

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

Oil and Gas Accountability Project,

Petitioners,

v.

D0101-CV-2009-247

The New Mexico Oil Conservation Commission,

Respondent,

OIL AND GAS ACCOUNTABILITY PROJECT'S MOTION FOR STAY

Pursuant to New Mexico Rule of Civil Procedure Rule 1-074(Q), the Oil and Gas Accountability Project (“OGAP”) hereby moves this Court to stay implementation of the Oil Conservation Commission’s (“Commission”) chloride standard, adopted by the Commission on June 18, 2009 in Order No. R-12939-A. Record of Appeal #2 (“RA #2 at 8-10 (“Order #2). OGAP requests this stay pending this Court rendering a decision in the consolidated case *Boling Enterprises Ltd. et al. v. New Mexico Oil Conservation Comm’n*, No. D-1010-CV-2008-01863 (“Appeal #1) and in the above-captioned proceeding. In support of its Motion, OGAP states the following:

I. Facts and Procedure

On May 9, 2008, the Commission entered its Order No. R-12939 (“Order #1”) in Case No. 14015 (“Proceeding #1”), thereby adopting the Pit Rule, including the original 250 mg/l chloride standard. Record of Appeal #1 (“RA #1”) at 4 ¶ 21. The Pit Rule became effective on June 16, 2008, but it was timely appealed by several oil and gas companies and the Independent Petroleum Producers of New Mexico (“IPANM”) in *Boling Enterprises Ltd. et al. v. New Mexico Oil Conservation Comm’n* (No. D-1010-

CV-2008-01863) and in *IPANM v. New Mexico Oil Conservation Comm'n* (No. D-101-CV-2008-01874). These appeals were consolidated and are still pending in this Court.

Eight months after the Pit Rule became effective, on February 18, 2009, the Governor directed the “Secretary [of the Energy, Minerals and Natural Resources Division]... to work with the oil and gas industry to modify the Pit Rule to allow oil and gas companies to better absorb the costs associated with the Pit Rule.” RA #2 at 2 ¶8. On February 27, 2009, the Oil Conservation Division (“Division”) filed an application with the Commission to amend various provisions of the Pit Rule (RA #2 at 863 – 891), which commenced the proceeding below, styled Case No. 14292 (“Proceeding #2”). Among other things, the Division sought in Proceeding #2 to change the chloride standard applicable to on-site trench burial of oil field waste from 250 mg/l to 3000 mg/l. RA #2 at 864 ¶ II-g and 883 § 19.15.17.13(F)(3)(c).

In considering the Division’s application in Proceeding #2, the Commission took “administrative notice that it adopted the Pit Rule ... by Order No. R-12939 in Case No. 14015. RA #2 at 4, ¶ 21. Then, based solely on much disputed industry evidence submitted in Proceeding #1, the Commission, in Proceeding #2, 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 #2 at 9, ¶ 53. The Commission also determined that, because waste meeting the 3000 mg/l chloride standard would not pollute ground water above standards for 2000 years (but certainly would thereafter) (RA #2 at 10, ¶ 60), “the Division’s proposed 3000 mg/l ... chloride standard will protect ground water for the reasonably foreseeable future.” RA #2 at 10, ¶ 62.

II. Argument

To obtain a stay from an order or regulation adopted by an administrative agency, a party must show: 1) a likelihood that the applicant for the stay will prevail on the merits of the appeal; 2) a showing of irreparable harm to applicant unless the stay is granted; 3) evidence that no substantial harm will result to other interested persons; and 4) a showing that no harm will ensue to the public interest. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 105 N.M. 708, 710, 736 P.2d 986, 988 (Ct. App. 1986) citing *Associated Securities Corp. v. Securities & Exchange Comm'n*, 283 F.2d 773 (10th Cir. 1960); *Teleconnect Co. v. Iowa State Commerce Comm'n*, 366 N.W. 2d 511 (Iowa 1985).¹ Here, OGAP satisfies all four requirements.

A. OGAP is Likely to Prevail on the Merits.

To obtain an order for a stay of an administrative action, a movant must demonstrate that it is likely to prevail on the merits of the underlying case. *Tenneco Oil Co.* 105 N.M. at 710, 736 P.2d at 988. However, when the other three tests have been satisfied, the first test is satisfied if the movant merely raises questions as to the merits that are substantial enough to make them fair grounds for litigation. *Otero Savings & Loan Ass'n v. Fed. Res. Bank*, 665 F.2d 275, 278 (10th Cir. 1981); *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1261-1262 (10th Cir. 2003).

As OGAP demonstrated in its Statement of Issues submitted on October 1, the Commission's Final Order in Proceeding #2 rolling back the chloride standard is little more than the result of a politically motivated directive. *Id.* at 4. Indeed, as noted in the

¹ The movant is also required to exhaust its administrative remedies by first applying to the appropriate administrative agency for a stay. *Tenneco Oil Co.*, 105 N.M. at 710, 736 P.2d at 988. In this case, OGAP approached the Division about issuing a stay, but the agency declined. *See*, attached electronic mails, attached hereto as Exhibits A and B.

Statement of Issues, no party presented **any** technical or economic evidence during the hearing rolling back the chloride standard that such a rollback was warranted. *Id.* at 11-13. Additionally, the Commission impermissibly reversed its prior policy decision on chloride levels by failing to provide a reasoned explanation for its policy reversal. *Id.* at 17-18, citing *FCC v. Fox TV Stations, Inc.*, 129 S.Ct. 1800, 1822 (2009). Finally, OGAP demonstrated that the Commission acted outside its statutory authority by rolling back the chloride standard for economic reasons – a rationale not permitted by the Oil and Gas Act. *Id.* at 21-22, citing *PNM et al. v. Environmental Improvement Board*, 89 N.M. 223. 226, 549 P.2d 638, 641 (Ct. App. 1976).

Under any test, OGAP seems likely to prevail on the merits. However, as demonstrated below, OGAP has satisfied the other three tests required for issuance of a stay and therefore the more liberal interpretation of the “probability of prevailing” test could be applied. *See, Greater Yellowstone Coalition v. Flowers*, 321 F.3d at 1261-1262. Under this test, OGAP has clearly raised issues as to the merits that are serious and substantial enough to make them fair game for litigation and further inquiry.

B. OGAP Will Suffer Irreparable Harm if a Stay is not Issued.

In this case, OGAP, by way of its individual members², will suffer irreparable harm if an order staying enforcement of the rolled back chloride standard is not issued. In order to substantiate a claim of irreparable harm, the movant must provide some evidence that the harm has occurred in the past and is likely to occur again. *Celebrezze v. NRC*, 812 F.2d 288, 290 (6th Cir., 1987). Moreover, because damage to the environment and natural

² In the context of granting standing to sue, New Mexico courts have adopted the position that organizations may sue if their individual members have standing in their own right. *ACLU v. Albuquerque*, 144 N.M. 471, 476, 188 P.3d 1222, 1227 (N.M. 2008). Similarly, OGAP’s organizational damages are predicated on the damages suffered by its individual members.

resources is permanent or long lasting, it is considered to be, by its very nature, irreparable. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

As OGAP demonstrated in Proceeding #2, it has members who have been directly impacted by oil and gas operations. RA at 1004-1005. The harm suffered by OGAP's members ranged from destruction of property to contamination of groundwater in their drinking water source. *Id.*

The Commission's decision in Proceeding #2 gives no indication that OGAP's members will not risk similar harm in the future. Indeed, the Commission's decision to roll back chloride standards is based on hydrological modeling that assumes 100% flawless trench liner installation – an assumption directly contradicted by the bulk of evidence presented in Proceeding #1 and which was never subsequently supported by any evidence. *See, e.g.*, RA #1 at 16, ¶ 95 (transcript citations omitted). Because the record indicates that OGAP's members continue to bear a significant risk of property damage and contamination of drinking water supplies, OGAP will suffer irreparable harm unless an order staying implementation of the more recently adopted chloride standard is granted.

Furthermore, OGAP members who are landowners will suffer irreparable harm by having permanent toxic waste disposal sites, i.e., trenches containing petrochemical waste with elevated levels of chlorides, located on their lands. Additionally, the general public who depends on groundwater for drinking water supplies will also be irreparably harmed. Finally, because all the likely harm demonstrated by OGAP, above, is environmental harm, which by its very nature, is irreparable.

C. No Other Interested Party will Suffer Irreparable Harm.

OGAP's Motion satisfies the third requirement for a stay because no other interested party will suffer irreparable harm. The Division is unlikely to be able to show irreparable harm in being stayed from enforcing the rolled back chloride standard as opposed to the standard promulgated in Proceeding #1. Enforcing the 250 mg/l chloride standard would not take any more administrative time or resources than enforcing the 3000 mg/l chloride standard. Moreover, as an administrative agency, the Division exists only to serve the public interest and its interests are therefore subsumed under the broader public interest. *Wagner Electric Corp. v. Thomas*, 612 F.Supp. 736, 742 (D.Kan. 1985). As demonstrated in Section II.D, below, the public interest is likely to be better protected by issuing an order staying enforcement of the chloride standard promulgated in Proceeding #2.

The oil and gas industry will likewise not suffer irreparable harm. Although not a party to this appeal, the oil and gas industry has shown an interest in the chloride standard. *See, e.g., Boling Enterprises Ltd. et al. v. New Mexico Oil Conservation Comm'n* (No. D-1010-CV-2008-01863). Numerous oil and gas companies and trade groups also participated in the Commission hearings that are the subject of this appeal.

In this instance, the only harm the industry could credibly allege is economic harm in the form of lost revenues or diminished profits. An allegation of economic harm is not sufficient to constitute irreparable harm. *Teleconnect Co. v. Iowa State Commerce Comm'n*, 366 N.W. 511, 514; *see also, Celebrezze v. NRC*, 812 F.2d 288, 290 citing *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985). Thus, based on an

allegation of economic harm, the oil and gas industry could not demonstrate irreparable harm.

Moreover, any allegation of economic harm would be based on disputed facts and a contradictory record. At best, the record in Proceeding #1 provides conflicting evidence as to the extent of economic injury the oil and gas industry will suffer. *See, e.g.*, RA #1 at 3-4, ¶¶ 11,12, 14; Oil and Gas Accountability Project *Statement of Appellate Issues*, Case No. DO101-CV-2009-247 at 11-13 (Oct. 1, 2009). However, in Proceeding #1, the Commission carefully considered the economic evidence and determined that the oil and gas industry would not suffer undue harm. RA #1 at 45, ¶ 300. Further, no evidence was presented in Proceeding #2 which would justify overturning the Commission's economic findings in Proceeding #1. Oil and Gas Accountability Project *Statement of Appellate Issues* at 11.

Finally, the oil and gas industry will not suffer harm because testimony in the record shows that relaxing the chloride standard alone will not allow more onsite waste disposal and thus will have no effect on costs. RA #2 at 48, 379, 501-502. For more onsite waste disposal to occur, **all** the § 3103 standards would have to be relaxed.

D. The Public Interest will not be Harmed.

Finally, there is no evidence that the public interest will be harmed by staying implementation of the rolled back chloride standards. In this case, the primary public interest implicated by an order staying enforcement of the rolled back chloride standard would be protection of fresh water supplies and protection of public health and the environment. *See*, NMSA 1978, § 70-2-12 (15), (21). Indeed, rather than being harmed by an order staying enforcement of the 3000 mg/l chloride standard, the public interest

would be **protected** by such an order. The 250 mg/l chloride standard promulgated in Proceeding #1 is facially more protective of fresh water quality, public health and the environment than the 3000 mg/l chloride standard promulgated in Proceeding #2. An order staying implementation of the less protective standard would clearly not harm the public interest.

III. Conclusion

For the foregoing reasons, OGAP respectfully requests that this Court issue an order staying the Oil Conservation Commission and Division from implementing the 3000 mg/l chloride standard promulgated by the Commission in Proceeding #2. Counsel for the Commission was contacted and the Commission opposes this Motion.

Respectfully submitted this 30th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2009, I have delivered a copy of the foregoing pleading in the above-captioned case via email and U.S. mail, fist class to the following:

David K. Brooks
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By: _____