THE SUPREME COURT OF THE STATE OF NEW MEXICO
September 12, 2008

NO. 31,235

BURLINGTON RESOURCES OIL & GAS CO. LP, CHESAPEAKE OPERATING INC., CONOCOPHILLIPS CO., DEVON ENERGY CORP., DUGAN PRODUCTION CORP., ENERGEN RESOURCES CORP., MARATHON OIL CO., MARBOB ENERGY CORP., OXY USA, INC., OCCIDENTAL PERMIAN, LTD., OXY USA WTP, L.P., D.J. SIMMONS, INC., WILLIAMS PRODUCTION CO., XTO ENERGY INC., and YATES PETROLEUM CORP.,

Plaintiffs-Petitioners,

v.

NEW MEXICO OIL CONSERVATION COMMISSION,

Defendant-Respondent.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeals number 28526.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 12th day of September, 2008.

(SEAL)

Madeline Garcia

Madeline Garcia, Chief Deputy Clerk

ATTEST: A TRUE COPY

Madeline Garcia

Clerk of the Supreme Court of the State of New Mexico

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. D-0101-CV-2006-02841

BURLINGTON RESOURCES OIL & GAS CO., LP, CHESAPEAKE OPERATING INC., CHEVRON TEXACO, CONOCOPHILLIPS CO., DEVON ENERGY CORP., DUGAN PRODUCTION CORP., ENERGEN RESOURCES CORP., MARATHON OIL CO., MARBOB ENERGY CORP., OXY USA, INC., OCCIDENTAL PERMIAN, LTD., OXY USA WTP, L.P., D.J. SIMMONS, INC., WILLIAMS PRODUCTION CO., XTO ENERGY, INC., YATES PETROLEUM CORP.,

Appellant,

vs.

THE NEW MEXICO OIL CONSERVATION COMMISSION,

Appellee.

MEMORANDUM OPINION

This matter comes before the Court on an appeal from the New Mexico Oil Conservation Commission's (or "OC Commission") Order No. R-12460-B, Case No. 13586, adopting revised rules regulating surface waste management in oil and gas operations. Appellants (or "the Industry Committee") challenge on a number of grounds both the revised rules and the procedures employed in adopting them. Having reviewed the whole record and briefing, and having heard oral argument, this Court concludes that the order is supported by substantial evidence, is in accordance with the law and within the OC Commission's scope of authority, and is not arbitrary or capricious, and that the OC Commission employed procedures that were in accordance with the law and that were not

arbitrary or capricious. *See* Rule 1-074(Q) NMRA; NMSA 1978, § 39-3-1.1.D (1999); Rule 1-075(Q). The OC Commission's order adopting revised rules is, therefore, affirmed.

BACKGROUND

The record shows that on September 28, 2005, the New Mexico Oil Conservation Division (or "OC Division") of the Energy, Minerals and Natural Resources Department filed an Application for Rulemaking. *See* Record on Appeal (hereinafter "RA") 003095. The application sought an order repealing specific existing rules concerning surface waste management, "adopting . . . new rules containing revised and more comprehensive provisions with respect to the transportation and surface disposition of wastes, to be codified as Rules 51 and 52 [19.15.2.51 and 19.15.2.52 NMAC]," and "adopting a new and more detailed rule concerning the permitting and operation of surface waste management facilities, to be codified as Rule 53 [19.15.2.53]." *Id.* (alterations in original); *see also* RA000002. The OC Division attached proposed versions of the rules changes to its application. At the same time, the Division published notice of the proposed revisions. *See* RA003095-3109.

The OC Division and OC Commission subsequently received extensive comments on the proposed revisions and the OC Division conducted a series of stakeholder and outreach meetings . *See, e.g.*, RA000002, 003126-3335. After receiving input through comments and interaction with various interests, the OC Division published several revised versions of its proposed rules changes. *See, e.g.*, RA003431. The OC Commission held hearings on the proposed changes on multiple days in April and May 2006. *See* RA000002. At the hearings, the OC Division presented testimony in support of its proposals, the Industry Committee presented evidence in opposition to portions of the OC Division's proposals and in support of its own alternatives, and New Mexico Citizens for Clean Air & Water, Inc., (or "Citizens") presented evidence in support of portions of the OC Division's

proposals and in support of its own alternatives. The OC Commission did not close the record after the hearings so as to allow a task force made up of the various interests to review the draft rules and testimony, to identify areas of consensus and areas where consensus was not possible, to make comments, and to recommend findings of fact and conclusions of law, as well as to allow additional comments apart from those of the task force. *See* RA001841-49.

Subsequently, the Secretary of Energy, Minerals and Natural Resources named to the task force two OC Division staff members (Glenn von Gonten and Carl Chavez), five industry representatives (four of whom represented entities that are specifically named as appellants in this matter), and two individuals representing environmental interests (including one who represented Citizens, now the intervenor in this matter). *See* RA000004. The task force met during the summer of 2006 and reported to the OC Commission in September 2006. *See* RA003094. Members of the Industry Committee provided additional comments in September 2006. *See* RA004114, RA004117. The OC Commission ultimately adopted revised rules.

Among the revised rules was 19.15.2.53.G,[1] which regulates "landfarms." *See* Statement of Issues (hereinafter "SI"), at 5. Definitional provisions of the regulations indicate that "[a] landfarm is a discrete area of land designated and used for the remediation of petroleum hydrocarbon-contaminated soils and drill cuttings." 19.15.2.53.A(1)(d).

Paragraph (2) of Subsection G of 19.15.2.53 requires soil background testing prior to

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[1]Intervenor and Appellee used revised numbering of rule provisions based on how the surface waste management rule was compiled into the New Mexico Administrative Code. The Court asks that, in the future, parties direct the Court to the numbering that was used in the record on appeal or cross-reference the versions. Using multiple versions of numbering only adds unnecessary complexities to an already intensely complex matter. This opinion will refer to the numbering used in the record on appeal.

beginning operation of a new landfarm or opening a new cell at an existing landfarm if the operator has not already established a background for various constituents. *See* RA000066. The background testing is "to establish total petroleum hydrocarbons (TPH) . . . .; chlorides; and other constituents listed in Subsections A and B of 20.6.2.3103 NMAC . . . ." *See* 19.15.2.53.G(2), at RA000066.

The rules also require ongoing monitoring of landfarms. Paragraph (4) of Subsection G of 19.15.2.53 requires operators to "conduct treatment zone monitoring to ensure that prior to adding an additional lift . . . chloride concentration . . . does not exceed 500 mg/kg if the landfarm is located where groundwater is less than 100 feet but at least 50 feet below the lowest elevation at which the operator will place oil field waste or 1000 mg/kg if the landfarm is located where ground water is 100 feet or more below the lowest elevation at which the operator will place oil field waste." RA00066. A "lift" is "an accumulation of soil or drill cuttings predominately contaminated by petroleum hydrocarbons that is placed into a landfarm cell for treatment." 19.15.2.53.A(2)(g), at RA00047. Paragraph (1) of Subsection G of 19.15.2.53 relies on those same chloride concentration levels as an oil field waste acceptance criterion, as does Subparagraph (d) of Paragraph (6) of that provision for treatment zone closure performance standards. RA000065, RA000067-68.

Paragraph (5) of Subsection G of 19.15.2.53 requires landfarm operators to report releases of certain constituents (including what the parties refer to as "3103 constituents" based on 20.6.2.3103 NMAC, which is referenced in 19.15.2.53.G(2)) into the area of ground between three and four feet below each landfarm cell's original ground surface, or the "vadose zone." 19.15.5.2.53G(5)(a) & (e), at RA00067. If vadose zone sampling results show that concentrations of the 3103 constituents exceed the original background concentration–in other words, are contaminating the soils below the landfarm cell–then the landfarm operator must notify the OC

Division's environmental bureau, perform additional sampling, and submit a response action plan that addresses "changes in the landfarm's operation to prevent further contamination and, if necessary, a plan for remediating existing contamination." 19.15.2.53G(5)(e), at RA000067.

Paragraph (6) of Subsection G of 19.15.2.53 provides performance standards that operators must meet when closing treatment zones of landfarms, stating:

> Treatment zone closure performance standards. After the operator has filled a landfarm cell to the maximum thickness of two feet or approximately 3000 cubic yards per acre, the operator shall continue treatment until the contaminated soil has been remediated to the higher of the background concentrations or the following closure performance standards. The operator shall demonstrate compliance with the closure performance standards by collecting and analyzing a minimum of one composite soil sample, consisting of four discrete samples.
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> (d) Chlorides . . . shall not exceed 500 mg/kg if the landfarm is located where ground water is less than 100 feet but at least 50 feet below the lowest elevation at which the operator will place oil field waste or 1000 mg/kg if the landfarm is located where ground water is 100 feet or more below the lowest elevation at which the operator will place oil field waste.
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> (e) . . . . If the concentration of [WQC Commission 3103] constituents exceed the PQL[, which is the lowest concentration that can be measured,] or background concentration, the operator shall either perform a site specific risk assessment using EPA approved methods and shall propose closure standards based upon individual site conditions that protect fresh water, public health, safety and the environment, which shall be subject to division approval[,] or remove pursuant to Subparagraph (b) of Paragraph (7) of Subsection G of 19.15.2.53 NMAC.

Subparagraph (b) of Paragraph (7) of Subsection G of Rule 19.15.2.53 provides alternatives to meeting the specified closure performance standards, stating:

> If the operator cannot achieve the closure performance standards specified in Paragraph (6) of Subsection G of 19.15.2.53 NMAC within five years or as extended by the division, then the operator shall remove contaminated soils from the landfarm cell and properly dispose of it at a division-permitted landfill, or reuse or recycle it in a manner approved by the division.

As an alternative to complying with the requirements of Subparagraph (c) of Paragraph (6) of Subsection G of 19.15.2.53. Subparagraph (a) of Paragraph (8) of Subsection G of Rule 19.15.2.53 allows a landfarm operator to "use an environmentally acceptable bioremediation endpoint approach to landfarm management." RA000068. Although Subparagraph (c) of Paragraph (6) precludes total petroleum hydrocarbons, that is, TPH, from exceeding 2500 mg/kg, as an alternative to that standard, Subparagraph (a) of Paragraph (8) provides that an "environmentally acceptable bioremediation endpoint occurs when the TPH concentration has been reduced by at least 80 percent by a combination o f physical, biological and chemical processes and the rate of change in the reduction in the TPH concentration is negligible." RA000068.

The Industry Committee took issue with the final rules and filed a petition for rehearing on November 8, 2006, which was not granted. *See* RA004120; *see also* NMSA § 70-2-25.A (1999) (deeming the OC Commission's failure to grant or refuse the application in whole or in part within ten days after the application is filed to be a refusal and final disposition of that application). Appellants sought certiorari pursuant to Rule 1-075, which was granted.[2]

DISCUSSION

This Court's review is limited to determining whether the OC Commission acted arbitrarily or capriciously, whether the OC Commission's action is supported by substantial evidence, and whether the OC Commission acted in accordance with the law and within the scope of its authority.

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[2]The Court notes that, although Appellants in this matter petitioned this Court for a writ of certiorari pursuant to Rule 1-075 because that rule "provides for constitutional review by the Court of administrative decisions and orders when there is not a statutory right to an appeal (*see* Pet. for Writ of Cert., at 2; Statement of Issues, at 1), Rule 1-074, which applies the same standards of review, is the more appropriate rule for this appeal because the Legislature has provided a statutory right to appeal. *See* § 70-2-25; § 39-3-1.1.D; *see also Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 106, 835 P.2d 819, 822 (1992).

See Rule 1-074(Q); Rule 1-075(Q); § 39-3-1.1.D; *see also Archuleta v. Santa Fe Police Dep't*, 2005-NMSC-006, ¶ 15, 137 N.M. 161, 167-68; 108 P.3d 1019, 1025-26 (applying standard of review pursuant to 1-075(Q)); *Paule v. Santa Fe County Bd. of County Comm'rs*, 2005-NMSC-021, ¶ 26, 138 N.M. 82, 117 P.3d 240, 248 (applying the same standard pursuant to Rule 1-074(Q)) review). Our state appellate courts have provided a comprehensive guide to the applicable, somewhat interconnected standards of review for administrative actions, which this opinion relies upon. *See, e.g., New Mexico Mining Ass'n v. New Mexico Water Quality Control Comm'n*, 2007-NMCA-010, 141 N.M. 41, 150 P.3d 991. The party challenging the administrative action has the burden of demonstrating grounds for reversal. *New Mexico Industrial Energy Consumers v. New Mexico Public Regulation Comm'n*, 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105, 110; *Selmeczki v. New Mexico Dept. of Corr's*, 2006-NMCA-024, ¶ 13, 139 N.M. 122, 126-27,129 P.3d 158, 162-63.

"An agency action is arbitrary and capricious if it is unreasonable, if it provides no rational connection between the facts found and the choices made, or if it entirely omits consideration of important aspects or relevant factors of the issue at hand." *New Mexico Mining Ass'n*, 2007-NMCA-010, at ¶ 22, 141 N.M. 41, 150 P.3d at 999. Yet, "[a]n agency's rule-making function is discretionary," and a reviewing court should not substitute its judgment for that of the agency "if there is no showing of an abuse of that discretion." *Id.* at ¶ 26, 141 N.M. 41, 150 P.3d at 1000.

With regard to questions of fact, the reviewing court examines the whole record to determine whether an agency decision is supported by substantial evidence. *See, e.g., New Mexico Industrial Energy Consumers*, 2007-NMSC-053, ¶ 24, 142 N.M. 533, 168 P.3d at 113. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate" to support the conclusions

reached by the fact-finder, and is "more than a mere scintilla." *See id.* at ¶ 28, 142 N.M. 533, 168 P.3d at 114 (internal quotations omitted); *accord Santa Fe Exploration Co.*, 114 N.M. at 114, 835 P.2d at 830; *New Mexico Mining Ass'n*, 2007-NMCA-010, at ¶ 30, 150 P.3d at 1001. The reviewing court views the record in the light most favorable to the agency's decision, drawing every inference in support of the agency's decision, while not disregarding conflicting evidence, reweighing the evidence, nor substituting its judgment for that of the agency. *See, e.g., New Mexico Industrial Energy Consumers*, 2007-NMSC-053, at ¶ 24, 142 N.M. 533, 168 P.3d at 113; *Doña Ana Mutual Domestic Water Consumers Ass'n v. New Mexico Public Regulation Comm'n*, 2006-NMSC-032, ¶ 11, 140 N.M. 6, 10, 139 P.3d 166, 170; *Santa Fe Exploration Co.*, 114 N.M. at 114, 835 P.2d at 830; *New Mexico Mining Ass'n*, 2007-NMCA-010, at ¶ 30, 141 N.M. 41, 150 P.3d at 1001; *Gallegos v. New Mexico State Corrections Dept.*, 115 N.M. 797, 800, 858 P.2d 1276, 1279 (Ct. App. 1992). Where the resolution and interpretation of conflicting evidence requires "expertise, technical competence, and specialized knowledge," and the agency possesses and exercises such knowledge and expertise and is acting within its authority, the reviewing court defers to the agency's judgment. *See Santa Fe Exploration Co.*, 114 N.M. at 114-15, 835 P.2d at 830-31. Although the evidence may support inconsistent findings, the reviewing court will not disturb the agency's findings if they are supported by substantial evidence on the record as a whole. *See Doña Ana Mutual Domestic Water Consumers*, 2006-NMSC-032, ¶ 11, 140 N.M. at 10, 139 P.3d at 170. The agency's decision will be upheld if the reviewing court is satisfied that evidence in the record demonstrates that the decision is reasonable. *See Santa Fe Exploration Co.*, 114 N.M. at 114, 835 P.2d at 830.

In contrast, the reviewing court conducts a de novo review to determine whether an agency's decision is in accordance with the law, and the reviewing court is not bound by the agency's legal

interpretations or conclusions. *See New Mexico Mining Ass'n*, 2007-NMCA-010, at ¶ 11, 150 P.3d at 995. An agency's ruling "should be reversed 'if the agency unreasonably or unlawfully misinterprets or misapplies the law.'" *Id.* (quoting *Archuleta*, 2005-NMSC-006, ¶ 18, 137 N.M. 161, 108 P.3d 1019). With regard to an agency's statutory authority, our Supreme Court has stated that "[s]tatutes create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute," and that "courts afford little deference to the agency's determination of its own jurisdiction." *In re Application of PNM Electrical Services v. New Mexico Public Utility Comm'n*, 1998-NMSC-017, ¶ 10, 125 N.M. 302, 305, 961 P.2d 147, 150. Still, "[o]n legal questions such as the interpretation of the [Oil and Gas Act] or its implementing regulations, [a reviewing court] may afford some deference to the [OC] Commission, particularly if the question at hand implicates agency expertise," so long as the court does not overlook that it "may always substitute its interpretation of the law for that of" the OC Commission. *Johnson v. New Mexico Oil Conservation Comm'n*, 127 N.M. 120, 123, 978 P.2d 327, 330 (1999). Finally, "[r]ules, regulations, and standards that have been enacted by an agency are presumptively valid and will be upheld if reasonably consistent with the authorizing statutes." *New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 11, 150 P.3d at 995.

Statutory Provisions

Appellants' arguments require this Court to carefully examine the statutory schemes of two acts. The Oil and Gas Act (or "O & G Act," Chapter 70, Article 2 NMSA 1978) created the OC Commission and confers upon it and the OC Division a number of powers and duties. *See, e.g.*, NMSA 1978, § 70-2-4 (1987), § 70-2-6 (1979), § 70-2-11 (1977), § 70-2-12 (2004). The OC Commission has "concurrent jurisdiction and authority with the division to perform its duties as

required by law." § 70-2-6.B; *see also* § 70-2-11.B (same). "In addition, any hearing on any matter may be held before the commission if the division director, in his discretion, determines that the commission shall hear the matter." § 70-2-6.B.

Subsection A of Section 70-2-6 of the O & G Act states:

> The division shall have, and is hereby given, jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of waste of potash as a result oil or gas operations in this state. It shall have jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil or gas operations.

Subsection A of Section 70-2-11 states:

> The division is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof.

Subsection B of Section 70-2-12 enumerates additional specific powers, stating:

> Apart from any authority, express or implied, elsewhere given to or existing in the oil conservation division by virtue of the Oil and Gas Act or the statutes of this state, the division is authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated in this subsection:
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> (15) to regulate the disposition of water produced or used in connection with the drilling for or producing of oil or gas or both and to direct surface or subsurface disposal of the water, including disposition by use in drilling for or production of oil or gas, in road construction or maintenance or other construction, in the generation of electricity or in other industrial processes, in a manner that will afford reasonable protection against contamination of fresh water supplies designated by the state engineer;
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> . . . .

(21) 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; and

(22) 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, including administering the Water Quality Act as provided in Subsection E of Section 74-6-4 NMSA 1978.

In contrast, the Water Quality Act (or "WQ Act," Chapter 74, Article 6 NMSA 1978) creates the Water Quality Control Commission (or "WQC Commission"). NMSA 1978, § 74-6-3 (2003) (also amended in 2007). The WQC Commission is the state water pollution control agency for purposes of the federal Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1251 *et seq.* (1987), and for various programs under the auspices of the federal Safe Drinking Water Act, 42 U.S.C.A. § 300f (1996). *See* § 74-6-3.E; 74-6-2.Q (2003). The federal Safe Drinking Water Act applies to state public water systems. *See* 42 U.S.C.A. § 300g (1974). The federal Water Pollution Prevention and Control Act establishes numerous goals under its policy of restoring and maintaining the "chemical and biological integrity of the Nation's waters." 33 U.S.C.A. § 1251.

Among many other mandatory and discretionary duties and powers, the WQ Act requires the WQC Commission, to adopt a comprehensive water quality management program and develop a continuing planning process, to adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the WQ Act, and to adopt regulations to prevent or abate water pollution in the state and to govern the disposal of septage and sludge. NMSA 1978, § 74-6-4.A-D (2003). The WQC Commission's water quality *standards* "shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act." § 74-6-4.C. The WQC Commission's *regulations* "shall not

specify the method to be used to prevent or abate water pollution but may specify a standard of performance for new sources that reflects the greatest reduction in the concentration of water contaminants that the [WQC] commission determines to be achievable through application of the best available demonstrated control technology, processes, operating methods or other alternatives, including where practicable a standard permitting no discharge of pollutants." § 74-6-4.D.

Subsection E of Section 74-6-4 of the WQ Act, which is referenced in Section 70-2-12.B(22) of the O & G Act, requires the WQC Commission:

> to assign responsibility for administering its regulations to constituent agencies so as to assure adequate coverage and prevent duplication of effort. To this end, the [WQC] commission may make such classification of waters and sources of water contaminants as will facilitate the assignment of administrative responsibilities to constituent agencies. The [WQC] commission shall also hear and decide disputes between constituent agencies as to jurisdiction concerning any matters within the purpose of the Water Quality Act. In assigning responsibilities to constituent agencies, the [WQC] commission shall give priority to the primary interests of the constituent agencies. The department of environment shall provide technical services, including certification of permits pursuant to the federal act, and shall maintain a repository of scientific data required by this [WQ] act.

The WQ Act includes the OC Commission as a "constituent agency." § 74-6-2.K. In contrast to the OC Commission's discretionary powers under Section 70-2-12.B of the O & G Act, under the WQ Act "[e]ach constituent agency shall administer regulations adopted pursuant to the Water Quality Act, responsibility for the administration of which has been assigned to it by the [WQC] commission." NMSA 1978, § 74-6-8 (1967). The WQ Act sets forth constituent agencies' discretionary powers, mostly in terms of assigned responsibilities. *See, e.g.*, NMSA 1978, § 74-6-9.B (1993) ("Each constituent agency may . . . develop facts and make studies . . . necessary to carry out the responsibilities assigned to the constituent agency."); § 74-6-10.A (1993) ("Whenever, on the basis of any information, a constituent agency determines that a person violated or is violating

a requirement, regulation or water quality standard adopted pursuant to the Water Quality Act or a condition of a permit issued pursuant to that act, the constituent agency may: . . issue a compliance order . . . ."); § 74-6-11.A (1993) ("If a constituent agency determines upon receipt of evidence that a pollution source or combination of sources over which it has been delegated authority by the commission poses an imminent and substantial danger to public health, it may bring suit . . . ."

The WQ Act also explicitly sets forth its limitations, for example:

> B. The Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, the Ground Water Protection Act or the Solid Waste Act except to abate water pollution or to control the disposal or use of septage and sludge.
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> . . .
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> E. The Water Quality Act does not supersede or limit the applicability of any law relating to industrial health, safety or sanitation.
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> F. Except as required by federal law, in the adoption of regulations and water quality standards and in an action for enforcement of the Water Quality Act and regulations adopted pursuant to that act, reasonable degradation of water quality resulting from beneficial use shall be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded.
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> G. The Water Quality Act does not apply to any activity or condition subject to the authority of the oil conservation commission pursuant to provisions of the Oil and Gas Act, Section 70-2-12 NMSA 1978 and other laws conferring power on the oil conservation commission to prevent or abate water pollution.
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> . . . . .

NMSA 1978, § 74-6-12 (1999).

In addition to its explicit limitations, the WQ Act expresses a general policy that helps place it in context:

> The Water Quality Act provides additional and cumulative remedies to prevent, abate and control water pollution, and nothing abridges or alters rights of action or

> remedies in equity under the common law or statutory law, criminal or civil. No provision of the Water Quality Act or any act done by virtue thereof estops the state or any political subdivision or person as owner of water rights or otherwise in the exercise of their rights in equity or under the common law or statutory law to suppress nuisances or to abate pollution.

NMSA 1978, § 74-6-13 (1967).

Appellants' Arguments

Appellants challenge the revised rules on a number of bases. They argue that "[t]he [OC] Commission's no degradation policy exceeds its jurisdiction and violates its statutory duties under the Oil and Gas Act." Included in that argument are incorrect assumptions. First, the argument is based on the assumption that the OC Commission's rules must be restricted by the Water Quality Act. Appellants' no-degradation argument would only be relevant if the Water Quality Act limits the OC Commission's own authority under the Oil and Gas Act to regulate the disposition of oil and gas industry wastes to protect public health and the environment. *Cf.* 70-2-12.B(21) & (22). Second, Appellants assume that the revised rules amount to a "no degradation policy," which, although somewhat superfluous, this Court will address in the last portion of this opinion.

Appellants also raise due process issues, which are addressed following the analysis of issues involving statutory authority. Finally, this opinion will address Appellants' assertions that some of the OC Commission's factual findings and various provisions in the new rules are not supported by substantial evidence.

A. Statutory Authority Issues

When construing statutory provisions, the reviewing court begins with the plain language and assumes "that the ordinary meaning of the words expresses the legislative purpose." *New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 12, 141 N.M. 41, 150 P.3d at 996. The main goal is to give

effect to the Legislature's intent, which is ascertained "by reading all the provisions of a statute together, along with other statutes in pari materia." *Id.*

With regard to their assertion that the OC Commission's no-degradation policy exceeds its jurisdiction and violates its statutory duties, Appellants state that the OC "Commission's jurisdiction under the Oil and Gas Act is based on the prevention of waste of oil and gas and the protection of correlative rights," and that "[w]hile [the Commission] has broad general powers to effect the purposes of the Act, its delegated authority is expressly defined and limited in the enumeration of powers section of the Act . . . ." SI, at 3. Appellants attempt to imply a limitation that the Legislature did not provide in the statutory provisions, and that is in fact clearly contradicted by the plain language of both the O & G Act and the WQ Act. For instance, Appellants overlook the fact that the preface of the "enumeration of powers" provision they reference states: "*Apart from any authority, express or implied, elsewhere given to or existing in the oil conservation division by virtue of the Oil and Gas Act or the statutes of this state*, the division is authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated in *this subsection*." 70-2-12.B (emphasis added). The language requires nothing in the way of construction. Regardless of any other language in the O & G Act, or other statutes–such as the WQ Act–and apart from any other stated purposes of the O & G Act, the OC Division is explicitly authorized to make rules and regulations and to issue orders with respect to the various "purposes and subject matter" specifically set forth in Subsection B of Section 70-2-12. The plain language expresses a clear legislative intent to prevent the use of other provisions of the O & G Act, or any other statute, to confine the OC Division's authority to act under Section 70-2-12.B's specific powers.

As indicated in this Court's recap of the statutory provisions above, Section 70-2-12.B's

specific authorizations include, among many others, the authority "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," and "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, *including* administering the Water Quality Act as provided in Subsection E of Section 74-6-4 NMSA 1978." § 70-2-12.B(21) & (22) (emphasis added). Rather than limiting the OC Division's authority, Section 70-2-12 actually expands it.

Appellants also attempt to use the Water Quality Act to manufacture a restriction on the OC Division's rulemaking authority under Section 70-2-12 of the O & G Act. First, they assert that Subsection B of Section 70-2-12 of the O & G Act "*directs* the Commission" to perform enumerated functions. *See* SI, at 3 (emphasis added); *see also* SI at 6 (stating that Section 70-2-12(B)(22) "expressly *require[s]* the Commission, where oil field wastes are concerned, to 'administer the Water Quality Act'"). However, Subsection B's language is not mandatory but "*authorizes*" the OC Division to make rules and regulations for the various purposes and with respect to the subject matter included in the paragraphs of that subsection. (Emphasis added). Second, while indicating that the O & G Act "directs" the OC Commission to perform acts set forth in Subsection B of Section 70-2-12, Appellants accentuate the language in Paragraph 22, "'including administering the Water Quality Act.'" They then assert that the OC "Commission has *also* been delegated certain duties by the Water Quality Act," thereby insinuating provisions under both acts are mandatory, and further state that the OC Commission, "as a 'constituent agency' of the [WQC Commission], is charged by statute with the 'administration' of the regulations of the [WQC Commission]." *See* SI, at 3-4 (emphasis

added). Appellants, in effect, attempt to graft the two acts onto one another and to imply that if the OC Commission exercises its authority under the O & G Act to regulate oil and gas industry waste so as to protect public health and the environment, their regulations are limited by what the WQC Commission has determined to be sufficient to protect water under the WQ Act. It appears that Appellants recognized that they could not cleanly consolidate the two acts, forcing them to use the tell-tale word "also" when structuring their argument. *See* SI, at 3. That is, the plain language of the two acts shows that the OC Commission has authority under the O & G Act that is distinct from its duties as a constituent agency under the WQ Act.

For instance, the plain language of Paragraph (22) of Section 76-6-4.B demonstrates that the OC Division has the authority to make regulations of oil and gas industry waste disposal "to protect public health and the environment, *including* administering the Water Quality Act," but that the OC Division is not limited in its efforts by the Water Quality Act. (Emphasis added). More specifically, the term "including" does not limit the authority to regulate disposition of oil and gas industry waste to actions allowed under the WQ Act, but instead acknowledges the OC Commission's authority to administer the Water Quality Act *in addition to* other efforts it deems necessary to protect public health and the environment. *Cf. In re Estate of Corwin v. Merchants Bank & Trust Co. of Norwalk*, 106 N.M. 316, 317, 742 P.2d 528, 529 (Ct. App. 1987) (indicating that the word "including" "is a word of expansion rather than of limitation"); *accord Board of County Comm'rs v. Bassett*, 8 P.3d 1079, 1983 (Wyo. 2000) ("The use of the word 'includes' is significant because 'includes' generally signifies an intent to enlarge a statute's application, rather than limit it, and implies the conclusion that there are other items includable, though not specifically enumerated.").

Moreover, the plain language of the WQ Act assigns responsibilities to constituent agencies

for administering Water Quality Act *regulations*, not water quality *standards*. *See* § 74-6-4.E; § 74-6-8. In analyzing the WQ Act's procedures for adopting water quality standards and for adopting regulations, our Court of Appeals has read all of the WQ Act provisions in context and concluded that the Legislature intended to distinguish between regulations regarding water pollution and standards for water quality. *See New Mexico Mining Ass'n*, 2007-NMCA-010, ¶¶ 14-16, 141 N.M. 41, 150 P.3d at 996-97. That analysis and conclusion provide guidance in this matter. That is, the statutory language of the WQ Act distinguishes water quality standards from regulations to prevent or abate water pollution, and explicitly indicates that constituent agencies are assigned responsibility for administering WQ Act *regulations*. *See* § 74-6-4.C, D, E; § 74-6-8. Although the WQC Commission's water quality standards may be applicable when an agency acts as a constituent agency to administer WQ Act regulations (to the extent those WQ Act regulations incorporate or rely on water quality standards), the WQ Act does not limit the OC Commission to those water quality standards in making its own regulations under the O & G Act. *Compare* § 74-6-4, NMSA 1978, § 74-6-5 (2005), § 74-6-8, § 74-6-9, *and* § 74-6-10, *with* 70-2-12.B.

Appellants argue that the OC Commission's regulations must not stray from the WCQ Commission's water quality standards. *See, e.g.*, SI, at 4-5, 7-8. While noting that Appellants point to no particular responsibility that has been assigned to the OC Commission as a constituent agency, even if Appellants' argument is construed as asserting that the OC Commission's assigned constituent agency responsibilities required it to enforce or apply a particular WQ Act regulation that incorporates water quality standards, the argument still fails for a number of reasons.

Under the WQ Act, the WQC Commission establishes water quality standards that "shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes

of the Water Quality Act." § 74-6-4.C. However, unlike authorization under the O & G Act, the WQ Act provision for adopting water quality standards does not specifically include protection of the environment, which is a broader concept than public health, as a primary consideration in establishing water quality standards. *See generally U.S. v. Overholt*, 307 F.3d 1231, 1257 (10th Cir. 2002) (discussing broad definitions of the word "environment," including "'surroundings,'" taken from WEBSTER'S II NEW RIVERSIDE DICTIONARY 232 (rev. ed. 1996), and "'that which environs; the objects or the region surrounding anything," taken from OXFORD ENGLISH DICTIONARY (2d ed. 1989) (electronic); BLACK'S LAW DICTIONARY 534 (6th ed. 1990) (defining "environment" as "[t]he totality of physical, economic, cultural, aesthetic, and social circumstances and factors which surround and affect the desirability and value of property and which also affect the quality of peoples' lives"). Although under the WQ Act's criteria for adopting water quality standards, the WQC Commission "shall give weight *it deems appropriate* to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes," that cost-benefit consideration based on the WQC Commission's discretionary weighting sets apart the parameters of the WQ Act from the O& G Act's authorization of the OC Commission regulate the disposition of nondomestic wastes resulting from the oil and gas industry so as "to *protect . . . the environment.*" *Compare* § 74-6-4.C, *with* § 70-2-12.B(21) & (22) (emphasis added). In establishing water quality standards, the WQC Commission may exercise its discretion in weighting various factors pursuant to Subsection C of Section 74-6-4. However, nothing in either act requires the OC Commission, in exercising its own authority to protect the environment when regulating disposition of oil and gas industry waste, to weight environmental considerations in the same way the WQC Commission has for adopting its

water quality standards, or to limit the environmental components the OC Commission considers to fish and wildlife. Likewise, unlike the WQ Act, the O & G Act authorizes regulation of oil and gas industry waste to protect the environment without requiring allowances for "reasonable degradation of water quality resulting from beneficial use." *Compare* § 74-6-12.F, *with* § 70-2-12(21) & (22). This Court need not reach the issue of determining the meaning of "beneficial use" as that phrase is used in the WQ Act.

Although under the WQ Act the WQC Commission adopts standards and regulations and shall assign to the OC Commission, as a constituent agency, responsibilities to administer the WQC Commission's regulations, the WQ Act does not restrict the OC Commission or Division's independent authority under the O & G Act to take more prudent precautionary measures to protect the environment from the disposal of oil and gas industry waste. *Compare* § 74-6-4.E *with, e.g.*, § 70-2-12.B(22). In other words, when under the WQ Act the WQC Commission assigns responsibilities to the OC Commission in its role as a constituent agency, the WQ Act provides a *floor* of protections based on WQ Act criteria; however, the WQ Act does not create a *ceiling* on the OC Division or Commission's authority, pursuant to the O & G Act, to make rules, regulations and orders for Section 70-2-12, Subsection B's purposes and subject matter, which specifically include regulating disposition of oil and gas industry waste so as to protect public health and the environment. *See* § 70-2-12.B(22).

In addition, other explicit provisions in both acts support the conclusion that the WQ Act does not constrain the OC Commission's authority to make regulations more protective of the environment–which by definition encompasses such components as native soils, vegetation, invertebrates, and wildlife, as well as water–than the water quality standards adopted by the WQC

Commission. For instance, like Paragraph (22), Paragraph (21) of Subsection B of Section 70-2-12 of the O & G Act gives the OC Commission the broad authority "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*." (Emphasis added).

Moreover, the WQ Act expressly states an overarching policy that it provides "*additional and cumulative remedies* to prevent, abate and control water pollution," and that "*[n]o provision of the Water Quality Act or any act done by virtue thereof* estops *the state* or any political subdivision or person as owner of water rights *or otherwise in the exercise of their rights* in equity or under the common law *or statutory law* to suppress nuisances *or to abate pollution*." § 74-6-13. The plain language of the WQ Act demonstrates that the Legislature intended it to provide a floor of protections rather than a ceiling.

Perhaps most significant and dispositive, the WQ Act sets forth express limitations on its provisions, including: "The Water Quality Act *does not apply to any activity or condition subject to the authority of the oil conservation commission pursuant to provisions of the Oil and Gas Act, Section 70-2-12 . . . and other laws conferring power on the oil conservation commission to prevent or abate water pollution*." § 74-6-12.G (emphasis added). Appellants would have this Court believe that the explicit language of Section 74-6-12.G is in conflict with the Legislature's later addition of the language to Section 70-2-12.B(22) of the O & G Act that states, "including administering the Water Quality Act as provided in Subsection E of Section 74-6-4," and that the latter, being more specific, should apply over the general language of the WQ Act. Again inserting mandatory language, Appellants assert that "the Commission ignores the later adopted express provisions in Section 70-2-12(B)(22) of the Oil and Gas Act *which require* it to administer the Water Quality

Act." *See* SI, at 10 (emphasis added). This Court rejects that argument. Again, although the WQ Act employs mandatory language with regard to constituent agencies administering its regulations, Section 70-2-12.B(22) of the O & G Act cannot be read to expressly require the OC Commission to administer the Water Quality Act or to limit the OC Commission's authority to that which is assigned to it as a constituent agency by the WQC Commission. The language that Appellants rest on merely recognizes the OC Division's authority to act pursuant to the WQ Act and would allow the OC Division to rely on the WQ Act's water protections, but does not mandatorily limit the OC Division's own authority under the O & G Act.

In addition, the law presumes that, when the Legislature amended Section 70-2-12.B (2004) of the O & G Act to add "including administering the Water Quality Act as provided in Subsection E of Section 74-6-4," it was aware of the existence of Section 74-6-12.G (last amended in 1999, and expressly excluding the OC Commission's authority to prevent or abate pollution under Section 70-2-12 of the O & G Act from the WQ Act), and of Section 74-6-13 (enacted in 1967, and expressly stating that the WQ Act provides cumulative and additional remedies, not limitations on the state acting pursuant to statutory authority), and presumes that the Legislature "did not intend to enact a law inconsistent with existing laws." *See ACLU of NM v. Albuquerque*, 2006-NMCA-078, ¶ 13, 139 N.M. 761, 768-69, 137 P.3d 1215, 1222-23 (quotations and alterations omitted). Also, the OC Commission had already been included as a constituent agency under the WQ Act when the WQ Act provision expressly excluding the OC Commission's authority under the O & G Act from the WQ Act was last amended. *Compare* § 74-6-2.K (including OC Commission as a constituent agency as early as 1993), *with* § 74-6-12.G (last amended in 1999, and stating "The Water Quality Act does not apply to any activity or condition subject to the authority of the oil conservation commission

pursuant to provisions of the Oil and Gas Act, Section 70-2-12 . . . .").

Furthermore, the logical reading of the two acts, as discussed in more detail above, demonstrates there is no conflict in the provisions. That is, when the OC Commission is acting pursuant to its authority under Section 70-2-12 of the O & G Act to regulate disposal of oil and gas industry waste so as to protect the environment, the WQ Act does not apply to limit that authority, even though the OC Commission would still have the discretion to use the WQ Act; yet, when the WQC Commission has assigned responsibilities to the OC Commission as a constituent agency pursuant to the mandatory language of WQ Act, then the WQ Act requires the OC Commission to comply with those regulations, but only in its capacity as a constituent agency–not based on the OC Division's independent authority under Section 70-2-12 of the O & G Act, but based on the WQ Act. *Cf. New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 8, 141 N.M. 41, 150 P.3d at 994 (discussing the relationship between the WQC Commission and the New Mexico Environment Department, with the latter being a constituent agency charged with various duties pursuant to regulations and standards adopted under the WQ Act). Again, the WQC Commission's assignment of responsibilities to the OC Commission as a constituent agency does not deprive the OC Commission of its own authority under the O & G Act.

Had the Legislature intended the WQ Act to carve out an exception to the OC Commission's authority to protect the environment, including but not limited to water, under the Subsection B of Section 70-2-12 of the O & G Act, it could have done so. *Compare* § 74-6-12.B ("The Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, the Ground Water Protection Act or the Solid Waste Act *except* to abate water pollution or to control the disposal or use of septage and

sludge." (Emphasis added)). Also telling is the fact that when the Legislature amended Section 70-2-12.B(22) of the O & G Act to add the language "including administering the Water Quality Act," it did not remove from the preface to that provision the language, "*Apart from any authority, express or implied, elsewhere given to or existing in* the oil conservation division by virtue of the Oil and Gas Act *or the statutes of this state*." (Emphasis added). Likewise, the Legislature chose not to create a discrete provision or to use mandatory language to limit the OC Commission's authority to protect the environment to that delegated to it by the WQC Commission as a constituent agency, but instead maintained discretionary prefatory language and added inclusive language. *See* § 74-6-12.B(22). The plain language of both the WQ Act and the O & G Act demonstrates that the Legislature did not intend to apply the WQ Act so as to constrain the OC Commission's authority under the O & G Act, and this Court finds no reason to depart from that plain language. *See Cobb v. State Canvassing Bd.*, 2006-NMSC-34, ¶ 34, 140 N.M. 77, 86-87, 140 P.3d 498, 507-08 (indicating that a reviewing court "will not read into a statute . . . language which is not there, particularly if it makes sense as written," nor "depart from the plain language of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions").

This Court's reading of the two acts also reconciles the language in the WQ Act regarding concerns about duplication of efforts. *See* § 74-6-4.E; *cf. New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 12, 141 N.M. 41, 150 P.3d at 996 (discussing harmonizing statutory provisions to facilitate their operation and to achieve statutes' goals). The term "duplication" suggests making the same efforts, but does not preclude providing more or different protections. That is, the OC Commission is not duplicating efforts of the WQC Commission when, acting under its independent authority

pursuant to the O & G Act, it provides greater or different environmental protections than those being provided by the WQC Commission, or when it acts only as a constituent agency pursuant to the WQC Act.

Empowering the OC Commission with authority to make regulations more protective of the environment than what the WQC Commission's standards require to protect water quality, or to provide different protections, makes a good deal of sense given the OC Commission's latitude to allow innovative ways to dispose of nondomestic wastes created by the oil and gas industry, such as landfarms, which are not creatures required by statute. *Cf., i.e.*, § 70-2-12.B(21) & (22); *see also* Testimony of von Gonten, at RA000734 ("We can see that there is no logical reason to allow even small amounts of contamination to be released from any surface waste management facility, regardless of whether it is a landfarm, landfill, oil treatment plant, or evaporation pond."). The Legislature apparently recognized that, in this specialized area, the OC Commission has the expertise to determine what sorts of risks and costs to the environment should be tolerated for the industry's benefit of disposing its waste, and, conversely, what protective measures the industry should be required to take in exchange for that benefit. *Cf. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n*, 98 N.M. 240, 245, 647 P.2d 873, 880 (Ct. App. 1982) (indicating that "[i]t is not difficult to see the wisdom behind" a provision in the WQ Act that allows constituent agencies to recommend regulations for adoption by the WCQ Commission because of those agencies' expertise, as compared with the New Mexico Environmental Improvement Board, which "consists simply of 'five members appointed by the governor'" (citation omitted)); *see generally New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 34, 141 N.M. 41, 150 P.3d at 1002 (recognizing that an agency may use "'conservative assumptions in interpreting the data with respect to carcinogens, risking error

on the side of overprotection rather than underprotection'" (internal citations omitted)); *compare* NMSA 1978, § 70-2-4 (1987) (creating the OC Commission and requiring that it be comprised of "a designee of the commissioner of public lands, a designee of the secretary of energy, minerals and natural resources and the director of the oil conservation division," and that the public lands designee and secretary of energy designee "shall have expertise in the regulation of petroleum production by virtue of education or training"), *and* NMSA 1978, § 70-2-5 (1987) (requiring the director of the OC Division to be a registered petroleum engineer or "by virtue of education and experience have expertise in the field of petroleum engineering"), *with* NMSA 1978, § 74-6-3.A (2003) (setting forth the composition of the WQC Commission, which includes various cabinet and agency appointees of the governor or their designees, including the chair of the OC Commission, and representatives of the public appointed by the governor).

Appellants cite *Continental Oil Co. v. Oil Conservation Comm'n*, 70 N.M. 310, 318, 373 P.2d 809, 816 (1962), for the proposition that the OC Commission "is a creature of statute and its powers are expressly defined and limited by law." SI, at 8. That proposition is accurate. However, *Continental* does not stand for the proposition that the OC Commission's powers are limited to the law as it was at the time that decision was rendered. The OC Commission's powers can be modified and expanded by statute as well, and Section 70-2-12.B expressly authorizes regulation of oil and gas industry waste so as to protect the environment. In addition, Appellants' assertions regarding the OC Commission's authority appear to be inconsistent–that is, if the OC Commission's authority was limited to preventing waste of oil and gas and the protection of correlative rights, as Appellants argue, then the OC Commission could not also perform what Appellants have dubbed as the "*duty* of the [OC] Commission to administer the Water Quality Act" pursuant to Section 70-2-12.B(21)

& (22). *Compare* SI, at 3, *with* SI, at 8 (emphasis added). Section 70-2-12.B expressly authorizes the OC Division to regulate oil and gas industry waste disposal under that provision, and Appellants point to no provisions of the O & G Act or other statutes that undermine that authorization.

Appellants also argue that interpreting the O & G Act to provide the OC Commission with the authority to protect the environment when regulating oil and gas industry waste disposal "renders provisions of the Water Quality Act superfluous and surplusage and therefore violates fundamental principles of statutory construction." SI, at 11-12. This Court also rejects that argument for a number of reasons. First, Appellants fail to point to any provision that is at risk of being nullified. Second, this Court can identify various statutory provisions that would be rendered "superfluous and surplusage" if it were to embrace the construction advanced by Appellants–for instance, Section 70-2-12.B's language, "[a]part from any authority, express or implied, elsewhere given to or existing in the oil conservation division by virtue of the Oil and Gas Act or the statutes of this state," Section 74-6-12's language, "[t]he Water Quality Act does not apply to any activity or condition subject to the authority of the oil conservation commission pursuant to provisions of the Oil and Gas Act, Section 70-2-12 NMSA 1978 and other laws conferring power on the oil conservation commission to prevent or abate water pollution," and Section 74-6-13's language, beginning ""[t]he Water Quality Act provides additional and cumulative remedies to prevent, abate and control water pollution." This Court's interpretation gives effect to the provisions of both the O & G Act and the WQ Act. Contrary to Appellants' assertions, given the plain language of both the O & G Act and the WQ Act, the OC Commission acted properly when it adopted the new rules. *See* SI, at 5.

The OC Commission's Findings conform to the plain language of the statutory provisions as well. Finding 22 states:

> Protection of the environment is not limited to protection of fresh water and prevention of human exposure to toxic agents, but also includes protection of soil stability and productivity, agriculture, wildlife, biodiversity and, in appropriate circumstances, the aesthetic quality of the physical environment.

RA000005; *see also* SI, at 5 (citing that Finding). Finding 24 states:

> Although the Commission and the Division have authority pursuant to NMSA 1978 Section 70-2-12.B(22), as amended, to apply the Water Quality Act to certain oil and gas industry operations, that authority is included within, and does not limit, the general authority of the Commission and the Division to regulate the disposition of oil and gas industry wastes under the Oil and Gas Act, without reference to the Water Quality Act.

RA000005; *see also* SI, at 5 (citing that Finding). Although, this Court is not bound by the OC Commission's interpretation of its statutory authority, here, the OC Commission's view of its authority is clearly in accordance with the various statutory provisions and with this Court's independent analysis of those provisions. *See New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 11, 141 N.M. 41, 150 P.3d at 995. The WQ Act does not limit the OC Commission's authority to make regulations to protect the environment to a greater extent than, or in a different manner from, those provided in the WQC Commission's water quality standards and regulations. This Court's review and analysis of the plain language of the acts makes that conclusion inevitable, and, without needing to defer to the OC Commission's interpretation, this Court finds that the rules are within the OC Commission's statutory authority, are consistent with the statutory provisions, and should be upheld against Appellants' "jurisdictional" challenge. *See PNM Electrical Services*, 1998-NMSC-017, at ¶ 10, 125 N.M. at 305, 961 P.2d at 150 (indicating that administrative agencies are limited to the power and authority that is expressly granted and necessarily implied by statute, and affording little deference to the agency's determination of its own jurisdiction); *cf. New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 11, 141 N.M. 41, 150 P.3d at 995 (stating that "[r]ules, regulations, and

standards that have been enacted by an agency are presumptively valid and will be upheld if reasonably consistent with the authorizing statutes").

Appellants further argue that "[t]he Commission's invocation of its general authority under the Oil and Gas Act is disingenuous[ ] because it only applies its no degradation policy to WQC [Commission] 3103 Groundwater constituents and to the protection of fresh water." *See* SI, at 7. This Court disagrees. Nothing precludes the OC Commission from regulating the same contaminants that have been determined to be harmful in another venue or to protect the environment from those contaminants to a greater degree, and there is no irony in the OC Commission's reference to the WQC Commission having identified the contaminants as constituents of concern for water quality protection. *See* SI, at 7. It is also reasonable for the OC Commission to use the phrase "WQCC 3103 Groundwater Constituents" as shorthand for a rather lengthy list of contaminants. Furthermore, there is ample support in the record to demonstrate that the OC Commission is protecting the environment–which includes not only water, but vegetation and soils as well–and that the WQC Commission's standards indicate that its protection of fresh water with regard to human health and welfare is more limited. *See, e.g.,* 19.15.2.53.G(6)(e), at RA000067 ("If the concentration of those constituents exceed the PQL or background concentration, the operator shall either perform a site specific risk assessment using EPA approved methods and shall propose closure standards based upon individual site conditions that protect fresh water, public health, safety and the environment . . . ."; 20.6.2.3103 NMAC (adopted under the WQ Act and referring to "Human Health Standards," "Other Standards for Domestic Water Supply," and "Standards for Irrigation Use"); *see also* § 74-6- 4.A-D. For instance, testimony before the OC Commission by the New Mexico Environment Department indicates that those contaminants (or "WQCC 3103 Groundwater

Constituents") threaten the environment, which is reflected in the OC Commission's rule basing closure standards "upon individual site conditions that protect fresh water, public health, safety and the environment." *See* 19.15.2.53.G(6)(e); *e.g.*, Finding 147, at RA000024, Findings 163-64, at RA000027; Testimony of von Gonten, at RA000713-16, RA000720, RA000731; Testimony of Dr. Donald A. Neeper (expert on soil physics testifying for Citizens), at 1504-05, 1511-1534, 1620-21. Looking to what the WQC Commission has already determined to be harmful to water quality also makes sense given the fact that the OC Commission would need to provide those minimal protections as a constituent agency; however, that does not preclude the OC Commission from improving on those protections to protect the environment under its own O & G Act authority, particularly in light of the long-term nature of landfarms.

Quite revealingly, industry representatives, at least initially, recognized the OC Commission's broader authority under the O & G Act. For instance, the Industry Committee submitted comments in March 2006 advocating for their own rules changes and indicating their proposed changes would be "protective of fresh water, public health and the environment." RA003467. Their comments included recommending a provision referencing "environmentally acceptable bioremediation" RA003478. In addition, September 2006 comments by Appellant Marbob Energy Corporation advocated for its version of closure standards that "would still protect human health and the environment." RA004118.

Moreover, Appellants' complaints about the Commission's reliance on the "WQCC 3103 Groundwater Constituents" is really somewhat of a red herring borne of Appellants' conflation of the two acts. The OC Commission, when acting under its own authority pursuant to the O & G Act, is entitled to pursue a mission different from or broader than that which the WQC Commission

pursues under the WQ Act. More specifically, when the OC Commission exercises its discretion pursuant to the O & G Act to allow the industry to engage in a means of waste disposal, like landfarms, the OC Commission also has discretion to put environmental protections in place with regard to that disposal and is not limited by the same considerations the WQC Commission would need to account for when developing water quality standards. *Cf., e.g.* Findings 49-51, 54, 56-58 at RA000009-10, Findings 105-117, at RA000018-19 (illustrating partial spectrum of innovations created for waste disposal). The testimony of Mr. von Gonten, who is a senior hydrologist with the Oil Conservation Division's Environmental Bureau, helps illustrate the difference between the mission of the OC Commission and that of the WQC Commission: "Rule 53 is designed to prevent releases, not to permit releases. Our goal is that there should be no releases as a result of operations." RA000731; *see also* Testimony of von Gonten, at RA000734 ("We can see that there is no logical reason to allow even small amounts of contamination to be released from any surface waste management facility, regardless of whether it is a landfarm, landfill, oil treatment plant or evaporation pond."). He also indicated that the industry's recommendations for soil closure concentrations were rejected due to concerns that landfarms of "up to 500 acres in size" will "handle *large volumes* of poorly characterized oil-contaminated waste and *will be operational for many years*." RA000731 (emphasis added). While the WQC Commission sets standards for water quality that will at a minimum protect the public health or welfare and enhance the quality of water, the OC Commission regulates disposal of industry waste and is entitled to prevent releases into the environment of contaminants that result from various means of waste disposal in order to protect the environment. In other words, when allowing the oil and gas industry to benefit by employing innovative means of disposing its own waste, the OC Commission can, pursuant to its authority

under Section 70-2-12.B(21) and (22), allocate to that industry the burden of ameliorating risks to the environment that it has created through that innovative means of disposal, without constraint by the WQ Act.

In adopting the new rules provisions, the O & G Commission acted within the authority under Paragraph B of Section 70-2-12 of the Oil and Gas Act. The rules and order are in accordance with the law and are not arbitrary or capricious.

B. Due Process Issues

Appellants also argue that the OC Commission's alteration of its originally proposed rule violates their due process rights. SI, at 15. They assert that "affected parties could not have been provided sufficient and unambiguous notice of the proposed rules or afforded a reasonable opportunity to participate in the hearing because significant provisions in the new rules were not proposed by the Division, nor considered at the hearing." SI, at 16. This Court rejects Appellants' argument.

"Before due process is implicated, the party claiming a violation must show a deprivation of life, liberty, or property." *Santa Fe Exploration Co.*, 114 N.M. at 110, 835 P.2d at 826. To comport with due process requirements, it is sufficient to give general notice of issues to be presented to the agency before it makes its final decision. *Id.* at 111, 835 P.2d at 827. An agency's "craft[ing] a unique solution to the problem presented to it" does not undermine the process by which it reached its conclusion. *Id.*

In *Santa Fe Exploration*, an appellant argued that he was denied procedural due process when the OC Commission failed to provide notice prior to a hearing that production might be reduced as a consequence of the hearing, and that the only issues properly before the OC Commission were

whether a certain well should be approved and what production penalty should be imposed *Id.* at 1 10, 835 P.2d at 826. In analyzing the due process argument that the OC Commission went beyond those issues, the Supreme Court of New Mexico discussed at some length another case wherein an appellant had "contended that its procedural due process rights were denied because the notice provided was not sufficiently specific to allow [the appellant] to prepare for issues to be addressed at the hearing." *Id.* at 110-11, 835 P.2d at 826-27 (discussing *Nat'l Council on Compensation Ins. v. New Mexico State Corporation Comm'n*, 107 N.M. 278, 756 P.2d 558 (1988)). The Court observed that in *National Council* it had disagreed and held that the notice comported with due process requirements because it provided the appellant with "'an opportunity to be heard by reasonably informing [the appellant] of the matters to be addressed at the hearing so that it was able to meet the issues involved.'" *Id.* (internal citations omitted; alterations in original). With regard to the facts before it in *Santa Fe Exploration*, the Court concluded that informing the parties prior to an administrative hearing that the OC Commission would be considering "production rates from the various wells and the correlative rights of all parties concerned" gave sufficient notice that allowable production might be reduced as a result of the hearing. *Id.*

Although in the present matter Appellants do not clearly set forth a constitutionally protected interest of which they are being deprived, this Court, for purposes of this analysis, will assume that Appellants' reference to the rules having "a serious impact on their ability to manage oil field wastes in New Mexico" suffices. *But cf. AA Oilfield Serv., Inc., et al., v. New Mexico State Corporation Comm'n*, 118 N.M. 273, 278, 881 P.2d 18, 23 (1994) (indicating that "for a party to have standing to attack [an agency's] order, that party must first show that it has been prejudiced by the lack of notice and hearing"); *Santa Fe Exploration*, 114 N.M. at110, 835 P.2d at 826 (indicating that the

party claiming a violation of due process must first show a deprivation of life, liberty, or property); *cf. Maso v. New Mexico Taxation & Revenue Dept.*, 2004-NMCA-025, ¶¶ 14-15, 135 N.M. 152, 156, 85 P.3d 276, 280 (recognizing district courts' authority to rely on their original jurisdiction to consider constitutional claims related to agencies' actions, even when those claims rely in part on evidence outside of the administrative record). Nonetheless, Appellants fail to demonstrate that they were denied due process.

Appellants were given notice that the OC Division was pursuing a repeal of specific existing rules concerning surface waste management and "adopting . . . new rules containing revised and more comprehensive provisions with respect to the transportation and surface disposition of wastes, to be codified as Rules 51 and 52 [19.15.2.51 and 19.15.2.52 NMAC]," and "adopting a new and more detailed rule concerning the permitting and operation of surface waste management facilities, to be codified as Rule 53 [19.15.2.53]." The originally proposed rule includes the language: "A treatment zone on each landfarm cell shall be monitored *to ensure that contaminants are not transferred to the underlying native soil or the groundwater.*" RA003106 (emphasis added). The February 2006 version stated, "The operator shall monitor the vadose zone beneath the treatment zone in each landfarm cell *to ensure that contaminants do not migrate to the underlying native soil or to groundwater.*" RA003449 (emphasis added).

Also, on December 28, 2005, months prior to commencement of the hearing, the OC Division filed an amended draft that included numerical standards for residual concentrations of Section 3103 constituents in landfarms. RA003354. The Industry Committee took issue with those standards and presented testimony as to why less stringent standards would protect groundwater and that different standards should be applied to different areas. *See, e.g.*, Testimony of Dr. Daniel Bruce

Stephens, at RA00956-961, 00998-1000. Environmental interests and OC Division staff opposed the Industry Committee's position because it did not provide for the broader goal of protecting the environment, including native soils and species. *See, e.g.*, Testimony of Dr. Donald A. Neeper, at 1512: Testimony of von Gonten, at 000718-19. In response to the different positions, the OC Commission fashioned a compromise site-specific, risk assessment approach that is initialized when a release (determined by the background concentration benchmark) gives rise to concern, which is an approach similar to those that have been employed and accepted pursuant to other statutory provisions. *Cf. Kerr-McGee*, 98 N.M. at 243-44, 647 P.2d at 876-77 (detailing regulatory structure pursuant to the Water Quality Control Act that provided assessment of pollutant concentrations on case-by-case basis).

Appellants protest that "[a]t all times prior to the entry of this Order, the closure standards in the proposed rules were based on the WQCC 3103 Groundwater Constituent numerical standards multiplied by a Dilution Attenuation Factor ("DAF") of 1," and that the "rules adopted by the Commission changed the closure standards to background concentrations or the Practical Quantitation Limit." SI, at 14-15. The fact that the originally proposed versions of the rules were altered in the course of the rulemaking process does not mean that Appellants did not receive adequate notice. *Cf. Santa Fe Exploration*, 114 N.M. at 110-11, 835 P.2d at 826-27 (rejecting argument that because the Oil Conservation Commission went beyond issues originally proposed for hearing, it "decided an issue of which the parties neither had notice nor an opportunity to be heard"). To find otherwise would mean that the changes proposed by Appellants themselves could not have been incorporated into the rules.

In addition, industry representatives presented extensive testimony at various hearings on the

rules changes. Some of these Appellants represented the industry on the task force that participated in, and gave considerable input into, the rulemaking process. The risk-based, site-specific assessment approach to regulating oilfield wastes was actually proposed by the Industry Committee in March 2006. *See* Comments, at RA003467 (indicating that the industry committee had "presented a risk-based approach to regulating oilfield wastes" and that "[t]hese situations should be considered on a site by site basis"). The Industry Committee's comments also demonstrate that it was well aware of differences of opinion on appropriate standards. *See* Comments, at RA003467 (indicating that staff "questioned [the Industry Committee's] recommendations, appearing to take the position that risk-based standards could not be considered *unless risk was eliminated in all situations*" (emphasis added)); RA003476-77 (indicating that the "Industry Committee has substantial doubts that commercial laboratories in the State of New Mexico can routinely reach the level of accuracy and precision required" with regard to constituent values, and proposing language that would apply a factor of the background concentrations, "the practical quantitation limit ((PQL, or the concentration specified in the then current New Mexico Environment Department's Soil Screening Levels . . . using the more stringent of 'Residential Soil' or 'DAF 20' . . .").

At the hearing, various interests, including the Industry Committee, testified about standards they claimed were appropriate. Testimony on behalf of other interests, as well as the industry, provided Appellants with opportunities to contradict the approach the OC Commission took in the rules it adopted. For instance, testimony indicated that a "no release" goal was being pursued. *See, i.e.*, Testimony of von Gonten at RA000707, RA000734. Dr. Donald Neeper testified at length about the goal of minimizing releases, the effects of industry waste disposal on vegetation and invertebrates, and how soils might be affected differently depending on their particular

characteristics. *E.g.*, RA001503-05, RA001519, RA001620-21.

In addition, the testimony of Dr. Daniel Bruce Stephens, a witness for the Industry Committee, indicates that the industry was prepared to address the regulations that were at stake. For instance, he testified: "And what's being expected is to clean up the treatment zone to a level called the DAF 1 level, which is drinking water standards -- and that's suitable, that's acceptable. You could treat the treatment zone down to a DAF of 1, if that's possible -- which I don't think it really is . . . ." RA000960. Dr. Stephens also testified that different standards would be required to protect groundwater, depending on the size of the "source area." RA000955-56.

Appellants essentially argue that, had they realized the OC Commission would adopt rules that took more conservative approaches than those they wanted, they would have put on even better evidence that their approach was the best one, or that rules somewhere between the approach the industry advocated and the one the OC Commission adopted would be sufficient to achieve the OC Commission's goals. This Court rejects the implications of Appellants' argument. That is, nothing indicates that the Appellants failed to put on the best evidence they had to offer to support their approach, or that they would have advocated for an approach closer to, but not quite as stringent as that adopted by the OC Commission had they been given notice of the exact approach ultimately adopted.

Dr. Stephens' testimony, as well as many other aspects of the record, demonstrate that the industry knew of, and responded to the risk assessment approach and alteration of standards. *See, e.g.*, RA000954-61; RA003467; RA 003476-77. Like the appellants in *Santa Fe Exploration*, Appellants presented their positions, and the fact that those positions, or those of others that they opposed, were not adopted in toto does not mean that they were not provided adequate notice or due

process. *See* 114 N.M. at 111, 835 P.2d at 827.

Appellants received sufficient notice of, and fully participated in the rulemaking process in which their suggestions were not entirely accepted. Given that the OC Commission had before it testimony that presented differing views of risks involved with disposal of the oil and gas industry's waste, and of diverse environmental conditions, it was reasonable for the OC Commission to adopt regulations that require an assessment of operations when there has been a release of contaminants into the environment, giving consideration to the characteristics of that specific site; that place the burden on the industry to show, on a case-by-case risk assessment, that their activities are not putting the environment at risk; and that adopt conservative acceptable contaminant levels to initiate assessment processes. *Cf. New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 34, 141 N.M. 41, 150 P.3d at 1002 (recognizing that an agency may use "'conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of overprotection rather than underprotection'" (internal citations omitted)); *see also, e.g.*, Findings 163-65, at RA000027; Testimony of von Gonten, at RA000717-24; Testimony of Stephens, at RA000952-60. Due process did not obligate the OC Commission to give notice of the exact solutions it would ultimately adopt. *Cf. Santa Fe Exploration*, 114 N.M. at 110-11, 835 P.2d at 826 -27.

Appellants also argue that their due process rights were violated because the OC Commission failed to follow its own procedural rules. They assert that the OC Commission's procedural rules prohibit considering modifications of the original rule if they were not submitted ten days prior to the scheduled hearing, and that the rules limit the OC Commission's final order to the rule that was proposed. As support for their propositions, Appellants cite specific rules provisions. SI, at 15 (stating that "[t]he rules also provide that 'any person, other than the applicant or a commissioner,

recommending modifications to a proposed rule change shall, no later than 10 business days prior to the scheduled hearing date, file a notice of recommended modification with the commission clerk'" (citing NMAC 19.15.14.1204(C)(1)); SI, at 16 (asserting that "[t]hese rules state that after hearing '[t]he commission shall issue a written order adopting or refusing to adopt the proposed rule change, or adopting the proposed rule change in part . . . .'" (citing NMAC 19.15.14.1205(E)(3) (alterations in original)). This Court does not read those provisions so as to preclude proposed rules being amended through the rulemaking process.

As with statutory provisions, when construing a rule, a reviewing court begins with the plain language and assumes that the ordinary meaning of the words expresses the agency's purpose. *Cf. New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 12, 141 N.M. 41, 150 P.3d at 996 (addressing construction of statutes and rules). If the plain language creates an absurd or unreasonable result, the literal language should be rejected. *Id.*

Here, the plain language of Rule 19.15.14.1204(C)(1), "other than the applicant or a commissioner," unambiguously indicates that an Oil Conservation commissioner or the applicant, which in this instance is the Oil Conservation Division, is not limited to proposing modifications to a rule within ten days prior to a hearing. Appellants seem to overlook that exception. The apparent rationale of the exception is to allow the commissioners and the applicant to consider and respond to information provided throughout the rulemaking process, to incorporate solutions to concerns raised and suggestions given through the process, and, in general, to make the rulemaking process more than perfunctory. To read the rule so as to preclude any modifications during the rulemaking process would be to create an ambiguity where there is none in order to reach the absurd and unreasonable result of prohibiting the OC Commission from considering and responding to

information the rulemaking process is designed to facilitate.

The same is true for Appellants' assertion that Rule 19.15.14.1205(E)(3) NMAC only allows the OC Commission to adopt the rule as it was originally proposed, in its entirety, or a part of the originally proposed rule, without modifications. That reading would not account for the ability of commissioners or applicants to modify proposed rules during the rulemaking process pursuant to Rule 19.15.14.1204(C)(1). *Cf. New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 12, 141 N.M. 41, 150 P.3d at 996 (indicating that all provisions should be read together to ascertain the intent of the drafters). Again, the proposed interpretation would create the absurd and unreasonable result of precluding consideration of, and response to information obtained during the rulemaking process. Also, Appellants' suggested reading that a partial adoption of the original rule without modifications to those portions is the only alternative to adopting the exact originally proposed rule would mean that the OC Commission could not even provide language to reconcile the surviving portions or to account for those omitted.

In addition, even after the rules were adopted, Appellants still had opportunities to weigh in on them and for their proposed changes to be considered. 19.15.14.1223 NMAC (allowing "any party of record whom the order adversely affects" to file an application for rehearing "setting forth the respect in which the party believes the order is erroneous"). The record indicates that Appellants took advantage of that opportunity. *See* Industry Committee's Application for Rehearing, at 004120; *see also* Comments of Marbob Energy Corporation, at RA004118 (presenting its position on "the standards being ultra conservative," and asserting that the criteria that were used in developing the standards were "the most conservative possible").

This Court finds that Appellants were not denied due process.

C. Substantial Evidence Issues

Appellants further argue that "Order No. R-12460-B is arbitrary, capricious, and unreasonable and must be reversed because the order contains findings of material facts that are not supported by substantial evidence." SI, at 19. Essentially, Appellants invite this Court to reweigh the evidence to favor their positions over the evidence that supports the provisions adopted. However, after reviewing the whole record, including testimony presented by all the interests involved, the Court finds substantial evidence in the record to support the order, and therefore declines Appellants' invitation. *See, e.g., New Mexico Mining Ass'n*, 2007-NMCA-010, at ¶ 30, 150 P.3d at 1001.

First, Appellants object to provisions that ensure that soils and drill cuttings placed in a landfarm do not have chloride concentrations that exceed "500 mg/kg if the landfarm is located where groundwater is less than 100 feet but at least 50 feet below the lowest elevation at which the operator will place oil field waste," that require landfarm operators to monitor treatment zones "to ensure that prior to adding an additional lift," the chloride concentration does not exceed that limit, and that incorporate that limitation into treatment zone closure performance standards. SI, at 20 (citing 19.15.2.53(G)(1), (4), and (6)(d)), at RA000065, RA000066, RA00068). This being a highly technical area where the OC Commission possesses and exercises expertise, technical competence, and specialized knowledge of disposal of waste from the oil and gas industry and the risks and impacts involved with that disposal, this Court defers to the OC Commission's judgment on the appropriate level for acceptance of oil field waste, for monitoring prior to adding lifts, and for treatment zone closure performance standards. *Santa Fe Exploration*, 114 N.M. at 114-15, 835 P.2d at 830-31. Nonetheless, contrary to Appellants' assertions, this Court's whole record review finds

substantial evidence to support the provision and to find that the OC Commission's decision on this technical issue is reasonable. *See id.* at 115, 835 P.2d at 831.

For instance, Dr. Neeper, an expert in soil physics, testified that caution should be exercised in basing any standard on modeling that does not account for the unpredictability of "preferential flow" of contaminants through various types of soil conditions and "that is the reason that [he] propose[d] that the depth to groundwater beneath most surface management facilities should be 100 feet instead of 50 feet." RA001603-04. He also indicated that the bases of his concerns regarding higher concentrations of chlorides were due to its effects on soil and groundwater. RA001618-20. He further testified:

> I am suggesting that a 100-foot-depth-to-groundwater requirement is much more protective than the 50-foot depth. One reason for that is that, as the chloride progresses through the ground, if it's not being carried rapidly by preferential pathways, sometimes it follows a diffusion-like process, and a diffusion-like process is slowed by a factor of four if you double the distance. . . . We have incidents of contamination of groundwater at depths of 100 feet or much greater in New Mexico, but you buy yourself a lot more protection."

RA001633. Dr. Neeper's testimony regarding the adverse effects of chlorides at higher levels on soils, vegetation, and invertebrates, also supports the provision. *E.g.*, RA1512-28; RA001620-24. One can also reasonably infer from the testimony, including that of the Industry Committee's expert, that if the quality of the soil and vegetation is negatively impacted by the chlorides, those deteriorated conditions will facilitate transport of the contaminants through the ground. *Compare* Testimony of Neeper, at *e.g.*, RA001509, RA001512-28, and RA001620-24 (discussing negative impacts on vegetation), *with* Testimony of Stephens, at RA000917 ("[U]nder natural conditions we see the more vegetated the site, the lower the net infiltration. And likewise, it's -- this kind of concept or what we see in nature is relevant to how vegetative covers may be put on landfarms,

because the more vegetation that goes in on top of the landfarm, the less moisture is going to be available for net infiltration and lower potential to have water from the landfarm move into the vadose zone that underlies it.").

In addition, the Environmental Bureau Chief for the Oil Conservation Division testified that the 500 milligrams per kilogram chloride level would be more protective of the environment than the 1000 mg/kg level, and that a larger percentage of species would tolerate the 500 mg/kg level than the 1000 mg/kg level. RA000303-04. He also testified that at least one other state provides a tiered structure that begins with a chloride standard of 500 mg/kg. RA000289; *cf. New Mexico Mining Ass'n*, 2007-NMCA-010, at ¶ 34, 150 P.3d at 1002 (indicating that a federal agency's reliance on data similar to that used by the state agency in the case before the court provided support for concluding that the state agency had acted reasonably). Mr. von Gonten testified that a 1000 mg/kg chloride standard, although protective of some native plants species, would not protect others. RA000856-57. The Environmental Bureau Chief's testimony also indicates the importance of considering the depth to groundwater in the rules. RA000370-71 (testifying that the depth to groundwater, although "rank[ing] about the middle of the pack when it comes to input parameters," "does have something to do with" those parameters, and that the choice of fifty feet for depth to groundwater "builds us basically time, it's a time issue . . . . it would buy us some time").

Appellants assert that when Dr. Neeper's testimony "is examined it is clear that [his] testimony focused on re-vegetation standards not groundwater standards." SI, at 20. However, that assertion only serves to reaffirm this Court's determination above–that the OC Commission was acting to protect the environment–and negates Appellants' assertion to the contrary on that point. Dr. Neeper's testimony, as well as that of others, demonstrate that both the larger environment and

the water that is one environmental component were being considered by the OC Commission, and that both were considered in establishing the 500 mg/kg chloride standard for landfarms located where groundwater is less than 100 feet but at least 50 feet below the lowest elevation at which the operator will place oil field waste. While Appellants also object that Dr. Neeper is not an expert on groundwater or hydrocarbon degradation in landfarms, the record shows that an expert the Industry Committee cites in support of their position is not an expert on soils and, moreover, their expert's testimony does not negate Dr. Neeper's position with regard to environmental impacts. *See* Testimony of Stephens, at RA000917, RA000998-1000.

Specifically, in response to cross-examination, Dr. Stephens testified:

> Q. . . . . Now according to your testimony it is acceptable for contaminants that are of concern in this case to remain in the soil above background. You've testified to that, right?
>
> A. Yes.
>
> Q. So degradation of the soil is acceptable, or should be acceptable, according to your testimony?
>
> A. Under conditions that it does not affect the -- and again, my testimony is relative to risks to groundwater. So with respect to that, with respect to groundwater standards, yes.
>
> Q. How about with respect to soil standards?
>
> A. I don't know of any soil standards other than the voluntary cleanup – . . . .
>
> A. . . . . And [protection of groundwater is] my expertise, yes.
>
> Q. . . . . Would you agree there's a level at which chloride is toxic to plants?
>
> A. Yes.
>
> Q. And would you agree that therefore there's a level at which chloride will affect . . . will prevent effective re-vegetation of a landfarm?
>
> A. Possible.
>
> Q. And the determination of that level is not part of your work in this case, is it?
>
> A. No, I haven't testified as to what level is either toxic to plants or a level at which plant growth is impeded to some degree. . . .

RA00998-001000.

Moreover, Dr. Neeper was qualified as an expert witness and his testimony was presented without objection. Finally, unlike that of other expert witnesses, Dr. Neeper's methodology took into consideration idiosyncracies of various climates and ecosystems particular to New Mexico.

In sum, with regard to substantial evidence issues, the record as a whole amply demonstrates the interconnectedness of various components of the environment and that the OC Commission devised a rule based on credible scientific evidence that would promote protecting the environment. *See New Mexico Mining Ass'n*, 2007-NMCA-010, at ¶ 34, 150 P.3d at 1002. Although it seems the record may also support the more rigorous approach of requiring employment of the 500 mg/kg chloride standard across the board to protect vegetation, soil, wildlife, and water, regardless of the depth to groundwater, it is reasonable to infer that the OC Commission devised a compromise to balance and respond to the concerns of the Division, the environmentally-interested entities, and the Industry Committee. *See* Findings 121-23, at RA00020-21. Having reviewed the whole record, and, in light of the applicable standards of review, this Court finds the OC Commission's factual findings and adoption of rules providing that soils and drill cuttings placed in landfarms located where groundwater is less than 100 feet but at least 50 feet below the lowest elevation at which the operator will place oil field waste do not contain chloride concentrations that exceed 500 mg/kg, that require landfarm operators to monitor treatment zones "to ensure that prior to adding an additional lift" chloride concentrations do not exceed those levels, and that rely on that limitation for treatment zone closure performance standards, are supported by substantial evidence based on credible scientific testimony, are rationally based and reasonable, and are not arbitrary or capricious. *See Santa Fe Exploration*, 114 N.M. at 115, 835 P.2d at 831; *cf. Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, ¶¶ 17, 30, 133 N.M. 97, 104, 108, 61 P.3d 806, 813, 817; *New Mexico Mining*

Ass'n, 2007-NMCA-010, at ¶ 34, 150 P.3d at 1002.

Appellants also argue that "the provision in Rule 53.5(7)(a)(iii) that requires an 80% reduction of TPH by bioremediation is not supported by the evidence in this case and is arbitrary, unreasonable and capricious." SI, at 24. As with the preceding issue, based on a whole record review, this Court finds the OC Commission's rule addressing this highly technical issue is reasonable and supported by substantial evidence. *See, e.g., Santa Fe Exploration*, 114 N.M. at 115, 835 P.2d at 831; Testimony of Price, at RA000366-67, RA000377 (discussing eighty percent reduction and indicating that the EPA and Corp of Engineers recommends an eighty percent reduction for TPH); Testimony of von Gonten, at RA000748-54, 000758-762 (explaining rationale for eighty percent reduction); Testimony of Neeper, at RA001542 (referencing study involving eighty percent remediation under conditions like those of this state). The OC Commission's findings provide its rationale, which is supported by substantial, credible evidence in the whole record that this Court will not reweigh, and show that the OC Commission considered the industry's positions but rejected them on a sound basis that is consistent with its goals and authority. *See* Findings 174-79, at RA000029. *See, e.g., New Mexico Mining Ass'n*, 2007-NMCA-010, at ¶ 34, 150 P.3d at 1002.

Lastly, this Court addresses Appellants' argument that the OC Commission's "no-degradation policy is not supported by the record in this case and is therefore arbitrary, capricious, and unreasonable." SI, at 22. The argument is based on the same assumption that Appellants make throughout their arguments–that is, that there is a "no-degradation policy." As indicated in the above analyses, the standards with which Appellants specifically take issue are supported by substantial evidence, are in accordance with the law, and are not arbitrary, capricious, or unreasonable. Because the OC Commission is not constrained by the WQ Act, the OC Commission may adopt a no-

degradation policy pursuant to its authority under 70-2-12.B without making the same sort of risk-balancing required when the WQC Commission adopts water quality standards and regulations pursuant to the WQ Act. Also, a no-degradation policy would be supported by credible scientific evidence in the record. *See* analyses *supra*. Nonetheless, although somewhat superfluous, this Court will address Appellants' assertion that the new regulations constitute a no-degradation policy. *But cf. Fasken v. Oil Conservation Comm'n*, 87 N.M. 293, 293, 532 P.2d 588, 589 (1975) (declining to assess the technical aspects of an administrative decision).

In support of their no-degradation argument, Appellants state:

> These rules require operators of surface waste management facilities, prior to commencement of operations, to test and to establish the background concentrations of the thirty-nine [WQC Commission] 3103 Groundwater Constituents. These background concentrations are then used as the subsequent monitoring and closure standards and therefore allow no discharge of these constituents and thereby no degradation.

SI, at pp. 5-6. Appellants object to, and base their argument on 19.15.2.53G(6) NMAC. *See* SI, at 5. However, in reviewing the rules as a whole, the Court finds problems with Appellants' conclusion. One must look at a number of 19.15.2.53's intricacies to assess Appellants' no-degradation argument. *New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 12, 141 N.M. 41, 150 P.3d at 996 ("Agency rules are construed in the same manner as statutes.").

Paragraph (5) of Subsection G of 19.15.2.53 requires landfarm operators to report releases of 3103 constituents into the vadose zone. 19.15.5.2.53G(5)(a) & (e). If vadose zone sampling results show that concentrations of the 3103 constituents exceed the original background concentration, the landfarm operator must notify the OC Division's environmental bureau, perform additional sampling, and submit a response action plan that addresses "changes in the landfarm's

operation to *prevent further contamination and, if necessary*, a plan for remediating existing contamination." 19.15.2.53G(5)(e) (emphasis added).

Subparagraph (e) of Paragraph (6) of Subsection G of 19.15.2.53, the provision with which Appellants specifically take issue, provides treatment closure standards that give landfarm operators options when the concentration of the 3103 constituents exceed background concentration. The provision states:

> *[T]he operator shall either perform a site specific risk assessment using EPA approved methods and shall propose closure standards based upon individual site conditions that protect fresh water, public health, safety and the environment*, which shall be subject to division approval *or remove* pursuant to Subparagraph (b) of Paragraph (7) of Subsection G of 19.15.2.53 NMAC.

19.15.2.53.G(6)(e), at RA000068 (emphasis added).

The plain language of the regulatory provisions contradict Appellants' no-degradation argument. That is, Paragraph (5) of Subsection G of 19.15.2.53 merely requires the landfarm operator to report detection of contaminants in the vadose zone and to devise a response action plan that "shall address changes in the landfarm's operation to *prevent further* contamination and, *if necessary*, a plan for remediating *existing* contamination." (Emphasis added). The language shows that the first concern is preventing additional contamination, and, because the remediation provision only applies when contamination has been detected, the language "if necessary" indicates that the rule contemplates situations wherein remediation of contaminated soils (that is, degraded soils or "degradation") would not be required, or, in other words, instances in which degradation may be allowed. Also, had the OC Commission intended to mandate a no-degradation standard, the regulations would not use plain language that gives landfarm operators opportunities to conduct site-specific risk assessments and to show that, given the specific site conditions, their proposed

standards would protect fresh water, public health, safety and the environment. Consequently, the plain language of 19.15.2.53G(5) does not provide a "no-degradation standard."

In addition to the plain language of the rules, the OC Commission's findings counter Appellants' no-degradation argument, and, notably, indicate that, although not agreeing on standards to be employed, the Industry Committee's representatives who served on the Task Force were supportive of a risk-assessment approach. For instance, the OC Commission found: "The Task Force further recommended changing the designation of the plan required with a report of a release from a 'corrective action plan' to a 'response action plan,' that would propose means to prevent further contamination, and *if necessary*, clean up existing contamination." *See* Finding 144, at RA000024 (emphasis in original). That finding is supported, among other information in the record, by the September 1, 2006 Task Force Memorandum, which endorses somewhat stronger language for Paragraph (e) of Subsection (5) of Section G than was ultimately adopted. *Compare* RA0003954 *and* RA0003958 ("If *any* vadose zone sampling results show the concentrations of [the various constituents] exceed the higher of the PQL or the background soil concentrations, then the operator shall notify the division's environmental bureau of the exceedance . . . . The operator shall submit the results of the resampling event and a response action plan for the division's approval . . . . The response action plan shall address changes in the operation of the landfarm to prevent further contamination and, *if necessary*, a plan for remediating any existing contamination." (Emphasis added.)). *with* RA00067. Also countering the no-degradation argument, and reaffirming the case-by-case risk assessment approach, is the OC Commission's finding that states: "The proposal that clean up be required only if, upon assessment of all circumstances the Division concluded that such action was warranted reflects the Division's actual intent, as stated by the

Division's witness, Mr. von Gonten." *See* Finding 145, at RA000024.

Evidence in the record supports the OC Commission's findings and also the conclusion that, rather than a no-degradation policy, the Division intended an approach of determining whether remediation is necessary using a case-by-case risk assessment. Mr. von Gonten testified that the reporting and response provision does not necessarily mean that the landfarm operator must completely remediate the contamination, but that it means operations are to stop in order to review what went wrong because landfarms, "if properly operated, will not have a release." *See* RA000706-07. He also testified that, although a no-release standard is realistic, the decision on whether remediation of contamination was necessary would be made on a case-by-case basis, and that responsive action would range from re-sampling, to changing the way in which the landfarm is operated, to possibly closing the cell and digging and hauling the contamination to a landfill. *See* Testimony of von Gonten, at RA000707.

Given the OC Commission's authority, technical expertise, mission to regulate landfarms so as to protect public health and the environment, and its findings, and given the testimony in the record, including that referring to the long-term nature of landfarms, the risks of contaminating the environment that they present, and the differences in environmental characteristics of landfarms, the OC Commission's case-by-case risk assessment approach is reasonable and not arbitrary or capricious, is supported by substantial credible evidence, and is in accordance with the law. *Cf., e.g., New Mexico Mining Ass'n*, 2007-NMCA-010, ¶ 34, 141 N.M. 41, 150 P.3d at 1002 (indicating that an agency is free to use conservative scientific assumptions and to risk error on the side of overprotection rather than underprotection).

CONCLUSION

Based on this Court's analysis of the whole record and of Appellants' arguments, the Oil Conservation Commission's Order No. R-12460-B in Case No. 13586, repealing existing rules and adopting new rules governing surface waste management in oil and gas operations, is supported by substantial evidence in the record, is not arbitrary and capricious, and is in accordance with the law and within the scope of the OC Commission's authority. The procedures employed were likewise in accordance with the law and not arbitrary or capricious. The order is, therefore, affirmed.

Counsel for Appellee is directed to prepare a Final Order consistent with this opinion, submit it to opposing counsel for approval as to form, and then to the Court for entry.

DANIEL A. SANCHEZ
DISTRICT JUDGE
DIVISION VII

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