

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO
COURT OF APPEALS

Earthworks' Oil & Gas Accountability Project and New Mexico Wilderness
Alliance,

Petitioners,

v.

No. _____

New Mexico Oil Conservation Commission,

Respondent,

and

New Mexico Oil and Gas Association,

Intervenors.

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SUPREME COURT OF NEW MEXICO
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TABLE OF CONTENTS

STATEMENT OF COMPLIANCE	ii
LIST OF ATTACHMENTS	ii
INTRODUCTION	1
QUESTIONS PRESENTED	4
MATERIAL FACTS	4
BASIS FOR GRANTING THE WRIT	9
1. The Commission lacked jurisdiction to promulgate the 2013 Pit Rule	9
2. The Commission's failure to explain its change in position was arbitrary and capricious	11
3. The Commission acted outside its statutory authority when it amended the Pit Rule in 2013	12
4. The Petition presents issues of constitutional significance and issues of great public importance	14
ARGUMENTS BEFORE THE COURT OF APPEALS	14
PRAYER FOR RELIEF	15

STATEMENT OF COMPLIANCE

Counsel for Petitioners certify that this Petition for a Writ of Certiorari complies with the word limitation of New Mexico Rule of Appellate Procedure 12-502.D(3). The body of this Petition contains 3140 words, Times New Roman typeface. The word count for this Petition was obtained using Microsoft Office Word 2007.

LIST OF ATTACHMENTS

The following documents are attached to this Petition:

- The Opinion of the Court of Appeals (Exhibit A);
- District Court Order Certifying the appeal to the Court of Appeals (Exhibit B);
- The New Mexico Oil Conservation Commission's Statement of Reasons for Adopting the 2013 Pit Rule Amendments (Exhibit C);
- The New Mexico Oil Conservation Commission's Statement of Reasons for Adopting the 2008 Pit Rule (Exhibit D);

INTRODUCTION

While this case raises concerns about environmental and public health protection, it also raises significant questions about the extent of executive power and the role of courts in providing a check to that power pursuant to the New Mexico Constitution. Additionally, it presents a question about the extent of the New Mexico Oil Conservation Commission's ("Commission") authority under the New Mexico Oil and Gas Act ("Act").

Petitioners seek reversal of the Court of Appeals' ("COA") opinion, issued on February 24, 2016, upholding the Commission's 2013 amendments to its rule regulating oil and gas field wastes ("2013 Amendments") in *Earthworks' Oil & Gas Accountability Project, et. al. v. New Mexico Oil Conservation Commission, et. al.*, No. 33,451 ("Opinion"). The 2013 Amendments dramatically changed earlier versions of 19.15.17 NMAC, commonly referred to as "the Pit Rule", promulgated in 2008 ("Pit Rule") and amended in 2009 ("2009 Amendments"). The Pit Rule was adopted to protect water resources and public health. *See*, Exhibit C at 4, ¶¶ 17, 300. However, subsequent amendments, including the 2013 Amendments at issue here, were promulgated for purely economic reasons. Each of the three rules - the Pit Rule in 2008, the 2009 Amendments, and the 2013 Amendments - was promulgated pursuant to the Oil and Gas Act.

Members of the oil and gas industry appealed the original Pit Rule to District Court on July 10, 2008. The Oil & Gas Accountability Project ("OGAP") filed an appeal of the 2009 Amendments to the District Court on July 30, 2009. Finally, OGAP and co-Petitioner New Mexico Wilderness Alliance appealed the 2013 Amendments to the District Court on August 2, 2013. In all three appeals, the basis for the District Court's jurisdiction was the New Mexico Constitution because the Act does not provide for any statutory right of appeal from Commission rulemakings.

The Court of Appeals Opinion fails to address the Constitutional issues that Petitioners raised. The COA upheld the Commission's jurisdiction to promulgate the 2013 Amendments, relying on an erroneous interpretation of *New Energy Economy v. Shoobridge*, 2010-NMSC-49 (2010) ("*Shoobridge*"), which - if upheld - would allow unfettered power in the executive branch in the context of rulemaking. Opinion, ¶¶ 7-9. As a result, the COA did not analyze the Constitutional underpinnings of the courts' power and its relation to that of the Commission's, which would have led to a different conclusion.

The Act is designed to promote wise use of the state's oil and gas resources, while protecting other natural resources such as water. Nothing in the Act, however, allows the Commission to promulgate a regulation whose primary

purpose is to ensure the economic well being of all or part of the oil and gas industry.

The COA opinion therefore conflicts with *Public Service Co. v. New Mexico Environmental Improvement Board*, in which the court held that absent specific and explicit direction from the Legislature, an administrative agency could not promulgate regulations whose primary purpose was to spur economic development. *Id.*, 1976-NMCA-039, ¶ 17, 89 N.M. 223, 230 (Ct. App. 1976). In this case, the COA erred by stating that economics were only one consideration among many that the Commission invoked to justify enacting the 2013 Pit Rule amendments. Opinion, ¶¶ 26-30. However, the record and the Commission's Statement of Reasons, clearly reveal that the oil and gas industry's economic concerns were the primary reason for the 2013 Amendments.

Finally, the COA erred by creating the legal fiction that the 2013 Amendments were promulgated as a new regulation without any historical context. Opinion, ¶ 23 (" ... the Commission is not required to 'justify its departure' from the 2008 Rule; it is only required to explain its reasoning for the 2013 Rule ..."). By failing to acknowledge that the 2013 Amendments are premised on the original Pit Rule, the COA Opinion conflicts with well established state and federal precedent that an administrative agency is required to explain a departure from established policy. The arbitrariness of the Commission's change in policy is heightened

because it based its policy change on virtually identical evidence that it heard in promulgating the Pit Rule in 2008.

QUESTIONS PRESENTED

1. Did the COA err in holding that the New Mexico Oil Conservation Commission has the authority to amend and repeal by implication a regulation that has been appealed to the district court pursuant to Article VI, § 13 of the New Mexico Constitution and which the courts have yet not reviewed?

2. Did the COA err in holding that the Commission did not act arbitrarily when it failed to explain the reasons for its change in policy between the initial Pit Rule enactment in 2008 and the 2013 Amendments?

3. Did the COA err by holding that the Commission acted within its statutory authority when it promulgated the 2013 Pit Rule primarily for the oil and gas industry's economic benefit?

MATERIAL FACTS

Unless otherwise noted, the material facts cited are found in the following documents in the Record Proper ("RP"): Order of the Oil Conservation Commission (May 9, 2008) ("Pit Rule Statement of Reasons"), RP 599-644; Order of the Commission and Statement of Reasons for Amending NMAC Title 19, Chapter 15, Part 17 (June 6, 2013) ("2013 Amendments Statement of Reasons") RP 3293-3343.

1. The Pit Rule is the Commission regulation governing management and disposal of oil and gas industry field waste. 19.15.17.6 NMAC.

2. In promulgating the Pit Rule in 2008, the Commission issued a written decision. In relevant part that decision provided:

a. The purpose of the Pit Rule was to protect human health and the environment, including fresh water, soil, wildlife and biodiversity.

b. The New Mexico Oil Conservation Division ("Division"), who is responsible for implementing and enforcing the Act, were the proponents of the Pit Rule.

c. "Pits" are surface or subsurface impoundments or depressions used to store liquid and certain solid waste from oil and gas development.

d. Waste may be stored temporarily in pits during oil and gas operations.

e. Waste may also be permanently disposed in pits, in which case, the liquid contents of the pits are mixed with soil using heavy machinery, covered, and buried in the ground.

f. The waste placed in pits is typically harmful to biological organisms and can be considered hazardous.

g. The waste placed in pits, even when those pits are lined, inevitably leaches into the environment and groundwater.

h. Consequently, the Commission required waste permanently disposed of in pits to be treated to concentration levels that would meet New Mexico's groundwater standards in 20.6.2.3103 NMAC.

i. The Commission considered the impact of the Pit Rule on small businesses, as required by the Small Business Regulatory Relief Act, and made all possible accommodations to small businesses without compromising the Pit Rule's protection of public health and the environment.

3. A group of oil and gas operators appealed the 2008 Pit Rule to the First Judicial District Court pursuant to the New Mexico Constitution, Article VI, § 13 and NMRA 1-075 on July 10, 2008. Petition for Writ of Certiorari, *Burlington Resources, et. al. v. New Mexico Oil Conservation Commission, et. al.*, No. D-0101-CV-2008-01863.

4. The Commission amended the Pit Rule in 2009, in order to fulfill the oil and gas industry's economic wishes.

5. On July 30, 2009, the Oil & Gas Accountability Project appealed the 2009 Amendments to the First Judicial District Court pursuant to the New Mexico Constitution, Article VI, § 13 and NMRA 1-075. Petition for Review, *Oil & Gas Accountability Project v. New Mexico Oil Conservation Commission*, No. D0101-CV-2009-247.

6. While the oil and gas industry's and OGAP's appeals were still pending before the courts, a new Commission accepted an oil and gas industry petition to amend the Pit Rule yet again. These amendments resulted in the current 2013 version of the Pit Rule.

7. The Commission's written decision adopting the 2013 Amendments justified them in the following ways:

a. Wastes disposed of in pits are largely non-toxic and those that are toxic to biological organisms would never reach groundwater.¹

b. The oil and gas industry believed the waste concentration testing requirements in the Pit Rule were confusing.

c. The oil and gas industry believed the Pit Rule's siting requirements were "unnecessarily restrictive".

d. The oil and gas industry disagreed with how the Division was interpreting the Pit Rule.

e. The Pit Rule increased costs to the oil and gas industry.

f. Much of the impetus behind the oil and gas industry's petition

¹ These findings were based largely on the testimony of Dr. Ben Thomas. Dr. Thomas was one of many oil and gas industry witnesses that confirmed their testimony in the 2013 Amendments proceeding was identical to the testimony he presented for the oil and gas industry in the 2008 Pit Rule proceeding, and which the Commission had rejected. Testimony of Dr. Benjamin Thomas, RP 3847:21-25; 3848:1-20.

was to reduce costs for small and larger oil and gas companies.

g. The Pit Rule promulgated in 2008 accomplished the goal of protecting human health and the environment.

8. In an email prior to the proceeding adopting the 2013 Amendments, Commission chair, Jami Bailey, who also served as the Division's Director, indicated that the 2009 Amendments were a "half-measure" and that the 2013 Amendments were being proposed to remove requirements that "add to drilling costs." RP 646.

9. Division witnesses testified that the Division had not found the Pit Rule difficult to implement and enforce. *See, e.g.*, Testimony of Brandon Powell, RP 5212:22-24.

10. The Commission made no finding that the Pit Rule resulted in waste or impairment of correlative rights.

11. The Commission made no finding that the 2013 Amendments were at least as protective or more protective of human health and the environment than the Pit Rule enacted in 2008.

12. OGAP and the New Mexico Wilderness Alliance (collectively "Petitioners") appealed the 2013 Amendments on August 2, 2013. At that time, the appeals of the 2008 Pit Rule and 2009 Amendments were still pending in the District Court.

13. On January 14, 2014, the First Judicial District certified the 2008 Pit Rule appeal and 2009 Pit Rule Amendments to the Court of Appeals. On November 13, 2013, the District Court certified the 2013 Pit Rule Amendments appeal to the Court of Appeals.

BASIS FOR GRANTING THE WRIT

1. The Commission lacked jurisdiction to promulgate the 2013 Pit Rule.

The New Mexico Constitution provides that the district court shall have "jurisdiction over special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts or tribunals in their respective districts." N.M. Const., Art. VI, § 13 (emphasis added). Appellate jurisdiction in most administrative cases is conferred by statute. *See, e.g.*, NMSA 1978, § 74-2-9(A) (Air Quality Act); § 74-6-7(A) (Water Quality Act). However, there is no statutory provision for appeals of Commission regulations. NMSA 1978, §§ 70-2-25(A), (B); § 39-3-1.1. Thus, any appeal of a Commission regulation is accomplished pursuant to the district court's constitutional authority.

The process for appeals pursuant to the district court's constitutional authority is contained in New Mexico Rule of Civil Procedure 1-075. That rule provides that a final action of the district court is when the court remands, affirms, or reverses a lower tribunal's decision. NMRA 1-075(T),(U)(V). By the plain language of the Constitution and the Rules of Civil Procedure, a district court's

appellate jurisdiction over all lower tribunal actions begins when it grants certiorari and ends when it issues a final order. Infringement on this jurisdiction by amending a rule that is under court review but has not been resolved by a final order not only conflicts with Article VI, § 13, but also violates the separation of powers doctrine.

The COA failed to address this constitutional issue. Instead, the COA relied on *Shoobridge* to conclude that "to forestall" the Commission from amending the Pit Rule while it was being reviewed by a court would "permit courts to halt agency rulemaking proceedings prior to the issuance of a new rule" in violation of the separation of powers doctrine. Opinion at ¶¶ 8-9.

The COA not only misapplied *Shoobridge*, which dealt with an agency promulgating a new rule, rather than amending an existing rule that was under appeal, but also misconstrued the fundamental issue Petitioners raised. Petitioners contend that when there is a conflict between the Commission's authority to promulgate rules under the Oil and Gas Act and the district court's constitutional authority to review Commission rulemakings, the Constitutional authority must prevail.

Moreover, the Opinion conflicts with COA precedent. In *Pineda v. Grande Drilling Corp.*, the COA held:

insofar as legislation authorizing rulemaking by an agency could be construed to authorize the agency to enact rules that "affect the right

or remedy of either party, or change the rules of evidence or procedure, in any pending case," the legislation violates article IV, section 34.

Id., 1991-NMCA-004, ¶ 7, 11 N.M. 536, 539 (Ct. App. 1991).

2. The Commission's failure to explain its change in position was arbitrary and capricious. In concluding that the Commission's change in position between 2008 and 2013 on fundamental matters such as protection of fresh water and public health was not arbitrary, the COA stated that:

[O]ur standard of review does not contemplate a comparison of the old and new rules, but rather requires that we consider whether the Commission has provided an adequate explanation of its reasoning, *see, City of Roswell*, 1972-NMCA-160, ¶ 16, and whether its decision is unreasonable in light of the whole record. *See Archuleta*, 2005-NMSC-006, ¶ 17.

Opinion at ¶ 31. This holding, however, conflicts with the precedent of this Court, which require that an agency must explain a change in established rules or policy. *See, General Tel. Co. v. Corp. Comm'n*, 1982-NMSC-106, ¶ 34, 98 N.M. 749, 756 (1982) ("The SCC's radical departure from past practice ... without reasonable justification as reflected in the record in this case was improper."); *Hobbs Gas Co. v. N.M. Pub. Svc. Comm'n*, 1980-NMSC-005, ¶ 16, 94 N.M. 731, 736 (1980) ("the trial court found that the specific issue of acquisition adjustment had been dealt with by the Commission in a previous proceeding in a manner inconsistent with its theory in this case ... We affirm the trial court on this issue."). The COA's Opinion also

departs from established federal case law, which has been favorably cited by New Mexico courts. *See, Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 46-47 (1983) (agency required to explain change in regulations).

3. The Commission acted outside its statutory authority when it amended the Pit Rule in 2013. The only relevant statutory bases for the Pit Rule and its subsequent amendments are found at NMSA 1978, §§ 70-2-6, 70-2-11, and 70-2-12. Sections 70-2-6 and 70-2-11 provide the Commission with the authority to prevent waste, as defined in the Act, and protect correlative rights. Section 70-2-12 provides much more detailed authority, enumerating specific Commission authority. In relevant part, that section provides that the Commission is authorized to make rules, regulations and orders to: require wells to be operated in such a manner to prevent injury to neighboring leases or property [§70-2-12(B)(7)]; regulate disposition of water produced in connection with oil and gas drilling and production in a manner that will afford reasonable protection against contamination of fresh water supplies [§70-2-12(B)(15)]; and, regulate the disposition of nondomestic wastes resulting from exploration, development, production or storage of oil and gas to protect public health and the environment [§70-2-12(B)(21)]. Nowhere does the Act authorize the Commission to

promulgate regulations primarily for the economic benefit of the oil and gas industry.

In a factually similar case, *Public Service Company v. New Mexico Environmental Improvement Board*, the COA held that the Environmental Improvement Board acted beyond the authority granted it by the Air Quality Control Act ("AQCA") when it promulgated a regulation primarily for economic purposes where the AQCA made no provision for passing primarily economic-based rules, finding:

The legislative mandate in this instance is expressed in simple and direct language: The board shall prevent and abate air pollution ... there is nothing in the board's mandate that gives it the authority to plan for the industrial development of the area.

Id., 1976-NMCA-039, ¶¶ 7,10, 89 N.M. 223, 226-227 (Ct. App. 1976). Moreover, it is well established in New Mexico law that administrative agencies are limited to the authority explicitly delegated them by the Legislature. *See, e.g., Rivas v. Bd. of Cosmetologists*, 1984-NMSC-076, ¶ 3, 101 N.M. 592, 593 (1984) (citations omitted); *Continental Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, ¶ 11, 10 N.M. 310, 318 (1962)

Contrary to these precedents, the COA's Opinion held that while the Commission took some economic factors under consideration, its primary purpose in promulgating the rule was not to accommodate the oil and gas industry's economic development. Opinion at ¶¶ 28-29. However, both the Commission's

written statement of reasons and the record clearly demonstrate that the only reason for the 2013 Amendments was to accommodate the oil and gas industry's economic concerns, particularly given that the non-economic evidence the Commission heard was substantially identical to that which it heard, and rejected, in promulgating the Pit Rule in 2008.

4. The Petition presents issues of constitutional significance and issues of great public importance. As noted in basis 1 for granting this Petition, the Constitutional jurisdiction of the district court is at issue. The orderly administration of justice and the meaningful opportunity for litigants to have their day in court demands that the district court's jurisdiction be free from interference by executive agencies.

Additionally, the Commission's promulgation of a regulation primarily in order to accommodate the economic wishes of an industry raises an issue of great public importance. In order for the public to have any confidence in the integrity of administrative rulemaking, it must first have confidence that the administrative agency is acting properly within its statutory authority and protecting the public interest rather than private profits.

ARGUMENTS BEFORE THE COURT OF APPEALS

Petitioners raised each of the questions presented in this Petition before the Court of Appeals. Petitioners raised and cited numerous sources of authority for

their argument that the Commission lacked jurisdiction to promulgate the 2013 Amendments. *Earthworks' Oil & Gas Accountability Project, et. al. v. New Mexico Oil Conservation Commission, et. al.*, No. 33,451, Petitioners' Brief in Chief at 20-23 (April 21, 2014); Petitioners' Reply Brief at 6-8.

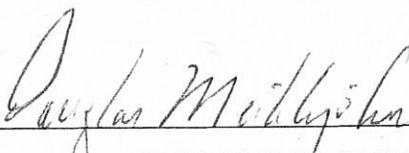
Petitioners raised the inadequacy of the Commission's explanation of its policy change. Petitioners' Brief in Chief at 6-8; Petitioners' Reply Brief at 15-19.

Arguments related to the Commission acting beyond its statutory authority were raised in Petitioners' Brief in Chief at 30-37 and Petitioners' Reply Brief at 1-4.

PRAYER FOR RELIEF

Petitioners respectfully request that this Court reverse the COA's February 24, 2016 decision and set aside the 2013 Amendments.

Respectfully submitted this 24th day of March, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March 2016, I have delivered a copy of the foregoing pleading in the above-captioned case via electronic mail and/or U.S. Mail, First Class to the following:

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