

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



In the Matter of:

PROPOSED AMENDMENT  
TO 20.6.2 NMAC (Copper Rule)

No. WQCC 12-01(R)

**FREEPORT MCMORAN'S BRIEF ON THE COMMISSION'S AUTHORITY TO  
CONDUCT A COPPER INDUSTRY-SPECIFIC RULEMAKING**

**Introduction**

Freeport McMoRan Tyrone Inc., Freeport-McMoRan Chino Mines Company and Freeport-McMoRan Cobre Mining Company (collectively "Freeport") submit this pre-hearing Brief pursuant to paragraph 102.A of the Hearing Officer's November 21, 2012 Procedural Order herein, which invites, among other things, "[b]riefs on the basis or scope of the Commission's legal authority" to conduct a rulemaking and to adopt rules under the Water Quality Act that establish specific requirements applicable to the copper industry. Freeport does not at this juncture offer any "dispositive" motion, but will respond to any such motion. Moreover, consistent with Freeport's separately filed objections to the Procedural Order, which are incorporated herein by reference, Freeport does not offer any substantive brief relating to "point of compliance" issues at this point in the rulemaking proceeding, other than the arguments made below regarding the rulemaking process. Freeport's position continues to be that it is unconventional and premature to brief a "point of compliance issue" at this point in the rulemaking proceeding, and that briefing should properly be undertaken only after all interested parties have been given full opportunity to participate in the proposed rulemaking proceeding through the presentation or cross-examination of direct and rebuttal witnesses, the offering of documents into evidence, and the submission of oral or written comments, among other things.

In particular, Freeport does not believe that the Commission can properly address a “point of compliance” issue, or even consider what that phrase means or its relevance with respect to the proposed copper industry regulations, without receiving and considering evidence. Under the Procedural Order, the submission of evidence is to begin with the parties’ submissions of direct technical testimony by February 22. Consequently, it is inappropriate to require briefing of any point for which a Commission decision must be based on the evidence until after the evidence is presented.

Freeport has reviewed the Hearing Officer’s preliminary email response to Freeport’s objections to the procedural order and understands that the Hearing Officer did not intend the Procedural Order to imply that a party waives its rights to brief or present evidence on the points addressed in section 102.A of the Procedural Order by choosing not to brief these issues by the December 14, 2012 deadline. Freeport does, however, reserve the right to respond to any such briefing offered by others and to address those issues and other matters at later stages of the Commission’s rulemaking.

In this brief, Freeport offers points and authorities to assist the Commission in understanding its specific statutory basis for engaging in the rulemaking, as well as the broad scope and flexible nature of its rulemaking powers. As discussed more fully herein, there are legal authorities of which the Commission should be aware as it considers the Petition offered by the New Mexico Environment Department (“Department”). First, a copper industry-specific rulemaking was specifically mandated by the New Mexico Legislature’s enactment of Senate Bill 206 in its 2009 session. That legislation amended the Water Quality Act in a manner that results in a paradigm shift of power from constituent agencies, such as the Environment Department, to the Commission to specify methods to control and monitor water pollution

through regulations. Second, as the rulemaking authority under that Act, the Commission has broadly stated powers to adopt regulations to further the purposes of the Act after considering a wide range of evidence and policy factors. Third, the New Mexico Court of Appeals has encouraged the Commission to adopt factors and policies to guide the interpretation of the scope of the Act by constituent agencies, and has allowed the Commission to do so by a rulemaking, by adjudication, or by both. Fourth, the Commission has the flexibility to adopt regulations both that depart from the rulemaking proposal accompanying the Department's Petition, or even to change its own prior interpretations of the Water Quality Act, so long as it has a reasoned basis for such changes and remains within the scope of its broad rulemaking authority. These points, among others, are discussed more fully in this brief.

**I. State law requires the Commission to adopt regulations, and regulations have multiple advantages over case-by-case adjudication.**

**A. The Water Quality Act requires the Commission to adopt regulations that apply to the copper industry.**

In 2009, the Legislature enacted amendments to the Water Quality Act that require the Commission to “adopt regulations for the dairy industry and the copper industry,” and to “specify in regulations the measures to be taken to prevent water pollution and to monitor water quality.” NMSA 1978, §74-6-4(K) (2009). These new mandates are in addition to the Act's existing provision that the Commission “shall 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....” NMSA 1978, §74-6-4(E). The Water Quality Act also provides the Commission with authority to “adopt regulations for the operation and maintenance of [a] permitted facility, including requirements, as may be necessary or desirable, that relate to

continuity of operation, personnel training and financial responsibility, including financial responsibility for corrective action.” NMSA 1978, § 74-6-5(H).

The new requirement for the Commission to specify pollution control and monitoring measures by regulations represents a paradigm shift in the statute and from the Commission’s existing discharge permit regulations. Prior to the 2009 amendments, the Water Quality Act expressly prohibited the Commission from specifying the method to be used to prevent or abate water pollution. The 2009 amendments struck language in former subsection D (now subsection E) of NMSA section 74-6-4 which read that the regulations adopted by the Commission “shall not specify the method to be used to prevent or abate water pollution.” Under the Act prior to the 2009 amendments, the New Mexico Court of Appeals had concluded that the Environment Department could impose reasonable permit conditions, including the specific permit conditions under appeal that specified the method to be used to prevent or abate water pollution. *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission*, 2006-NMCA-115, ¶24, 140 N.M. 464, 143 P.3d 502. The 2009 amendments substantially limit the Department’s ability to impose permit conditions that specify the methods to prevent or abate water pollution and to monitor, as discussed in more detail below.

The adoption of regulations governing the copper industry will benefit the Commission, its constituent agencies, the public, and the industry itself. In the past, the lack of appropriate regulations governing the copper industry has made it difficult for the Commission and its constituent agencies to administer the Water Quality Act. For example, in *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission*, the Court of Appeals stated that the Water Quality Act’s “legislative standard is broad and there are no regulations providing interpretive guidance” and “the statute and existing regulations did not give the Commission

adequate information about the decision it was obligated to make.” 2006-NMCA-115, ¶ 34, 140 N.M. 464, 143 P.3d 502. The Court of Appeals remanded that case to the Commission to develop better regulatory criteria, but left it open to the Commission to develop those criteria by means of rulemaking, adjudication, or some combination of both. *Id.* at ¶ 35. The specific mandates in the Water Quality Act, the Commission’s and the Department’s past experience in attempting to carry out its responsibilities in the absence of adequate interpretive guidance, and the Court’s guidance weigh strongly in favor of giving full consideration to NMED’s proposed regulations.

**B. The advantages of regulations justify the Commission in engaging in this rulemaking proceeding, and the scope of the Commission’s power is broad.**

**1. Specific benefits of regulations under the Water Quality Act.**

Specific regulations for the copper industry will have a number of clear benefits. Once regulations are adopted for the copper industry, “permits for facilities in that industry shall be subject to conditions contained in the regulations.” NMSA 1978, § 74-6-5(D) (2009). The 2009 amendments to the Water Quality Act reduce the Department’s authority to regulate discharging facilities through permit conditions, and if the Department desires to impose permit conditions that are not contained in the industry-specific regulations, the constituent agency has the burden of “showing that each [permit] condition is reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions.” NMSA 1978, § 74-6-5(D) (2009). This new regulatory paradigm will provide the copper industry with far greater certainty on the regulatory requirements, which will assist it in planning for the future and ensuring that its actions conform to the law. Regulations supported by the best scientific and technical evidence will benefit the public by ensuring that the State’s groundwater is better

protected while assuring the copper industry that the regulations will reflect available and demonstrated technologies based on sound science.

NMED filed its Petition to Adopt 20.6.7 and 20.6.8 NMAC and Request for Hearing on October 30, 2012, and the proposed regulations themselves were attached to that Petition. NMED's Petition states that it is proposing regulations because "[t]he adoption of new rules for the copper mine industry is required by statute," and that it "developed its proposal for appropriate copper mine industry rules through an extensive public and stakeholder process." Petition, at 1-2. This rulemaking proceeding is an opportunity, and the appropriate vehicle, for the Commission to fulfill its responsibilities under the Water Quality Act.

## **2. General benefits of regulations.**

As noted above, in *Phelps Dodge Tyrone, Inc. vs. Water Quality Control Commission*, the Court of Appeals said that the Commission may act through rulemaking, adjudication, or some combination of both. Experts in the law governing administrative agencies have observed a number of ways in which rulemaking proceedings are superior to adjudications.

"Regulations, by their nature, are general requirements. They are designed to apply to all situations and can apply to any site. In contrast, a constituent agency's action in connection with a permit application is specific to the site in the application." *Phelps Dodge Tyrone, Inc.*, 2006-NMCA-115, ¶ 19, 140 N.M. 464, 143 P.3d 502; *see also* Guidelines for Water Quality Control Commission Regulation Hearings (the "Guidelines"), at § 103(M) (definition of "regulation" excludes "any order or decision issued in connection with the disposition of any case involving a particular matter as applied to a specific set of facts"). The primary purposes of rulemaking are (1) to affect future conduct; and (2) to establish clear and objective criteria to be applied in future

adjudicatory proceedings. Richard J. Pierce, 1 *Administrative Law Treatise* (“Pierce”), § 6.8, p. 496 (5th ed. 2010).

Rulemakings are distinguished from administrative adjudications by two principal characteristics: (1) rulemakings impact rights of broad classes of unspecified individuals, while adjudications resolve disputes among specific individuals in a specific case; and (2) rulemakings are prospective and have definite impacts on individuals only after the rule is subsequently applied, while adjudications have immediate impacts on specific individuals because they involve concrete disputes. See *Rauscher, Pierce, Refsnes, Inc. v. Taxation & Revenue Dep’t*, 2002-NMSC-013, ¶ 42, 132 N.M. 226, 46 P.3d 687; see *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17, 102 L.Ed.2d 493, 109 S.Ct. 468 (1988) (the “central distinction” between rulemaking and adjudication is that the rules have legal consequences “only for the future”) (Scalia, J., concurring) (emphasis added).

Rulemaking has a number of advantages over case-by-case adjudication. The primary one is that rulemaking results in higher quality decisions than those made in adjudications. In an adjudication, an agency’s decision is based primarily or exclusively on the specific facts related to and presented by the parties before it. By contrast, in a rulemaking proceeding, an agency may consider a much broader range of information. Pierce, § 6.8, p. 496. Because agencies can draw on a broader base of information, rulemaking proceedings “will be instrumentally superior to any ‘rule’ produced by the process of adjudicating a specific dispute.” *Id.* at p. 497. The principal difficulty in applying a decision made in Case A to a subsequent adjudicatory proceeding in Case B is that the constituent agency, and later the Commission, will be required to compare the facts and circumstances in both cases and decide whether they require that the holding in Case A should also govern Case B. By contrast, a rulemaking proceeding allows the

Commission to consider a broad range of facts and circumstances in the first instance, and then determine what general and specific rules should apply to all cases. The Water Quality Act reflects the broad scope of rulemaking by listing the general, expansive factors that the Commission is required to consider when engaging in rulemaking. *See* NMSA 1978, § 74-6-4(E) (listing facts and circumstances to be considered).

Rulemaking is also more efficient than case-by-case adjudication because it “eliminates the need to engage in expensive and time-consuming adjudicatory hearings to address issues of legislative fact” and “eliminates the need to relitigate recurring issues.” *Pierce*, at p. 497. “Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take.” *New Energy Economy, Inc. v. Shoobridge*, 2012-NMSC-049, ¶ 9,149 N.M. 42, 243 P.3d 746. In other words, by using rulemaking proceedings to resolve and clarify legal issues that cannot be resolved solely by reading the Water Quality Act, the Commission can avoid the need to litigate, and relitigate, those issues in expensive and time-consuming adjudicatory proceedings. *See Pierce*, at pp. 497-98 (regulations “are easier and less expensive to enforce than are ‘rules’ announced in the course of adjudicating specific disputes.”).

Rulemaking also leads to greater fairness, because regulations provide stakeholders with clearer advance notice of what is permissible, and what is impermissible, than is possible through an adjudication. *See Pierce*, at p. 500. Rulemaking reduces the likelihood of inconsistent decisions, and allows the general public a greater voice in the formulation of rules that affect their interests. *Id.*

These advantages of rulemaking proceedings, as compared to adjudications, provide additional assurance that the Commission is on the right track in planning to hold a hearing on NMED's proposed copper industry regulations.

**3. The scope of the Commission's rulemaking power under New Mexico law is broad.**

New Mexico's courts have affirmed the principle that administrative agencies, like the Commission, that possess specialized and technical expertise, are in a better position than judges to evaluate matters within the scope of that expertise. *See, e.g., Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶32, 147 N.M. 583, 227 P.3d 73 (courts give deference to administrative agencies with respect to matters within agency's field of expertise). While an agency's regulations cannot exceed the authority granted to it by statute, "[r]ules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes that they implement." *Wilcox v. N.M. Bd. of Acupuncture and Oriental Medicine*, 2012-NMCA-106, ¶ 7, \_\_\_ N.M. \_\_\_, \_\_\_ P.2d \_\_; *see also New Mexico Mining Ass'n v. New Mexico Mining Comm'n*, 1996-NMCA-098, ¶ 15, 122 N.M. 332, 924 P.2d 741 (regulations "will be upheld if they are in harmony with the agency's express statutory authority or spring from those powers that may be fairly implied therefrom."); NMSA 1978, §74-6-4(C) (Commission "shall not adopt or promulgate a standard or regulation that exceeds a grant of rulemaking authority listed in the statutory section of the Water Quality Act authorizing the standard or regulation"). In any challenge to a regulation that this Commission adopts, the burden will be on opponent of rules to prove the regulation's invalidity. *New Mexico Mining Ass'n*, 1996-NMCA-098, ¶ 8 ("A party challenging a rule adopted by an administrative agency has the burden of establishing the invalidity of the rule or proposed regulation.").

In this rulemaking proceeding, the Commission is not bound by any prior decision made in adjudication of permit or compliance appeals. An important aspect of rulemaking is that it is characterized by flexibility, and regulations can be adopted, or changed, to address new factual, legal, and other circumstances or changes in law or policy. In other words, to the extent that the Commission has previously adopted a regulation or rendered a decision regarding a topic, the Commission can change its mind, as long as it provides reason for doing so. “The dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them.” *Pierce*, vol. 2, §11.5, at p. 1037. Thus, administrative agencies, like the Commission, can make changes in policy as long as a reasoned explanation is provided. *See, e.g., Wilcox v. N.M. Bd. of Acupuncture and Oriental Medicine*, 2012-NMCA-106, ¶ 27, \_\_\_ N.M. \_\_\_, \_\_\_ P.2d \_\_\_ (upholding agency’s power to change definitions or reinterpret statutory terms in its regulations); *Joab, Inc. v. Espinosa*, 116 N.M. 554, 560, 865 P.2d 1198, 1204 (Ct. App. 1993) (noting that agency may “adapt policies to demands of changing circumstances,” and upholding agency’s change in policy as having a “reasonable justification”). Thus, an agency rulemaking is not somehow defective merely because it represents a change in the agency’s position on one or more issues. That is particularly true with respect to adjudicatory decisions made before the 2009 amendments to the Water Quality Act.

The 2009 Amendments to the Water Quality Act were signed into law by Governor Richardson. The regulations implementing the 2009 Amendments will be adopted by a Water Quality Control Commission appointed in large part by a Republican Governor. Regulations or amendments to regulations properly can reflect the specific policies of the current executive. Relying on a U.S. Supreme Court decision, the New Mexico Supreme Court has provided the necessary guidance on this point:

...an agency to which [the legislative branch] has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices-resolving the competing interests which [the legislative branch] itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, ¶ 16, 134 N.M. 472, 481, 79 P.3d 297 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66, 81 L. Ed. 2d 694, 104 S.Ct. 2778 (1984)).

Furthermore, decisions on how to regulate industrial discharges under the Water Quality Act require consideration of several factors and striking a balance between economic and environmental impacts:

The critical phrase ["at any place of withdrawal of water for present or reasonably foreseeable future use"] suggests that the legislature meant for impacts to be measured in a practical and sensible fashion, but the issue is complicated by the fact that groundwater and surface water systems are interconnected. Contaminated waters migrate into areas that were previously pristine. We have no doubt that the legislature intended to limit that kind of migration. On the other hand, mining is a necessary and important component of our economy and our modern way of life. We believe that the legislature intended that our laws, regulations, and any interpretation of them, strike a wise balance between these competing interests.

*Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission*, 2006 NMCA 115, ¶ 29, 140 N.M. 463, 143 P.3d 501.

This discussion illustrates the policy choices within the realm of the administration to propose, and for the Commission to consider and weigh based upon the evidence presented in this rulemaking proceeding. Thus, the Commission must consider the importance of mining in the consideration and adoption of the copper industry regulations under the Water Quality Act. The proposed rules submitted by the Department along with its Petition for Rulemaking

presumably attempt to strike a reasonable balance among the competing interests as described by the Court of Appeals. The Department and the other parties will have its opportunity to present evidence for the Commission's consideration explaining how the proposed rules strike a reasonable balance among the relevant interests.

## **II. Specific rulemaking procedures in the Water Quality Control Commission.**

### **A. Constituent agency must form advisory committee and negotiate with stakeholders.**

In addition to mandating that the Commission enact water quality regulations for the copper industry, the Legislature required the constituent agency to “establish an advisory committee composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders to advise the constituent agency on appropriate regulations to be proposed for adoption by the commission,” and also provided “an opportunity for public input and stakeholder negotiations.” NMSA 1978, § 74-6-4(K). Indeed, it has long been routine for constituent agencies to meet with stakeholders to discuss proposed regulations, either before a rulemaking petition is filed or before a rulemaking hearing. *See, e.g., Regents of the Univ. of California v. New Mexico Water Quality Control Commission*, 2004-NMCA-073, ¶ 6, 136 N.M. 45, 94 P.3d 788 (noting that NMED “met with a range of entities, including LANL, and solicited input on the amendments.”).

Providing the lead role to a constituent agency is natural given its expertise. *See* NMSA 1978, § 74-6-9 (one of constituent agency's roles is to recommend regulations to Commission); *Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Commission*, 98 N.M. 240, 246, 647 P.2d 873, 879 (Ct. App. 1982) (“It is not difficult to see the wisdom behind [§ 74-6-9]. Agencies which deal with certain technical aspects of water quality and quantity are better able to keep a continuing study of their particular duties as are charged by law. They have the expertise.”). This

lead role also makes sense because the constituent agency will ultimately be responsible for administering any water quality regulations that this Commission may adopt for the copper industry. NMSA 1978, § 74-6-4(F) (commission “shall assign responsibility for administering its regulations to constituent agencies....”).

Here, as noted in its rulemaking petition, the Department developed the proposed copper industry regulations through an extensive process, involving formation of an advisory committee to seek advice on rules to propose, public input on the proposed rules, and stakeholder negotiations with environmental organizations and the copper industry. Thus, this stage of the rulemaking process has been successfully accomplished.

**B. The Commission has already voted to hold a rulemaking hearing, and is on the right track.**

Under the Water Quality Act, a hearing is a necessary prerequisite to the adoption, amendment, or repeal of any regulation. NMSA 1978, §74-6-6(A). The Commission is required to decide whether to hold a hearing. NMSA 1978, § 74-6-6(B). Here, NMED’s rulemaking petition was filed on October 30, and the Commission, at its November 13 meeting, voted to hold a hearing. Under the 2009 amendments to the Water Quality Act, as discussed above, the Commission is required to adopt regulations for the copper industry.

The Water Quality Act also provides that the Commission “may appoint a hearing officer to take evidence in the hearing.” NMSA 1978, §74-6-6(D); *see also* Guidelines, §104.B (Commission “may appoint hearing officer to take evidence in the hearing.”). The Commission set a hearing on the Petition to Adopt to commence on April 9, 2013, and appointed a hearing officer, Felicia L. Orth, who issued a Procedural Order.

**C. The Rulemaking Hearing.**

**1. Procedure for and Content of the Rulemaking Hearing.**

A rulemaking hearing, while conducted in some respects like a trial, is nevertheless not “an adjudicatory or trial-type hearing.” *Wylie Bros.*, 80 N.M. 633, 642, 459 P.2d 159, 168 (Ct. App. 1969). Thus, the rules of civil procedure and rules of evidence that govern pre-trial proceedings and trials in courts do not apply. Guidelines, §401.A. This is because the focus of a rulemaking hearing is not to resolve a discrete factual dispute between particular parties, but rather to establish regulations for the entire copper industry in the state.

In terms of the content of the hearing, the Water Quality Act, NMSA 1978, §74-6-4(E) lists the following factors that the Commission must consider in “making regulations”:

- (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;

The Commission may give the “weight it deems appropriate” to these factors as well as to any other “relevant facts and circumstances.” *Id.* In addition, the Commission “shall consider, in addition to the factors listed in Subsection E of this section, the best available scientific information.” NMSA 1978, § 74-6-4(K). All of these criteria are relevant to and required to be considered by the Commission in considering the methods required to be used within the copper industry to prevent water pollution. The Commission should not make decisions regarding

NMED's proposed regulations until it has received and considered evidence on these points. The Commission has adopted detailed guidelines which, in addition to the Procedural Order issued by the Hearing Officer in this case, are designed to ensure that all interested persons have an opportunity to submit evidence and present their views to the Commission, and to establish an orderly process.

Administrative actions often involve the agency looking at two interconnected factors: whether the action presents a question of law, a question of fact, or some combination of the two. *See AG of N.M. v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 9, 150 N.M. 174, 177, 258 P.3d 453. As set forth above, the Water Quality Act is designed to require the WQCC to consider a combination of questions of fact and law when adopting the proposed Copper Rules. It is difficult, if not impossible, to imagine any issue where the WQCC would be able to decide the matter as a issue of law without considering the necessary facts and circumstances presented through a public hearing. Likewise, the proposed Copper Rules should be considered as a whole because it creates a new regulatory framework specific to the copper industry, and any attempt to reject a part of the Copper Rules without considering all of the facts and circumstances related to the whole set of proposed rules is inappropriate.

In reaching its decision, the Commission is not bound to adopt the proposed regulation as submitted by NMED. Rather, an administrative rulemaking is a fluid process in which an agency weighs the competing proposals, ideas, and viewpoints submitted by the parties and the public. If a proposal raises legal or other substantive issues, such issues can and should be dealt with in the course of the agency's administrative process. The Commission may make changes to the regulations in accord with evidence presented at the hearing, or it may reject the regulations entirely. *See, e.g., Shoobridge*, 2010-NMSC-049, ¶ 18 (proposed regulation is

subject to public hearing process, and regulation adopted may be different from the one proposed); *Wylie Bros.*, 80 N.M. at 641, 459 P.2d at 167 (in rulemaking, agency may change proposed regulations depending on the “data, views, arguments and testimony presented at the hearing”); *Regents of Univ. of California*, 2004-NMCA-073, ¶ 14 (“As a result of the hearing, the Department proposed additional changes to certain portions of the proposed amendments”).

Considering dispositive motions and substantive briefing at the outset of the rulemaking process, and before the introduction of evidence, is inconsistent with the Water Quality Act requirements and established rulemaking procedures that require the Commission to receive and consider evidence on the matters addressed in the statute before adopting a rule. If a party believes that a regulation is ill-advised or should be changed, that party will have an opportunity to make its case *after* the relevant testimony, documentary evidence, and oral arguments have been provided to the Commission. It is at that time, and not before, that dispositive motions are proper. Of course, administrative agencies have, at times, enacted regulations that are beyond the scope of their legal authority or not supported by the evidence. Even where a challenge to a proposed regulation is made on purely legal grounds, however, the proper time for making that determination is after the full administrative process has run its course. *See, e.g., Shoobridge*, 2012-NMSC-049, ¶¶ 9, 12, 14, 18 (even where opponent of proposed regulation desires to bring challenge to proposed regulation on purely legal grounds, proper time for such challenge is after rulemaking hearing concludes); *Bokum Resources Corp. v. New Mexico Water Quality Control Comm’n*, 93 N.M. 546, 548, 603 P.2d 285, 287 (1979) (considering challenge to agency’s legal authority to adopt regulation after “lengthy hearings”); *New Mexico Mining Ass’n v. New Mexico Mining Comm’n*, 1996-NMCA-098, ¶¶ 2, 9-16, 122 N.M. 332, 924 P.2d 741 (considering claim that regulation adopted after public hearing was beyond agency’s statutory authority).

Whatever its ultimate decision, the Commission must state the reasons for it. *See* Guidelines, § 407.D; *City of Roswell v. New Mexico Water Quality Control Commission*, 84 N.M. 561, 565, 505 P.2d 1237, 1241 (Ct. App. 1972) (court cannot review agency's decision "unless the record indicates what facts and circumstances were considered and the weight given to those facts and circumstances."). The Commission's statement of reasons need not be highly specific. *See Regents of Univ. of Calif. v. WQCC*, 2004-NMCA-073, ¶ 13 ("statement of reasons" need not state why the Commission "adopted each individual provision of the standards or must respond to all concerns raised in testimony. Such a requirement would be unduly onerous for the Commission and unnecessary for the purposes of appellate review.").

In stating its reasons for adopting regulations, the Commission may interpret ambiguous provisions of the Water Quality Act. *See, e.g., Rex, Inc. v. Manufactured Hous. Comm.*, 119 N.M. 500, 512, 892 P.2d 947, 959 (1995) (to the extent the statute is "ambiguous, it is within the authority of the agency charged with effecting that statute to interpret it," and "a reviewing court may, where appropriate, accord substantial weight to the interpretation given a statute or regulation by a body charged with administering such law"); *Old Abe Co. v. New Mexico Mining Comm'n*, 121 N.M. 83, 90-91, 908 P.2d 776, 783-84 (Ct. App. 1995) ("When a statute is unclear, an agency's interpretation of the statute through rule making is entitled to be given 'substantial weight' by the courts").

Should any party wish to appeal, the Water Quality Act sets forth the procedure for doing so. *See* NMSA 1978, § 74-6-7; *see also* Guidelines, § 501.A (appeal from regulation adopted by Commission must be taken within 30 days after regulation is filed in accord with the State Rules Act).

## **2. The Importance of the Rulemaking Hearing.**

New Mexico's appellate courts (as well in courts in other jurisdictions), have repeatedly stressed the critical importance of hearings in allowing the courts to review whether regulations have been validly adopted in accord with an agency's authority. The Court of Appeals has said it is "proper procedure" for this Commission to conduct rulemaking hearings. *See Regents of the Univ. of California*, 2004-NMCA-073, ¶ 6. The Water Quality Act provides that appeals are based on "the record made before the commission." NMSA 1978, § 74-6-7(A).

Moreover, in deciding whether to uphold regulations, "consideration must be given" to "the nature of the data, views, arguments and testimony presented at the hearing." *Wylie Bros.*, 80 N.M. at 642, at 168. Indeed, the "rulemaking authority of an agency cannot usually be fairly tested in the absence of a specific legal and factual setting." *Bristol-Myers Co. v. Federal Trade Comm.*, 424 F.2d 935, 940 (D.C. Cir. 1970). *See also New Mexico Municipal League, Inc. v. New Mexico Environmental Improvement Bd.*, 88 N.M. 201, 210, 539 P.2d 221, 230 (Ct. App. 1975) (board's rationale for adopting regulations "was founded and based upon evidence and testimony it had accumulated during the several meetings it held on the proposed regulations," and "not only are the reasons for adopting the regulations clearly indicated, the foundation for those reasons is likewise ascertainable from the record."); *Kerr-McGee Nuclear Corp.*, 98 N.M. 240, 246, 647 P.2d at 879 (holding that Commission regulation was supported by substantial evidence, relying on exhibit presented by constituent agency at hearing); *Regents of Univ. of California*, 2004-NMCA-073, ¶ 14 (review of comprehensive hearing record enabled appellate court to determine basis for regulations; "From the record containing oral testimony, written testimony, exhibits, comments, and statement of reasons, this Court has a sufficient foundation to perform its task of review").

As the above cases illustrate, a full administrative hearing is necessary to enable the Commission to evaluate the factual and legal merit of NMED's proposed regulations. The Commission should reject ill-advised proposals to stop this rulemaking proceeding before the Commission has even had a chance to hear all of the relevant testimony and consider the relevant documentary evidence.

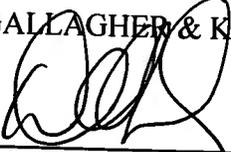
### **III. Conclusion.**

The Commission has already decided to hold a rulemaking hearing to consider NMED's proposed water quality regulations for the copper industry in order to carry out the Commission's obligations under the Water Quality Act to adopt regulations specific to the copper industry. The Commission has clear legal authority to hear and consider NMED's proposal, along with the views of all others who choose to participate in the rulemaking proceeding. The Water Quality Act specifies the criteria that the Commission must consider in adopting the regulations required by the Water Quality Act. The Commission is on the right track, because NMED's proposed regulations can be properly evaluated only in light of the evidence and testimony that will be presented at a full rulemaking hearing. All participants in the hearing process will have an opportunity to express their views on whether NMED's proposed regulations are consistent with the requirements of the Water Quality Act and to request that the Commission to consider amendments to the Department's proposed regulations. The Commission then can consider the proposed regulations and any offered amendments and evidence offered by all of the parties regarding the criteria specified in the Water Quality Act. The Commission can accept amendments to NMED's proposed regulations or can develop its own rule language to address any concerns it may have with NMED's proposed rule. Most importantly, however, the Commission should make those decisions only after hearing all of the evidence and considering

the rule as a whole, in light of the Water Quality Act's requirements and the specified criteria for adoption of regulations.

Respectfully Submitted,

GALLAGHER & KENNEDY, P.A.



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing pleading was mailed to the following parties this December 14, 2012:

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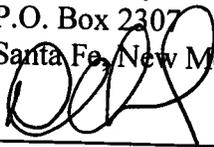
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