STATE OF NEW MEXICO

BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF COPPER FLAT MINE,
DISCHARGE PERMIT DP-1840

No. GWB 18-06(P)

REPLY IN SUPPORT OF MOTION IN LIMINE

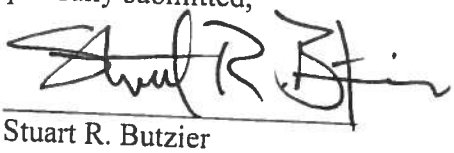
New Mexico Copper Corporation ("NMCC") provides this limited reply to the respective September 13, 2014 response briefs of Turner Ranch Properties ("Turner"), *et al.*, and Elephant Butte Irrigation District, primarily for the purpose of offering the attached NMMC Exhibits A through C, to which NMCC's counsel will refer in the telephonic hearing scheduled for 3:00 p.m. with all parties and the Hearing Officer. These exhibits are offered primarily to refute the arguments of the responding parties that they should be permitted to address, in the guise of an "as applied" context, issues already decided by the Copper Rule, purportedly because the arguments the New Mexico Supreme Court unanimously rejected in *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2018-NMSC-025, 417 P.3d 369 ("*Gila Res.*") were merely "facial" challenges to the Copper Rule.

What is demonstrated by NMCC Exhibits A through C—which respectively are pertinent excerpts (1) from the New Mexico Court of Appeals decision, (2) from the Consolidated Reply filed by Turner and other appellants in the Supreme Court appeal from that decision, and (3) from the Supreme Court's decision—is that a central part of the so-called "facial" challenge unanimously rejected by this state's highest court was the position of Turner and others that the Copper Rule unlawfully would allow for clean water within an area of hydrologic containment to migrate to an open pit during and following operations of a copper mine. This fundamental issue,

having been litigated and decided against Turner, *et al.*, is settled law in New Mexico and is not subject to re-litigation as a matter of both *stare decisis* and *res judicata*.[1] Viewed within the context of this settled law, the offerings of the responding parties herein to have multiple witnesses testify about groundwater migrating to the pit, and speculating that in doing so would become contaminated and cause damage to surrounding landowners, should be recognized for what they are, which is no more than thinly veiled arguments relating to "water supply and impairment" that Turner readily acknowledges is "within the authority of the Office of the State Engineer." *See* the September 13, 2018 Response of Turner Ranch Properties, L.P. and Hillsboro Pitchfork Ranch, LLC to New Mexico Copper Corporation's Motion in Limine, at p. 6.

NMCC reserves the right to orally respond to other arguments put forward by the responding parties herein during this afternoon's telephonic hearing.

Respectfully submitted,



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[1] Although the "Turner" parties commonly represented by the Environmental Law Center consist of Turner Properties in the New Mexico Supreme Court, and Turner Ranch Properties herein, the commonly represented parties clearly should be recognized as parties who are *in privity* for purposes of *res judicata*.

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2018, a copy of the foregoing **Motion in Limine** was e-mailed to the following:

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3275051

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: April 8, 2015

NO. 33,237
(consolidated with Nos. 33,238 and 33,245)

GILA RESOURCES INFORMATION PROJECT, AMIGOS BRAVOS, TURNER RANCH PROPERTIES, L.P., STATE OF NEW MEXICO, ex rel. Gary King, Attorney General, and WILLIAM C. OLSON,

Appellants,

v.

NEW MEXICO WATER QUALITY CONTROL COMMISSION,

Appellee,

and

FREEPORT-MCMORAN CHINO MINES COMPANY, FREEPORT-MCMORAN TYRONE, INC., FREEPORT-MCMORAN COBRE MINING COMPANY, and NEW MEXICO ENVIRONMENT DEPARTMENT,

Intervenors-Appellees.

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OPINION

SUTIN, Judge.

{1} The Attorney General (hereafter the State) and, separately, a group of appellants comprised of Gila Resources Information Project (GRIP), Amigos Bravos, Turner Ranch Properties, L.P., and William C. Olson (collectively Gila) appealed the Water Quality Control Commission's (the Commission) order adopting a set of regulations codified at 20.6.7 NMAC (12/1/2013) pertaining to ground water protection and supplemental permitting requirements for copper mine facilities (the Regulations). The Commission and, separately, a group of Intervenors-Appellees comprised of Freeport-McMoRan Chino Mines Co., Freeport-McMoRan Tyrone, Inc., Freeport-McMoRan Cobre Mining Co., and the New Mexico Environment Department (collectively Freeport) filed answer briefs. We consolidated three appeals and address both the State's and Gila's contentions in this Opinion.

{2} Primarily at issue in this appeal is whether the Regulations adopted by the Commission violate the Water Quality Act (the WQA), NMSA 1978, §§ 74-6-1 to -17 (1967, as amended through 2013), and whether the Commission's reasons for adopting the Regulations were supported by sufficient evidence. We hold that the Regulations do not violate the WQA. Additionally, we conclude that Appellants' various attacks on the Commission's statement of reasons in support of its adoption

{21} This Court will set aside the Commission's order adopting regulations only if the order is "(1) arbitrary, capricious[,] or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." Section 74-6-7(B); *see Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 16, 138 N.M. 625, 124 P.3d 1164 (stating that an agency action is arbitrary or capricious "if it is unreasonable or without a rational basis, when viewed in light of the whole record." (internal quotation marks and citation omitted)); *Regents of the Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, ¶ 29, 136 N.M. 45, 94 P.3d 788 (stating that an agency decision is supported by substantial evidence where "relevant evidence that a reasonable mind might accept as adequate" supports the conclusion (internal quotation marks and citation omitted)).

The Regulations Do Not Violate the WQA

{22} Appellants make a number of arguments in support of their respective claims that the Regulations violate the WQA. We address these arguments in turn, combining them where it is reasonable to do so in order to avoid duplication. We begin, however, by describing the Regulations, generally.

{23} Because the phrase "place of withdrawal" is not defined in the WQA, designating places of withdrawal is a matter left to NMED's and the Commission's

expertise. *See Phelps Dodge*, 2006-NMCA-115, ¶ 37 (recognizing NMED's authority to determine the locations of places of withdrawal, subject to the Commission's review and authority to define relevant factors). As we recognized in *Phelps Dodge*, in determining places of withdrawal, two competing interests are at stake: the need to protect water sources and the need to allow mining operations, which are "a necessary and important component of our economy and our modern way of life." *Id.* ¶¶ 27, 29. Further, we recognized that because mining has inevitable environmental impacts, it would be unrealistic and overbroad to conclude that an entire mining facility is a place of withdrawal such that water quality standards must be met everywhere within the facility's boundaries. *Id.* ¶ 33.

{24} Under the Regulations, the primary method for protecting groundwater during the mine's operation is through discharge control at each mining "unit," that is, at the place of each mining-related activity, by containing ground water that exceeds applicable standards. Although the containment strategy may allow ground water underlying certain units to exceed the 3103 standards during mining operations, pursuant to the Regulations, those areas are not available as "places of withdrawal" during mining operations. The effectiveness of the discharge control at each mining unit is determined by monitor wells that are located on the perimeter of each unit, and should a monitor well detect an exceedance of the 3103 standards, the Regulations

data, views[,] or arguments orally or in writing and to examine witnesses testifying at the hearing.").

{36} We next address Appellants' arguments regarding the extent to which the Regulations allow ground water pollution. Having rejected the notion that the Regulations permit water pollution within the entire boundary of a mine facility, we focus on the State's argument that the Regulations violate the WQA because they allow copper mining facilities to pollute ground water within a unit up to the point of a monitor well. We also address the related argument, raised by Gila, that the Regulations "frustrate[] the [WQA's] basic purpose" because the Regulations permit rather than abate and prevent ground water pollution within mining units.

{37} In promulgating the Regulations, the Commission was acting pursuant to the Legislature's mandate that it formulate regulations to "prevent or abate water pollution" while simultaneously weighing, among other things, the "social and economic value of the sources of water contaminants" and the "technical practicability and economic reasonableness of reducing or eliminating" them. Section 74-6-4(E)(2), (3). Thus, the Commission was required to strike what it deemed to be an appropriate balance between the need to prevent or abate water pollution and the need to create regulations with which the mining industry could reasonably and practicably comply. To the extent that Appellants' arguments are implicitly based on

the premise that the Commission was required by the WQA to establish regulations that would totally prevent mining operations from polluting ground water, we reject them. *See Phelps Dodge*, 2006-NMCA-115, ¶ 33 (recognizing that it is unrealistic to require that all ground water underlying a mine site meet drinkable standards).

{38} Appellants cite various provisions of the Regulations pursuant to which the ground water underlying discrete mining units is not required to meet the 3103 standards to exemplify their point that the Regulations permit ground water contamination. While the Commission acknowledged that the containment strategy required by the Regulations may allow ground water underlying certain units to exceed the 3103 standards during mining operations, to say that the Regulations therefore permit ground water contamination goes too far. As noted earlier, containing ground water that exceeds the 3103 standards is the primary method of controlling discharge. Pursuant to the Regulations, each mining unit is governed by requirements that specifically identify the method by which contaminated water is controlled.

{39} For example, Appellants argue that the Regulations permit ground water pollution because, during mining operations and after closure, the 3103 standards do not apply to ground water that is located inside the " 'area of open pit hydrologic containment' and related 'open pit surface drainage area.' " *See* 20.6.7.24(D) NMAC

("During operation of an open pit, the [3103 standards] do not apply within the area of open pit hydrologic containment."). An

> "[a]rea of open pit hydrologic containment" means, for an open pit that intercepts the water table, the area where ground water drains to the open pit and is removed by evaporation or pumping, and is interior to the department approved monitoring well network installed around the perimeter of an open pit[.]"

20.6.7.7(B)(5) NMAC. An " '[o]pen pit surface drainage area' means the area in which storm water drains into an open pit and cannot feasibly be diverted by gravity outside the pit perimeter, and the underlying ground water is hydrologically contained by pumping or evaporation of water from the open pit." 20.6.7.7(B)(42) NMAC. Thus, although it is true that the 3103 standards do not apply to open pits during mining operations, Appellants fail to acknowledge the Regulations' provision for ground water protection in that area by removing the contaminated water from the open pit. *See* 20.6.7.33(D) NMAC.

{40} After closure of mining operations, Part 20.6.7.33(D) NMAC of the Regulations requires a permittee to provide a detailed closure plan for open pits that will "minimize the potential to cause an exceedance of" the 3103 standards. Under that part of the Regulations, any water within an open pit that is predicted to flow into the ground water must meet the 3103 standards. 20.6.7.33(D)(2) NMAC. An exception applies only to open pits that are determined to be "hydrologic evaporative

sink[s]," meaning that evaporation of the water in the open pit will exceed the inflow and will, therefore, not flow into the ground water. 20.6.7.33(D)(1) NMAC. Thus, Appellants' assertion that the Regulations permit the water from open pits to exceed the 3103 standards perpetually after closure is inaccurate.

{41} Gila argues, further, that the Regulations violate the WQA because they permit widespread ground water pollution above the 3103 standards without requiring the permittee to apply for a variance. Section 74-6-4(H) provides that under particular circumstances, the Commission "may grant an individual variance from any regulation[.]" Nothing in the Regulations purport to alter the Commission's ability or discretion to grant a variance under Section 74-6-4(H), and having rejected Gila's premise that the Regulations "permit[] widespread ground water pollution[,]" we decline to consider this argument further.

{42} In sum, Appellants have failed to demonstrate that the Regulations violate any provision of the WQA. Although the Regulations' provisions are not perfectly protective of ground water underlying a mining facility, the WQA did not require them to be. *See* § 74-6-4(E). The Commission determined that the Regulations established "efficient measures and clear provisions to prevent and contain ground water contamination[,]" and having reviewed the various at-issue provisions, we cannot conclude that the Commission reached this conclusion in error.

the record. To that end, we observe the Commission's transcribed deliberations in which each member of the Commission confirmed that they had reviewed each party's "written closing arguments and proposed statements of reason" and during which the contents of Appellants' Joint Proposal were reviewed and discussed.

{60} In sum, Appellants have not demonstrated that the Order provides any basis for reversal. We conclude that Appellants' attacks on the Commission's findings as unsupported by sufficient evidence or as being contrary to law do not warrant reversal.

CONCLUSION

{61} We affirm the Commission's order adopting the Regulations.

{62} **IT IS SO ORDERED.**

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

LINDA M. VANZI, Judge

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NOS. S-1-SC-35279, 35289, & 35290

GILA RESOURCES INFORMATION PROJECT, AMIGOS BRAVOS, TURNER RANCH PROPERTIES, L.P., STATE OF NEW MEXICO ex rel. HECTOR BALDERAS, Attorney General, and WILLIAM C. OLSON,

Appellants-Petitioners,

v.

NEW MEXICO WATER QUALITY CONTROL COMMISSION,

Appellee-Respondent,

and

FREEPORT-MCMORAN CHINO MINES COMPANY, FREEPORT-MCMORAN TYRONE, INC., FREEPORT-MCMORAN COBRE MINING COMPANY, and NEW MEXICO ENVIRONMENT DEPARTMENT,

Intervenors-Respondents.

CONSOLIDATED REPLY BRIEF OF APPELLANTS-PETITIONERS AMIGOS BRAVOS, GILA RESOURCES INFORMATION PROJECT, AND TURNER PROPERTIES, L.P.

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judicial estoppel, respectively. Moreover, the Commission's unexplained departure from its prior adjudication should be disregarded as arbitrary decision making.

In sum, the Commission and NMED have an undisputed duty under the Act to prevent water pollution and protect ground water that may be withdrawn for present or future use. It is undisputed that the Rule permits ground water pollution above 3103 Standards, in perpetuity, at all existing and future copper mines. It allows this pollution with no regard to whether the polluted ground water may be withdrawn for present or reasonably foreseeable future use. Therefore, the Rule violates the Act on its face. It does not prevent water pollution or protect Places of Withdrawal. Petitioners respectfully request the Court to reverse the Court of Appeals and set the Rule aside.

ARGUMENT

I. THE RULE DOES NOT PREVENT WATER POLLUTION OR PROTECT PLACES OF WITHDRAWAL.

A. The Commission Never Intended The Rule To Define Places Of Withdrawal.

Respondents' argument that the Rule defines Place of Withdrawal has no support in the text of the Rule or in the record. The Rule does not mention, much less define, Place of Withdrawal or provide any guidance for identifying Places of Withdrawal. [NMED AB 10 ("Copper Rule does not expressly define the concept

[4-10-13 2 Tr. 243:8-10] NMED's counsel confirmed in closing that "The rule does not make a determination where place of withdrawal is …." [9-10-13 12 Tr. 2747:20-21] And Freeport, whose lawyers wrote the Statement of Reasons as well as the challenged provisions of the Rule, made the same point to the Court of Appeals, arguing that the Rule "does not say *how* to determine" or "otherwise define 'place of withdrawal.'" [FMI COA AB 2, 13 (emphasis in original)][4] Accordingly, the Commission never intended the Rule to define, much less protect, Places of Withdrawal. Respondents' contrary argument on appeal, therefore, is a *post hoc* rationalization that has no support in the Rule or the record below.

B. The Rule Permits Ground Water Pollution Without Regard To Places of Withdrawal.

The Rule arbitrarily permits ground water pollution wherever copper mines happen to be located, now or in the future. As Respondents admit, the Rule allows ground water pollution within areas circumscribed by perimeter monitoring wells, which areas the Rule implicitly precludes from being Places of Withdrawal, *a priori*. The Rule permits pollution to remain in these areas, unabated, forever. 3103 Standards within "area[s] of open pit hydrologic containment" are completely waived, both during and after active mining operations. 20.6.7.24(D) and -

[4] FMI filed two answer briefs in the Court of Appeals, one in response to Petitioners and one in response to the Attorney General. Citations in this Reply Brief refer to the former.

.33(D)(1) NMAC. In addition, the Rule permits massive waste rock piles and tailings impoundments located outside the area of open pit hydrologic containment to pollute ground water wherever they are located. 20.6.7.21(B)(1)(c) and -.22(A)(4)(c) NMAC. The Rule thus allows the copper industry to create sprawling ground water contamination sites, covering thousands of acres, at which various pump-and-treat remediation systems must be operated in perpetuity. **[Remand Order, p. 53, ¶ 238, 24 RP 004525, ¶ 238** (describing this situation at the Tyrone Mine)]

C. The Pump-And-Treat Ground Water Remediation Systems Required Under The Rule, Though Appropriate At Superfund And Other Contamination Sites, Have No Place In A Rule That Is Supposed To Prevent Water Pollution.

Respondents admit that the Rule relies on "containment strategies" rather than prevention. **[SOR, p. 204, ¶ 1332, 29 RP 006843, ¶ 1332]** The Rule permits Freeport or any other copper mining company to pollute ground water so long as it also implements pump-and-treat remediation, as necessary, to "contain" the pollution within permitted areas. As explained by Freeport, pump-and-treat remediation within the mine site creates a "cone of depression" in ground water. [FMI AB 4-5] This induces clean ground water from offsite to flow into and through the polluted areas onsite, where it is contaminated and eventually

produced at various pumping centers—either at an open pit or an interceptor well.[5] Unless the contaminated water so produced can be used in the mining process,[6] it must be treated and disposed of during active operations. *See* 20.6.7.17(C)(3) NMAC (governing "process water[7] or impacted stormwater treatment system plans and specifications"). Under the Rule, this process of pump, treat and dispose is allowed to continue in perpetuity after active operations cease. 20.6.7.33(H) NMAC ("Closure water management and water treatment plan") and 20.6.7.35 NMAC ("Post-Closure Requirements").

The Rule's pollution "containment strategy" clearly is not a preventative tool; it is an after-the-fact remedy. This same remedy is typically used at Superfund Sites under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675 (2002).

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[5] Prior to the Rule, Freeport's predecessor had committed to prevent this by installing "new capture wells" to "collect [clean] ground water before it becomes contaminated." **[Remand Order, p. 55, ¶ 245, 24 RP 004527, ¶ 245]** The Rule does not require this.

[6] Aside from water quality concerns, the produced water could not legally be used unless the operator possessed appropriate water rights. NMSA 1978, § 72-12A-5(A)(1980) ("No water rights may be established solely by mine dewatering.")

[7] "Process water" includes "any water containing water contaminants in excess of [3103 Standards] that is generated, managed or used within a copper mine facility including ... pit dewatering water [and] intercepted ground water ...." 20.6.7.7(B)(50) NMAC.

Dated: March 7, 2016.

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: March 8, 2018

NOS. S-1-SC-35279, -35289, & -35290

GILA RESOURCES INFORMATION PROJECT, AMIGOS BRAVOS, TURNER RANCH PROPERTIES, L.P., STATE OF NEW MEXICO, ex rel., HECTOR BALDERAS, Attorney General, and WILLIAM C. OLSON,

Appellants-Petitioners,

v.

NEW MEXICO WATER QUALITY CONTROL COMMISSION,

Appellee-Respondent,

and

FREEPORT-MCMORAN CHINO MINES COMPANY, FREEPORT-MCMORAN TYRONE, INC., FREEPORT-MCMORAN COBRE MINING COMPANY, and NEW MEXICO ENVIRONMENT DEPARTMENT,

Intervenors-Respondents.

EXHIBIT
NMCL-C

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OPINION

NAKAMURA, Chief Justice.

(1) In September 2013, the New Mexico Water Quality Control Commission (the Commission) adopted the Copper Mine Rule, 20.6.7 NMAC (Copper Rule). Petitioners argue that the Copper Rule violates the Water Quality Act (WQA), NMSA 1978, §§ 74-6-1 to -17 (1967, as amended through 2013) because it is premised on an impermissible construction of the statutory phrase "place of withdrawal of water for present or reasonably foreseeable future use." Section 74-6-5(E)(3). Petitioners assert that, as a consequence of this impermissible construction of the statutory phrase, the Copper Rule permits rather than prevents groundwater contamination at open pit copper mining facilities. We reject these arguments, conclude that the Copper Rule is premised on a permissible construction of the statutory phrase, and affirm the Commission's decision to adopt the Copper Rule.

I. BACKGROUND

(2) The WQA was enacted in 1967. Its purpose is "to abate and prevent water pollution." *Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 59, 93 N.M. 546, 603 P.2d 285. Prior to 2009, the WQA did not allow the Commission to specify by rule the "method to be used to prevent or abate

water pollution . . . ." Section 74-6-4(D) (2003). Amendments to the WQA enacted in 2009 altered this legislative framework.

[3] The 2009 amendments to the WQA directed the Commission to adopt regulations particular to specific industries, including the copper mining industry, specifying "the measures to be taken to prevent water pollution and to monitor water quality." Section 74-6-4(K). The regulations were to be developed by the New Mexico Environment Department (NMED). Section 74-6-4(K) ("The constituent agency shall establish an advisory committee . . . to advise the constituent agency on appropriate regulations to be proposed for adoption by the commission."); Section 74-6-2(K)(1) ("'[C]onstituent agency' means . . . the department of environment[.]"). The NMED engaged in an open rulemaking process that resulted in the Copper Rule, which the Commission adopted when it entered its Order and Statement of Reasons on September 25, 2013. Petitioners appealed the Commission's decision to adopt the Copper Rule. *See Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2015-NMCA-076, ¶ 1, 355 P.3d 36.

[4] The Court of Appeals rejected Petitioners' contention that the Copper Rule violates the WQA and affirmed the Commission's order adopting it. *Id.* ¶¶ 2, 19, 61. We granted certiorari to review Petitioners' requests that we set aside the Copper

Rule and remand this matter to the Commission with instructions that it promulgate a new rule that complies with the WQA.

II. DISCUSSION

[5] The Commission's order adopting the Copper Rule shall be set aside if it is "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." Section 74-6-7(B). Petitioners contend that the Commission's decision to adopt the Copper Rule is not in accordance with law because the Copper Rule is inconsistent with and violates the WQA.

[6] Petitioners do not ask us to evaluate the lawfulness of the Copper Rule under some specific set of circumstances; the Copper Rule has not yet been applied at a copper mine. Instead, Petitioners mount a facial challenge to the Copper Rule. *See Am. Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606, 619 (1991) ("This case is a challenge to the validity of the entire rule in all its applications."). The inquiry before us is whether the Copper Rule is a permissible exercise of the Commission's statutory authority, *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 21, 141 N.M. 41, 150 P.3d 991, and Petitioners must establish

that no set of circumstances exist where the Copper Rule could be valid. *Reno v. Flores*, 507 U.S. 292, 301 (1993).

{7} Petitioners make varying specific claims in support of their assertion that the Copper Rule violates the WQA. To meaningfully discuss those specific claims, we must first examine how open pit copper mining is conducted. We then provide an overview of the Copper Rule focusing on the provisions that are central to its function as a regulatory tool and to which Petitioners object. Finally, we consider Petitioners' specific arguments.

A. Copper Mining

{8} Petitioners contend that "the undisputed testimony and other evidence in the record show[s] that open pit copper mines have caused tens of thousands of acres of ground water pollution in New Mexico and that this pollution persists for hundreds of years." Nevertheless, the legality of open pit mining is not disputed and no party advocates banning this form of mining.

{9} According to Respondents, open pit copper mining is the typical method to mine copper. An "open pit" is "the area within which ore and waste rock are exposed and removed by surface mining." 20.6.7.7(B)(41) NMAC. For context of the scale of open pit mines, one such mine in Grant County, New Mexico is 11,600 feet long,

8,500 feet wide, and 2,000 feet deep. Open pits eventually become deep enough to reach the groundwater table. At that point, water must be pumped out of the open pit to mine it any deeper.

(10) As the depth of the open pit increases, gravity causes groundwater in the vicinity of the open pit to flow towards the bottom of the pit. The area affected by this hydrological phenomenon is referred to as the "[a]rea of open pit hydrologic containment." 20.6.7.7(B)(5) NMAC ("'Area of open pit hydrologic containment' means . . . where ground water drains to the open pit and is removed by evaporation or pumping, and is interior to the department approved monitoring well network installed around the perimeter of an open pit[.]"). Some surface waters also drain into the open pit. "[T]he area in which storm water drains into an open pit and cannot feasibly be diverted by gravity outside the pit perimeter" is referred to as the "[o]pen pit surface drainage area." 20.6.7.7(B)(42) NMAC. Petitioners aver that, while the area of open pit hydrologic containment and open pit surface drainage area are distinct in that one concerns groundwater and the other surface water, the areas both exist as a consequence of the open pit, exist at the same general location, and are properly considered as companion concepts.

impoundments," which can be as large as several square miles. 20.6.7.7(B)(60) NMAC.

{14} All of these copper extraction processes, as well as waste rock stockpiles, can cause discharges that impact groundwater quality. For this reason, mining units are frequently located near the open pit and within the open pit surface drainage area so as to capture any discharges at a mining unit.

{15} The open pit itself is also capable of generating discharges that may contaminate groundwater. When rain water contacts the exposed surfaces of the open pit, acidic solutions can be generated. Other sources of possible contaminant discharge at open pit mining facilities include "surface impoundments that store or retain process water; wastewater or storm water runoff that has contacted mined materials; pipeline and tank systems used to convey or store process water; and equipment washing facilities."

B. The Copper Rule

{16} The Copper Rule is comprised of thirty-nine different sections and a myriad of subsections which address all manner of discharge control for the copper mining industry. It is a "supplement [to] the general permitting requirements . . . to control discharges of water contaminants specific to copper mine facilities . . . ."

20.6.7.6 NMAC. The "purpose" of the Copper Rule, as stated by the Commission, "is to control and contain discharges of water contaminants specific to copper mine facilities and their operations to prevent water pollution so that ground water meets the quality standards of 20.6.2.3103 NMAC at locations of present and potential future use." The groundwater quality standards set out at 20.6.2.3103 NMAC (3103 standards) specify the allowable pH range and maximum allowable contaminant concentration for groundwater. 20.6.2.3103(A)-(C) NMAC. Groundwater is polluted when the contaminant concentration levels identified in the 3103 standards are exceeded.

[17] Petitioners' objections to the Copper Rule arise from two of its features. First, the Copper Rule specifies that, "[d]uring operation of an open pit, the standards of 20.6.2.3103 NMAC do not apply within the area of open pit hydrologic containment." 20.6.7.24(D) NMAC. Second, the Copper Rule requires an applicant for a discharge permit to install monitoring wells in specific locations at an open pit mining facility. 20.6.7.28(A) NMAC. The monitoring wells must be placed "around the perimeter and downgradient of each open pit, leach stockpile, waste rock stockpile, tailings impoundment, process water impoundment, and impacted stormwater impoundment." 20.6.7.28(B) NMAC. The monitoring wells must also be installed "as close as

practicable" to the open pit or mining unit in order "to detect an exceedance(s) or a trend towards exceedance(s) of the applicable standards at the earliest possible occurrence, so that investigation of the extent of contamination and actions to address the source of contamination may be implemented as soon as possible." *Id.* "The [NMED] may require additional wells around the perimeter of mine units that are underlain by areas where ground water flow directions are uncertain" and may "require additional monitoring wells at any other unit of a copper mine facility that has the potential to cause an exceedance of applicable standards . . . ." *Id.*

C. Petitioners' Arguments

1. Section 74-6-5(E)(3) and "place of withdrawal"

{18} Petitioners' primary contention in this appeal is that the Copper Rule permits the copper mining industry to pollute groundwater above the 3103 standards wherever its mines are located. It does this, Petitioners explain, by waiving compliance with 3103 standards within the area of open pit hydrologic containment and by assessing the impacts of mining on groundwater at monitoring wells rather than at the open pit and mining units themselves. This is, Petitioners argue, inconsistent with the plain language of Section 74-6-5(E)(3), which states that

> [t]he [NMED] shall deny any application for a permit or deny the certification of a federal water quality permit if:
>
> . . . .
>
> (3) the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. Determination of the discharge's effect on ground water shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use.

This provision is incorporated into the Copper Rule at 20.6.7.10(J)(3) NMAC, which requires compliance with Section 74-6-5(E)(3).

[19] According to Petitioners, the WQA's mandate that determination of the effects of a discharge shall be measured at "any place of withdrawal of water for present or reasonably foreseeable future use" is "clear and unambiguous." A place of withdrawal, Petitioners argue, is "a place where ground water is presently being used or foreseeably could be used in the future." Petitioners assert that Section 74-6-5(E)(3) requires a site specific evaluation of whether a discharge will contaminate groundwater with present or future use and argue that, "[i]f any discharge will pollute above standards groundwater with present or reasonably foreseeable future use, the permit application must be denied."

[20] Petitioners claim that the Copper Rule violates the WQA because it permits contamination of groundwater at the open pit and at mining units without a site

record to determine whether, on balance, the evidence fails to support the [Commission's] finding[s]. This we will not do." (second and third alterations in original) (internal quotation marks and citation omitted)). Rather, Petitioners' arguments in this appeal are focused on the lawfulness of the Copper Rule. Thus, we need only focus on whether the Commission's decision to adopt the Copper Rule was lawful.

{42} To the extent our inquiry of the lawfulness of the Copper Rule requires considerations of evidentiary matters, "this Court reviews the whole record to see if the agency decision is supported by substantial evidence." *AA Oilfield Serv., Inc. v. N.M. State Corp. Comm'n*, 1994-NMSC-085, ¶ 2, 118 N.M. 273, 881 P.2d 18. "We will uphold the agency decision so long as the evidence in the record satisfies us that the agency decision is reasonable." *Id.*

d. The Commission's construction of Section 74-6-5(E)(3)

{43} To understand the Commission's construction of Section 74-6-5(E)(3), it is necessary to understand the regulatory strategy underlying the Copper Rule. The record supports Respondents' contention that open pit copper mining leads inevitably to some degree of contaminant discharge. The Copper Rule acknowledges this reality and operates from the premise that the most effective way to mitigate these inevitable

discharges is through containment. Thus, 3103 standards may be exceeded within the area of open pit hydrologic containment not, as Petitioners contend, because the Copper Rule invites pollution there, but because the Copper Rule accepts that some discharge contamination is inevitable, seeks to contain that contamination, and relies on the hydrologic phenomenon produced by the open pit to contain it. This justification for the waiver is supported by evidence in the record and by provisions within the Copper Rule.

[44] One of Respondents' experts offered the following explanation for why the Copper Rule waives the 3103 standards in the area of open pit hydrologic containment:

> The reason for this [waiver] is evident from the definition of the area of hydrologic containment and the exhibits. Ground water within the area of hydrologic containment, whether impacted by mine operations or not, will flow to, and be extracted at, the pit. The disposition of this ground water, therefore, is known, and it will be utilized and managed in accordance with an NMED approved water management plan. Water extracted at open pits is most commonly utilized as part of the mine operational water requirements, such as replenishment of the leach circuit.

Another of Respondents' experts stated that "complete effective hydrologic control" can be achieved in the open pit surface drainage area and, consequently, it is preferable to locate mine units in this area because "there is excellent containment to

protect surrounding ground water." Evidence presented to the Commission indicated that storm water will be diverted away from the open pit and groundwater underlying or adjacent to the pit will drain to the pit and will be removed by evaporation or pumping. The Copper Rule provides that the monitoring well system must be placed "as close as practicable" to the open pit, 20.6.7.28(B) NMAC, and that "[w]ater generated from within the perimeter of the open pit and pit dewatering activities shall be managed according to a mine operation water management plan." 20.6.7.24(C) NMAC.

[45] When properly considered, the Copper Rule's waiver of 3103 standards in the area of open pit hydrologic containment reflects policy preferences and strategic choices designed to mitigate the environmental harms inherent in open pit copper mining. The waiver provision in no way invites industry to contaminate freely in that area. This strategic containment approach is also reflected in the way the Copper Rule treats the "place of withdrawal" language in Section 74-6-5(E)(3).

[46] The Copper Rule makes no express delineation regarding which areas at a mine facility are places of withdrawal and which are not. Respondents contend that the regulatory structure embraced by the Copper Rule makes certain essential assumptions about this subject. We agree.

{60} If "monitoring of a water contaminant source indicates that applicable standards are exceeded," then the Copper Rule imposes varying contingency requirements. 20.6.7.30 NMAC. The Commission found that "contingencies in each case comprise some or all of the following actions: notify, confirm, repair, correct, and abate."

{61} The Copper Rule's waiver of standards within the area of open pit hydrologic containment and its exclusion of certain areas as places of withdrawal does not negate or otherwise eliminate the existence or effect of the provisions summarized above. We cannot conclude that the Copper Rule violates the WQA because it purportedly permits rather than prevents contamination when the Copper Rule's plain terms contain an abundance of provisions that afford significant groundwater protections at copper mine facilities designed to prevent pollution.

f. Conclusion: Section 74-6-5(E)(3) and "place of withdrawal"

{62} This Court is not competent to judge what is the most effective and efficient way to combat the adverse consequences of open pit copper mining. Our task in this case is limited to assessing whether the Copper Rule violates the WQA. The inclusion of the "place of withdrawal" language in Section 74-6-5(E)(3) suggests not, as Petitioners insist, that the WQA clearly and plainly forbids the containment

5. The Copper Rule's Closure Provisions

{71} Petitioners object to the closure provisions of the Copper Rule. They contend that these provisions allow "extensive ground water pollution above 3103 Standards, in perpetuity[.]" Petitioners misstate what the Copper Rule allows.

{72} The Commission found that "[p]ost-closure protection of ground water is achieved by making the closed open pit a ground water sink, either by evaporation or by pumping." The Commission heard evidence and was persuaded that "[t]his protection will be effective." Accordingly, the Copper Rule allows 3103 standards to be exceeded only at a closed open pit mine that is a hydrological evaporative sink, i.e., where evaporation exceeds water inflow. 20.6.7.33(D)(1) NMAC. In this circumstance, the contaminated water will evaporate over time. By definition, this is not "in perpetuity." Moreover, 20.6.7.33(D)(1) NMAC expressly limits the types of exceedances permitted in a closed open pit that is a hydrological evaporative sink. And lastly and as already noted, the Commission's position is that, at closure, all groundwater at a mine site—with the exception of groundwater at an open pit that is a hydrologic evaporative sink—must be abated to 3103 standards. We reject Petitioners' arguments concerning the Copper Rule's closure provisions.

III. CONCLUSION

{73} Petitioners have not established that the Copper Rule is inconsistent with the WQA or otherwise clearly incorrect. Nor have they established that there are no conceivable set of facts under which the Copper Rule might be valid. We affirm the Commission's decision to adopt the Copper Rule.

{74} **IT IS SO ORDERED.**

JUDITH K. NAKAMURA, Chief Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice