

STATE OF NEW MEXICO
INTERSTATE STREAM COMMISSION
IN THE MATTER OF THE PROPOSED RULE TO IMPLEMENT
THE WATER SECURITY PLANNING ACT
Rulemaking No. 25-01(R)

**REPLY OF THE NEW MEXICO WATER ADVOCATES TO THE RESPONSE OF THE
INTERSTATE STREAM COMMISSION**

INTRODUCTION

The Water Advocates submit this Reply to correct the record and address the Interstate Stream Commission staff's October 10 Response to the Water Advocates' October 6 Motion. The extensive Response is largely argumentative and fails to address the statutory issues now before the Commission.

The Response does not rebut the Water Advocates' statutory arguments; instead, it reframes them as commentary to avoid the Commission's responsibility to evaluate their merits. The Water Advocates' Motion sets forth specific legal and factual assertions grounded in statutory text and established principles of administrative law. The staff's Response minimizes those assertions by characterizing them as rhetorical questions and dismissing them as late public comment, thereby avoiding engagement with the statutory and procedural issues raised. The Response represents staff advocacy, not a reasoned determination of the Commission, which has yet to act in its quasi-legislative capacity. The Motion does not seek to convert the rulemaking into an adjudicatory proceeding; it seeks

only a fair rulemaking process designed to create the record to satisfy the State Rules Act and fulfill the Water Security Planning Act's directive that the program be established and conducted based on science, data, and professional judgment. The Commission, not its staff, must exercise this delegated legislative authority by making the determinations of law and fact necessary to justify adoption of the rule.

Under the State Rules Act, substantive filings addressing statutory compliance obligate the agency to respond meaningfully to the issues in the record. (NMSA 1978, § 14-4-5.3 (A-C); 14-4-5.4 (A); *City of Albuquerque v. N.M. State Engineer*, 2010-NMSC-013, ¶ 21; *Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.*, 1984-NMSC-042, ¶ 13). The staff's Response instead reframes the Water Advocates' legal assertions as rhetorical questions and dismisses them without analysis. By substituting argumentative misrepresentations of the Motion for reasoned analysis, the Response obstructs development of a rulemaking record adequate to meet the Commission's increased burden to establish the reasoned rationale for its decisions in the absence of any staff rationale.

This Motion and Reply are submitted in good faith to assist the Commission in fulfilling its statutory responsibilities. They identify and preserve substantive and procedural defects that, if uncorrected, will expose the Commission to judicial review and possible invalidation of the adopted rule under the State Rules Act (NMSA 1978, § 14-4-5.7). The Water Advocates seeks to prevent that outcome by urging the Commission to correct deficiencies now through a transparent, evidence-based process.

The sections that follow address each major misstatement and omission in the Response and clarify the Commission’s duties under the governing statutes.

A. THE DEFAULT RULE DOES NOT CONSTRAIN THE COMMISSION

The Response’s opening assertion misinterprets the legal effect of the Default Rule and, in doing so, understates the Commission’s own discretion and responsibility. The Response claims: “The NMISC has fully complied with the notice and comment requirements of the State Rules Act and the Default Procedural Rule, neither of which require the Commission to structure its hearing to accommodate technical evidence, expert analysis, and rebuttal.” That statement misreads both the State Rules Act and the Default Rule.

NMAC 1.24.25 supplies a uniform process where an agency lacks its own promulgated procedures; it is a stand-in, not a ceiling on process. See NMAC 1.24.25.8(B). The Water Security Planning Act imposes more: the Commission must establish and conduct the state’s program based on science, data, and professional judgment (NMSA 1978, § 72-14A-4(C)). For a technical rulemaking of this kind, the Commission not only may but should supplement the Default Rule to ensure the rulemaking record contains the factual basis required by the State Rules Act § 14-4-5.4(A) for reasoned rule adoption. As the Supreme Court explained in *City of Albuquerque v. N.M. State Engineer*, 2010-NMSC-013, ¶ 21, an agency exercising quasi-legislative authority must develop a rational basis grounded in substantial evidence; it cannot rely solely on procedural compliance.

B. MISCHARACTERIZATION OF THE MOTION

The Response asserts: “The Motion ignores the fact that the rulemaking record is not yet complete at the time of introduction of the proposed rule.” That is incorrect. The Motion expressly states, “the Commission must adopt procedures now to develop a reasoned record adequate for judicial review,” and “the Proposed Rule omits the explanation, documentation, and rationale necessary to demonstrate how its provisions comply with the Water Security Planning Act.”

The Motion requests “qualified participants be allowed to present testimony, exhibits, and expert analysis to complete the record before adoption.” These are process requests intended to ensure a lawful, reviewable record, not an effort to adjudicate the merits prematurely.

The Response further claims: “The Water Advocates seek to complicate and obfuscate the rulemaking with technical matters that the governing legislation does not require to be determined in the rule.” Those ‘technical matters’ of geohydrology, the arts and sciences of water resources planning, meaningful consideration of future generations, and improved governance are the very subjects the Legislature commanded the Commission to base its program and decisions upon under § 72-14A-4(C). The Motion seeks only the procedures needed to rationally and transparently ground the rule’s content in science, data, and professional judgment, as the Act requires (NMSA 1978, § 72-14A-4(C)). Avoiding these subjects would defeat the statute’s purpose and render the rule unsupported by the very expertise the Act requires.

C. STATUTORY DUE PROCESS REQUIREMENTS

The Motion uses due process in the statutory sense: the Commission must provide a fair opportunity to present evidence and testimony, not merely public comment, so that the rulemaking record will be adequate for review under the State Rules Act sections and case cited in the Introduction. These statutory protections exist precisely to ensure that rulemaking records are sufficiently robust to permit judicial review without remand.

The Response repeatedly invokes constitutional due process (ten mentions, including two headings) and then dismisses a constitutional claim the Motion did not make. The Motion asserts that, in exercising delegated legislative authority, the Commission must observe procedural fairness sufficient to produce a reasoned, reviewable rule. Because the record has yet to be made, the Commission should adopt procedures now to provide this level of statutory due process at the hearing. That requirement—to afford meaningful participation and evidentiary opportunity—carries directly into the question of how the Commission conducts its upcoming hearing.

D. OPPORTUNITY TO PRESENT TESTIMONY AND EVIDENCE

The Response states: “Granting the Water Advocates’ eleventh-hour request to intervene as a party to the rulemaking is not only unnecessary for them to have a voice in this rulemaking, but it would also violate the statutory due process protections of all other interested entities or members of the public.” That claim reverses the logic of procedural fairness.

The Motion expressly requests that any qualified party be permitted to present testimony and exhibits and to participate fully in the rulemaking hearing. The Commission has discretion under NMAC 1.24.25.10(A) to provide additional procedures consistent with law when necessary to develop a complete and reliable record.

At the September 18 Commission meeting (video recording and transcript obtained via a public records request), staff counsel described herself as representing the planning program and argued for limiting public participation to brief unsworn comments; Hearing Officer Orth corrected that view, emphasizing that rulemaking is conducted publicly and that anyone may present witnesses and exhibits. Expanding informed participation strengthens due process; it does not diminish it.

The Commission's July 17 Order, July 17 Motion to Initiate Rulemaking, and August 26 New Mexico Register Notice make no mention of any opportunity to present witnesses or exhibits, limiting participation to brief public comment. On September 18, staff counsel defended the restriction. Hearing Officer Orth overruled, stating anyone may "step up and make public comment on that, put on witnesses and exhibits, what have you." The agency never recorded that clarification for the record. Absent attendance at that meeting, potential witnesses may think such participation is disallowed. This circumstance undermines the fairness of the proceeding. The claim of untimeliness is refuted by the Commission's failure to make the Hearing Officer's clarification official. The Motion seeks to preserve and expand that public access. This omission constitutes a grave staff denial of public due process opportunity. Staff disregarded the Hearing Officer's clear statement of the law and failed to make the change public.

E. FAILURE TO CONSIDER SUBMITTED COMMENTS

The Response asserts: “The NMISC has considered all of the Water Advocates’ comments submitted to date.” That is incorrect. On November 1, 2024, the Water Advocates’ president and past president met with the ISC Director, Deputy Director, and General Counsel to present and discuss detailed written recommendations and proposed rule language.

They commended the submittal’s substantive recommendations, said they were timely, and committed to forwarding a set of recommendations and the Water Advocates’ draft rule to planning-program staff. At a December follow-up meeting, the General Counsel advised that planning-program staff declined to consider the documents. The facts contradict the Response’s assertion.

F. LACK OF RATIONALE RENDERS THE PROPOSED RULE ARBITRARY AND CAPRICIOUS IN ITS CURRENT FORM

The Response repeats that the Motion is premature because the record is not yet complete. That misstates the defect identified. The Proposed Rule, as filed, contains no accompanying explanation or rationale for its substantive provisions. Under the State Rules Act, a rule must rest on a reasoned basis that shows its consistency with law and evidence (NMSA 1978, § 14-4-5.3, 5.4 (A); *New Energy Economy, Inc. v. N.M. Pub. Regulation Comm’n*, 2016-NMSC-005, ¶¶ 17-18). See also *Duke City Lumber Co. v. N.M. Environmental Improvement Bd.*, 1984-NMSC-042, ¶ 13 (agency must articulate the rational connection between facts found and choices made). Absent a documented

rationale, the Proposed Rule's content is arbitrary and capricious on its face because it fails to disclose the reasoning and evidentiary linkage between the rule's provisions and the statutory purposes they purport to advance.

The Water Advocates filed the Motion after the staff published the pre-filed testimony and exhibits of its four expert witnesses. The Water Advocates expected this testimony and exhibits to articulate the missing rationale. They did not. The testimony and exhibits consist largely of policy summaries, administrative description, and irrelevant historical documents, which leave the legal, technical, and evidentiary bases for the Proposed Rule's provisions unexplained. In the absence of a reasoned rationale prepared by staff, the Commission must develop the record to support each provision, or the rule will remain susceptible to judicial review as arbitrary, capricious, or unsupported by substantial evidence. Accordingly, the Commission must take corrective procedural steps to develop this missing rationale during the hearing process itself.

G. THE DEFAULT RULE DOES NOT LIMIT THE COMMISSION'S PROCEDURAL AUTHORITY

The Response's refrain that the Commission has "fully complied" with the State Rules Act and the Default Rule does not address the issue. The Default Rule fills the procedural gap where an agency has not promulgated its own procedures; it does not restrict the Commission from tailoring its process to the demands of a technical rulemaking. See NMAC 1.24.25.8 (B).

The Water Security Planning Act requires the program to be established and conducted based on science, data, and professional judgment (NMSA 1978, § 72-14A-4(C)). A hearing limited to unsworn comment cannot meet that standard. At the September 18 meeting, the Director emphasized that three Brendle Group reports provide an extensive technical basis for the Proposed Rule; they do not. Those reports summarize engagement and process but do not supply hydrologic, engineering, or scientific analysis to support the rule's provisions. A lawful rulemaking cannot rest on administrative summaries in place of a reasoned rationale that links choices to supporting facts. Accordingly, the Commission must take corrective procedural steps to develop this missing rationale during the promulgation process.

H. THE COMMISSION MUST HARMONIZE § 72-14A-4(C)(1)(d) AND § 72-14A-5(C)(1)

Section 72-14A-4(C)(1)(d) directs the Commission to promulgate rules establishing the composition of a regional water planning entity. That authority allows the Commission to define composition standards, such as representational balance and capability, as part of the formation and recognition process.

At a late stage of the Water Security Planning Act's passage, the Legislature unanimously adopted the House floor amendment that added § 72-14A-5(C)(1), which provides that each regional water planning council shall appoint its own members. As the later-enacted and more specific statement on membership, § 72-14A-5(C)(1) must be read in harmony with § 72-14A-4(C)(1)(d) under the whole-statute rule, which requires all parts of a statute to be construed so that none are rendered surplus or contradictory. A council cannot be recognized without members, and those members must be appointed by the

council itself within the composition standards the Commission lawfully establishes. It is the Commission's duty to harmonize these provisions by rule so that council formation and recognition occur coherently and lawfully.

The Proposed Rule fails to do so. It specifies fixed membership slots without any relevant qualifications and without a process by which councils appoint members consistent with § 72-14A-5(C)(1). By treating § 72-14A-4(C)(1)(d) as plenary authority over composition and disregarding § 72-14A-5(C)(1), the Proposed Rule substitutes administrative preference for legislative direction. To comply with the Act, the Commission must define composition standards for recognition such as broad stakeholder representation and competence while providing a process for councils to appoint their members consistent with § 72-14A-5(C)(1). That construction honors both provisions, preserves legislative intent, and avoids reading § 72-14A-5(C)(1) as an implied repeal of § 72-14A-4(C)(1)(d).

CONCLUSION

The Water Advocates' Motion seeks lawful procedures, not delay. It asks the Commission to adopt hearing rules that will enable development of a reasoned, evidence-based record supporting every provision of the adopted rule. The staff's Response misstates both the Motion and the governing law. The Commission retains full authority under the State Rules Act and the Water Security Planning Act to correct these deficiencies now, to ensure an open, technically grounded, and transparent hearing, and to promulgate a rule that satisfies statutory mandates.

By exercising that authority, the Commission will strengthen public trust in its statutory mission and demonstrate that rulemaking on complex scientific and engineering matters can meet both legal and professional standards. The Water Advocates respectfully urge the Commission to proceed accordingly and to adopt a rule that is lawful, reviewable, and commands lasting public confidence.

Respectfully submitted,
NEW MEXICO WATER ADVOCATES

By: _____/s/_____
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Dated: October 13, 2025