

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

IN THE MATTER OF PROPOSED NEW
RULE 20.6.8 NMAC –
*Ground and Surface Water Protection –
Supplemental Requirements
For Reuse of Treated Produced Water*

No. WQCC 25-34 (R)

Water Access Treatment & Reuse Alliance,
Petitioner.

**REPLY IN SUPPORT OF MOTION TO DISQUALIFY COMMISSIONERS AND
VACATE ORDER SETTING HEARING ON “WATR ALLIANCE” PETITION**

The Center for Biological Diversity and Mario Atencio (“Movants”) respectfully file this reply regarding our motion to disqualify commissioners whose impartiality and fairness in this matter have been compromised by interference from the Governor’s office, and to vacate the July 8th vote and corresponding July 9th order granting the Water Access Treatment and Reuse Alliance (“Industry Alliance”) petition that relied on their tainted vote.

Movants rest our motion on 20.1.6.102 NMAC, which requires impartiality and fairness of decision makers in this proceeding. The responses in opposition to our motion fail to rebut the simple truth that the Governor’s Office and Secretary Kenney have destroyed any semblance of impartiality and fairness here. Votes were directed by the Governor’s office. Those votes must be undone. The Commission’s strong recusal rule requires no less. 20.1.6.102 NMAC. And no respondent to our motion has refuted the simple truth that, based on the July 7th emails, the impartiality and fairness of the implicated commissioners can reasonably be questioned. Because that is the legal standard, disqualification is required.

The oil and gas trade associations, comprised of the New Mexico Oil and Gas Association, the Independent Petroleum Association of New Mexico, and the Permian Basin Petroleum Association, dedicate most of their response to due process arguments that we did not raise.¹ They address our rule-based argument only briefly, and insist, directly contrary to the plain language of the rule, that the impartiality and fairness required of the commission is limited to compliance with the Water Quality Act, the Governmental Conduct Act, and the Financial Disclosures Act. The trade associations provide a partial quote of the rule in support of their erroneous reading that impartiality and fairness can only be reasonably questioned when a commissioner stands to benefit financially. There is no support for this reading in the rule or in case law. While commissioners “may” rely on those acts in recusing themselves, they are not required to rely only on those acts and are certainly not limited to those acts, as they may also rely on “any other relevant authority.” 20.1.6.102 NMAC.

The oil and gas trade associations defend the commissioners’ rights to “having advanced views on important policy issues in the State,” and “acting in furtherance of the Governor’s plans and policies,” but they fail to acknowledge that our motion concerns the directing of Commission votes by the Governor’s office. The associations strain credulity with their reading of Secretary Kenney’s July 7th email as merely an expression of the Governor’s policy position. And the trade associations ignore entirely the July 7th email from the Governor’s office expecting the commissioners’ “commitment” to “get this over the finish line,” a glaring omission.

In omitting evidence and providing misleading partial quotes of Commission rules, the oil trade associations fail to respond to our argument that the July 7th emails show the Governor’s

¹ We note that the oil trade associations failed to timely respond to our motion or to request an extension.

office directing votes in this proceeding, and that directing of votes obliterates the fairness and impartiality required of this body and necessitates recusal.

The Industry Alliance similarly makes unfounded legal claims in an attempt to narrow the scope of the Commission’s strong recusal rule, including arguing that the impartiality and fairness requirement applies only to what it refers to as “decisions on the merits” or “final” actions or decisions, and suggesting that only “hearings” are required to be fair and equitable.² These arguments are again directly contrary to the Commission rule, which requires that “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...*” § 20.1.6.102 NMAC. The tainted July 8th vote clearly falls under the umbrella of “any action.” Id.

The Industry Alliance asserts that directing votes is “routine executive coordination.” It presents a tortured reading of the July 7th emails, suggesting that the “finish line” the Governor’s Office referred to was just the vote, regardless of outcome, and ignoring entirely the “commitment” that Deputy Chief Buerkle expected of the commissioners. In effect, the Alliance says that the Governor’s office only wanted the commitment of the commissioners to vote – no particular way, mind you – on what the Industry Alliance downplays as a “routine administrative housekeeping.”³ This is preposterous. It beggars belief to assume the Governor has to huddle with Secretaries and secure their commitment just to vote no particular way.

But this is a distraction. The question is not what spin can the oil trade associations or the Industry Alliance put on the July 7th emails, but whether a reasonable person, reading those emails, could harbor significant doubt about the commissioners’ impartiality or fairness in this

² Industry Alliance response at 9-11.

³ Industry Alliance response at 1.

proceeding. § 20.1.6.102 NMAC; *State v. Gage*, 2023 N.M. LEXIS 108, ¶ 13, quoting *State v. Riordan*, 2009-NMSC-022, ¶ 11, 146 N.M. 281, 209 P.3d 773. Rather than confront the applicable legal standard, both the oil trade associations and the Industry Alliance argue irrelevant standards like whether the emails are proof of an “irrevocably closed mind”⁴ or “unalterably closed mind.”⁵

Critically, no party plainly states that, based on the July 7th emails, a person could not reasonably question the impartiality and fairness of the implicated commissioners. That is the legal standard here.

Many New Mexicans do reasonably question whether the commissioners can be fair and impartial based on these emails directing their votes and based on the radical reversal the Commission undertook on this issue on July 8th, just two months after banning the dumping of treated toxic waste in our rivers and on our land because current science shows it is not safe. We and numerous other parties – not limited to environmental organizations – question the fairness and impartiality of the commissioners. The editorial board of the Santa Fe New Mexican questions the fairness and impartiality of the commissioners.⁶

The bottom line is that the Governor’s office undermined the fairness and impartiality of commissioners in this hearing by mandating that the Governor’s cabinet secretaries and their designees vote to advance the Industry Alliance’s petition.

To restore impartiality, fairness and integrity to these proceedings, movants ask the Commission to disqualify the secretary of environment, the secretary of health, the director of

⁴ Oil Trade Association Response at 9.

⁵ Industry Alliance response at 21.

⁶ *Produced water? Stick to earlier decision*, Santa Fe New Mexican (Sept. 24, 2025), available at https://www.santafenewmexican.com/opinion/editorials/produced-water-stick-to-earlier-decision/article_7e93d52f-83dc-468b-822a-0887a67e0a93.html, attached as Attachment 1.

the department of game and fish, the state engineer, the chair of the oil conservation commission, the director of the state parks division of the energy, minerals and natural resources department, the director of the department of agriculture, and all of their staff designees. In order to cure the arbitrary, improper and Governor-directed July 8th vote and corresponding July 9th order, Movants further request that the Commission vacate that vote and dismiss the Industry Alliance's petition.

Respectfully submitted this 20th day of October, 2025,

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Certificate of Service

I hereby certify that on October 20, 2025 a copy of the foregoing Motion was emailed to the persons listed below.

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Produced water? Stick to earlier decision

Santa Fe New Mexican · 24 Sep 2025

Staffers at the state Environment Department and members of the Water Quality Control Commission together have done incredible work in recent months working on a rule determining how water waste from the oil and gas industry might be reused. Or not.

The process took 18 months, included expert testimony, arguments from lawyers for and against, and plenty of debate. In May, the Water Quality Control Commission prohibited the reuse or discharge of produced water from oil and gas fields, except in limited pilot projects. The prohibition was to sunset in about five years, giving the pilot projects a chance to prove or disprove more thoroughly the idea that water contaminated with chemicals used in fracking can be made safe for reuse.

That was the right call. And it remains the right decision, despite the oil and gas industry's refusal to accept the vote — with the support, apparently, of Gov. Michelle Lujan Grisham. Here's what has happened since May. An organization named the Water Access Treatment and Reuse Alliance filed a new petition with the commission requesting another rulemaking proceeding. WATR Alliance members, many with ties to the oil and gas industry, say they have new research supporting their claim that produced water can be reused and discharged safely.

There's no harm to human health and the environment to see here, folks.

But what of the Water Quality Control Commission? Its members took a tough vote in May. From May to when the new petition was refiled in July, what really changed? Some of the commission members, for one thing.

This is where the governor made her move. As reporter Nicholas Gilmore found, behind the scenes, the Governor's Office and her Cabinet secretary, James Kenney of the Environment Department, have been working to influence commission members.

Gilmore made a public records request to obtain copies of emails among top administration officials on the subject; thanks to the Game and Fish Department and the Office of the State Engineer for following the law. The Environment Department, by the way, still has not replied to the request as required by state law.

Kenney now is on the commission; he has filled a seat since May. Messages Gilmore obtained show the Environment Department secretary was sending emails in June and July to the heads of state departments urging them to participate in the new hearing. Customarily, those department heads assign a staff member to sit in their place. This wasn't only Kenney's idea. Emails make clear he was acting at the behest of the Governor's Office, writing in July that, "Per the [Governor's Office], the statutorily named person to the WQCC will need to participate vs your designee."

He's not just helping stack the commission with individuals who work directly for the governor — as opposed to staff members who cannot be fired summarily and are protected from

political pressure. Yes, under statute, Cabinet secretaries can attend these meetings instead of staff.

It's clear the administration is in an all-out effort to get the petition "over the finish" line, as one staffer wrote in an email. That included "huddles" behind closed doors with commission members. Most unseemly, and potentially violations of how the Water Quality Control Commission should be run under state law.

Kenney also wants the hearing moved to Eastern New Mexico. Again, the request is in line with industry desires.

The WATR Alliance is asking for Jal. Such a move — holding a lengthy and complex hearing away from Santa Fe — hasn't occurred since 1987.

This is another indication that the administration, unhappy with the first vote, is stacking the deck for a different outcome.

Oil and gas, make no mistake, are fueling New Mexico's record revenues. These industries also are making record profits. That means oil and gas companies have the dollars to clean up the pollution left behind.

Science someday might be able to treat produced water — defined in state statute as "fluid that is an incidental byproduct from drilling for or the production of oil and gas" — so it can be reused without risk. In a state where freshwater is in short supply, finding additional water sources is crucial. But that day is not here. The Water Quality Control Commission did its job in May. Stop the meddling.