

**STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION**

**IN THE MATTER OF:  
TWO PETITIONS FOR REVIEW OF THE SECRETARY'S  
DECISION TO ISSUE DISCHARGE PERMIT NO. 1840  
FOR THE COPPER FLAST MINE (DP-1840),**

**ELEPHANT BUTTE IRRIGATION  
DISTRICT, and**

**TURNER RANCH PROPERTIES, L.P.,  
HILLSBORO PITCHFORD RANCH, LLC,  
AND GILA RESOURCES INFORMATION PROJECT**

**WQCC 19-02(A)**



**BRIEF OF NEW MEXICO COPPER CORPORATION  
ON WHETHER PUBLIC COMMENT SHOULD BE ACCEPTED  
AT THE AUGUST 13, 2019 PERMIT REVIEW HEARING**

New Mexico Copper Corporation (NMCC) respectfully submits that any proposal to accept public comment at the August 13, 2019 Water Quality Control Commission's (Commission) permit review hearing should be summarily denied for the following reasons:

1. Pursuant to NMSA 1978, §74-6-5(Q), the Commission's permit review consists only of a review [of] the record compiled before the constituent agency, including the transcript of any public hearing held on the application or draft permit, and shall allow any party to submit arguments. The commission may designate a hearing officer to review the record and the arguments of the parties and recommend a decision to the commission. The commission shall consider and weigh only the evidence contained in the record before the constituent agency and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the constituent agency. Based on the review of the evidence, the arguments of the parties and recommendations of the hearing officer, the commission shall sustain, modify or reverse the action of the constituent agency. The commission shall enter ultimate findings of fact and conclusions of law and keep a record of the review.
2. Nowhere in this statutory description of the permit review process is there any provision made for public comment. To the contrary, the statutory provision states that the review shall be made on the record compiled before the New Mexico Environment Department

(NMED), including the transcript from the five-day long “public hearing” where ample opportunities were afforded members of the public to make comment.<sup>1</sup> Indeed, the Hearing Officer’s Report, filed December 3, 2018, identifies “many members of the public [who] participated in questioning and testimony at the hearing” and “dozens of other individuals” who submitted written public comment during the hearing, “all of which are part of the record.” H.O. Rpt. at pp. 2-4.

3. Section 74-6-5(Q) does “allow any party to submit arguments,” and, consistent with that, the Scheduling Order entered herein on May 20, 2019 schedules opening oral arguments and rebuttal arguments from the Petitioners, Applicant and Department, i.e., the parties herein. Appropriately, no provision is made in the Scheduling Order for public comment, nor does the public notice of, or agenda for, the August 13, 2019 permit review hearing invite or provide for public comment.
4. All of the above is entirely consistent with, and further underscored by, the Commission’s adjudicatory procedures at 20.1.3 NMAC. There again, the procedures state, in 20.1.3.16(F)(3) NMAC, that “[t]he commission shall consider and weigh only the evidence contained in the record before the department and the recommended decision of the hearing officer, if any....” The procedures also allow, in 20.1.3.16(F)(1) NMAC, that the parties may make oral argument prior to deliberations, but disallows “new evidence.” Nowhere in the Commission’s adjudicatory procedures for permit review hearings is any provision

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<sup>1</sup> The five-day long public hearing complied with all provisions of 20.1.4 NMAC, which provides the procedural regulations for public hearings before the Environment Department involving permit issuance. These regulations expressly provide the opportunity for public comment. *See* 20.1.4.300(B)(2)NMAC, providing, “General Written and Oral Statements; Non-Technical Testimony: Any person may provide a general written statement concerning the Draft Permit, Application, or Petition at or before the hearing. Any person may provide a general oral statement or non-technical testimony concerning the Draft Permit, Application, or Petition at the hearing.”

made for public comment, and the reason is obvious. A permit review upon an administrative appeal taken from the issuance of a discharge permit by the constituent agency is an appeal solely on the record.

5. If the Legislature or the Commission intended for public comment to be allowed at permit review hearings, they would have expressly provided for it in NMSA 1978, §74-6-5(Q) or 20.1.3.16 NMAC, just as the Commission expressly did for abatement plan hearings in 20.1.3.17(F) NMAC, for variance hearings in 20.1.3.18(D) NMAC, and for compliance order hearings in 20.1.3.20(B)(1) NMAC.
6. The opportunity parties have to convince the Commission that there was an inadequate opportunity to submit comment or evidence on a particular matter at issue in the appeal under NMSA 1978, §74-6-5(R) and 20.1.3.16(A)(3) is not addressed to members of the public seeking an opportunity to make public comment at the permit review hearing. Those provisions contemplate a party invoking the opportunity to make the inadequate opportunity showing prior to the permit review hearing, and the Commission deciding whether to allow additional comment or evidence to be taken by the constituent agency. The provisions do not contemplate a process whereby a member of the public attempts to justify making public comment at the permit review hearing. No such process exists, and there is no basis to create such a process or apply a nonexistent standard to it herein.

WHEREFORE, NMCC respectfully submits that public comment not be accepted at the permit review hearing on August 13, 2019.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Stuart R. Butzier", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of **New Mexico Copper Corporation's Brief on the Issue of Whether Public Comment Should be Accepted at the August 13, 2019 Permit Review Hearing** was sent via the stated methods below on August 12, 2019:

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By:   
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Stuart R. Butzier

## Certificate of Service

I hereby certify that on August 12, 2019 a copy of the foregoing **Brief of New Mexico Copper Corporation on Whether Public Comment Should be Accepted at the August 13, 2019 Permit Review Hearing** was emailed to the persons listed below. A copy will be mailed first class upon request.

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