Water Quality Control Commission
RECEIVED
January 20, 2026
Pamela Jones

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.

RESPONSE TO MOTION FOR RECONSIDERATION
OF COMMISSION DECISION TO DENY PETITION 25-34

The Center for Biological Diversity (the "Center") and Mario Atencio (collectively, "Respondents") file this response to the December 29th Motion for Reconsideration of Commission Decision to Deny Petition 25-34 (the "Motion") filed by the oil and gas industry trade group Water Access Treatment and Reuse Alliance ("Industry Alliance"). The Motion attempts to revive the properly dismissed petition *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)* ("Petition 25-34") with the spurious argument that no motion to deny or dismiss was ever noticed, considered, or voted on. Below, Respondents set forth the reasons why this Motion fails and should be denied.

I. The Commission properly noticed its vote to dismiss Petition 25-34.

The Industry Alliance's claim that "The Commission never noticed, considered, or voted on any motion to deny the Petition or otherwise determine that the Petition should not be set for hearing." This is simply false.

On September 25, 2025 Respondents the Center and Mario Atencio filed our Motion to Disqualify Commissioners and Vacate Order Setting Hearing on WATR Alliance Petition ("Motion to Disqualify and Vacate"). Our Motion to Disqualify and Vacate repeatedly asked the Commission to dismiss the Industry Alliance Petition: "In order to rectify the improper and politically influenced July 8th vote and corresponding July 9th order, Movants further request that the Commission dismiss the Alliance's petition."[1] Our Motion to Disqualify and Vacate included an entire subsection devoted to our request for dismissal. Section C of the argument was titled, "The poisoned July 8th vote must be vacated and this matter dismissed."[2] That section laid out the grounds and necessity for dismissal, stating that "political interference poisons these votes beyond any cure except for complete dismissal of this matter."[3] Our Motion concluded by *again* asking for dismissal: "Movants additionally request that this Commission vacate its July 8th vote and corresponding July 9th order in this matter and dismiss the Alliance's petition in its entirety."[4]

The Industry Alliance explicitly responded to our Motion on October 14, 2025, and had, or should have had, full knowledge that our Motion requested dismissal.[5]

On October 20, 2025, the Center and Mario Atencio filed our Reply in Support of Motion to Disqualify Commissioners and Vacate Order Setting Hearing on WATR Alliance Petition. The Center and Mario Atencio repeated our request for dismissal: "In order to cure the arbitrary,

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[1] Center for Biological Diversity and Mario Atencio, *Motion to Disqualify Commissioners and Vacate Order Setting Hearing on WATR Alliance Petition* (Sept. 25, 2025) at 2, attached as Exhibit 1.
[2] *Id.* at 9.
[3] *Id.* at 10.
[4] *Id.* at 11.
[5] Consolidated Response in Opposition to Motions to Disqualify and Vacate (Oct. 14, 2025) at 1, attached as Exhibit 2. "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**…" (emphasis added).

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."[6]

As shown here, Respondents' Motion to Disqualify and Vacate – which the Industry Alliance was aware of and had responded to – clearly and repeatedly asked the Commission to dismiss the Industry Alliance Petition as relief based on the need to disqualify the votes and vacate the order to move the petition forward.

The Commission properly noticed its November 13, 2025 meeting on November 3, 2025. The agenda for that meeting included our Motion to Disqualify and Vacate. Under the heading "Items for WQCC Discussion and Possible Formal Action," item number 6 was: "WQCC 25-34(R): Consideration of motions to disqualify and/or vacate Commission action. Tannis Fox, Mariel Nanasi, Jeffrey Wechsler, Kari Olson, Lilah Jones, **Colin Cox, Mario Atencio,** Tim Davis." [7]

As this procedural history makes clear, the Commission properly noticed Respondents' Motion to Disqualify and Vacate, which included in its request for relief dismissal of Petition 25-34.

II. The Commission properly voted to dismiss Petition 25-34.

On November 13, 2025, the Commission heard our Motion to Disqualify and Vacate, among other motions listed on agenda item 6. Colin Cox argued for Respondents, and again explicitly and repeatedly asked the Commission to dismiss Petition 25-34. At that meeting, the Commission heard, considered, and voted on Respondents' motion, among others. The

[6] Center for Biological Diversity and Mario Atencio, *Reply in Support of Motion to Disqualify Commissioners and Vacate Order Setting Hearing on WATR Alliance Petition* (Oct. 20, 2025) at 5, attached as Exhibit 3.
[7] *State of New Mexico Water Quality Control Commission Meeting Agenda for Nov. 13, 2025*, at 1 (emphasis added), attached as Exhibit 4.

Commission granted in part the relief sought by Respondents and others. Without reaching the issue of disqualification, the Commission voted 7 to 4 to vacate its July 7th vote and July 8th order setting Petition 25-34 for a hearing, and thus to dismiss or otherwise not hold a hearing regarding Petition 25-34. Indeed, vacating the vote mandated a dismissal of the petition, as sought by Respondents.

In offering the motion to vacate at the November 13th meeting, Commissioner Brancard stated: "I think we have created – we, the governor, the administration, and the executive branch – has created a taint in this rulemaking. And it would be best to simply stop it and start all over again with somebody else proposing a new rule."[8] He explicitly intended to dismiss Petition 25-34. And his fellow Commissioners understood this intent.

During deliberations of Commissioner Brancard's motion to vacate and "simply stop" Petition 25-34, Commissioner McWilliams asked, "What would that look like if we vacated that and we allowed a reset, would the same parties be allowed to bring before the commission the rule for another vote on the hearing?"[9] From this question, it is evident that Commissioner McWilliams understood the vote would result in dismissal of Petition 25-34 and an entirely new petition would be required to restart a rulemaking on this issue.

Following the vote to vacate, Chair Thomson said: "We are largely done with this issue. We have vacated the action taken in July, so the other issue, whether to disqualify certain commissioners, is moot."[10] Dismissal of Petition 25-34 was the only way that disqualification could arguably be moot. If, following the November 13th vote, Petition 25-34 was still pending in

[8] Commissioner Brancard, WQCC Meeting, Nov. 13, 2025, https://www.youtube.com/watch?v=T3-kL56nPdQ.
[9] Commissioner McWilliams, WQCC Meeting, Nov. 13, 2025, https://www.youtube.com/watch?v=T3-kL56nPdQ.
[10] Commission Chair Thomson, WQCC Meeting, Nov. 13, 2025, https://www.youtube.com/watch?v=T3-kL56nPdQ.

any way in front of the Commission as the Industry Alliance argues, the motions to disqualify would not be moot, and the Commission would not be "largely done" with this issue. Chair Thomson intended the November 13th vote to be the end of Petition 25-34, and the November 19th order he signed dismissing Petition 25-34 reflects that intention.

The truth of this is borne out even by the Industry Alliance's chosen transcript excerpts. The Industry Alliance motion quotes this exchange from the November 13th meeting:[11]

> **Chair Thomson:** The motion is to vacate the action we took on July 8th.
>
> **Commissioner Sloane:** Mr. Chair, for clarity, a yes vote then would be to not hold a hearing and a no vote would be to go forward with a hearing. Correct?
>
> **Chair Thomson**: Yes.

Commissioner Sloane asks whether a yes vote on the motion is equivalent to a vote "to not hold a hearing" on Petition 25-34. Chair Thompson replies, "Yes." To *not hold a hearing* is to deny or dismiss the hearing. It is abundantly clear, even from the Industry Alliance's own motion, that the Commission understood it was voting to deny, dismiss, or otherwise "not hold a hearing" regarding Petition 25-34. Nowhere in the transcript does any Commissioner suggest they are voting to merely reset the Petition to its as-yet-unconsidered status prior to July 7th, 2025.

The Industry Alliance places a misleading spin on a quote of Commissioner Brancard's from the December 9, 2025 Commission meeting, wherein Commissioner Brancard requests the November 13th minutes be corrected to properly reference his motion vacating the "July 8th action to hold a hearing," instead of incorrectly referencing the "July 8th hearing" which does not exist. This housekeeping exercise is further evidence that Commissioner Brancard intended to

[11] Commissioners Sloane and Commission Chair Thomson, WQCC Meeting, Nov. 13, 2025, https://www.youtube.com/watch?v=T3-kL56nPdQ.

dismiss Petition 25-34 with his motion. Indeed, the order dismissing Petition 25-34 had been published some 20 days earlier, and neither Commissioner Brancard nor any of his colleagues raised any issue with that order.

There is no ambiguity here. The November 19th order dismissing Petition 25-34 is in total harmony with the actions of the Commission at, and leading up to, its November 13th meeting.

The Industry Alliance offers no legal or other support for its disingenuous, incorrect interpretation of vacatur. As a practical matter, the suggestion that vacatur should reset the status of Petition 25-34 to post-receipt but pre-consideration by the Commission would not only ignore the clear intent of Commissioner Brancard's motion to vacate, it would also entirely fail to address the disqualification arguments in Respondents' Motion to Disqualify. One of the explicit reasons the Commission voted as it did on November 13th to not hold a hearing on Petition 25-34 was so that it would not have to reach Respondents' disqualification arguments.

The plain truth is that the Commission properly considered our Motion to Disqualify and Vacate and, following a public vote at a properly noticed meeting, granted a part of the relief sought therein, dismissing Petition 25-34. In its Motion here, the Industry Alliance raises no legitimate grounds for reconsideration of that vote or resulting order, and instead asks the Commission to ignore the content of our Motion to Disqualify and Vacate and subsequent Commission deliberations of that motion and others at its November 13th meeting.

III. Conclusion

As explained above, Respondents Center for Biological Diversity and Mario Atencio filed a motion seeking, among other things, dismissal of Petition 25-34. The Industry Alliance received and responded to our motion. The Commission properly noticed, considered, and voted on our motion, ultimately voting to dismiss, i.e. to "not hold a hearing" regarding Petition 25-34.

In so doing, the Commission complied with all relevant rules. Because of this, the Industry Alliance Motion for Reconsideration should be denied in its entirety.

Respectfully submitted this 19th day of January, 2026,

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Certificate of Service

I hereby certify that on January 19, 2026 a copy of the foregoing Motion was emailed to the persons listed below.

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Exhibit 1

RECEIVED Pamela Jones
By Water Quality Control Commission at 2:21 pm, Sep 25, 2025

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF PROPOSED NEW
RULE 20.6.8 NMAC –
Ground and Surface Water Protection –
Supplemental Requirements
For Reuse of Treated Produced Water No. WQCC 25-34 (R)

Water Access Treatment & Reuse Alliance,
Petitioner.

MOTION TO DISQUALIFY COMMISSIONERS AND VACATE ORDER SETTING HEARING ON "WATR ALLIANCE" PETITION

The Center for Biological Diversity and Mario Atencio ("Movants") respectfully move the Water Quality Control Commission ("Commission") 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 ("Alliance") petition that relied on their tainted vote.

The Commission standard for disqualification is strong: a "Commission member shall not participate in any action in which his or her impartiality or fairness may reasonably be questioned." § 20.1.6.102 NMAC. This rule mirrors rules of judicial conduct and is rooted in constitutional requirements of due process and fundamental legal principles of fairness. These are foundational elements of New Mexico and United States law.

Recently revealed emails show that the Governor's office and Secretary James Kenney instructed Commission members and their superiors to vote in support of the Alliance petition to discharge treated oil and gas waste into our rivers and onto our land, contrary to the science-

based prohibition on that pollution that the Commission adopted earlier this year. The brazen rigging of this hearing violates the requirement that the commissioners be fair and impartial and deprives the public of their right to fair and impartial decision-makers.

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 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 rectify the improper and politically influenced July 8th vote and corresponding July 9th order, Movants further request that the Commission dismiss the Alliance's petition.

I. FACTUAL BACKGROUND

In May of this year, the Commission concluded its hearing in *In the Matter of Proposed New Rule 20.6.8 NMAC – Ground and Surface Water Protection – Supplemental Requirements for Water Reuse*, No. WQCC 23 - 84 (R). This hearing primarily concerned the safety - notably, the lack thereof – of the treatment, discharge and reuse of toxic oil and gas waste outside of the oilfield. It took place over the course of eighteen months in 2024 and 2025 and included testimony from over fifteen experts, tens of thousands of pages of written testimony and exhibits, over one hundred public commenters, eleven days of evidentiary hearing, and four days of Commission deliberations.

One fact above all became apparent over the course of that hearing: the science does not support the reuse and discharge of "treated" oil and gas waste. Expert after expert testified to the fact that oil and gas waste had not been fully characterized, was not fully understood, that testing methodologies for many of its 1,400+ potential contaminants had not been developed, and that

treatment technologies had not been adequately tested, especially not continuously and at scale. From this mountain of evidence, the Commission rightly concluded that discharge and industrial-scale reuse of treated oil and gas waste outside of the oilfield were not compatible with its statutory duty to protect human health and the environment. NMSA 1978, § 74-6-4 (D), (E) and (K).

Because there is no scientific evidence that demonstrates that discharge or reuse of oil and gas wastewater can be done safely, in May of 2025, the Commission rightly prohibited discharge to protect public health and the environment and set guidelines to permit pilot projects that would further the science on this issue while protecting the environment. To allow time for that science to develop, the Commission set a sunset date for its rule five years in the future. This five-year timeline was based on industry representations and the New Mexico Environment Department's estimate of the time needed to develop "appropriate and relevant standards."[1]

Then, less than 30 days after the Commission finalized this rule, oil industry group Water Access Treatment and Reuse Alliance filed a new petition to undo all of the science-based protections that the Commission just adopted and instead allow the reuse of treated oil and gas waste outside of the oilfield and the dumping of that waste onto New Mexico soil and into New Mexico's rivers and groundwaters. The Alliance is a trade group whose members overlap significantly with members of New Mexico Oil and Gas Association ("NMOGA"), which fully participated in the prior hearing. Because they lost their bid to dump their waste into our rivers, the Alliance's and NMOGA's members are trying for a second bite at the apple, going back to the Commission under a different name, pretending to be new applicants, and demanding that the

[1] Order and Statement of Reasons, *IN THE MATTER OF PROPOSED RULE 20.6.8 NMAC – Ground and Surface Water Protection – Supplemental Requirements for Water Reuse, No. WQCC 23-84 (R)*, Finding 25 (May 24, 2025).

Commission revisit its decision after the time for reconsideration has passed and after they have already appealed the Commission's decision.

The Alliance ignores the Commission's findings, ignores the need for evidence and for science to protect public health and the environment, and ignores the research process the Commission established for that explicit purpose. The Alliance claims that new science justifies their proposal but have repeatedly refused to point to even a single scientific study to support this claim. In fact, the latest science from New Mexico researchers states that research on the health effects of treated oil and gas waste from the Permian Basin is "still lacking," and that more research is needed to determine if it can be treated and reused safely.[2]

The Commission considered the Alliance's petition on July 8, 2025. Prior to this meeting, movants filed opposition briefs detailing the petition's numerous substantive and procedural deficiencies, and twenty-five state legislators wrote to the Commission imploring them to respect the hearing process, respect the science, and respect the law by denying the Alliance's bad faith petition. At the July 8th meeting, dozens of people spoke overwhelmingly against the petition and in favor of retaining the just-adopted protective rule.

Movants are now aware that, prior to that July 8th vote, Governor Michelle Lujan Grisham instructed numerous appointees to the Commission – and their superiors – to support the Alliance's petition.[3] E-mails from Secretary James Kenney and the Governor's office to a number of commissioners show that the Governor, through Secretary Kenney, rigged the hearing to prejudge approval of the Alliance's petition.

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[2] Wijukoon et al., *Comprehensive cytotoxicity assessment of treated produced water from thermal distillation using human cell lines,* Ecological and Environmental Safety, Vol. 302 (Sept. 1, 2025).
[3] Nicholas Gilmore, *Governor's Office leaned on Cabinet heads to get fracking waste regulation change 'over the finish line,'* Santa Fe New Mexican (Sept. 15, 2025).

On July 7, 2025, Secretary Kenney, sent the following email:[4]

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

Secretary Kenney* sent this email to the following recipients (* denotes Commission member or Commission member superior):

- Jeff Witte, Secretary of Agriculture*
- Elizabeth Anderson, State Engineer*
- Gina DeBlassie, Secretary of Department of Health*
- Micheal Sloane, Secretary of Game and Fish*
- Melanie Kenderdine, Secretary of Energy, Minerals, and Natural Resources**
- Rob Black, Secretary of Economic Development

[4] E-mail from Secretary James Kenney to Jeff Witte, Elizabeth Anderson, Gina DeBlassie, Micheal Sloane, Melanie Kenderdine, Rob Black, Stephanie Rodriguez, Caroline Buerkle, Daniel Schlegel, Holly Agajanian, Rebecca Roose, *Subject: Produced Water Reuse Petition Hearing Tomorrow* (July 7, 2025), Attachment 1.

- Stephanie Rodriguez, Secretary of Higher Education
- Caroline Buerkle, Deputy Chief Operating Officer, Office of the Governor
- Daniel Schlegel, Chief of Staff, Office of the Governor
- Holly Agajanian, General Counsel, Office of the Governor
- Rebecca Roose, Infrastructure Advisor, Office of the Governor

That same morning, Caroline Buerkle, Deputy Chief Operating Officer, Office of the Governor, replied to all recipients: "Thank you, Secretary. As per our huddle discussion, we need everyone's commitment to get this over the finished line."[5]

Recipients of Buerkle's email chain were five members of the Commission, as well as Cabinet Secretary of EMRND Melanie Kenderdine, the superior of two additional members. These members are, per statute, the secretary of environment, the secretary of health, the director of 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 ("EMNRD"), and the director of the department of agriculture. NMSA § 74-6-3(A). These secretaries were instructed to support the Alliance's petition and ensure that their designees supported the petition as well.

On July 8, 2025, the Commission heard the Alliance's petition and voted 10-0 in favor of approving the petition for a hearing. Of those ten votes, six were under the control of the Governor:

- James Kenney, Secretary of the Environment
- Toby Velasquez, director of the state parks division of EMNRD
- Katie Laney, staff designee of the director of the department of agriculture
- Katie Zemlick, staff designee of the state engineer
- Chelsea Langer, staff designee of director of the department of health
- Kirk Patten, staff designee of the director of the department of game and fish

[5] E-mail from Caroline Buerkle to James Kenney, Jeff Witte, Elizabeth Anderson, Gina DeBlassie, Micheal Sloane, Melanie Kenderdine, Rob Black, Stephanie Rodriguez, , Daniel Schlegel, Holly Agajanian, Rebecca Roose, *Subject: RE: Produced Water Reuse Petition Hearing Tomorrow* (July 7, 2025), Attachment 1.

We note that a seventh position under the control of the Governor, chair of the oil conservation commission Chris Moander, was not present at the July 8th meeting, but remains implicated in the rigging of this hearing going forward.

The above emails prove that the Governor and Secretary Kenney undermined the fairness of the hearing process: mandating that the Governor's cabinet secretaries and their designees vote to advance the Alliance's petition.

II. ARGUMENT

a. Implicated commissioners cannot be trusted and must be disqualified.

In light of these emails, the seven listed commissioners and their designees must be disqualified from this proceeding because their impartiality and fairness can reasonably be questioned.

The Commission's hearing regulations on disqualification are clear: "A Commission member shall not 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 (emphasis added). The objectives of the Commission's hearing regulations are "to assure that commission hearings are conducted in a fair and equitable manner." § 20.1.6.6(E) NMAC.

While the Commission standard of when impartiality and fairness may reasonably questioned has not been interpreted by a court, the language closely tracks the requirements for state judges in New Mexico's Code of Judicial Conduct: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned…."

21-211(A) NMRA.[6] Impartiality is reasonably questioned when an "objective, disinterested observer, fully informed of the underlying facts, would entertain significant doubt that justice would be done absent recusal." *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.

Here, the seven commissioners – and their designees – implicated in these emails must be disqualified from this proceeding because emails show that following a huddle about the Alliance's petition, Secretary Kenney and the Governor's office required the commissioners' "commitment" to "get this over the finish line." These emails are evidence of prejudgment and impropriety, unbefitting Commission proceedings.

This is several steps beyond whether the commissioners' fairness and impartiality "may reasonably be questioned." These commissioners simply cannot claim fairness and impartiality regarding the Alliance's petition. They were instructed by their superior to support the petition prior to their July 8th meeting – and support it they did. We have seen no evidence that any commissioner objected to or resisted the Governor's improper demand in any way. The commissioners were assured that any concerns they had could be addressed later, after they voted to approve the petition for a hearing. They were told when and where the hearing should happen.

Applying the standard from *Riordan,* we ask, would an objective, disinterested observer, fully informed of the underlying facts, entertain significant doubt that justice would be done in this situation, where a majority of voting commissioners have been instructed by their boss to vote a particular way regardless of any concerns they might have? The answer can only be "yes." Justice was not done on July 8th, and justice cannot possibly be done in this hearing moving

[6] Committee Comment 1 states that "the terms "recusal" and "disqualification" are often used interchangeably." 21-211(A) NMRA.

forward. The commissioners have been given their marching orders. They are committed to getting this over the finish line. The evidence is irrelevant, the conclusion forgone.

This is a plain betrayal of the public trust by officials both elected and appointed. The seven commissioners implicated in these emails must immediately be disqualified from this proceeding.

b. This betrayal of the public trust cannot be cured through substitution.

As explained above, this has not been and cannot be a fair and impartial hearing. The rot at the heart of this hearing goes all the way to the highest executive office. The tainted commissioners cannot now designate subordinates to fill their roles because those subordinates can reasonably be expected to receive the same improper orders from their superiors to get the Alliance's petition over the finish line regardless of the evidence. Any designee would necessarily serve under the shadow of Secretaries and a Governor that have shown their willingness to subvert the Commission's fairness and impartiality in favor of the Governor and the oil industry. Because the entire chain of command is tainted, any designee will be subject to the same reasonable questions regarding their impartiality and fairness as their superiors, and will therefore be required to recuse themselves. § 20.1.6.102 NMAC.

c. The poisoned July 8th vote must be vacated and this matter dismissed.

On July 8, 2025, when the Commission voted to approve the Alliance's petition for a hearing, as many as six of the ten voting commissioners – a majority – were voting under orders from the Governor. They were "committed" to getting the Alliance petition "across the finish line." The e-mails between the Governor's office, Secretary Kenney, and several commissioners on the eve of the vote are evidence of unlawful political interference in what should have been a

fair hearing. This political interference poisons these votes beyond any cure except for complete dismissal of this matter.

In *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, a commissioner's vote in favor of affirming a permit was disqualified "because it was based on matters outside of the record, rendering the Commission's determination invalid." *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, 138 N.M. 625, 629. In part due to this disqualified vote, the Court of Appeals found that the Commission's dismissal of an administrative appeal was arbitrary, an abuse of discretion, and not supported by substantial evidence, stating "this commissioner's explanation for his vote for dismissal creates a serious enough concern about the validity of the outcome of the vote to add support to our view that the Commission's dismissal was arbitrary and an abuse of discretion." Id. at 635. Notably, the court in *Gila Res.* also recognized that "concepts of fairness and transparency" apply to "administrative proceedings." Id. at 634.

While *Gila Res.* concerned a permit and not a rulemaking, the situation is otherwise extremely similar. A majority of commissioners here have based their decisive votes not on the evidence and argument before them, but on politically motivated instructions from their superiors. This is the very definition of arbitrary, and is certainly not fair. Their votes are invalid and must be vacated. Failure to vacate the invalid, politically influenced July 8th vote and July 9th order would likewise be arbitrary and capricious.

III. POSITIONS OF OTHER PARTIES

Movants sought the position of the parties. The Commissioner of Public Lands, WildEarth Guardians, New Energy Economy, Western Environmental Law Center, Amigos Bravos and Sierra Club support the motion. Select Water Solutions, Oxy, NMOGA, IPANM,

PBPA, the WATR Alliance oppose the motion. Bruce Weatherbee does not oppose the motion. No other party responded.

IV. CONCLUSION

The Governor's office and Secretary Kenney have compromised the fairness, impartiality and integrity of this body by directing votes in this proceeding. Movants respectfully request that this Commission grant their motion to disqualify from this proceeding the secretary of environment, the secretary of health, the director of the department of game and fish, the state engineer, the chair of the oil conservation commission, and the director of the state parks division of the energy, minerals and natural resources department, the director of the department of agriculture and their all of their designees. Movants additionally request that this Commission vacate its July 8th vote and corresponding July 9th order in this matter and dismiss the Alliance's petition in its entirety.

Respectfully submitted this 25th day of September, 2025,

THE CENTER FOR BIOLOGICAL DIVERSITY
By: */s/ Colin Cox*
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Gail Evans
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/s/ Mario Atencio
Mario Atencio
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Certificate of Service

I hereby certify that on September 25, 2025 a copy of the foregoing Motion was emailed to the persons listed below.

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/s/ Colin Cox

Attachment 1

From: Buerkle, Caroline, GOV
To: Kenney, James, ENV; Witte, Jeff; Anderson, Elizabeth, OSE; DeBlassie, Gina, DOH; Sloane, Michael B., DGF; Kenderdine, Melanie, EMNRD
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

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
Governor Michelle Lujan Grisham

P: (505) 476-2221
C: (505) 690-4804
E: caroline.buerkle@exec.nm.gov

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From: Kenney, James, ENV <James.Kenney@env.nm.gov>
Sent: Monday, July 7, 2025 8:01 AM
To: Witte, Jeff <jwitte@nmda.nmsu.edu>; Kenney, James, ENV <James.Kenney@env.nm.gov>; Anderson, Elizabeth, OSE <elizabeth.anderson@ose.nm.gov>; DeBlassie, Gina, DOH <Gina.DeBlassie@doh.nm.gov>; Sloane, Michael B., DGF <michael.sloane@dgf.nm.gov>; Kenderdine, Melanie, EMNRD <Melanie.Kenderdine@emnrd.nm.gov>
Cc: Buerkle, Caroline, GOV <Caroline.Buerkle@exec.nm.gov>; Black, Rob, EDD <rob.black@edd.nm.gov>; Rodriguez, Stephanie, HED <Stephanie.Rodriguez@hed.nm.gov>; Schlegel, Daniel, GOV <Daniel.Schlegel@exec.nm.gov>; Agajanian, Holly, GOV <Holly.Agajanian@exec.nm.gov>; Roose, Rebecca, GOV <rebecca.roose@exec.nm.gov>
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
-
To request a meeting, please fill out this form. For our organizational listing, please use this link.

Exhibit 2

RECEIVED Pamela Jones
By Water Quality Control Commission at 2:53 pm, Oct 14, 2025

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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Exhibit 3

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 and 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

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[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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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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/s/ Colin Cox

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 statue 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.

Exhibit 4

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION
1190 St. Francis Drive, Suite S-2102
Santa Fe, New Mexico 87505
Phone: (505) 660-4305

CONSTITUENT AGENCIES

Environment Department
Department of Game and Fish
Department of Agriculture
State Parks Division
Bureau of Geology and Mineral Resources
State Engineer & Interstate Stream Commission
EMNRD Oil Conservation Division
Department of Health
Soil and Water Conservation Commission
(At-Large) Public Members

MEETING AGENDA

New Mexico Water Quality Control Commission
In-Person and Hybrid Meeting[1] via Cisco WebEx Platform[2]
November 13, 2025, 9:00 A.M.

Items for WQCC Discussion and Possible Formal Action

1. Roll call of Water Quality Control Commission ("WQCC" or "Commission") Members.

2. Approval of November 13, 2025, WQCC Meeting Agenda.

3. Approval of October 14, 2025, regular meeting minutes.

4. Public Comment.

5. **WQCC 25-67:** ***Protect Tesuque, Inc.'s Petition for Review of Discharge Permit Renewal (DP-75).*** Thomas Hnasko, Christal Weatherly.

6. **WQCC 25-34(R):** ***Consideration of motions to disqualify and/or vacate Commission action.*** Tannis Fox, Mariel Nanasi, Jeffrey Wechsler, Kari Olson, Lilah Jones, Colin Cox, Mario Atencio, Tim Davis. The Commission will hear oral briefs as follows: (1) the parties that filed motions shall have no more than a total of thirty minutes to deliver oral briefs and (2) the parties that filed responses to the motions shall have no more than a total of thirty minutes to deliver oral briefs. All parties are encouraged to focus their oral briefs on the substance of their motion or response and not the merits of the underlying matter.

7. Next WQCC meeting date, old and/or upcoming Commission matters.

8. Adjournment.

[1] New Mexico State Capitol, Room 307, 490 Old Santa Fe Trail, Santa Fe, New Mexico.

[2] To join the meeting via video or telephone see information on next page. If you are having difficulty joining the meeting virtually, please contact WQCC Administrator Pamela Jones (505-660-4305) pamela.jones@env.nm.gov

To connect to the meeting virtually, please click link below:

https://www.env.nm.gov/events-calendar/

Find the date of this meeting and click on the WebEx link listed.

If you are an individual with a disability or other need requiring a reader, amplifier, interpreter, or any other form of auxiliary aid or service to attend or participate in the meeting, please contact our staff to discuss your accessibility needs at least one week prior, or as soon as possible, by emailing Pamela Jones at pamela.jones@env.nm.gov or calling 505-660-4305. **If you are having difficulties logging on to the meeting or during it, please contact Pam Jones at (505) 660-4305.**