

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.

REPLY IN SUPPORT OF WATER PROTECTION ORGANIZATIONS' MOTION TO  
DISQUALIFY SEVEN COMMISSIONERS AND THEIR DESIGNEES AND VACATE  
COMMISSION VOTE GRANTING WATR'S REQUEST FOR HEARING

Preliminary Statement

Amigos Bravos, Citizens Caring for the Future, Sierra Club, and Western Environmental Law Center (“Water Protection Organizations”) move to disqualify executive branch members of the Water Quality Control Commission (“Commission”) and their designees on the ground that their “impartiality [or] fairness may reasonably be questioned” in violation of the Commission’s rule at 20.1.6.102 NMAC. These Commission members have been directed by the Governor’s Office to adopt the Petition in this matter: “**As per our huddle discussion, we need everyone’s commitment to get this over the finish[] line.**”<sup>1</sup> In response, Petitioner Water Access Reuse & Treatment Alliance (“WATR”) and Oil and Gas Associations<sup>2</sup> (collectively, “Industry Parties”)

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<sup>1</sup> July 7, 2025 email among C. Buerkle, J. Kenney, *et al.* [Ex. 1 (emphasis added) (re-attached)].

<sup>2</sup> New Mexico Oil and Gas Association, Independent Petroleum Association of New Mexico, and Permian Basin Petroleum Association (collectively, “Oil and Gas Associations”). Oil and Gas Associations late-filed their response to the motions to disqualify filed by the Center for Biological Diversity and New Energy Economy in their Consolidated Response filed October 13, 2025; their response was due October 10, 2025 and Oil and Gas Associations should have sought an extension in accordance with 20.1.6.101.C NMAC instead of granting themselves an extension through their so-called “Statement of Opposition to Environmental Non-Governmental Organizations’ Motions to Disqualify,” filed October 10, 2025.

argue there is nothing to see here, that the direction from the Governor's Office represents nothing more than a "general policy position." Oil and Gas Ass'ns Resp. at 13.

In the Commission's 68 year history, there has never been a proceeding before it so tainted. While the Governor has authority to set policy for her executive agencies, her office does not have a right to direct how her cabinet secretaries or their subordinates will vote in a specific matter before the Commission, a body charged with deciding issues fairly and impartially. In this case, the Governor's Office crossed the line between appropriately setting executive policy and improperly interfering in an administrative rulemaking in which impartial Commissioners must base their decisions on the record. *See* NMSA 1978, § 74-6-7(A) & (B)(2).

The integrity of the Commission and the public's confidence in the Commission are on the line. The Commission's July 7, 2025 vote granting WATR's request for hearing should be vacated and the executive branch Commission members and their designees should be disqualified from participating in this proceeding.

### **Background**

#### **I. THE WHOLE OF THE PROCEEDINGS SURROUNDING WATR'S PETITION IS CLOUDED BY THE EXECUTIVE'S ACTIONS**

The Governor's Office has directed seven cabinet secretaries to "commit" to get the Petition in this matter "over the finish line." Ex. 1. One day before the Commission's July 8, 2025 meeting, when the Commission was to "vote to accept or decline the petition," New Mexico Environment Department ("NMED") Secretary Kenney directed the other six cabinet secretaries to "discuss this petition [with] your designee or those who work for you." *Id.* Per the earlier "huddle" among the cabinet secretaries and Governor's Office, the cabinet secretaries were told that "the administration is supportive of produced water reuse petition" and, before the Commission met to deliberate, Secretary Kenney already assumed the Commissioners would

vote to move the Petition forward: “**Following petition acceptance**, a hearing officer will be assigned.” *Id.* (emphasis added.) And, indeed, the very next day, at the Commission’s July 8 meeting, all executive branch Commission members – even those who expressed misgivings about the Petition – voted in unison to move it forward.<sup>3</sup>

After being in office 6½ years, Secretary Kenney **first** appeared as a Commission member for the July 8 meeting when WATR’s Petition was to be heard. During that meeting, Secretary Kenney pushed for WATR’s Petition to move forward, even though the Petition sought authorization to discharge treated produced water to New Mexico ground and surface waters – a regulatory action five NMED scientists strongly opposed in the 18 month rulemaking that had just concluded.

Oil and Gas Associations claim that, in the July 7 email, Secretary Kenney directed the “Cabinet Secretaries or Department Directors” to attend the July 8 meeting, but then they didn’t. Oil and Gas Ass’ns Resp. at 5. But Oil and Gas Associations misread or mispresent the email. The statutorily-designated members (which consists of five cabinet secretaries and two division directors from the Energy, Minerals and Natural Resources Department) were directed by the Governor’s Office to attend the **hearing**, that was to occur in October or early November in Lea or Eddy County, **not** the July 8 meeting.<sup>4</sup> For the July 8 meeting, the cabinet secretaries were

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<sup>3</sup> The executive agency Commissioners in attendance included statutorily designated Commissioners Secretary Kenney and State Parks Division Director Toby Velasquez and the following designees: Department of Agriculture designee Katie Laney, Department of Game and Fish designee Kirk Patten, Department of Health designee Chelsea Langer, and State Engineer designee Katie Zemlick. [WQCC July 8, 2025 meeting video](#), 2:01:20 to 2:02:10. (Oil Conservation Division Director designee Christopher Moander was absent.)

<sup>4</sup> “Once the hearing officer is assigned, that person will reach out to WQCC members about scheduling the in-person hearing. The preferred location for the hearing is Lea or Eddy County for two weeks in late October or early November. **Per the GO, the statutorily named person to the WQCC will need to participate vs your designee.**” Ex. 1 (emphasis added).

directed to “discuss the petition [with] **your designee.**” Ex. 1 (emphasis added).

During the July 8 meeting, several Commissioners questioned Secretary Kenney whether NMED would participate in the hearing. The Secretary would not commit that NMED technical staff would participate. There has **never** been a rulemaking in the Commission’s history on a rule that NMED would implement in which NMED has not appeared as a party as far as can be discerned. In fact, to date NMED has not entered an appearance in this proceeding, and the Commission will not have the benefit of NMED staff’s scientific and regulatory expertise.

At the next Commission meeting, on August 12, 2025, all five cabinet secretaries who are statutorily designated as Commission members did suddenly show up to sit as Commissioners<sup>5</sup> -- **another first** in Commission history as far as can be discerned. All summarily voted to reject objections to the Petition.<sup>6</sup>

While Oil and Gas Associations claim there is not “anything remarkable” about the five cabinet secretaries unexpectedly attending a Commission meeting, that is far from the truth. None of the secretaries had previously sat on the Commission during their tenures (except Secretary Kenney for the first time in July 2025) and the five only first appeared as a constellation at the August 12 meeting.

While the Governor’s Office denies any improper interference has occurred,<sup>7</sup> NMED recently substituted its science advisor for Secretary Kenney on the Commission.<sup>8</sup>

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<sup>5</sup> Secretary Kenney claimed that “The governor did not explicitly ask us to all show up” to the August 12 Commission meeting. Redfern, *et al.*, [New Mexico governor puts finger on scale in oilfield wastewater vote](#), Source NM, updated Sept. 24, 2025.

<sup>6</sup> [WQCC Aug. 12, 2025 video recording](#), 4:02:53 to 4:04:16 & 4:52:13 to 4:54:00.

<sup>7</sup> Gilmore, [Governor's Office leaned on Cabinet heads to get fracking waste regulation change 'over the finish line'](#), Santa Fe New Mexican, updated Oct. 15, 2025.

<sup>8</sup> Mencinger, [Ethics complaint filed against Environment secretary ahead of water quality meeting](#), Santa Fe New Mexican, updated Oct. 14, 2025.

## Argument

### **I. THE EXECUTIVE BRANCH COMMISSION MEMBERS' IMPARTIALITY AND FAIRNESS IS REASONABLY QUESTIONED; THEY MUST BE DISQUALIFIED AND THE JULY 8 VOTE MUST BE VACATED**

#### **A. The Legal Standard at Issue Is Commission Rule 20.1.6.102 NMAC**

While Oil and Gas Associations claim that Water Protection Organizations' Motion to Disqualify is based on due process claims, that is not true. Water Protection Organizations' motion is based on the Commission's own rule at 20.1.6.102 NMAC, a rule that the Commission is required to follow. *Navarez v. N.M. Dep't of Workforce Solutions*, 2013-NMCA-079, ¶ 15; *City of Albuquerque v. State Labor & Indus. Comm'n*, 1970-NMSC-037, ¶ 5, 81 N.M. 288; *Law v. N.M. Mexico Human Servs. Dep't*, 2019-NMCA-066, ¶ 23. Water Protection Organizations move to disqualify the seven executive branch Commission members designated under the Water Quality Act<sup>9</sup> and their designees under the Commission rule, which provides:

No 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 in any such action by giving notice to the commission and the general public by announcing this recusal on the record.

20.1.6.102 NMAC.

WATR half-heartedly argues the rule applies only to the merits of a hearing. WATR Resp. at 3-4, 8-9. That's just wrong. By its express terms 20.1.6.102 NMAC applies to "any action" of

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<sup>9</sup> Movants move to disqualify NMED Secretary Kenney, Department of Agriculture Secretary Jeff Witte, Department of Game and Fish Director Michael Sloane, Department of Health Secretary Gina DeBlasie, and State Engineer Elizabeth Anderson, along with Oil Conservation Division Director Albert Chang and State Parks Director Toby Velasquez, both of whom are supervised by Energy, Minerals and Natural Resources Department Secretary Melanie Kenderdine, who was part of the July 7 email chain and "huddle." These Commissioners are the statutorily designated Commission members within the executive branch. NMSA 1978, § 74-6-3(A)(1)-(7).

the Commission, which includes granting a hearing on a petition for rulemaking, which is a significant “action” of the Commission.

**B. The Basis for Disqualification Here Is *Sui Generis***

Industry Parties argue at length that the July 7 email correspondence does not prove bias, citing New Mexico cases where bias was not found. *See, e.g., Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n*, 2006-NMCA-115, 140 N.M. 464. But the facts in this case are completely different than in any other New Mexico case or any case cited by Industry Parties. It is *sui generis*, although the closest New Mexico case is the leading case in New Mexico: *N.M. Bd. of Exam’rs of Optometry*, 1979-NMSC-005, 92 N.M. 414. In *Reid*, the court struck down the administrative agency’s decision based on prejudgment. There, prior to a licensing hearing, a board member stated that an optometrist before the board “would be losing his license soon anyway, or wouldn’t be practicing soon anyway . . . .” *Id.* ¶ 4. The board member admitted making the statement, but testified he could render a fair and impartial decision. *Id.* That was not enough for the court:

. . . our system of justice requires that the **appearance** of complete fairness be present. The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

*Id.* ¶ 7 (emphasis added). Despite the board member’s testimony that he could be fair and impartial, the court found the appearance of “prejudgment” was not cured. *Id.* ¶ 9.

While actual bias or prejudice renders a decision invalid, the standard in New Mexico is higher. Fundamental to this body of New Mexico law is the premise that “our system of justice requires that the **appearance** of complete fairness be present.” *Id.* ¶ 7 (emphasis added). Public confidence in Commission decision-making is critical to its legitimacy.

The Commission's own rule reflects this principle. The standard for recusal set by the Commission is an objective one, based on whether a reasonable person would question a Commissioner's impartiality or fairness. The Commission's rule **does not** require a showing of actual bias or prejudice.

The Commission has set a high standard for itself, and justifiably so. The Commission is responsible for protecting our state's most precious resource. The public should have confidence that protecting our water resources, not politics, drives Commission decisions.

The July 7 email correspondence directing commissioners to "commit" to get WATR's Petition "over the finish line" – coupled with the host of highly unusual and problematic Commission actions surrounding WATR's Petition – have more than raised questions whether the seven executive branch Commissioners and their designees can render a fair, impartial, and independent decision based on the record.

Here, unlike any case cited by the parties, the Governor's Office has **directed** her cabinet secretaries to secure a **predetermined** outcome in this proceeding. Whether or not the Governor's Office has directed the precise terms of a final rule does not matter. The Governor's Office has directed her seven cabinet secretaries to secure passage of a rule that authorizes discharge of treated produced water to New Mexico ground and surface water, whatever the specific contours of the rule turn out to be. Industry parties' claim that the direction from the Governor's Office is "benign" is just not credible. Oil and Gas Ass'ns Resp. at 11.

C. **It Is Not Reasonable to Expect Executive Branch Commissioners to Disregard the Directive from the Governor's Office**

It would be the height of naivete to believe that the seven statutorily-designated executive branch Commission members – who **all** serve at the pleasure of the Governor – would disregard direction from the Governor's office to "commit" to get the Petition "over the finish line."

Contrary to Industry Parties' claim, WATR Resp. at 9, that direction can reasonably be inferred to mean rule adoption, and nothing else.

It would also be naïve and unreasonable to believe that lower level state agency employees designated by their superiors would disregard direction of the Governor's Office or their superiors. In fact, it would be unfair to ask lower level state agency staff to serve on the Commission with the understanding that adoption of the Petition has been directed at the highest level of state government. Indeed, during the July 8 Commission meeting, all executive agency Commissioners in attendance, constituting a majority of the vote, voted to grant the request for hearing, even those who questioned whether to proceed with WATR's Petition. It is too much to expect that the lower level state agency staff would have gone against the Governor's Office or their superiors.

Industry Parties try to explain away the clear meaning of the July 7 email correspondence. But its meaning is obvious and -- by itself -- undermines the integrity of this proceeding. But there is likely more to know: there is information that is still not publicly available including what was discussed during the "huddle" among the Governor's staff and cabinet secretaries and why the five cabinet secretaries suddenly decided to sit as Commissioners during the August 12 meeting. There has been no public accounting of all the behind-the-scenes goings on, and the public is left to wonder.

This case is not one like those cited by Industry Parties where a particular Commissioner because of their background may have some bias. The circumstances here are completely different and plainly require disqualification. The Governor is not simply setting general executive policy. The Governor's Office is directing Commissioners who are required to be impartial and fair how to vote in a specific matter. There is no room in the Governor's directive

for executive branch Commissioners to exercise independent judgment. And, at this juncture, the appearance of unfairness and partiality cannot be overcome no matter if there were representations of independence from executive branch Commissioners. *Accord Reid*, 1979-NMSC-005, ¶¶ 7, 9.<sup>10</sup> This proceeding is infected to its core: the July 8 vote to grant WATR's request for hearing should be vacated and the seven statutorily-designated executive branch Commissioners and their designees should be disqualified.

### **Conclusion**

For the reasons set forth herein and in the motion to disqualify, Water Protection Organizations respectfully request the Commission, first, with a quorum of the Commission, to vote to vacate the July 8 vote granting WATR's request for hearing and, second, to vote to disqualify the executive branch statutorily designated Commission members and their designees from this proceeding.

Respectfully submitted,

/s/ Tannis Fox

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<sup>10</sup> See The New Mexican, [Produced water? Stick to earlier decision](#), updated Sept. 24, 2025.

Certificate of Service

I certify a copy of the foregoing pleading was emailed to the following on October 19, 2025:

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/s/ Tannis Fox  
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**Cc:** [Black, Rob, EDD](#); [Rodriguez, Stephanie, HED](#); [Schlegel, Daniel, GOV](#); [Agajanian, Holly, GOV](#); [Roose, Rebecca, GOV](#)  
**Subject:** RE: Produced Water Reuse Petition Hearing Tomorrow  
**Date:** Monday, July 7, 2025 8:25:52 AM

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Thank you, Secretary. As per our huddle discussion, we need everyone's commitment to get this over the finished line.

**Caroline Buerkle**

Deputy Chief Operating Officer | Office of the Governor  
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**Subject:** Produced Water Reuse Petition Hearing Tomorrow  
**Importance:** High

Good morning -

You (or your designee) or someone who works for you serve on the Water Quality Control Commission (WQCC). As discussed in the Climate, Energy and Natural Resources Huddle, the administration is supportive of the produced water reuse petition which the WQCC will administratively take up tomorrow. The Commissioners will vote to accept or decline the petition and assign a hearing officer. Following the petition acceptance, a hearing officer will be assigned. Currently, NMED has one hearing officer, Felicia Orth. Once the hearing officer is assigned, that person will reach out to WQCC members about scheduling the in-person hearing. The preferred location for the hearing is Lea or

Eddy County for two weeks in late October or early November. Per the GO, the statutorily named person to the WQCC will need to participate vs your designee. Please discuss this petition your designee or those who work for you. Any concerns about the petition can be addressed during the fall hearing. Please reach out to me if your staff have concerns about the petition or if you are asked to meet with industry or NGOs about it.

The agenda for the WQCC hearing is attached for your reference. There is a public comment portion of the agenda tomorrow where I would expect pro/con members of the public to speak. In addition, state legislators are already weighing in support of the petition and holding the hearing in Jal.

Thank you,  
Secretary Kenney (he/him)  
New Mexico Environment Department  
Mobile: (505) 470-6161

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To request a meeting, please fill out this [form](#). For our organizational listing, please use this [link](#).