

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

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

WQCC 12-01 (R)

New Mexico Environment Department,
Petitioner.



**NEW MEXICO ENVIRONMENT DEPARTMENT'S BRIEF ON COMMISSION'S
AUTHORITY TO CONSIDER PETITION**

The New Mexico Environment ("Petitioner" or "Department") submits this legal brief at the Commission's request to clarify the parameters of the Commission's rulemaking authority under the Water Quality Act ("the Act"), and to address the assertion that the Commission lacks the necessary authority to consider the amendments proposed in the Department's Petition to Amend 20.6.2 NMAC.

**I. THE WATER QUALITY CONTROL COMMISSION HAS BROAD
RULEMAKING AUTHORITY THAT NECESSARILY INCLUDES THE
CONSIDERATION OF POLICY FACTORS.**

As courts have long recognized, boards and commissions in general have broad discretion to determine whether and when to initiate rulemakings. *See, e.g., WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981). Boards and commissions are statutorily created entities intended to fulfill a legislative purpose: "The adoption of regulations is legislative in nature" *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd.*, 80 N.M. 633, 637-8, 459 P.2d 159, 163-4 (Ct. App. 1969). The New Mexico Supreme Court has found proper delegation of legislative authority "where administrative discretion occurs within a governmental scheme, policy, or purpose." *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 41, 140 N.M. at 89, 140 P.3d at 510 (citing *State v. Spears*, 57 N.M. at 406, 259 P.2d at 360).

Boards and Commissions engage in rulemaking not only to enforce laws, but also to implement policy. This was made explicitly clear in the recent *Shoobridge* case, in which the New Mexico Supreme Court was asked to decide whether a district court could intervene to stop an administrative rulemaking proceeding on a purely “legal” grounds – i.e., whether the state Environmental Improvement Board (“EIB or Board”) had the statutory authority to entertain petitions for greenhouse gas rules. *See New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 3, 149 N.M. 42, 243 P.3d 746.

The *Shoobridge* case arose following the filing of the greenhouse gas rule petitions with the EIB in 2009. The groups opposing these rules sought to prevent the Board from hearing the petitions by filing a request for a preliminary injunction with district court Judge Shoobridge, based on their assertion that the EIB did not have statutory authority to promulgate such rules under New Mexico’s Air Quality Control Act. Judge Shoobridge issued the injunction, and both the EIB and New Energy Economy petitioned the NM Supreme Court to review the district judge’s decision.

In upholding the general authority of the Board to consider and adopt regulations, the Court emphasized that the EIB’s rulemaking authority is broad; it can, and is designed to be exercised for effecting policy. *Shoobridge*, 2010-NMSC-049, ¶ 9. (recognizing that when EIB is engaged rulemaking proceedings, the Board is attempting to develop legislative facts. “Legislative facts are those which help the tribunal to determine the content of law and *policy*...”)
(emphasis added). The Court ruled that Judge Shoobridge lacked the authority to prevent the EIB from holding hearings on the petitions.

The reasoning in *Shoobridge* is directly applicable to the present case. The Water Quality Control Commission has rulemaking powers equivalent to the EIB, and there is no

reason to believe the WQCC's rulemaking authority is any less than the EIB's. The Supreme Court said in *Shoobridge* that when the EIB engages in rulemaking, it is carrying out a legislative function and it must make policy choices. *Shoobridge* 2010-NMSC-049, ¶ 9. The Supreme Court held that allowing a district court to interrupt that process "[C]ould deprive the public of the opportunity to propose rules or regulations and otherwise participate in the rulemaking process. In addition, the administrative agency should be given the opportunity to correct any errors that have been brought to its attention during the course of such proceedings." *Shoobridge*, 2010-NMSC-049, ¶ 14.

II. RULEMAKING LANGUAGE IN THE WATER QUALITY ACT SHOULD BE CONSTRUED BROADLY.

Rulemaking has traditionally been seen as the method by which executive branch agencies "flesh out" the often very general language contained in enabling statutes enacted by the legislature. Rulemaking represents an effort to shape the details of substantive law by means of a unitary public proceeding, in contrast to case-by-case adjudication as the means for achieving this result. *See generally, National Petroleum Refiners Association v. FTC*, 482 F.2d 672, 682 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). As a result, legislation granting rulemaking powers is generally given a broad reading to allow the agency, board, or commission to use its expertise to reach the best result. "The need to interpret liberally broad grants of rule-making authority . . . has been emphasized time and again by the [United States] Supreme Court." *National Petroleum Refiners Assoc.*, 482 F.2d 672, at 680.

In *National Petroleum Refiners*, the Federal Appeals Court held that the Federal Trade Commission ("FTC") has substantive rulemaking power in addition to adjudicatory power to carry out its mandate under its enabling legislation. This assertion of broad rulemaking authority had been directly challenged by various industry groups in connection with the FTC's

promulgation of octane standards for gasoline, with the result that the Federal Court of Appeals sustained the Commission by holding that it had authority to promulgate rules with substantive effect, even where such rules were not specifically authorized by the enabling statute. See *National Petroleum Refiners Assoc.*, 482 F.2d 672, at 676-77. “To accept respondent's argument [that the FTC lacks this authority] would undermine the flexibility sought in vesting broad rule making authority in an administrative agency.” *Id.*, at 681 (quoting *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L. Ed. 2d 318 (1973)).

The court explained that rulemaking can save the agency resources compared with proceeding on a case-by-case basis to change industry-wide practices; it can provide businesses greater certainty as to what business practices are not permissible; it allows the agency to solicit and consider a wide range of data and viewpoints from various interested persons, and it avoids singling out one respondent for initial imposition of a new and perhaps costly legal obligation. See *National Petroleum Refiners*, 482 F.2d 672, at 683.

Similarly, the Water Quality Act gives the Water Quality Control Commission broad authority to “adopt, promulgate and publish regulations to prevent or abate water pollution in the state or in any specific geographic area, aquifer or watershed of the state or in any part thereof, or for any class of waters . . .” NMSA 1978, § 74-6-4 (E).

The Act further states that, in making these regulations, the commission shall “give weight *it deems appropriate* to all relevant facts and circumstances, including:

- (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;
- (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) (emphasis added).

When a rule is proposed, the WQCC has discretion whether to hold a hearing on the proposal. *See* NMSA 1978, § 74-1-9(A); § 74-6-6(B). This discretion is significant because the WQCC could have decided not to hear the Department's proposed rules for any reason. *Id.* It is clear from the language of the Act that the New Mexico legislature intended for the WQCC to have the necessary latitude to use its expertise in formulating rules that balance economic reasonableness with protection of the environment.

III. CONTROVERSY CONCERNING THE "LEGALITY" OF A PROPOSED RULE IS NOT RIPE UNTIL A FINAL RULE IS ADOPTED.

A. Dispositive Motions Should Not Be Employed to Circumvent the Administrative Fact-Finding Process.

At this stage, the Commission has only the Petition with the proposed rule language before it. No testimony has been received from the Department or other parties to explain what the rules are intended to do, what the language means, how it will be implemented, or why it is being proposed. Without this testimony, the Commission would have no basis to determine whether the proposed rules comply with the Water Quality Act.

Furthermore, the Commission must engage in fact-finding and develop an administrative record before it can decide to adopt any or all of the proposed language. The New Mexico Supreme Court has expressed its strong disapproval of attempts to circumvent the administrative fact-finding process:

"In particular . . . we caution against using a declaratory judgment action to challenge or review administrative actions if such an approach would

foreclose any necessary fact-finding by the administrative entity, discourage reliance on any special expertise that may exist at the administrative level, disregard an exclusive statutory scheme for the review of administrative decisions, or circumvent procedural or substantive limitations that would otherwise limit review through means other than a declaratory judgment action.”

Smith v. City of Santa Fe, 2007-NMSC-055, ¶ 15; 142 N.M. 786. *See also*, *Stennis v. City of Santa Fe*, 2008-NMSC-008, ¶ 3, 143 N.M. 320, 176 P.3d 309; *accord*, *State ex rel. Regents of Eastern New Mexico University v. Baca*, 2008-NMSC-047, ¶ 20, 144 N.M. 530, 189 P.3d 663 (per curiam).

**B. No Case or Controversy Exists in the Legal Sense
Until the WQCC Issues Its Decision.**

In the *Shoobridge* case, discussed in detail above, the Supreme Court held that the doctrine of “ripeness” constituted an additional reason why the district judge should not have acted to prevent the EIB from considering the greenhouse gas rules. The Supreme Court found it would be improper to attempt to determine the proposed rules’ legality before the EIB had decided whether to even adopt the proposed rules. “[E]ven if a purely legal question is presented for declaratory judgment, it is not justiciable unless it is ripe.” *Shoobridge*, 2010-NMSC-049, ¶ 18.

Further, the Supreme Court found that the Declaratory Judgment Act requires an actual case or controversy, and until an administrative agency actually issues a decision in a rule-making proceeding, no such case or controversy exists: “[T]he proposed regulation was the subject of public hearings, and the final version, if one emerges from the process, is unknown. It is only upon the adoption of a regulation that the parties can be certain that they are aggrieved and that there is an actual controversy.” *Shoobridge*, 2010-NMSC-049, ¶ 18. Similarly, only after the Commission adopts a final rule will this controversy be “ripe”.

IV. CONCLUSION

The broad rulemaking authority of entities such as the WQCC is well established, and the rulemaking language in the Water Quality Act was intended to give the Commission the necessary latitude to consider both technical and policy factors when considering proposed regulations. Until such time as a hearing is held, testimony and public comment are taken, and an administrative record is developed, the Commission will not have a sufficient basis to rule on a dispositive motion. The public hearing process is designed to give all interested parties an opportunity to present evidence and make arguments, and the Commission should allow this process to proceed before making any judgment concerning the proposed rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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