

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF PROPOSED AMENDMENTS
TO 20.6.2, THE COPPER MINE RULE,

No. WQCC 12-01(R)

New Mexico Environment Department,
Petitioner.

**ATTORNEY GENERAL'S RESPONSE TO NMED'S BRIEF ON AUTHORITY OF
COMMISSION TO CONSIDER PETITION**

Preliminary Statement

In its Brief on Authority of Commission to Consider Petition, the New Mexico Environment Department ("NMED") relies heavily on *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, 149 N.M. 42, 243 P.3d 746, a case in which a state district court enjoined a rulemaking before the Environmental Improvement Board ("EIB") on the ground that the EIB lacked statutory authority to consider and adopt a rulemaking petition regulating greenhouse gases filed by New Energy Economy, Inc. ("NEE"). The New Mexico Supreme Court dissolved the district court's preliminary injunction, holding that a court should not interfere with an ongoing administrative rulemaking and that the case was not "ripe" for court review under the Declaratory Judgment Act because the EIB had not promulgated a final rule. *Shoobridge*, ¶ 1, 149 N.M. at 44, 243 P.3d at 748. NMED argues in its Brief that the Water Quality Control Commission ("Commission") should proceed to hearing on NMED's Copper Mine Rule Petition based on the reasoning in *Shoobridge*. NMED Brief, pp. 2-3, 5-6.

NMED's reliance on *Shoobridge*, however, is misplaced. *Shoobridge* addressed whether a court may interfere with an administrative rulemaking prior to conclusion of the rule making by the administrative body. The issue before the Commission, as presented in the Attorney General's Motion to Remand, is the *Commission's own decision* whether to consider NMED's

Petition for rulemaking. Under the Water Quality Act (“WQA”), the Commission has complete discretion to determine whether to hold a public hearing on NMED’s Petition. *See* NMSA 1978, § 74-6-6.B. If NMED’s Petition proposes rules that violate the WQA, as the Attorney General has argued, the Commission has full authority to remand the Petition back to NMED to cure the Petition, rather than to waste the limited time and resources of the Commission conducting a hearing. The reasons a court is prohibited from enjoining an administrative body’s ongoing rulemaking are inapplicable to the decision by an administrative body itself to hold a hearing or not on a rulemaking petition before it.

Argument

I. THE COMMISSION MAY NOT PROMULGATE RULES THAT EXCEED ITS STATUTORY AUTHORITY

In its Brief, NMED first observes that, under *Shoobridge*, the Commission has “broad rulemaking authority that necessarily includes the consideration of policy factors.” NMED Brief, p. 1. However, the issue before the Commission, as posed by the Attorney General’s Motion for Remand, is not whether the Commission has the authority to consider policy factors during a rulemaking. Indeed, the WQA expressly allows the Commission to consider “all relevant facts and circumstances” in a rulemaking, including seven specified factors. NMSA 1978, § 74-6-4.D.¹ The issue before the Commission is whether the Commission should expend

¹ Those factors are:

- (1) character and degree of injury to or interference with health, welfare, environment and property;
- (2) the public interest, including the social and economic value of the sources of water contaminants;
- (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;
- (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;

the time and effort to consider a rulemaking petition that, on its face, violates the WQA. The question is not whether the Commission may establish policy *within* the bounds of its authority under the WQA – it can -- but whether NMED’s proposed Copper Mine Rule oversteps the bounds of the WQA and therefore the authority of the Commission to promulgate.

As detailed in NMED’s Motion for Remand, NMED’s Petition would allow copper mines to contaminate New Mexico ground water above water quality standards, in direct violation of the WQA’s prohibition against such contamination. *See* NMSA 1978, § 74-6-5.E(3) (NMED may not issue discharge permit if ground water quality exceeds standards at a “place of withdrawal of water for present or reasonably foreseeable future use”); NMSA 1978, § 74-6-12 (reasonable degradation of water quality allowed so long as water quality standards are not exceeded). There can be no question but that the Copper Mine Rule, as proposed, violates the WQA: NMED’s own technical expert and Ground Water Quality Bureau technical staff reached this conclusion. *See* Sept. 7, 2012 Memo to D. Martin, NMED, from B. Olson: Major Issues in 9/7/12 NMED 2nd Internal Discussion Draft, pp. 1, 2 [attached as Ex. J to Attorney General’s Motion to Remand].

While the Commission has discretion to consider all relevant facts and circumstances in any rulemaking – including those facts and circumstances which implicate policy – the Commission’s discretion is bounded by the strictures of the WQA. It is well established that administrative agencies are limited to the power and authority expressly granted or necessarily

-
- (5) feasibility of a user or a subsequent user treating the water before a subsequent use;
 - (6) property rights and accustomed uses; and
 - (7) federal water quality requirements

NMSA 1978, § 74-6-4(E).

implied by statute. *In re PNM Elec. Servs.*, 1998-NMSC-017, ¶ 10, 125 N.M. 302, 305, 961 P.2d 147, 150; *AA Oilfield Serv., Inc. v. N.M. State Corp. Comm'n*, 118 N.M. 273, 27, 881 P.2d 18, 22 (1994); *Rivas v. Bd. of Cosmetologists*, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984).

The Commission, quite plainly, may not promulgate rules that violate the WQA, and should not waste its time and resources holding a hearing on a Petition that, quite plainly, violates the WQA.

II. ***SHOBRIDGE* DOES NOT APPLY TO THE COMMISSION'S DECISION WHETHER TO HOLD A HEARING ON A RULEMAKING PETITION**

In *Shoobridge*, the groups opposing the rulemaking argued that the EIB lacked statutory authority to adopt the greenhouse gas rules proposed in NEE's petition. The district court agreed, and issued the injunction enjoining the rulemaking. *Shoobridge*, ¶ 3, 149 N.M. at 44, 243 P.3d at 748. The Supreme Court dissolved the district court's injunction, holding that:

[A] court may not intervene in administrative rule-making proceedings before the adoption of a rule or regulation for three reasons. First, the separation of powers doctrine forbids a court from prematurely interfering with the administrative processes created by the Legislature. Second, only upon completion of administrative rule-making proceedings will a party be certain that it is aggrieved, since it is not known whether a regulation will even be adopted by the agency. Third, since the administrative proceeding is not complete, there is no actual controversy to be resolved by a declaratory judgment action.

Id. ¶ 1, 149 N.M. at 44, 243 P.3d at 748. NMED argues that the reasoning in *Shoobridge* applies to the Commission's decision whether to hold a hearing on NMED's Petition.

The fundamental problem with NMED's argument is that *Shoobridge* involved a *court's* attempt to enjoin an administrative agency's rulemaking. This matter involves the decision of the *administrative agency itself*, the Commission, to hold a hearing on a rulemaking petition. Under the WQA, the Commission has full and complete discretion to determine whether to hold

a hearing on a rulemaking petition before it. NMSA 1978, § 74-6-6.B.² The Commission's discretion is so broad under the WQA, its decision not to grant a hearing is not subject to judicial review. *Id.*

The rationale for prohibiting courts from interfering with administrative processes has no application to the Commission's own determination to hear a rulemaking petition. Indeed, the Supreme Court's first reason for not allowing the district court to enjoin an administrative rulemaking – separation of powers concerns – obviously does not apply to the Commission's own decision to hold a hearing.

NMED argues that the Supreme Court's second and third reasons apply, claiming that there is no "case or controversy" until the Commission promulgates a final rule and only then will the matter be "ripe". NMED Brief, p. 6. This argument, however, is nonsensical in the context of the Commission's decision to consider NMED's Petition and outside the context of a court attempting to interfere with an ongoing administrative rulemaking pursuant to the Declaratory Judgment Act. The Supreme Court in *Shoobridge* held that, because the administrative proceedings were not complete, the plaintiffs' declaratory judgment action was not "ripe" *before the court* because there was not an "actual controversy" *before the court*. The legal requirement under the Declaratory Judgment Act -- requiring "the presence of an 'actual controversy' before a *district court can assume jurisdiction* in a declaratory judgment action" -- has no application to the Commission's discretionary decision under the WQA to hold a

² Section 74-6-6.B provides:

Any person may petition in writing to have the commission adopt, amend or repeal a regulation or water quality standard. The commission shall determine whether to hold a hearing within ninety days of submission of the petition. The denial of such a petition shall not be subject to judicial review.

rulemaking. *See Shoobridge*, ¶ 1, 149 N.M. at 44, 243 P.3d at 748 (emphasis added) (citing Declaratory Judgment Act at NMSA 1978, § 44-6-2).

The question of whether to hold a hearing on a rulemaking petition is not only “ripe” before the Commission, it is the precise question before the Commission whenever any rulemaking petition is filed. The Commission has complete discretion under the WQA not to hold a hearing on NMED’s proposed Copper Mine Rule on the ground that the proposed rule would allow water quality standards to be exceeded under mine sites, in contravention of the WQA. *Indeed, determination by the Commission whether it has authority to promulgate a proposed rule is an appropriate, if not necessary, threshold question for the Commission to consider in deciding whether to hold a hearing.* The Commission is not required to and should not undertake the time and expense of a hearing on a rulemaking petition that proposes rules contrary to the WQA. While it is correct that the Commission could cure the defects in the proposed rule after hearing, the defects in the proposed rule are so pervasive and the defective provisions so numerous and interrelated, that considering the proposed rule in its current form would expend much greater and unnecessary resources than if the proposed rule complied with the WQA. The Commission’s limited time and resources are better spent considering a rule that follows the WQA.

Conclusion

For the reasons set forth herein and in the Attorney General’s Motion for Remand, the Commission should remand NMED’s Copper Mine Rule Petition to NMED with direction to develop a rule, with the Copper Rule Advisory Committee, that complies with the WQA.

Respectfully submitted,

GARY KING
ATTORNEY GENERAL OF NEW MEXICO



Tannis L. Fox
Assistant Attorney General
Water, Environmental and Utilities Division
Office of the New Mexico Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504
T 505.827.6695 F 505.827.4444
tfox@nmag.gov

Counsel for the Attorney General

Certificate of Service

I certify that the following were served with the foregoing pleading by email on January 11, 2013:

Andrew Knight
Assistant General Counsel
Office of General Counsel
New Mexico Environment Department
P.O. Box 5469
Santa Fe, New Mexico 87502-5469

Dalva Moellenberg
Anthony J. Trujillo
Gallagher and Kennedy, P.A.
1233 Paseo de Peralta
Santa Fe, New Mexico 87501-2758

Bruce Frederick
Staff Attorney
New Mexico Environmental Law Center
1405 Luisa Street, #5
Santa Fe, New Mexico 87505-4074

Tracy Hughes
1836 Cerros Colorados
Santa Fe, New Mexico 87501

Louis W. Rose
Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, New Mexico 87504-2307

John J. Indall
Comeau, Maldegen, Templeman & Indall LLP
P.O. Box 669
Santa Fe, New Mexico 87504-0669



Tannis L. Fox