

First Judicial District  
County of Santa Fe  
State of New Mexico

**OIL AND GAS ACCOUNTABILITY  
PROJECT**

**ENDORSED**  
First Judicial District Court

**NOV 16 2009**

Santa Fe, Rio Arriba &  
Los Alamos Counties  
PO Box 2268  
Santa Fe, NM 87504-2268

**Appellant,**

**No.: DO101-CV-2009-247**

v.

**NEW MEXICO OIL CONSERVATION  
COMMISSION**

**Appellee.**

**APPELLANT'S REPLY TO THE NEW MEXICO OIL CONSERVATION  
COMMISSION'S RESPONSE TO STATEMENT OF APPELLATE ISSUES**

The Oil and Gas Accountability Project ("Appellant") files this Reply to the New Mexico Oil Conservation Commission's ("Commission's") November 2, 2009, *Response to Petitioner's<sup>1</sup> Statement of Appellate Issues* ("Comm'n Resp.").

1. No evidence in the record supports Finding No. 53, because the Commission improperly took administrative notice of the disputed industry evidence that was admitted in a separate case.

The Commission admits that it amended the Pit Rule solely because, according to industry assertions, the original Rule imposed unreasonable costs on industry. Thus, Finding No. 53 provides:

*Evidence presented by oil and gas operators in Case No. 14015 ["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.*

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<sup>1</sup> Appellant incorrectly designated itself as "Petitioner" and the Commission as the "Respondent" in the Statement of Appellate Issues. All references herein refer to the Oil and Gas Accountability Project as the "Appellant."

OCC Order # 2 at 9 ¶ 53. The Commission further admits (and Finding 53 so provides) that the only “evidence” used to support Finding 53 was introduced in a separate proceeding held before the Commission, i.e., Proceeding #1.<sup>2</sup> *Comm’n Resp. 6* (“Appellant says ... that the evidence the Commission referenced in Finding 53 was not presented at the hearing in Proceeding #2[.] ... *This is correct*”) (emphasis added). The Commission maintains, however, that this lack of evidence is cured by the Commission’s taking of “administrative notice of the evidence in Proceeding #1[.]” *Id.* This argument is unsupported by law.

First, because official notice<sup>3</sup> in administrative proceedings serves the same function as judicial notice in court proceedings, i.e., it circumvents the usual requirement that one must produce evidence to prove an alleged fact, an agency should only notice facts that are “not subject to reasonable dispute.” State ex rel. CYFD v. Brandy S. et al., 2007 NMCA 135, 32, 142 N.M. 705, 713 (Ct. App. 2007); see also NMSA 12-8-11(D) (State Administrative Procedures Act, providing that “official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency”); NMRE 11-201 (providing that courts may take judicial notice of facts “(1) generally known within the community, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or (3) notice is provided for by statute”); 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”); Lockley v. Law Office of Cantrell, 110 Cal. Rptr. 2d 877, 889 (App.. 2d Dist. 2001) (“Courts may not take judicial notice of allegations in affidavits,

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<sup>2</sup> As in the Statement of Appellate Issues, “Proceeding # 1” refers to Commission Case No. 14015; “Order #1” refers to Commission Order No. R-12939 in Proceeding #1; “Proceeding #2” refers to Commission Case No. 14292, i.e. the case below; and “Order #2” refers to Order No. R-12939-A, i.e., the Order on appeal in this case.

<sup>3</sup> “Administrative notice” is also commonly referred to as “official notice.”

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declarations and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof.”). In this case, as the Commission readily admits, the industry’s allegation that the Pit Rule would unduly increase industry’s costs and discourage exploration was vigorously disputed in Proceeding #1. *See, e.g., Commission Response at 6, 10.* Therefore, because the industry testimony used by the Commission to support Finding 53 was disputed, the Commission could not properly take administrative notice of it.

Second, the Commission did not provide prior notice that it intended to take administrative notice of the disputed industry testimony used to support Finding 53. Although not controlling in this case, the State Administrative Procedures Act provides useful guidance on the issue of notice:

Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency, but whenever any officer or agency takes official notice of a fact, the noticed fact and its source shall be stated at the earliest practicable time, before or during the hearing, but before the final report or decision, and any party shall, on timely request, be afforded an opportunity to show the contrary.

NMSA 12-8-11(D); *see also, e.g., Sykes v. Apfel et al.*, 228 F.3d 259 (3<sup>rd</sup> Cir. 2000)

(recognizing “two prerequisites to official notice: First, the information noticed must be appropriate for official notice. Second, the agency must follow proper procedures in using the information, disclosing to the parties and affording them a suitable opportunity to contradict or ‘parry its effect’”) (quoting Ohio Bell Telephone Co. v. Public Utilities Comm’n of Ohio, 301 U.S. 292, 302 (1937) (other internal quotes omitted); 2 Am.Jur 2d *Administrative Law* § 349 (2004) (“parties must be provided notice before issuance of decision that is based in whole or in part on facts or material [administratively] noticed, of the fact or material noticed and the sources thereof and be afforded opportunity to contest and rebut the facts or material”); cf. NMAC §§ 19.15.3.12 & .13 (providing for advance notice of testimony and exhibits in rulemakings before

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the Commission). The Commission never gave warning that it intended to notice any particular evidence from Proceeding #1, much less the disputed industry evidence now at issue.

Appellant admits that the Commission did give general notice that it *could* take administrative notice of Proceeding #1, but this was not sufficient, because it failed to provide specific notice of the particular evidence that the Commission had in mind. Proceeding #1 lasted 23 full days and yielded a voluminous transcript thousands of pages long. Accordingly, unless the Commission told them in advance, or unless a party sought to introduce the evidence in Proceeding #2, the parties could have no clue as to what specific evidence from Proceeding #1 the Commission intended to notice in Proceeding #2. The one time a party merely cited specific evidence from Proceeding #1 in Proceeding #2, the Appellant objected.<sup>4</sup> RA at 484. In any event, the Commission gave no warning that it would notice the disputed industry evidence from Proceeding #1 and then use it as the exclusive support of a key finding in Proceeding #2 (i.e. Finding 53). Moreover no party requested the Commission to admit this evidence in Proceeding #2.<sup>5</sup> Therefore, the Appellate never had an opportunity to object or “parry its effect.” As our Supreme Court observed:

But if judicial notice is taken of a prior judicial proceeding, there must be a clear delineation in the record as to what is being noticed. ... Moreover, a specification of what is being noticed should be clearly and timely stated so the parties affected may have an opportunity to address themselves to such matters.

Frost v. Markham et al., 86 N.M. 261, 263, 522 P.2d 808, 810 (1974). Because the Commission never provided a ‘clear delineation’ of what was being noticed, it did not (and could not) properly take administrative notice of the disputed industry evidence. Therefore, Finding 53 is

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<sup>4</sup> This evidence was not related to Finding 53.

<sup>5</sup> Indeed, in its opening statement the Division inadvertently misled the parties, suggesting that it was “experience with rule” that led the agency to propose changing it, not the disputed evidence from Proceeding #1. RA at 42.

not supported by *any* evidence in the record of Proceeding #2, much less substantial evidence.

Moreover, contrary to the suggestion of the Commission (*Comm'n Brf. at 2*), the Appellant has not asked this Court to take judicial notice of the entire record of Proceeding #1, indirectly or otherwise. Although the Appellant asked this Court to take judicial notice of the "filings" in the cases pending before it in Boling Enterprises Ltd. et al. v. New Mexico Oil Conservation Comm'n (No. D-1010-CV-2008-01863) and IPANM v. New Mexico Oil Conservation Comm'n (No. D-101-CV-2008-01874) (collectively referred to herein as "Boling Enterprises"), the Appellant did not intend thereby to cause this Court to improperly take judicial notice of the entire record in Proceeding #1. See State ex. rel CYFD v. Brandy S., 2007 NMCA 135, 32, 142 N.M. 705, 713 (Ct. App. 2007) (expressing "grave concerns about the propriety" of taking judicial notice "of an entire case file in [termination of parental rights] hearing"). The Appellant instead merely asks this Court to take notice of the Commission's Order in Proceeding #1 (referred to as "Order #1"), the findings made in that Order, and the Commission's briefs in Boling Enterprises.<sup>6</sup>

Finally, no statute authorizes the Commission to take administrative notice of evidence admitted in separate proceedings, much less of the entire record in such proceedings.<sup>7</sup> Cf. PNM et al. v. Environmental Improvement Board, 89 N.M. 223, 226, 549 P.2d 638, 641 (Ct. App. 1976) (as "creatures of statute," administrative agencies must derive their authority from statute). Accordingly, the Commission must resolve each matter that comes to hearing before it based exclusively on the evidence admitted in that hearing. Cf. NMSA 70-2-13 (requiring "director of

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<sup>6</sup> Contrary to the suggestions of the Commission's counsel, the Commission can and should be bound by the position its counsel has taken in this Court in Boling Enterprises. See, e.g., Citizens Bank v. C & H Constr. & Paving Co., 89 N.M. 360, 366, 552 P.2d 796, 802 (N.M. Ct. App. 1976) (holding that doctrine of "judicial estoppel" "means that a party is not permitted to maintain inconsistent positions in judicial proceedings.").

<sup>7</sup> Furthermore, nothing in the Commission's regulations refer to administrative notice or describe the materials or facts that may be subject to notice, or the circumstances under which notice may be taken.

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the division" [to] base the decision rendered in any matter or proceeding heard by an examiner upon the transcript of testimony and record made ..."). Because the Commission based its decision to amend the chloride standard on information that was not properly admitted in Proceeding #2, its decision was arbitrary, not support by substantial evidence, and an abuse of discretion. See Gila Res. Info. Project v. N.M. Water Quality Control Comm'n, 2005 NMCA 139, 42 138 N.M. 625, 636 (Ct. App. 2005) (holding that possibility of one commissioner of Water Quality Control Commission basing his vote on information learned outside the record of the hearing "creates a serious enough concern about the validity of the outcome of the vote").

2. In Proceeding #1, the Commission considered the additional costs imposed by the Pit Rule and concluded, based on the whole record, that there was no less expensive way to protect public health and the environment.

The Commission maintains that it "did not address the evidence of increased costs associated with waste disposal in its express findings in Order #1." *Comm'n Resp. at 7; see also Comm'n Resp. at 10*. This is not correct. As set out in the Statement of Appellate Issues ("*Statement*"), in Proceeding #1 the Commission deliberated extensively and considered in detail the additional costs that the Pit Rule would allegedly impose on industry. *Statement at 11-13*. Its prolonged deliberations on the issue of costs led directly to Finding 300 of Order #1, which states that the "Commission has considered the potential effect of these rule changes on small businesses as required by the Small Business Regulatory Relief Act" and found "that the rule changes as adopted are necessary to protect fresh water, human health, and the environment." *Statement, Exhibit A at 45 ¶ 300*. The purpose of the Small Business Regulatory Relief Act is to force agencies to carefully review their regulations to assure that they do not impose unnecessary costs on small businesses. NMSA 1978, §§ 14-4A-2(B), (D) & (I), 14-4A-5(C)(3), and 14-4A-6. The Commission complied with the Act by making "those changes it found possible ... to lessen

any potential effects [on industry] while still meeting its statutory duty to protect fresh water, human health, and the environment.” *Statement, Exhibit A at 45 ¶ 300.*

In telling contrast, there appears to be no mention at all of costs in the Commission’s deliberations in Proceeding #2. And the Commission never discusses or even refers to the disputed industry evidence during its deliberations in Proceeding #2, even though it ultimately relies exclusively on this evidence to support Finding 53.<sup>8</sup> This provides strong evidence that the hearing was essentially a sham. In Proceeding #1, the Commission heard extensive and disputed evidence regarding the additional costs that the Pit Rule would (or would not) impose on industry and concluded that, despite any increase in costs, there was no less expensive way to protect public health and environment. In Proceeding #2, without hearing *any* evidence that the Pit Rule would increase industry costs, the Commission simply cherry-picked highly disputed industry testimony from Proceeding #1 and used it to support Finding 53 in Order #2. Because the Commission never explains why it now finds the disputed industry evidence so compelling and all the contrary evidence so unpersuasive, it is reasonable to assume that the Governor’s private meeting with industry and his resulting directive to “roll back” the Pit Rule improperly influenced the Commission’s decision and essentially forced the outcome. Cf. Gila ¶ 42, 138 N.M. at 636. In any event, Finding 53 is not supported by any evidence in Proceeding #2.

3. The Commission’s decision to allow the oil and gas industry to pollute ground water in the indefinite future is arbitrary and capricious.

As recognized by the Commission itself, it has a “statutory duty to protect fresh water, human health, and the environment.” *Statement, Exhibit A at 45 ¶ 300.* An agency’s statutory duty to protect public health and the environment necessarily extends not only to those presently living, but to future generations as well. Cf. NMSA 1978, § 74-1-2 (purpose of the

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<sup>8</sup> The Commission has no agency expertise in evaluating costs.

Environmental Improvement Act is to protect “this generation as well as those yet unborn from health threats”); NMSA 1978, § 74-6-5(E)(3) (requiring Environment Department and constituent agencies<sup>9</sup> to protect ground water for “present and reasonably foreseeable future use”); NMSA 1978, § 74-13-2(A) (purpose of the Recycling and Illegal Dumping Act is to “protect the health and welfare of current and future residents of New Mexico by providing for the prevention and abatement of illegal dumpsites”). Although the Commission acknowledges its duty to “protect ground water quality” for reasonably foreseeable future use in Proceeding #2 (RA at 10 ¶ 62), it failed to fulfill that duty in this case.

The Commission changed the chloride standard from 250 mg/l to 3000 mg/l based on: (1) the alleged increase in costs caused by the 250 mg/l standard and (2) the “much longer timeframes for migration of pollutants to ground water ....” *Comm’n Resp. at 10*; see also *Comm’n Resp. at 13* (arguing that the new chloride standard will “not contaminate any ground water for the reasonably foreseeable future.”) Thus, the Commission admits that the amended chloride standard will not prevent ground water pollution; it will only delay it. But merely delaying pollution fails to fulfill the Commission’s duty to protect “places of withdrawal” of ground water (a/k/a “fresh water”) for “present and reasonably foreseeable future use,” as required under 74-6-5(E)(3) of the Water Quality Act. See *Comm’n Resp. at 14* (noting applicability of this statute).

The case of Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n, 2006 NMCA 115, 27, 140 N.M. 464, 471 (Ct. App. 2006) is instructive on the nature of the Commission’s duty. In reversing a determination of the Water Quality Control Commission (“WQCC”) under Section 74-6-5(E)(3), the Court of Appeals remanded the case back to the

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<sup>9</sup> The Commission is a constituent agency of the Water Quality Control Commission (“WQCC”). NMSA 1978, § 74-6-2(K)(4), and its chairman sits on the WQCC. NMSA 1978, § 74-6-3(A)(15).

WQCC and required it to “create some general factors or policies to guide its determination.”

The purpose of this exercise was to require the WQCC to devise objective standards for determining what ground water would be protected as a “place of withdrawal” under the Water Quality Act.

In the instant case, the Commission essentially decided that ground water should not be protected in the long term. It made this decision, not based on any objective factors, but arbitrarily and capriciously, since there is no evidence in the record that humans will stop needing clean water in the long term. By assuming that its duty to protect ground water only extends into the future for some arbitrary and undefined “timeframe” (*Comm’n Resp. 13*), the Commission misinterpreted the law. The Commission’s duty is not merely to gaze into the future for an arbitrary “timeframe.” It instead must determine, based on objective site-specific factors, whether there is any reasonably foreseeable use of the ground water that will eventually be polluted if the contaminants disposed of in a given trench were allowed to exceed ground water quality standards. The Findings in Proceeding #1 support this description of the Commission’s duty:

[On-site] closure should be based on the level of various constituents in the waste and site specific information rather .... Order # 1 at 12 ¶ 71.

Because waste constituents over time will leach to ground water, the waste should only be buried on-site if the constituents in the waste are at levels that will not result in ground water contamination. Order # 1 at 12 ¶ 74.

The 250 mg/l chloride [standard] ... is protective of ground water because if a chloride leachate of 250 mg/l reaches ground water it will not cause an exceedance of the state ground water standard, which is 250 mg/l .... Order #1 at 13 ¶ 79.

From Proceeding #1 to Proceeding #2, the Commission without notice changed its environmental policy from one of protecting ground water for reasonably foreseeable future use

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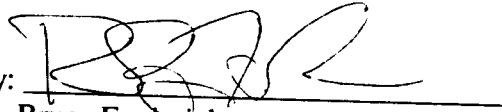
to one of merely holding back the inevitable pollution for some arbitrary "timeframe." Its failure to explain this reversal in policy, as well as its failure to identify or use objective factors in selecting a "timeframe," renders its decision to radically change the chloride standard arbitrary and capricious. *Statement at 9 -11; Phelps Dodge* ¶ 33, 140 N.M. at 472 ("A conclusion reached using an overly broad legal standard is arbitrary and capricious and not in accordance with law.").

### Conclusion

The Commission's decision to change the chloride standard in the Pit Rule is not based on substantial evidence; moreover, the Commission misinterpreted its statutory duty to protect ground water for reasonably foreseeable future use. Therefore, Appellant respectfully requests the Court to reverse the Commission's decision to change the chloride standard.

Respectfully submitted:

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### Certificate of Service

I certify that a copy of the forgoing paper was mailed to David K. Brooks, Esq., attorney for the NM Oil Conservation Division, at 1220 South St. Francis Dr., Santa Fe, NM 87505, on the 14<sup>th</sup> day of November, 2009.

  
Bruce Frederick