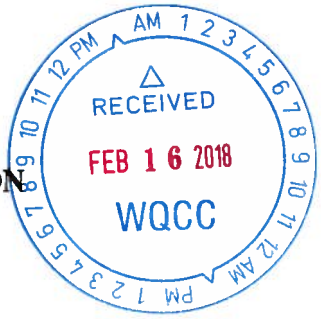

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

In the Matter of:

OF PROPOSED AMENDMENTS TO GROUND AND SURFACE WATER PROTECTION REGULATIONS, 20.6.2 NMAC	))))	**No. WQCC 17-03(R)**

POST-HEARING SUBMISSION OF RIO GRANDE RESOURCES CORPORATION, NEW MEXICO COPPER CORPORATION, AND AMERICAN MAGNESIUM, LLC

Introduction

Stuart R. Butzier and Christina C. Sheehan of Modrall, Sperling, Roehl, Harris & Sisk, P.A., together with their clients herein, Rio Grande Resources Corporation, New Mexico Copper Corporation and American Magnesium, LLC, appreciate this opportunity to supplement their participation in the hearing on the above-referenced matter with this post-hearing submission. This submission consists of an identification of the three mining companies represented, a brief explanation of their positions on three rulemaking issues of importance to those mining companies, followed by proposed findings of fact and conclusions of law.

Interests of the Three Mining Companies Represented

All three of the mining companies represented are involved in various stages of permitting mining development projects in New Mexico that hold the tremendous promise of bringing direct and indirect employment opportunities for citizens of New Mexico, rural economic development in three separate communities in the form of base industry expansion and labor-intensive production of metals and energy minerals, and tax revenues for the State of New Mexico in the form excise and resource severance taxes, among other direct and indirect benefits, in the coming years. All three have a keen interest in ensuring responsible, fair,

consistent and understandable regulations that are protective of the environment and other values, but that do not unduly burden or create confusion and uncertainty for regulators and the regulated community alike.

Rio Grande Resources Corporation (RGR), a subsidiary of General Atomics, is the owner and operator of the Mount Taylor Mine, a deep, underground, high-grade uranium mine near Milan, New Mexico, in the Grants Uranium Mining District. Decades ago the mine previously produced significant volumes of uranium ore, and substantial amounts of high-grade ore remain in place, but until recently the mine has been on standby status. In December 2017, however, RGR received a Mining and Minerals Division permit, after successfully renewing other state and federal permits, to come off of standby status and return to active status, which will involve taking steps over this year and the coming years to reestablish uranium production. The company's goal is to be well-timed and well-positioned to meet what it expects will be increasing demands for low-carbon energy resources, both domestically and world-wide.

New Mexico Copper Corporation (NMCC), a subsidiary of THEMAC Resources, is the owner of the Copper Flat Mine near Truth or Consequences, New Mexico. The mine briefly produced and processed ore containing copper and associated minerals in the early 1980s. Based on significant efforts in recent years, NMCC has taken itself to the late stages of permitting an open pit mining and processing operation with the state and federal governments to restore production. Upon producing ore from the Copper Flat Mine, NMCC will process the ore on-site into concentrates that will then be shipped off-site for further processing, in order to meet the continuing demand for copper as an important base industry supporting a wide range of products of longstanding and widespread use, as well as products proven to be essential to a number of emerging technologies.

American Magnesium, LLC (AmMg), is in the early stages of permitting a dolomite quarry near the Florida Mountains approximately 13 miles south of Deming, New Mexico. The dolomite deposit in question is being permitted with the Mining and Minerals Division as a "minimal impact new mining operation" under the 1993 New Mexico Mining Act, and with the Bureau of Land Management under a pending application for approval of a mining plan of operations. The surface deposit comprises dolomite that contains recoverable magnesium. AmMg proposes to transport the dolomite ore to the Peru Industrial Park in the Deming area for processing of the ore to recover magnesium and other marketable byproducts, including portland cement, that will result from the processing of the dolomite ore, in order to take advantage of favorable infrastructure and meet demands for high-strength, light-weight magnesium alloys increasingly viewed favorably by the automobile and aeronautics industries, among others.

Explanation of Positions

1. NMED Amendment Allowing Specifications of Time for Variances (20.6.2.1210.C)

RGR, NMCC and AmMg support NMED's language amending 20.6.2.1210.C to allow the Commission the discretion to "specify the length of time" that variances may be in place, effectively eliminating the arbitrary five-year limit on variances that can be granted by the Commission under the current provision. The five-year limit on variances, as recognized by this Commission when it a avoided the arbitrary prohibition when it adopted the Copper Rule, can be counterproductive in such contexts as mining, where the need for variances longer than five years associated with long-term projects and/or impacts may be shown to the Commission as being justified. NMED's proposed change, as pointed out by witness Kurt Volbrecht, would bring fairness and consistency to the variance requirements by eliminating the arbitrary five-year limit for all regulated communities, not just one part (*copper* mining) of one industry (mining).

The testimony of Ms. Martin, the primary witness for the party opposing the change, was convoluted and unpersuasive. Although on cross-examination she acknowledged, as a former regulator in Oklahoma, the need for fairness and evenhandedness in regulations and the application of regulations in the real world, she retreated to an artifice when confronted with the unfairness of retaining the five-year limitation for everybody but the copper industry. Specifically, she posited—unreasonably and without persuasive legal justification—that perhaps the five year limitation in the general variance provision of 20.6.2.1210.C might be read by a court as indirectly limiting the variance provision of the Copper Rule that, for the copper industry only, supplants it. This is the argument of a witness unpersuaded by her own position, and it should be soundly rejected. The Commission in fairness should adopt NMED's offered amendment.

2. Proposals for Describing Water Bodies in Variance Requests (20.6.2.1210.A(5))

NMED and Olson each offer amendatory language for 20.6.2.1210.A. NMED's original proposal is reasonable; Olson's original and modified proposal are not and would be problematic. The current provision in question would require variance petitions under Rule 1210 to "describe the water body or watercourse affected by the discharge," and NMED's common sense proposal was to limit this requirement to the discharge "*for which the variance sought,*" (emphasis added). NMED's original language clearly recognizes that it would be nonsensical to require the information where the variance either has nothing to do with a discharge, or to require the information for all of what could be multiple discharges, such as for a discharge permit covering multiple units of a large mine, where the variance sought may implicate only one of the discharge locations. NMED's original proposal therefore is sensible.

Olson's original proposal for 20.6.2.1210.A(5) was to expand the information required by this provision to include an analysis of the present and future uses of any water that may be affected by the variance. This proposal thus alluded to the "place of withdrawal" language of the Water Quality Act that has occupied the attention of both this Commission and the New Mexico Court of Appeals in multiple lengthy adjudication proceedings, appeals, and remands. The proposal would foist onto permittees a task that has proven confounding to NMED, to this Commission, and to the Court of Appeals, which described the "place of withdrawal" as "beguiling."

Olson subsequently modified his proposal after discussing it with NMED, but he did not solve the fundamental problem of creating a confusing requirement that unduly complicates the variance application process for a permittee. Specifically, in attempting to revise the scope of his initial proposal, which Olson conceded was broader than he intended it to be, he proposes an almost identical avenue to expand the information required by 20.6.2.1210.A(5) by suggesting to include information on "uses of water that may be affected." Olson's second proposal harbors the same flaws that his original proposal did, it would require an analysis of present and future uses of water that may be affected by the variance. The proposed language therefore introduces unnecessary uncertainty into the regulations that, if adopted, would be sure to be the subject of future controversy.

Moreover, the variance application requirements have been in the ground water program regulations literally for decades, including periods when Olson himself was a regulator under the program and a Commissioner of this Commission, and Olson completely failed to identify problems that have been encountered or reasons why the particular permit application

requirement relating to identifying waters needs to be substantively changed as he now proposes in his private capacity.

3. Language Limiting the 3105.A Exemption (20.6.2.3105.A)

RGR, NMCC and AmMg oppose NMED's proposal to narrow the 3105.A exemption. NMED proposes to narrow the scope of the exemption by adding the underlined language to the exemption for:

> A. Effluent or leachate which conforms to all the . . . standards of Section 20.6.2.3103 NMAC and has a total nitrogen concentration of 10 mg/l or less . . . . If treatment or blending is required to achieve these standards this exemption does not apply.

There can be little doubt that, on its face and in its plain meaning, the underlined language proposed by NMED would dramatically narrow the exemption, particularly in a state such as New Mexico, where fresh water resources are scarce, and treatment and blending to meet standards are commonplace and desirable from the standpoint of maximizing water resources and use.

Moreover, in the cross-examination of NMED's primary witness on the proposed narrowing of the exemption, Ground Water Quality Bureau Chief Michelle Hunter, three things became painfully clear. First, NMED had not thought through even the most obvious issues about how it might work in practice. For example, when asked whether just the first user of blended or treated water or all subsequent users, would need to permit their discharges, Ms. Hunter had no answer and merely said that would be something NMED would need to talk about. Second, NMED's witness acknowledged that the exemption as written has been in effect four 40 or possibly even 50 years without prior change or any specification of fundamental problem. Third, and most tellingly, Ms. Hunter revealed on cross examination that NMED is about to embark on a two- or three-year rulemaking process specifically addressed to water

recycling and reuse, yet she could not acknowledge the most obvious take-away from her testimony, which is that it is premature to interject a recycling and reuse component into the 3105.A exemption that has been in effect for 40 or 50 years, when the very subject of recycling and reuse has not yet been vetted through the 2 or 3 rulemaking process NMED now plans to pursue.

Finally, in any event the narrowing of the 3105.A would serve as an ill-advised inhibitor on treating and making secondary uses of water. As examples that were raised during the cross examination of Ms. Hunter, cities may be less inclined to use beneficially reclaimed water for irrigating parks, and municipal and private golf courses may find that development of fresh water resources are more affordable and less burdensome that going through a lengthy and costly groundwater discharge permitting process with NMED. Creating such unintended and counterproductive incentives in the rush to interject an issue that is about to be the subject of a full-blown permitting process makes little sense, especially when the 3105.A exemption from the requirement to get a discharge permit is justified by the common sense premise of the exemption: this discharge is question would be nothing more than water already meeting standards.

Argument Conclusion

For all the above reasons, RGR, NMCC and AmMg respectfully request that this Commission adopt NMED's well-considered amendatory language to 20.6.2.1210.C and 20.6.2.1210.A, but reject the ill-considered amendatory language Bill Olson proposes for 20.6.2.1210.A, as well as NMED's prematurely inserted limitation on the longstanding exemption in 20.6.2.3105.A. In all other respects, RGR, NMCC and AmMg join and adopt the positions taken by the New Mexico Mining Association in this rulemaking proceeding.

Proposed Findings of Fact

1. NMED submitted its "Amended Notice of Withdrawal of the New Mexico Environment Department's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC" ("Amended Notice of Withdrawal") on November 7, 2017. WQCC 17-03(R), Docket Number 89.

2. The Amended Notice of Withdrawal included the version of NMED's proposed changes to 20.6.2 NMAC that were considered at the Water Quality Control Commission hearing on WQCC 17-03(R) on November 15-18, 2017. WQCC 17-03(R), Docket Number 89, pp. 6-83.

3. Included in these proposes changes was a change to 20.6.2.1210.A(5), which would require a person seeking a seeking a variance pursuant to NMSA 1978, §74-6-4(G) to submit a petition to NMED that would "describe the water body or watercourse affected by the discharge for which the variance is sought and provide information on uses of water that may be affected." WQCC 17-03(R), Docket Number 89, p. 17 (proposed revision to the regulation in underline). The first part of the underlined language ("for which the variance was sought") originally was a proposal from NMED, and the second part of the proposal ("and provide information on uses of water that may be affected") was a modification of language originally proposed by William Olson. Hearing Transcript, Volume 1, p. 340, lines 8-13.

4. On July 27, 2017, William Olson submitted "William C. Olson Statement of Position, Proposed Amendments and Statement of Reasons for Proposed Amendments to NMED's Proposed Revisions to 20.6.2 NMAC." WQCC 17-03(R), Docket Number 32.

5. One of Mr. Olson's proposed changes was to 20.6.2.1210.A(5) NMAC. WQCC 17-03(R), Docket Number 32, pp. 2-3.

6. Mr. Olson requested NMED include a change to 20.6.2.1210.A(5) so that any person seeking a variance pursuant to NMSA 1978, §74-6-4(G) would be required to submit a petition with the WQCC that would "provide an analysis of present and foreseeable future uses of water that may be affected by the variance." WQCC 17-03(R), Docket Number 32, pp. 2-3.

7. Mr. Olson submitted that this change "is necessary to minimize potential impacts on the uses of water and meet the statutory requirements of the Water Quality Act." WQCC 17-03(R), Docket Number 32, p. 3.

8. Mr. Olson conferred with NMED about his suggested revisions, during which time it was "pointed out that [Mr. Olson's] language was broader than I intended," Hearing Transcript, Volume 1, p. 340, lines 8-9, and that that language "started bringing us back into the issue of place of withdrawal for present and reasonably foreseeable future use." Hearing Transcript, Volume 1, p. 349, lines 12-14.

9. Mr. Olson indicated that his change was intended to supply "information on people that are going to be affected [by variances] and water supplies that are going to be affected [by variances]." Hearing Transcript, Volume 1, p. 340 lines 15-18.

10. Following the meeting, NMED added proposed revision to 20.6.2.1210.A(5), which, again, would require a petition for variance to include would require a person seeking a seeking a variance pursuant to NMSA 1978, §74-6-4(G) to submit a petition to NMED that would "describe the water body or watercourse affected by the discharge for which the variance is sought and provide information on uses of water that may be affected." WQCC 17-03(R), Docket Number 89, p. 17 (proposed revision to the regulation in underline); *see also* Hearing Transcript, Volume 1, page 349, lines 12-13.

11. At the hearing, Mr. Olson conceded that the language would involve identifying potential future sources of water. Hearing Transcript, Volume 1, p. 350, line 9.

12. At the hearing, Mr. Olson further recognized that there would be no limit on the potential future uses of water a petitioner would need to identify in order to complete a variance petition. Hearing Transcript, Volume 1, p. 350 lines 17-22.

13. Included in NMED's November 7, 2017 proposed changes was language adjustments to 20.6.2.1210.C allowing the Commission to specify the duration of variances, which language supplanted a five year limitation on variances that exists in the current version of the provision.

14. In adopting the Copper Rule, the Commission included a variance provision supplanting 20.6.2.1210.C for application to the copper mining industry, and in doing so avoided importation of the five-year limitation appearing in 20.6.2.1210.C.

15. Included in NMED's November 7, 2017 proposed changes was language that would narrow the scope of the exemption for discharges meeting groundwater standards in 20.6.2.3105.A., a provision that an NMED witness acknowledged had been in the ground water program regulations without change for at least 40 years.

16. NMED's proposed narrowing of the 20.6.2.3105.A exemption goes to an issue—recycling and reuse of water—that NMED's Ground Water Quality Bureau Chief offered in testimony is about to be the subject of a two or three year new rulemaking process.

17. It became clear during the public hearing of this matter that NMED had not fully considered all of the ramification of its proposed narrowing of the 20.6.2.3105.A exemption, including the question of whether permits would be required only of parties treating or blending water prior to reuse, or whether, for example, it would apply to any and all subsequent users of the water where discharge may reach groundwater.

Proposed Conclusions of Law

1. NMED's proposed revision to 20.6.2.2110.A(5) NMAC creates uncertainty for petitioners for a variance, as it is unclear how the language differs from the broad language that Mr. Olson originally proposed, which would require a petitioner to identify provide an analysis of present and foreseeable future uses of water that may be affected by the variance.

2. The proposed requirement to have petitioners for a variance submit information on "uses of water that may be affected" creates regulatory uncertainty about the infinite and impossible projections that would be needed to identify potential future water use.

3. The proposed requirement to have petitioners for a variance submit information on "uses of water that may be affected" fails to establish any criteria with which NMED would be able to assess a petitioner's application.

4. The proposed revision to 20.6.2.2110.A(5) NMAC would not minimize potential impacts on the uses of water.

5. The proposed revision to 20.6.2.2110.A(5) NMAC is unnecessary and therefore is not recommended for adoption.

6. NMED's originally proposed language for 20.6.2.2110.A(5), which would limit the provision to discharges related to the variance requested, is recommended for adoption.

7. NMED's proposed changes to 20.6.2.1210.C are recommended for adoption.

8. NMED's proposed changes to 20.6.2.3105.A are not recommended for adoption.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, a copy of the foregoing, Post-Hearing Submission of Rio Grande Resources Corporation, New Mexico Copper Corporation and American Magnesium, LLC was hand delivered to the following:

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