

**STATE OF NEW MEXICO
INTERSTATE STREAM COMMISSION**

**IN THE MATTER OF
PROPOSED NEW RULE 19.25.16
NMAC – Regional Water Security Planning**

No. NMISC 25-01 (R)

**New Mexico Interstate Stream Commission
Water Planning Program,**

Movant

**RESPONSE OF THE NEW MEXICO INTERSTATE STREAM COMMISSION TO
NEW MEXICO WATER ADVOCATES' MOTION DATED OCTOBER 6, 2025**

The New Mexico Interstate Stream Commission (NMISC or Commission), through its Counsel, submits this response to the *pro se* motion filed by New Mexico Water Advocates (Water Advocates) on October 6, 2025 (the Motion). This response addresses only those items in the Motion that seek to cast doubt on the integrity or legality of the rulemaking. We consider the remainder of the requests and claims to be public comments that will be included in the rulemaking record for the Commission's consideration, along with all other written comments received after the deadline for written public comment and prior to the hearing.

Specifically, this response addresses the following claims raised by the Water Advocates: (1) that the Water Advocates should be allowed to intervene in the rulemaking under their constitutional right to due process; (2) that the NMISC has not provided an adequate basis for the content of the Proposed Rule, and that the Proposed Rule is arbitrary and capricious; (3) that the Proposed Rule does not meet the statutory requirement to provide a procedure for regional water planning councils to develop and provide notice to the Commission of issues and concerns relating to the public welfare of its region and a procedure for each regional council to consider

public welfare values and the needs of future generations; and (4) that the Proposed Rule impermissibly defines the composition of regional councils and denies regional councils the autonomy to determine their own membership.

The Hearing Officer should (1) deny the Water Advocates' request to intervene in the rulemaking; (2) dismiss their premature claims related to the basis for the Proposed Rule as a matter of law; and (3) dismiss their claims related to the omission of, or conflict with, the statutory requirements of the Proposed Rule, because the Proposed Rule meets the statutory requirements for content and intent to ensure broad participation and diverse viewpoints in regional water security planning, and because the claims are premature. The NMISC respectfully requests that the Hearing Officer rule on the Motion prior to the start of the rulemaking hearing on October 15, 2025.

I. PROCEDURAL HISTORY

The Water Security Planning Act (Act) requires the Commission to promulgate rules for regional water planning. NMSA 1978, § 72-14A-4 (2023). After a year of public outreach and input throughout New Mexico, the Commission voted at its public meeting on July 17, 2025 to initiate the rulemaking process for the Proposed Rule, set a hearing for three days from October 15 to 17, 2025, and appoint a hearing officer. Immediately after the July 17 Commission meeting, the NMISC posted the following documents on the rulemaking page and public comment portal of the NMISC website: (1) *Proposed Rule*; (2) *Motion to Initiate the Rulemaking Process, Set a Rulemaking Hearing, Appoint a Hearing Officer, and Provide Notice and Open Public Comment Period*; and (3) *Order Setting Hearing Dates and Appointing Hearing Officer, Providing Notice and Opening Public Comment Period*. The Order authorized the Water Planning Program to provide notice and allow for public comment in advance of the minimum

required timeframe for notice of rulemaking to be published in the New Mexico Register. The NMISC rulemaking webpage includes the rulemaking docket and a portal for submission of written comments. Notice of Rulemaking was published in the August 26 issue of the New Mexico Register. The deadline for submitting public comments in advance of the hearing was September 27. On October 1, the NMISC pre-filed and placed on the docket all comments received by the September 27 deadline, written testimony of its witnesses, and exhibits. The Motion was filed on October 6, 2025, six business days prior to the start of the rulemaking hearing.

II. ARGUMENT

A. The Right to Due Process in a Rulemaking Proceeding is Statutory, not Constitutional, and the NMISC has Met and Exceeded all Statutory Due Process Requirements for Public Notice and Opportunity to Comment.

The NMISC is committed to ensuring that all voices are heard and has invested significant time and resources in the development of the Proposed Rule, including conducting a year-long state-wide public outreach campaign to solicit input about what the regions want and need for water security planning; publishing the outreach campaign's engagement reports on a website dedicated to disseminating information about regional water security planning; distributing an early discussion draft of the proposed rule with a three month comment period; expanding the statutory written public comment period on the Proposed Rule from 30 days to 72 days; pre-filing testimony and exhibits before the October hearing to allow for time for review; designating time for public comment at the hearing; allowing commenters to request specific time slots in advance of the hearing; and holding a hybrid in-person and virtual hearing over the course of three days to make it easier for the public and other entities to comment at the hearing.

Water Advocates claim that their due process rights under Article II, Section 18 of the New Mexico Constitution will be violated if they are not granted party status in the Rulemaking, including the opportunity to provide testimony and examine witnesses. This is a misinterpretation of their due process rights in administrative rulemaking, which is a legislative function, not an adjudicative one. Because this rulemaking is a legislative process of general applicability rather than an adjudication of individual rights, there is no constitutional right to due process in a rulemaking proceeding under New Mexico law. *Livingston v. Ewing*, 1982-NMSC-110, ¶ 14. This interpretation also comports with federal law. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (“[The answer to the question] . . . whether all individuals have a constitutional right to be heard, before a matter can be decided in which all are equally concerned, was that it was hard to believe that the proposition was seriously made.”) New Mexico courts interpret Article II, Section 18 of the New Mexico Constitution consistently with these federal principles. *Southwestern Public Service Company v. New Mexico Public Regulation Commission*, 2025-NMSC-013, ¶ 48.

New Mexico courts have consistently held that the constitutional right to due process applies only when the government acts in an adjudicatory or quasi-judicial capacity to deprive a specific individual of a protected interest, not when it engages in legislative functions such as rulemaking. *See id.* at ¶¶ 48-51 (citing, among others, *Livingston v. Ewing*, 1982-NMSC-110, ¶ 14). Additionally, “[i]n order to assert a procedural due process claim . . ., a plaintiff must establish deprivation of a legitimate liberty or property interest and that he was not afforded adequate procedural protections.” *Tri-State Generation and Transmission Association, Inc., v. D’Antonio, Jr.*, 2012-NMSC-039, ¶ 37 (quoting *Barreras v. N.M. Corrs. Dep’t*, 1992-NMSC-059,

¶ 18). The Water Advocates have no legitimate liberty or property interest at stake in this rulemaking that would invoke a constitutional right to due process.

There are, of course, procedural due process protections that apply to this rulemaking, but those protections are statutory, not constitutional. The State Rules Act, NMSA 1978, §§ 14-4-1 to -11, governs notice, publication, and comment procedures for rule adoption. The Default Procedural Rule for Rulemaking, 1.24.25 NMAC (Default Rule), implements the State Rules Act and applies to this Rulemaking because the NMISC has not adopted its own procedural rules for rulemaking. Neither the State Rules Act nor the Default Rule provides for a multi-party rulemaking or requires that the Hearing Officer grant the Water Advocates' request to intervene as a party in the Rulemaking. The NMISC has not only complied with statutory due process requirements, it has gone well beyond the minimum statutory and Default Rule requirements in providing wide notice of the Proposed Rule and extended time for comment.

The NMISC appreciates the Water Advocates' interest and advocacy and has worked closely with the Water Advocates on matters related to regional water planning in other forums. However, 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 who would not have had adequate notice of their opportunity to participate in the rulemaking as a party. The NMISC has provided the Water Advocates and all other interested entities or members of the public with ample opportunities to voice their opinions about the rulemaking and the Proposed Rule, both by submitting comments during the formal rule promulgation process as well as during NMISC's early outreach prior to the initiation of rule promulgation. The NMISC has considered all of the Water Advocates comments submitted to

date, and intervention as a party is not necessary for them to be heard. The Water Advocates will have an additional opportunity to address the Commission during the public comment periods of the hearing.

B. Claims that the NMISC has Failed to Demonstrate a Rational Basis for the Contents of the Proposed Rule are Premature.

Although the Water Advocates briefly acknowledge in their Motion that “NMSA 1978, § 14-4-5.5 requires a statement of reasons only upon adoption of the final rule,” they otherwise ignore the fact that the rulemaking record is not yet complete, and the Commission has not yet adopted a final rule. Instead, they complain that the record was not complete when the NMISC filed its petition for the Proposed Rule, or when the NMISC pre-filed written testimony and exhibits, which the NMISC filed voluntarily to allow for time for review prior to the hearing. The NMISC provided a robust and sufficient basis for the Proposed Rule in its pre-filed exhibits and written testimony. Should any additional information be presented at the hearing through public comment or the live testimony of the witnesses and responses to Commission questions, it will also become part of the rulemaking record. There is simply no requirement that the rulemaking record be complete upon petitioning for a public hearing or prior to a hearing, and such a requirement would run counter to the purpose of the hearing.

The Water Advocates also allege that the Proposed Rule is arbitrary and capricious. Motion, page 13. Challenges of this type to the basis for the rulemaking are not ripe for review until after the rulemaking record is closed and the Commission takes final action on the Rule. In *New Energy Economy Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 1, the New Mexico Supreme Court reviewed a ripeness challenge to an administrative rule that had yet to be promulgated and held that the mere possibility or even probability that a person may be adversely affected in the

future by official acts fails to satisfy the actual controversy requirement. *See also, Tri-State Generation and Transmission Association, Inc.*, 2012-NMSC-039, ¶ 48. Like the Water Advocates’ procedural complaints that are based on the incompleteness of the record, claims regarding the factual basis for the Proposed Rule are premature and should be disregarded.

The Water Advocates also misstate what is required for the rulemaking versus what is needed for a regional water security plan. They claim that because the Water Security Planning Act requires the outcomes sought by each regional water planning entity to be developed using the best available science, be grounded in state water law, and consider public welfare values, the Rule itself must somehow make determinations about those things. NMSA 1978, § 72-14A-5(B) (2023). This is an incorrect interpretation of the purpose of the Rule and the Act’s requirements. The purpose of the Rule is to establish the procedures as required by the Act and to ensure that the best available science is made available to the regional planning entities—not to establish the best available science, re-state state water law, or dictate public welfare values for each region.

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.” Motion, page 4. The Act requires that the Commission promulgate rules that, at a minimum, establish boundaries, criteria, composition, and procedures. *See* NMSA 1978, § 72-14A-4. The Proposed Rule does this. 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. *Id.*

C. Combined Provisions in the Proposed Rule Provide a Procedure for Regional Councils to Develop and Provide Notice to the Commission of Issues and Concerns Relating to the

Public Welfare of the Region, as Well as to Consider Public Welfare Values and the Needs of Future Generations.

The Water Advocates allege that “[T]he proposed rule omits the two procedures expressly required by [the Act]: (1) a procedure for a regional water-planning entity to develop and provide notice to the commission of issues and concerns relating to the public welfare of its region, and (2) a procedure for each entity to consider public-welfare values and the needs of future generations.” Motion, page 10. This is incorrect. The procedures for a regional water planning entity to develop and provide notice to the commission of issues and concerns relating to the public welfare of the water planning region and to consider public welfare values and the needs of future generations of New Mexicans are woven through multiple sections of the Proposed Rule as integral components of the planning process and of the regional water security plans.

Section 19.25.16.13 of the Proposed Rule lays out the general process by which councils are to develop their plans through broad engagement and input to ensure that diverse perspectives are included in the development of the plan, including values around public welfare and the needs of future generations. Section 19.25.16.14(A) describes the information and considerations that regional councils shall take into account in the development of their plans. Section 19.25.16.14(A) also directs each council to consider public welfare values and the needs of future generations of New Mexicans and include those considerations in its regional water security plan. Section 19.25.16.14.C provides that councils must consider statewide objectives in their regional plans that must collectively protect the public welfare of the state. Section 19.25.16.15 describes the criteria that must be met for Commission approval of a regional water security plan, including consideration of public welfare values and the needs of future generations. Notice to the Commission of public welfare issues for the region also occurs through their inclusion in the Regional Water Security Plan under Section 19.25.16.15.

Provisions for how the State Engineer can consider the public welfare issues identified by a regional water planning council in making permitting decisions are found in Section 19.25.16.16.

Even if the statutory requirements had not been met in the Proposed Rule (which is not the case), any such error or omission would not justify a wholesale disruption to the rulemaking proceedings by granting party status to the Water Advocates. Should the Proposed Rule fail to meet any of the statutory requirements of the Water Security Planning Act, the rulemaking proceedings are designed to provide the NMISC with opportunity to correct any errors that have been brought to its attention. *New Energy Economy*, 2010-NMSC-049, ¶ 14.

D. The Water Security Planning Act Requires the NMISC to Establish the Composition of a Regional Water Planning Entity and to Promote Broad Participation.

Under the Water Security Planning Act, “[e]ach regional water planning entity shall . . . be composed of regional stakeholders as identified in the entity’s guidelines. Section 72-14A-5(C)(1). But the Water Advocates’ Motion incorrectly describes the statutory language as granting “autonomy to regional councils to determine their own membership . . .” and argues that “any rule that prescribes or constrains council membership would conflict with this legislative directive and undermine regional self-determination intended by the Water Security Planning Act.” Motion, page 10. The Water Advocates’ interpretation directly contradicts Section 72-14A-4(C)(1)(d) of the Water Security Planning Act, which requires the Rule to “establish the composition of a regional water planning entity,” and which is addressed in Section 19.25.16.12 of the Proposed Rule. Far from constraining council membership, the Proposed Rule casts a wide net to provide for robust and diverse representation of regional interests and ample opportunities to participate in regional water security planning councils. Moreover, without providing some basis in the rule for the composition of the councils, nothing would prevent

special interest groups from *sua sponte* designating themselves as the regional water security council and “determining their own membership.” Such circumstances would prevent or discourage participation from entities that have differing interests or viewpoints and would be contrary to the Act’s mandate to encourage broad participation and diverse viewpoints in regional water security planning.

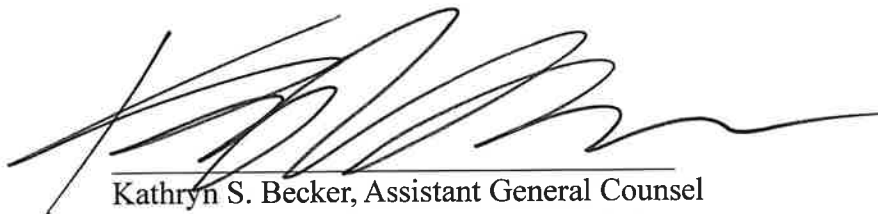
III. CONCLUSION

The claims made in the Water Advocates’ Motion are legally and factually unsubstantiated. The claims of due process violations fail because there is no constitutional right to due process in a rulemaking proceeding under New Mexico law, and the NMISC has complied with and exceeded all applicable statutory due process requirements. Claims related to the NMISC’s basis for the Proposed Rule are premature because the rulemaking record is still being developed and the NMISC has not yet adopted a final rule. The Proposed Rule meets statutory requirements to provide a procedure for regional councils to develop and to provide notice to the Commission of issues and concerns relating to the public welfare of the region, as well as to consider public welfare values and the needs of future generations. The Proposed Rule does not undermine regional self-determination but instead satisfies the requirement in the Water Security Planning Act that the NMISC establish through the Rule the composition of a regional water planning entity and to promote broad participation in regional water security planning.

The Hearing Officer should deny Water Advocates’ request to intervene, dismiss their premature claims about the basis for the Proposed Rule, and dismiss their unsubstantiated claims about the failure of the Proposed Rule to comply with the statutory requirements of the Water Security Planning Act.

The NMISC looks forward to proceeding as planned with the rulemaking hearing to provide a fair and transparent process for the Water Advocates and all others who are interested in regional water security planning.

Respectfully submitted on October 10, 2025, by:

A handwritten signature in black ink, appearing to read 'K. Becker', with a long horizontal flourish extending to the right.

Kathryn S. Becker, Assistant General Counsel
New Mexico Interstate Stream Commission

With service by email to:

Norm Gaume, PE
President, New Mexico Water Advocates