



Secretary James Kenney  
New Mexico Environment Department

Sarah Cottrell Propst  
Energy, Minerals, and Natural Resources Department

John Roderick, Director  
Water Protection Division  
New Mexico Environment Department

Jason Herman  
Ground Water Quality Bureau  
New Mexico Environment Department

Dylan Fuge, General Counsel and Acting Director  
New Mexico Oil Conservation Division  
Energy, Minerals, and Natural Resources Department

March 21, 2023

Dear Secretary Kenney, Secretary Propst, Director Roderick, Director Fuge, and Director Herman:

Last Fall, we engaged with you about our concerns about produced water contamination in the Eastern Agency of the Navajo Nation, and most recently, on December 29th, 2022, we sent you a letter requesting further information regarding Kanalis' produced water pilot project in Ojo Encino Chapter and urging you to exercise greater oversight over produced water and the New Mexico Produced Water Research Consortium. As of the date of this letter, we have not heard back from you. We are writing to follow up on our requests, once again ask for a meeting, and urge you to address the root causes of pollution from toxic oil and gas wastewater.

Despite making multiple verbal and written requests and filing Inspection of Public Record Act (IPRA) requests beginning in March 2022 with your agencies – New Mexico Environment Department (NMED), Oil Conservation Division (OCD), and the New Mexico Produced Water Research Consortium (Consortium) – our organizations and the local community advocates with whom we are working have yet to receive any detailed reporting of the procedures and results of Kanalis’s produced water project in Ojo Encino Chapter. In addition to our concerns about this, other pilot projects, and the need for greater oversight of the Consortium, we continue to be alarmed by the thousands of un-remediated spills of produced water across the state, and seek your immediate attention to address the lack of enforcement of pollution across the State.

### **Pollution Enforcement**

In 2022, the oil and gas industry in New Mexico produced a staggering *2 billion barrels* of toxic liquid waste known as “produced water”, a 20% increase from the industry’s 2021 produced water production.<sup>1</sup> At the same time, OCD is not enforcing its own spill rule, such that over 1,450 toxic spills went unpenalized in 2022, along with a backlog of years-old spills that have yet to be remediated, some of which belong to repeat offenders.<sup>2</sup>

In order to hold industry accountable for despoiling New Mexico’s environment and putting public health at risk, at the average rate of 4 spills per day, OCD must increase enforcement. In 2020, the OCD regained its authority to assess civil penalties for violations of the Oil and Gas Act.<sup>3</sup> In 2021, the Oil Conservation Commission finally prohibited spills of liquid waste.<sup>4</sup> OCD has the authority to issue penalties to discourage future spills but has failed to issue notices of violation or penalties for oil and gas contaminants spilled.<sup>5</sup>

Your agencies are responsible for protecting public health and the environment from toxic oil and gas waste through regulation and enforcement of the law. Therefore, at this critical juncture, where the industry’s disposal options are shrinking amid its growing volume of waste, and spills and leaks are rampantly threatening our land and water, we urge your agencies to:

1. OCD - Exercise existing spill enforcement authority and assess penalties against oil and gas polluters;
2. OCD - Initiate a rulemaking process to:
  - a. create a strict liability and penalty scheme for releases;

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<sup>1</sup> Data obtained from <https://www.emnrd.nm.gov/ocd/ocd-data/statistics/> “Statewide Natural Gas and Oil Production Summary including Produced Water and injection by month”. Generated 02/27/2023. Accessed February 28, 2023.

<sup>2</sup> New Mexico Oil & Gas Conservation Division Permitting [Incident search](#), accessed January 31, 2023; Redfern, Jerry. 2022, February 8. “By Not Hiring Enough Staff, New Mexico Leaves Private Contract Money on the Table”. Capital and Main. <https://capitalandmain.com/by-not-hiring-enough-staff-new-mexico-leaves-private-contract-money-on-the-table>

<sup>3</sup> 19.15.5.10 NMAC

<sup>4</sup> 19.15.29.6, 19.15.29.8, 19.15.29.9 NMAC

<sup>5</sup> See OCD’s [compliance website](#). Instead, OCD has only issued a handful of violations for failure to report spills in a timely fashion. This approach does not prevent spills or hold operators accountable for contaminating New Mexico’s land, air, and water.

- b. prohibit any use of produced water or treated produced water except for drilling and fracking operations – e.g. ensure there are no exceptions to the prohibition of the surface application of produced water; see NMAC 19.15.34.8A
  - c. require the identification of the chemical and radionuclide composition of produced water or treated produced water that is spilled, leaked or released into the environment and to make such information available to the public;
  - d. require tracking and reporting of the movement, transportation and location of produced water and treated produced water throughout its production, treatment, reuse and disposition in oil and gas operations and compile the reported tracking information and make it publicly available;
3. NMED - Initiate a rulemaking process to prohibit any use of produced water (treated or untreated) outside of the oil field, including irrigation, construction, and applications to land or roads;
4. NMED and OCD - Maintain open, transparent and regular communication between your agencies regarding the number, volume, and remediation backlog of oil and gas spills to ensure accurate representation and protection of groundwater and surface water quality.

### **Consortium Oversight**

We are concerned that parts of the Consortium are basing decisions, which have the potential to impact human and environmental health, on a rushed agenda rather than science. The Consortium [website](#) makes clear its intentions to “fast-track” research and “accelerate” the acceptance and implementation of policies<sup>6</sup> to allow the use of treated produced water for activities such as irrigation. Such an agenda undermines both NMED’s and OCD’s mission to protect the environment, creates potential risks to communities, and erodes public trust.

Every well produces wastewater with varying levels of naturally-occurring and human-made chemical contaminants, including highly dangerous per- and polyfluoroalkyl substances (PFAS) used in oil and gas extraction in New Mexico. There should never be streamlining of testing and tracking methods in order to “fast-track” or “accelerate” the use of produced water.<sup>7</sup> Full, pre-treatment disclosure of all chemical additives should be required of any proposed pilot project pending approval by the Consortium. Without full disclosure, no suite of testing parameters is guaranteed to catch all “trade secret” additives.

The fast-tracking of Consortium research has already had real-world impacts, as recently evidenced by NMED’s and OCD’s lack of oversight during the potential application of produced water on land in Ojo Encino Chapter, Navajo Nation during the Kanalis pilot project approved

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<sup>6</sup> “The NM-PWRC research program consists of a portfolio of independent research projects evaluated and approved by the Technical Steering Committee (TSC) **with the intent of fast-tracking** fit-for-purpose treatment technology research and technology development that can: **Accelerate the implementation and acceptance** of policies and regulations for the use of treated produced water in New Mexico,” accessed online Feb. 23, 2023 at <https://nmpwrc.nmsu.edu/research/index.html>.

<sup>7</sup> The only exception to this could be reuse of wastewater within the oil-field, as long as the final user tests their waste (produced water) prior to any form of disposal application.

by the Consortium.<sup>8</sup> Your agencies are responsible for overseeing the Consortium. Therefore, we urge you to:

1. NMED and OCD - Exercise direct oversight of the Consortium with a focus on produced water pilot projects and public transparency to ensure that the Consortium exercises scientific rigor in all of its activities in order to protect public health and the environment;
2. NMED and OCD - Specifically prohibit any use of treated produced water for Consortium pilot projects unless operators meet the following guidelines:
  - Full disclosure of exact chemicals used in specific drilling and fracturing operations prior to treatment. This is the only way to guarantee that treatment technologies are removing all potential toxins and ensures that, should another pilot project begin without the knowledge or consent of landowners or nearby residents, as with Kanalis' project in Ojo Encino Chapter, your agencies will have access to toxicological data upfront, when needed;
  - Rigorous tracking and testing of all treatment byproducts, including salts, prior to transport, disposal, or reuse;
  - Rigorous tracking and testing of all equipment, such as filters and membranes, prior to transport, disposal, or reuse;
  - Comprehensive air monitoring for all potential volatile or hazardous air pollutants.
- NMED and OCD - Acknowledge that pilot testing does not guarantee real-world efficacy, particularly over the long term as treatment equipment accumulates contaminants such as radium-226;

### **Addressing Root Causes**

As the oil and gas industry produces more waste amidst a decrease in injection well capacity, we recognize that your agencies face pressure to authorize uses for produced water outside the oil field. We also recognize that you lack the staff and funding needed to fulfill your duties to protect the public and environment. However, these problems are exacerbated by the routine practice of permitting new sources of pollution while enforcement is not happening. Instead of making the problem worse, we urge your agencies to address the root cause of the produced water and oil and gas pollution problems: our state's expansion of oil and gas development without any real oversight or enforcement.

New Mexico cannot cope with the toxic pollution the oil and gas industry is already producing. Adding more is highly irrational. Therefore, we urge you to:

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<sup>8</sup> Jerry Redfern, "[Toxic Water Project Sparks Controversy With Navajo Neighbors.](#)" Capital & Main, February 7, 2023.

1. OCD and NMED - Provide a clear, public analysis of the resources required to fulfill your oversight and enforcement obligations, remediate spills in a timely fashion, and fully protect public health and the environment;
2. OCD and NMED - Use the full scope of your discretion and the law to decrease the rate of oil and gas permitting;
3. OCD - Initiate a rulemaking to prohibit the use of freshwater below the freshwater table in drilling and fracking operations in order to preserve this vulnerable vital resource.

In this climate, our state has but one pragmatic choice: to meaningfully decrease oil and gas production and work towards a just transition away from energy generation that offloads its toxic burden onto communities and the environment. The toxic legacy of current oil and gas production in New Mexico is already staggering. We urge you to adopt the recommendations above to prevent your agencies from making it worse.

Sincerely,

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New Mexico Campaigner  
Center for Biological Diversity

Melissa Troutman  
Climate & Energy Advocate  
WildEarth Guardians

Gail Evans  
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CC:

New Mexico Governor Michelle Lujan Grisham  
New Mexico Department of Agriculture Secretary Jeff Witte  
New Mexico Department of Health Secretary Patrick Allen  
New Mexico Indian Affairs Department Secretary James Mountain  
New Mexico Economic Development Department Secretary Alicia Keyes  
New Mexico Department of Game and Fish Director Michael Sloan  
New Mexico State Engineer Mike Hamman  
New Mexico Commissioner of Public Lands Stephanie Garcia Richard  
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New Mexico Water Resources Research Institute Director Sam Fernald  
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