The Commission should take the following action on the ENGO Motions:

1. The Cabinet Secretaries, Department Directors, and Commission Designees should each decline to recuse themselves from this proceeding.
2. The ENGO Motions should be summarily denied as both legally and factually unsupported.
3. Shortly before the evidentiary hearing, each of the Cabinet Secretaries, Department Directors, and Commission Designees who will be sitting for the hearing should again confirm that they can be fair and impartial and will base their decision on the evidence presented in the administrative proceedings.
4. The hearing should be schedule in Southeastern New Mexico in the first quarter of 2026.

Respectfully submitted,

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I certify that on October 13, 2025 a copy of the foregoing **Energy Trade Associations’ Consolidated Response in Opposition to Environmental Non-Governmental Organizations’ Three Motions to Disqualify** was emailed to the following:

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