

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

WILDEARTH GUARDIANS and
NEW ENERGY ECONOMY,

Appellants,

v.

No. A-1-CA-42858

NEW MEXICO OIL CONSERVATION
COMMISSION,

Appellee.

DOCKETING STATEMENT

Appeal from Oil Conservation Commission Case No. 23580
Hearing Officer Felicia Orth

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WildEarth Guardians and New Energy Economy (“Appellants”) file this Docketing Statement pursuant to Rules 12-208 and 12-601 NMRA in their appeal of the Oil Conservation Commission’s (“OCC” or “Commission”) June 3, 2025 “PFAS Rule Making Order and Reasons for the Action Taken”, Order No. R-23824, in OCC No. 23580.

I. Nature of the Proceeding

This case arises out of a rulemaking hearing before the Commission involving a proposed rule that in part sought to prohibit per- and polyfluoroalkyl substances (“PFAS”) from use in downhole oil and gas operations and provide affected communities with notification of chemicals used in all downhole oil and gas operations. The Commission promulgated a final rule that arbitrarily limited the PFAS prohibition to a narrower set of downhole operations known as well completions and recompletions, without evidence. Additionally, the Commission failed to provide an effective date for community notification of the limited chemical disclosures oil and gas operators are required to provide. On the latter issue, the Commission’s final rule includes a placeholder for the effective date that reads “on or before [DATE].” *See* Exhibit B to Notice of Appeal at Section 19.15.16.17(D) NMAC.

The issues on appeal are rather simple and straightforward. Appellants file this appeal and request that this Court set aside the adoption of Section 19.15.14.9(C)

NMAC, because there is no evidence in the record to support the Commission's decision to issue a PFAS prohibition *only* to completions and recompletions. However, there is ample, and no contradictory, evidence in the record to support a PFAS prohibition in all downhole operations. The OCC's narrowing relied on the Oil Conservation Division's ("OCD") pre-hearing redline draft rather than the actual hearing record, ignoring uncontested evidence and even contradicting the OCD's post-hearing position. The Commission's adoption of this limited prohibition is contrary to law, arbitrary and capricious, and not supported by substantial evidence in the record.

Additionally, Appellants appeal and request that this Court set aside the adoption of 19.15.16.19(D) NMAC, because the Commission's final rule includes placeholder language that reads "[DATE]" instead of providing an actual date for community notification. The adoption of a rule with placeholder language instead of an actual date is arbitrary, capricious, and contrary to law and constitutes plain error rendering the provision unenforceable and leaving regulated parties and communities without legal clarity.

The issues for appeal are important for New Mexicans' public health and for our environment. By arbitrarily restricting the PFAS prohibition to a narrower set of oil and gas production operations, the OCC's rule provides no legal prohibition on the use of PFAS in downhole operations like drilling. Therefore, unlimited amounts

of PFAS can be used in drilling. Evidence at the hearing shows that there are about 3,000 completion and recompletion activities a year in New Mexico, while there are about 7,000 *additional* downhole operations in New Mexico over the course of a year. The record additionally demonstrates that PFAS used in any downhole operations will have multiple pathways to contaminate the environment including spills and loss of mechanical integrity events. The record demonstrates that PFAS are a class of chemicals that are toxic at very low concentrations, persist in the environment for decades, bioaccumulate in human and animal tissue, and pose severe human health risks, including cancer, reproductive harm, and immune system suppression.

Appellants are nonprofit organizations seeking to protect the public health of New Mexicans and their environmental quality. Both organizations have an interest in ensuring that PFAS substances do not continue to enter New Mexico's environment. Prohibiting the pathways for PFAS use and discharge is the safest way to minimize the present and future harm of PFAS to human health and the environment.

II. Date of Order to be Reviewed and Timely Filing

The Commission entered its "PFAS Rule Making Order and Reasons for the Action Taken", Order No. R-23824, on June 3, 2025. On July 16, 2025, the OCC filed the final rule with the State Records Administrator. Therefore, pursuant to

NMSA 1978 Section 70-2-12.2(C) and 19.15.3.15(D) NMAC, August 15, 2025 was the deadline for filing a Notice of Appeal in this matter. The final rule was published in the New Mexico Register on July 29, 2025.

On August 13, 2025, counsel for WildEarth Guardians (“Guardians”) filed the Notice of Appeal of with the clerk of the OCC and copied all parties to that matter. That same day, counsel for Guardians hand delivered the Notice of Appeal to the New Mexico Court of Appeals clerk’s office in Albuquerque. On August 14, 2025, WildEarth Guardians mailed, via certified mail, the Notice of Appeal to the New Mexico Court of Appeals office in Santa Fe, New Mexico. Counsel for Guardians additionally filed its Notice of Appeal on August 20, 2025, via file and serve, along with a Motion to Accept as Timely Filed. On August 28, 2025, the Motion was granted and the Notice of Appeal was accepted as timely filed on August 13, 2025.

III. Statement of the Case

The OCC has the statutory authority to adopt rules to regulate produced water and nondomestic wastes for the protection of the environment and public health

pursuant to NMSA 1978 §§ 70-13-3,¹ 70-2-12(B)(7),² (B)(15),³ (B)(21),⁴ and (B)(22).⁵ Pursuant to the Commission’s rules governing rulemaking proceedings, “[a]ny person may file an application with the commission to adopt, amend or repeal any rule within the commission’s jurisdiction.” 19.15.3.8(A) NMAC. Here, one of the Appellants, WildEarth Guardians, filed the application for rulemaking, and the Commission entered an order setting the hearing on the proposed rule for November 12-15, 2024. A hearing officer presided over the four-day evidentiary hearing where the Commission heard from nine technical witnesses and one fact witness. All parties

¹ “It is the jurisdiction of: A. the oil conservation division of the energy, minerals and natural resources department to regulate produced water as provided in the Oil and Gas Act [Chapter 70, Article 2 NMSA 1978].”

² Providing OCC and OCD power to make rules to “to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties[.]”

³ Providing OCC and OCD power to make rules to “to regulate the disposition, handling, transport, storage, recycling, treatment and disposal of produced water during, or for reuse in, the exploration, drilling, production, treatment or refinement of oil or gas, including disposal by injection pursuant to authority delegated under the federal Safe Drinking Water Act, in a manner that protects public health, the environment and fresh water resources[.]”

⁴ Providing OCC and OCD power to make rules to “to regulate the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment[.]”

⁵ Providing OCC and OCD power to make rules to “to regulate the disposition of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to protect public health and the environment[.]”

had the opportunity to present exhibits and cross-examine the witnesses. The Commission also had the opportunity to examine the witnesses, and the Commission heard public comment regarding the proposed rule daily. *See generally* 19.15.3.10 NMAC (providing for public comment on proposed rules); 19.15.3.11 NMAC (governing qualifications as a technical witness or nontechnical witness), and 19.15.3.12 NMAC (providing hearing procedures and governing cross-examination and admissibility of evidence).

The portions of the petition for rulemaking that are relevant to this appeal asked the OCC to prohibit the use of PFAS in downhole oil and gas operations and asked the OCC to require full chemical disclosure of all chemicals used in downhole operations while requiring community notification of these disclosures.⁶

At the hearing, the Commission heard, and the hearing officer admitted, evidence that supports a prohibition on the use of PFAS in downhole oil and gas operations. This evidence was uncontested at the hearing, and there is no record evidence to support a PFAS prohibition that applies *only* to a narrow subset of extraction operations known as completions and recompletions, rather than all

⁶ See Notice of Public Meeting and Public Hearing, which was marked as WildEarth Guardians Exhibit 2, “WildEarth Guardians proposes that the Commission amend its rules to prohibit the use of toxic perfluoroalkyl and polyfluoroalkyl substances (“PFAS”) and undisclosed chemicals in downhole operations.” Available in the OCD online docket at: https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20241015/23580_10_15_2024_04_25_34.pdf

downhole operations. The Commission also heard, and the hearing officer accepted, testimony to support community notification of all chemicals used downhole in oil and gas extraction.

During deliberations, the OCC voted to prohibit the use of PFAS in the narrower set of completions and recompletions operations, which does not cover operations like oil and gas drilling or enhanced oil recovery. The OCC further decided not to require full chemical disclosure, but did vote to require community notification of the existing disclosures that are incomplete due to disclosure gaps like the ability to claim trade secrets. While the OCC voted to adopt a community notification provision, it did not provide an actual date for those notifications and instead Section 19.15.16.19(D) NMAC contains a placeholder and reads in relevant part “On or before [DATE], an operator shall provide the FracFocus disclosure to the following persons and entities unless the person or entity opts out of the notification[.]”

After deliberations, but before the OCC issued its final order, Appellants tried on two separate occasions to remedy the issues described above. Appellants first filed a Motion to Clarify requesting that the OCC reopen deliberations to prohibit PFAS in all downhole operations rather than the narrower subset of completion and recompletion operations. Appellants made this request based on the fact that the OCC adopted this narrower prohibition in reliance on the OCD’s prehearing redline

rule — not on the uncontested evidence developed at hearing — and not the OCD’s post-hearing position that a PFAS prohibition in all downhole operations was more appropriate. The Motion to Clarify was an attempt to remedy an apparent oversight during deliberations, but was denied, on a two-to-one vote.

Appellants next filed their Motion for Rehearing which outlined that the OCC’s decision to adopt a PFAS prohibition in a narrow subset of oil and gas operations was arbitrary and capricious and not supported by substantial evidence. Appellants pointed out that a broader PFAS prohibition in all downhole operations was supported by substantial evidence in the record and provided citations to that evidence. Second, Appellants pointed out that the final version of Section 19.15.16.19(D) NMAC was incomplete and provided a placeholder that reads “[DATE]” instead of providing an actual effective date for that provision. That motion was denied by operation of law on July 2, 2025 when the Commission did not act upon it within the 10-day deadline set by the Oil and Gas Act. NMSA 1978 §70-2-25.

IV. Standard of Review

When reviewing an OCC rulemaking order, this Court shall set aside rules that are “1) arbitrary, capricious or an abuse of discretion; 2) not supported by substantial evidence in the record; or 3) otherwise not in accordance with law.” NMSA 1978 § 70-2-12. “A ruling by an administrative agency is arbitrary and

capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.” *Colonias Dev. Council v. Rhino Env't Servs.*, 2005-NMSC-024, ¶ 13, 138 N.M. 133, (internal quotation marks and citation omitted). Additionally, “[a]n agency’s action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.” *Albuquerque Cab Co. v. N.M. Pub. Regul. Comm’n*, 2017-NMSC-028, ¶ 8, (internal quotation marks and citation omitted).

V. Statement of the Issues, Authorities, and Preservation

This case presents six issues for this Court:

ISSUE 1: Was the Commission’s decision to limit the scope of the PFAS prohibition to completions and recompletions unsupported by substantial evidence where the record supports a PFAS prohibition in all downhole operations and lacks any evidence to support a PFAS prohibition in a narrow subset of downhole operations?

Preservation

This issue was preserved through testimony, evidence admitted at the hearing, Appellants’ closing brief, post-hearing Motion for Clarification, and Motion for Rehearing.

Authorities

- NMSA 1978 § 70-13-3 (providing the Oil Conservation Division with the jurisdiction to regulate produced water).
- NMSA 1978 § 70-2-12(B)(7) (Providing the Commission and the Oil Conservation Division with the power to make rules to “to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties[.]”).
- NMSA 1978 § 70-2-12(B)(15) (Providing the Commission and the Oil Conservation Division with the power to make rules to regulate produced water).
- NMSA 1978 § 70-2-12(B)(21) (Providing the Commission and the Oil Conservation Division with the power to make rules to regulate nondomestic wastes).
- NMSA 1978 § 70-2-12(B)(22) (Providing the Commission and the Oil Conservation Division with the power to make rules to regulate nondomestic wastes).
- NMSA 1978 § 70-2-12.2 (providing standard of review for agency rulemaking orders).
- *Earthworks v. OCC*, 2016-NMCA-055, ¶¶ 10-12, (providing standard of review for Oil Conservation Commission rulemaking proceedings).

- *Rutter & Wilbanks Corp. v. OCC*, 1975-NMSC-006, ¶ 20 (Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”) (internal citations omitted).
- *Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad Inc.*, 2010-NMCA-065, ¶ 45, 148 N.M. 516. (Rules are arbitrary and capricious if “there is no rational connection between the facts found and choices made, or necessary aspects of consideration or relevant factors are omitted.”).
- *Colonias Dev. Council v. Rhino Env't Servs.*, 2005-NMSC-024, ¶ 13, 138 N.M. 133, (“A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.”) (internal quotation marks and citation omitted).
- *Albuquerque Cab Co. v. N.M. Pub. Regul. Comm'n*, 2017-NMSC-028, ¶ 8, (“[a]n agency’s action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.” (internal quotation marks and citation omitted).
- *Albuquerque Bernalillo Cnty. Water Util. Auth. v. N.M. Pub. Regul. Comm’n*, 2010-NMSC-013, ¶ 51, 148 N.M. 21 (“The canons of statutory construction guide our interpretation of administrative regulations.”).

- NMSA § 70-2-17(C) (distinguishing between drilling and completing a well).
- *Evarts v. Stovall* 1938-NMSC-001, ¶ 5, 42 N.M. 32 (distinguishing between drilling and completing a well).
- *Mountain States Natural Gas Corp. v. Petroleum Corp. of Texas*, 693 F.2d 1015, 1017 (10th Cir. 1982) (distinguishing between drilling and completing a well).
- *Jalapeno Corp. v. N.M. Oil Conservation Commission*, A-1-CA-37449, mem. op. ¶ 16 (N.M. Ct. App. Sept. 23, 2020) (non-precedential) (distinguishing between drilling and completing a well).
- 19.15.11.11(B) NMAC (distinguishing between drilling and completing a well).
- 19.15.13.8(B) NMAC (distinguishing between drilling and completing a well).
- Ariz. R.S. § 27-551(2) (distinguishing between drilling and completing a well).

ISSUE 2: Was the Commission’s decision to limit the scope of the PFAS prohibition to completions and recompletions arbitrary and capricious where the record supports a PFAS prohibition in all downhole operations and lacks any

evidence to support a PFAS prohibition in a narrow subset of downhole operations and where the OCC ignored relevant, uncontested evidence in the record?

Preservation

This issue was preserved through testimony, evidence admitted at the hearing, Appellants' closing brief, post-hearing Motion for Clarification, Motion for Rehearing.

Authorities (same as for ISSUE 1)

ISSUE 3: Was the Commission's decision to limit the scope of the PFAS prohibition to completions and recompletions contrary to law where the record supports a PFAS prohibition in all downhole operations and lacks any evidence to support a PFAS prohibition in a narrow subset of downhole operations and where the OCC ignored relevant, uncontested evidence in the record?

Preservation

This issue was preserved through testimony, evidence admitted at the hearing, Appellants' closing brief, post-hearing Motion for Clarification, Motion for Rehearing.

Authorities (same as for ISSUE 1)

ISSUE 4: Was the Commission's decision to limit the scope of the PFAS prohibition to completions and recompletions arbitrary and capricious where the Commission's Statement of Reasons does not provide a reason for limiting the PFAS

prohibition to a narrow subset of downhole operations, rather than all downhole operations?

Preservation

This issue was preserved through testimony, evidence admitted at the hearing, Appellants' closing brief, post-hearing Motion for Clarification, Motion for Rehearing.

Authorities (same as for ISSUE 1)

ISSUE 5: Was the Commission's final rule arbitrary and capricious where it fails to provide an actual date for community notification provisions, and instead includes a placeholder that reads "[DATE]".

Preservation

This issue was preserved through testimony, evidence admitted at the hearing, Appellants' closing brief, Motion for Rehearing. Additionally, because this defect was discoverable only after the Commission voted and produced a final rule, this issue is subject to the preservation exceptions outlined in Rule 12-321(A) NMRA ("If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.") and Rule 12-321(B) NMRA (providing that exceptions to the preservation requirement include "issues involving (a) general public interest; (b) plain error; (c) fundamental error[.]").

Authorities

- Rule 12-321 NMRA (providing exceptions to the preservation requirement).
- NMSA 1978 § 70-2-12.2 (providing standard of review for agency rulemaking orders).
- *Pineda v. Grande Drilling Corp.*, 1991-NMCA-004, ¶ 12, 111 N.M. 536 (“general public interest” weighed in favor of considering issue of effective date of new rule for the first time on appeal).
- *Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad Inc.*, 2010-NMCA-065, ¶ 45, 148 N.M. 516. (Rules are arbitrary and capricious if “there is no rational connection between the facts found and choices made, or necessary aspects of consideration or relevant factors are omitted.”).

ISSUE 6: Did the Commission’s final rule result in plain or fundamental error where it fails to provide an effective date for the community notification provisions, and instead include a placeholder that reads “[DATE]”.

Preservation

This issue was preserved through testimony, evidence admitted at the hearing, Appellants’ closing brief, Motion for Rehearing. Additionally, because this defect was discoverable only after the Commission voted and produced a final rule, this issue is subject to the preservation exceptions outlined in Rule 12-321(A) NMRA

(“If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.”) and Rule 12-321(B) NMRA (providing that exceptions to the preservation requirement include “issues involving (a) general public interest; (b) plain error; (c) fundamental error[.]”).

Authorities

- Rule 12-321 NMRA (providing exceptions to the preservation requirement).
- NMSA 1978 § 70-2-12.2 (providing standard of review for agency rulemaking orders).
- *Pineda v. Grande Drilling Corp.*, 1991-NMCA-004, ¶ 12, 111 N.M. 536 (“general public interest” weighed in favor of considering issue of effective date of new rule for the first time on appeal).
- *Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad Inc.*, 2010-NMCA-065, ¶ 45, 148 N.M. 516. (Rules are arbitrary and capricious if “there is no rational connection between the facts found and choices made, or necessary aspects of consideration or relevant factors are omitted.”).

VI. Nature of the Record

The rulemaking proceeding at the Oil Conservation Commission was recorded in a written transcript. Furthermore, the entire proceedings were recorded

and are posted to the OCC's YouTube page available at:
<https://www.youtube.com/@emnrdocc4231/videos>.

VII. Related and Prior Appeals

Counsel for Appellants are not aware of any related or prior appeals.

Respectfully submitted September 11,
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Certificate of Service

I hereby certify that on September 11, 2025 a true and correct copy of the foregoing document was e-filed and served through the Court's e-filing system upon counsel of record.

I additionally certify that pursuant to Rule 12-208(C) the following were served on September 11, 2025 via email with a true and correct copy of the foregoing document:

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