

**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.

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 EMNRD 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

Colin Cox

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/s/ 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

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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

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Sent: Monday, July 7, 2025 8:01 AM
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Subject: Produced Water Reuse Petition Hearing Tomorrow
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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 Jan.

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

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