

ENDORSED  
First Judicial District Court  
MAY 02 2011  
Santa Fe, New Mexico  
Los Alamos County  
PO Box 2250  
Santa Fe, NM 87502

**First Judicial District  
County of Santa Fe  
State of New Mexico**

**OIL AND GAS ACCOUNTABILITY  
PROJECT**

**Appellant,**

**No. D0101-CV-2009-247**

**v.**

**NEW MEXICO OIL CONSERVATION  
COMMISSION**

**Appellee**

**Oil and Gas Accountability Project's Supplemental Brief**

The Oil and Gas Accountability Project ("OGAP") respectfully submits this Supplemental Brief in compliance with the Court's February 23, 2011, Order. The Court ordered the parties to submit supplemental briefs on two issues: 1) whether OGAP "waived" the right to complain about the lack of evidence supporting the decision of the New Mexico Oil Conservation Commission ("the Commission") to change the "chloride standard"; and 2) whether and to what extent the Pit Rule is in full force and effect during the pendency of this appeal. The Court also directed the parties to propose parameters of a remand order if this Court remands Case No. D0101-CV-2009-247 (regarding Commission's amendment of the chloride standard) to the Commission for further proceedings.

**I. Relevant Facts and Procedure**

On February 27, 2009, the Oil Conservation Division ("Division") filed an application with the Commission to amend various provisions of the Pit Rule (RA at 863 – 891), at the direction of the Governor and Secretary of the Energy, Minerals and Natural Resources

Department. In response to this petition, the Commission commenced a rulemaking proceeding to, among other things, amend the chloride standard from 250 mg/l to 3000 mg/l, thereby greatly increasing the risk of groundwater pollution above established standards.<sup>1</sup> This rulemaking is hereinafter referred to as "Proceeding #2".

During the course of Proceeding #2, the Commission made several statements that it now contends constituted administrative notice of disputed testimony that industry presented during a prior rulemaking adopting the Pit Rule ("Proceeding # 1"). The Commission then used this disputed testimony, which it had previously rejected during Proceeding #1, to justify its amendment of the chloride standard. The statements that the Commission now contends constituted administrative notice of specific disputed testimony were, "the record should reflect that the Commission may and probably will take notice of all prior proceedings before the Commission in this matter and the notice of the record in this matter" (RA at 37); "[t]he Commission has the ability to take notice of any prior proceedings. And what we were doing is notifying the – we do have the ability to do that, and we may be required to do that" (RA at 40); and "[t]he attorneys are being notified now that we take notice of any or all of the prior proceedings in this matter." (RA at 40). Thus, the Commission never mentioned any specific testimony from Proceeding #1, much less disputed testimony. It merely stated that it might take administrative notice of the Pit Rule and the fact that it adopted the Pit Rule in a prior proceeding, i.e., Proceeding #1.

After Proceeding #2 concluded, the Commission entered Order No. R-12939-A ("Order # 2"), which OGAP timely appealed ("Appeal #2"). Based solely on the disputed and

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<sup>1</sup> The standard for chloride in groundwater, set by the Water Quality Control Commission, is 250 mg/l.

discredited industry evidence presented in Proceeding #1, the Commission found that requiring operators to haul their waste offsite to a regulated disposal facility “significantly increases the cost of oil and gas development and may significantly reduce oil and gas exploration and production.” RA at 9 (Order # 2 ¶ 53). The Commission *never* heard or otherwise admitted this testimony in Proceeding #2, nor did it take administrative notice of this disputed testimony at any time during hearing. Instead, the Commission merely took “administrative notice that it adopted the Pit Rule ... by Order No. R-12939 [“Order #1”] in [Proceeding #1]. RA at 4 (Order #2, ¶ 21).

In Appeal #2, and pursuant to New Mexico Rule of Civil Procedure Rule 1-074(Q), OGAP filed a motion to stay implementation of the amended chloride standard that the Commission adopted in Order #2. OGAP’s Motion for Stay (Oct. 30, 2009) (“Motion for Stay”). In doing so, OGAP requested a stay of the 3000 mg/l chloride standard, pending a final decision on the consolidated cases.<sup>2</sup> No ruling has been made on the Motion for Stay.

Oral arguments in Appeal #2 were held on February 23, 2011. This supplementary briefing was ordered at that hearing.

## **II. Argument**

On February 23, 2011, this Court directed the parties in this case to provide supplemental briefing on the following issues: 1) whether OGAP “waived” the right to complain about the lack of evidence supporting the Commission’s decision to change the “chloride standard”; and 2)

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<sup>2</sup> In its Motion, the Petitioner satisfied all of the requirements of Rule 1-074(Q), as well as the test set out under *Tenneco Oil Co. v New Mexico Water Quality Control Comm’n*, 105 N.M. 708, 710, 736 P.2d 986, 988 (Ct. App. 1986), by showing that, (1) it is likely to prevail on the merits, (2) it will suffer irreparable harm if a stay is not issued, (3) no other interested party will suffer irreparable harm, and (4) the public interest will not be harmed by granting a stay.

whether and to what extent the Pit Rule is in full force and effect during the pendency of this appeal. The Court also directed the parties to propose parameters of a remand if this Court remands the Chloride Standard Amendment back to the Commission for further proceedings

- A. In Proceeding # 2, the Commission Never Took Administrative Notice of, nor did it otherwise admit, the Disputed Testimony from Proceeding #1 that it Cited to Support Finding No. 53. Therefore, No Substantial Evidence Supports Finding No. 53.

In order to justify increasing the chloride standard to 3000 mg/l, the Commission found that, “[e]vidence presented by oil and gas operators in [Proceeding #1] indicates that a requirement that pit or drying pad waste be hauled to a disposal facility rather than buried on site significantly increases the cost of oil and gas development and may significantly reduce oil and gas exploration and production.” RA at 9 (Order # 2, Finding 53) (citations omitted). The Commission did not base Finding # 53 on any testimony or other evidence admitted during the hearing in Proceeding #2. Instead, the Commission simply “cherry picked” disputed industry testimony from Proceeding # 1, ignoring all of the countervailing evidence admitted in that Proceeding, which the Commission had formerly found persuasive. A review of the record in Proceeding #2 reveals that the Commission never admitted, noticed, or even mentioned this disputed testimony from Proceeding # 1 until it entered its final decision, i.e., Order # 2. As a result, Finding 53 is not supported by *any* evidence, much less substantial evidence.

- B. The Commission Could Not Lawfully Take Administrative Notice of Disputed Testimony in Proceeding # 1.

As OGAP argued in its Statement of Appellate Issues, in its Reply to the Commission’s Response to its Statement of Appellate Issues and in oral argument, the Commission could not take administrative notice in Proceeding # 2 of disputed testimony admitted in the original Pit

Rule proceeding. OGAP hereby incorporates those arguments herein.

While the Commission correctly stated that it has the ability to take administrative notice of the Pit Rule and the fact of Proceeding #1 (RA at 37-40), it did not and could not take administrative notice of disputed testimony presented during Proceeding #1. In order for administrative notice to be proper, the administrative agency must 1) alert the parties in advance of the specific facts it proposes to take notice of, giving them an opportunity to object; and 2) only take administrative notice of undisputed facts. *See*, Statement of Appellate Issues at 9-13 (Oct. 1, 2009); Appellant’s Reply to the New Mexico Oil Conservation Commission’s Response to Statement of Appellate Issues at 1-7 (Nov. 16, 2009); *see also*, *Flowers v. White’s City*, 114 N.M. 73, 76 (Ct. App. 1992) (holding that administrative law judge can take official notice of the same facts as district judge and that a “judicially noticed fact must be one not subject to reasonable dispute”); *Frost v. Markham*, 86 N.M. 261, 263, 522 P.2d 808, 810 (N.M. 1974); *Transcontinental Bus System, Inc. v. State Corp. Comm’n*, 56 N.M. 158 179-180, 241 P.2d 829, 843 (N.M. 1952) . As OGAP has previously argued, the Commission failed to meet the notice requirement and, in any event, could not have properly taken notice of disputed testimony. OGAP stands on its previous arguments in this respect, and in the interest of judicial economy only addresses at length – as indicated at oral argument – the Commission’s assertion that OGAP “waived” its right to complain about the lack of evidence supporting the Commission’s decision.

C. OGAP has not Waived its Right to Object to the Complete Lack of Evidence Underlying Finding 53.

1. *OGAP was denied the opportunity to object.*

The Commission does not dispute that Finding 53, in which the Commission found that the existing chloride standard caused economic harm to operators, is a key finding. Instead, the

Commission argues that OGAP has “waived” the right complain about the total lack of evidence supporting Finding 53, because OGAP purportedly failed to adequately object to the Commission’s alleged taking of administrative notice. The Commission’s argument is meritless.

The Commission never took administrative notice of any particular evidence that was presented in Proceeding #1, disputed or otherwise. It merely took notice during the hearing in Proceeding #2 that the Pit Rule was adopted in Proceeding #1. Only after the public hearing did the Commission cite evidence from Proceeding #1 in its Final Order without ever alerting the parties in advance or otherwise providing opportunity to object to its noticing of disputed testimony as if it were established fact.

A review of the record below in Appeal # 2 reveals that the Commission never took administrative notice of any particular testimony from Proceeding #1. Instead, it merely stated that it might take administrative notice of the Pit Rule and its adoption in Proceeding #1, which in fact is all it actually did. Order #2, ¶ 21; RA at 37-40. The most definitive statement that the Commission made during the hearing in Proceeding #2 ,regarding the alleged notice, was that it would “take notice of all prior proceedings before the Commission in this matter and the notice of the record in this matter.” RA at 40. The most charitable reading of the Commission’s statements at hearing can only lead to the conclusion that the Commission was simply taking notice of the fact that it had previously promulgated the Pit Rule in Proceeding #1. Because that fact is not disputed, and thus may properly be noticed, OGAP did not object. However, the Commission never alerted OGAP that it would take administrative notice of disputed testimony from Proceeding #1, and OGAP had no reason to assume that the Commission would disregard the law concerning administrative notice, i.e., that it would take notice of disputed facts.

Accordingly, OGAP was never presented any factual basis upon which to object.

Moreover, the Commission's failure to provide notice that it would use specific disputed testimony from Proceeding #1 to support key findings and conclusions in Proceeding #2 and provide OGAP the opportunity to rebut them violates OGAP's due process rights and fundamental notions of fairness. Administrative rulemaking proceedings must provide notice of the proposed rule and the opportunity for interested parties to submit data and evidence. *See, Rivas v. Bd. of Cosmetologists*, 101 N.M. 592, 593-594, 686 P.2d 934, 935-936 (N.M. 1984). Allowing a party to raise objections is critical to providing due process. *Uhden v. New Mexico Oil Conservation Comm'n*, 112 N.M. 528, 530-531, 817 P.2d 721, 723-724 (N.M. 1991). By failing to notify OGAP that disputed facts from a previous proceeding would be used to support a key finding and denying OGAP the opportunity to object to those facts, the Commission denied OGAP due process.

2. *The strict rules regarding preservation of error do not apply to administrative proceedings.*

As argued above and in previous briefs, if the Commission took administrative notice of disputed testimony, it clearly erred in doing so. The Court may reverse the Commission based on this error regardless of the appellate rules applicable to preservation of error in judicial proceedings, because such "formal rules of procedure do not have to be applied to administrative hearings." *Garza v. State Taxation & Revenue Dep't*, 135 N.M. 673, 675 (Ct. App., 2004). Indeed, the New Mexico Supreme Court specifically found that an appellant need not formally preserve error based on substantial evidence arguments in order to obtain judicial review. *Dick v. City of Portales*, 118 N.M. 541, 543, 883 P.2d 127,129 (N.M. 1994). The Court's decision in *Portales* was based on the informal nature of administrative proceedings and the fact that

statutes do not require formal preservation of error. *Id.*; see also, *Fitzhugh v. N.M. Dept. of Labor*, 122 N.M. 173, 184, 922 P.2d 555, 566 (N.M. 1996) (“the record in administrative cases can be characterized by procedural informality and inadequate documentation that would not be acceptable in a trial setting”); *Chicharello v. Employment Sec. Div.*, 122 N.M. 635, 638, 930 P.2d 170, 173, n. 1 (N.M. 1996). Accordingly, the Commission’s “waiver” argument is inapposite, because it is based on an inappropriate application of the strict rules of procedure to an informal administrative proceeding.

3. *The Commission’s application of administrative notice to disputed testimony constituted fundamental and plain error and therefore, this Court may reverse the Commission on that basis regardless of whether that error was formally preserved.*

Even if the doctrine of failure to preserve were applicable to administrative proceedings, which it is not, this Court may nevertheless reverse the Commission for improperly taking notice of disputed testimony from Proceeding #1, because in doing so the Commission committed fundamental and plain error. Pursuant to Appellate Rules 11-103(D) and 12-216(B), respectively, an appellate court may reverse a lower court on an unpreserved error where the lower court committed either “fundamental” or “plain” error. In civil cases, fundamental error occurs where “substantial justice was not done, the court was deprived of jurisdiction . . . , the issue was one of general public interest that would impact a large number of litigants, or, [where] there was a ‘total absence of anything in the record of the case showing a right to relief’[.]” *Diversey Corp. v. Chem-Source Corp.*, 1998 NMCA 112, 40, 125 N.M. 748, 965 P.2d 332. Plain errors include those that “are obvious or . . . [that] otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.” *State v. Summerall*, 105 N.M. 82, 82-83, 728 P.2d 833, 833-834 (N.M. 1986); cf. *Empire W. Cos. v. Albuquerque Testing Lab.*, 110 N.M.

790, 793, 800 P.2d 725, 728 (N.M. 1990) (“under the proper circumstances, preclusion of the right to cross-examine may be plain error requiring reversal despite the lack of objection or offer of proof”). In this case, the Commission’s error in taking administrative notice of disputed testimony constituted both fundamental and plain error.

The Commission committed fundamental error by treating disputed testimony from Proceeding #1, which was never admitted in Proceeding #2 and could not properly be the subject of administrative notice, as if it were established fact in order to support a key finding. As a result, no evidence in the record of Proceeding #2 supports Finding 53. Furthermore, the Commission’s failure to alert the parties that it would take notice of disputed testimony from Proceeding #1, thereby denying them the opportunity to object, constituted substantial injustice. This also constituted “plain error,” because it seriously affect the fairness of the administrative proceeding below and calls into question its integrity. Accordingly, the Court may reverse the Commission on these grounds without regard to the strict rules of preservation applicable to judicial proceedings.

#### **D. Parameters for a Remand**

As OGAP demonstrated in its Statement of Issues and at oral argument, Order #2 is arbitrary, capricious, and not supported by substantial evidence in the record as a whole. Therefore, OGAP respectfully requests the Court to reverse and remand to the Commission in accordance with Rule 1-074(R) and NMSA 1978, § 39-3-1.1 (D) (1999). Upon remand, the Commission should be required to produce evidence, aside from the highly disputed evidence from Proceeding #1, that (1) the 250 mg/l chloride standard is economically unfeasible to implement, (2) the 250 mg/l standard operated and continues to operate as an actual deterrent to

oil and gas exploration and production, and (3) the contamination of groundwater after 2000 years, under the 3000 mg/l standard, does not constitute a threat to public health and the environment.

Since the original 250 mg/l chloride standard was implemented under the Pit Rule, neither the Commission nor the oil and gas industry has produced any evidence that that standard was actually economically unfeasible or led to a decrease in oil and gas exploration and production. The only evidence that the Commission used to support these propositions in Order #2, was based on heavily disputed evidence submitted in Proceeding #1, before the 250 mg/l chloride standard was actually implemented. Therefore, it is all based on speculation and conjecture and unsupported by actual, operational data.

Furthermore, the Commission should be required to provide evidence that the contamination of groundwater beyond the “reasonably foreseeable future” will not constitute a threat to public health and the environment. As OGAP explained in its Reply to the New Mexico Oil Conservation Commission's Response to the Statement of Appellate Issues (pp. 7-10), the Commission has a duty to protect against groundwater contamination, for both present and future public health. Therefore, upon remand, the Commission should provide evidence as to why people will not need clean drinking water in 2000 years.

**E. Enforceability of the Pit Rule and Chloride Standard Rollback During Appeal**

Absent a request for a stay, an administrative order or rule continues to be enforceable during the pendency of an appeal. The Court of Appeals has held:

During the pendency of an appeal, a stay can be granted as an incident to this court's power to review final administrative orders or regulations. *Compare* NMSA 1978, § 12-8-18 (specifying under Administrative

Procedures Act, that the filing of an appeal does not stay enforcement of an agency decision, but the agency may grant, or Court of Appeals may order a stay upon appropriate terms). Grant of an application for stay is not a matter of right, it is an exercise of judicial discretion, and the propriety of its issuance is dependent upon the circumstances of each individual case. *See State v. Doe*, 103 N.M. 30, 702 P.2d 350 (Ct. App. 1985).

...

The mere fact that an administrative regulation or order may cause injury or inconvenience to applicant is insufficient to warrant suspension of an agency regulation by the granting of a stay. *Union Liability Life Insurance Co. v. Wholand*, 114 N.H. 549, 323 A.2d 585 (1974). An administrative order or regulation will not be stayed pending appeal where the applicant has not made the showing of each of the factors required to grant they stay. *Id*

*Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 105 N.M. 708, 710, 736 P. 2d 986, 988 (Ct. App. 1986).

In the Pit Rule appeal (No. D-101-CV-2008-1863) neither the Industry Committee nor the Independent Producers moved for a stay of the appealed regulation. Therefore, the Pit Rule remains in full force and effect during the pendency of its appeal.

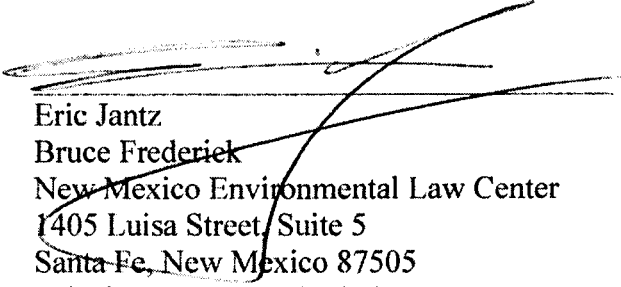
In the chlorides standard amendment appeal, however, OGAP filed a motion for a stay on October 30, 2009, requesting that the chlorides standard rollback be stayed. The Commission responded on November 16, 2009. While this Court has not yet made a ruling on OGAP's stay motion, OGAP respectfully requests a ruling on that motion at the Court's earliest convenience.

Should this Court reverse and remand the chloride standard rollback, the effect of the remand would be to dissolve the enforceability of the 3000 mg/l chloride standard. Until the Commission can support an alternative standard with substantial evidence on the record, the Pit Rule with the 250 mg/l chloride standard would be the enforceable standard.

## Conclusion

Due to the insufficiency of the administrative notice of the Proceeding #1 record and lack of evidence in the Proceeding #2 record, the Commission's decision to change the chloride standard was arbitrary, capricious, and not based upon substantial evidence. Therefore, the Appellant respectfully requests the Court to reverse the Commission's decision to change the chloride standard and remand to the Commission in accordance with the foregoing parameters.

Respectfully submitted this 2<sup>nd</sup> day of May 2011.



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**Certificate of Service**

I hereby certify that a copy of the foregoing pleading was placed in the U.S. mail, first class, this 2<sup>nd</sup> day of May, 2011, to the following parties:

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By: 