

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



In the Matter of
PROPOSED AMENDMENT TO
20.6.2 NMAC (Copper Rule)

No. WQCC 12-01 (R)

ATTORNEY GENERAL'S MOTION TO ADMIT RECORD FROM *TYRONE PERMIT APPEAL* INTO RECORD PROPER

The Attorney General of New Mexico ("Attorney General") hereby moves to admit into the Record Proper in this proceeding portions of the record from a related proceeding held before the Water Quality Control Commission ("Commission"): *In the Matter of Appeal of Supplemental Discharge Permit for Closure (DP 1341) for Phelps Dodge Tyrone, Inc.*, WQCC Nos. 03-12(A) and 03-13(A) ("*Tyrone Permit Appeal*"). The Attorney General requests inclusion from the *Tyrone Permit Appeal* of (1) the Transcript of Proceedings, volumes 1-24, (2) all admitted exhibits, and (3) the Commission's Decision and Order on Remand (Feb. 4, 2009) ("Comm'n Decision"). Those documents are copied onto a compact disc, attached as Exhibit A. In support of this motion, the Attorney General states:

Background

1. On October 30, 2012, the New Mexico Environment Department ("NMED") filed its Petition to Adopt 20.6.7 and 20.6.8 NMAC and Request for Hearing ("Petition") with the Commission.
2. In the Petition, NMED requests the Commission to adopt proposed Supplemental Permitting Requirements for Copper Mine Facilities, 20.6.7 NMAC (the "Proposed Copper Mine Rule"), and proposed Financial Assurance Requirements for Copper Mine Facilities, 20.6.8 NMAC.
3. The Proposed Copper Mine Rule is intended to regulate the operations and

closure of copper mine facilities in order to protect ground water in New Mexico pursuant to the Water Quality Act (“WQA”), NMSA 1978, §§ 74-6-1 to -17.

4. The regulation of discharges of copper mine facilities to ground water pursuant to the WQA was the subject of the *Tyrone Permit Appeal*, a complex and lengthy legal proceeding before the Commission.

5. In 2003, the Commission held a 10 day hearing on the appeal by Phelps Dodge Tyrone, Inc. (“Tyrone”)¹ of a closure permit issued by NMED under the WQA for the Tyrone copper mine site in Grant County, New Mexico.

6. Many issues were litigated during that hearing. Critical to the current proceeding before the Commission is the Commission’s decision, in 2004, that the Tyrone copper mine was a “place of withdrawal for present and reasonably foreseeable use” under Section 74-6-5.E(3) of the WQA. Commission’s Partial Final Decision and Order Affirming Supplemental Discharge Permit and Requesting a Modification to Condition 22, Conclusion of Law, ¶ 29 (June 10, 2004).

7. Section 74-6-5.E(3) mandates that NMED “shall deny” a discharge permit application if:

the discharge would cause or contribute to water contamination levels in excess of any state or federal standard. Determination of the discharges’ effect on ground water shall be measured at *any place of withdrawal of water for present or reasonably foreseeable future use.*

(Emphasis added.)

8. The Commission’s 2004 decision, therefore, required the ground water *underneath the Tyrone mine site* to meet water quality standards.

9. Tyrone appealed the Commission’s decision to the New Mexico Court of Appeals. The court found, in 2006, that the Commission’s determination that the Tyrone mine

¹ Tyrone’s parent company, Phelps Dodge Corporation, has since been acquired by Freeport-McMoRan, Inc.

site was a “place of withdrawal” was overly broad, and remanded the matter to the Commission to “create some general factors or policies to guide its determination” as to what constitutes a “place of withdrawal” under the WQA. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n*, 2006-NMCA-115, ¶ 35, 140 N.M. 464, 473, 143 P.3d 502, 511.

10. After a 24 day hearing on remand during 2008, the Commission issued in 2009 an 86 page decision making extensive factual findings and legal conclusions. Most significant to this proceeding are the Commission’s following conclusions of law:

a. The Commission held that the WQA protected ground water from exceeding water quality standards at “*any* place of withdrawal for present and reasonably foreseeable future use.” Comm’n Decision, Conclusions of Law (“COL”), ¶ 26 (emphasis in the original).

b. The Commission held, in accordance with the direction from the Court of Appeals, that the following factors must be considered in determining “place of withdrawal”: site hydrology and geology, quality of water prior to discharge, past and current land use in the vicinity, future land use in the vicinity, past and current water use in the vicinity, and population trends in the vicinity. *Id.* at COL, ¶¶ 15-21.

c. The Commission held that the WQA “does not establish any specific ‘point(s) of compliance’ for compliance with water quality standards.” *Id.* at COL, ¶ 27.

d. Finally, the Commission held that the Tyrone mine site was a place of withdrawal of water for present and reasonable foreseeable future use under the WQA. *Id.* at COL, ¶¶ 29-51.

11. The Commission’s holdings in the *Tyrone Permit Appeal* are consistent with NMED’s interpretation of the WQA for the last 35 years, which is that the WQA “ensure[s] that

all ground water underneath a discharge site meets ground water quality standards.” *See id.* at Findings of Fact, ¶ 83.

Basis for Inclusion of Record from Tyrone Permit Appeal into This Proceeding

12. NMED, in its Proposed Copper Mine Rule, does not follow the Commission’s prior determinations in the *Tyrone Permit Appeal* in at least the following ways:

a. The Proposed Copper Mine Rule does not require that a site-specific determination based on the Commission’s criteria (set forth in paragraph 10.b above) be made as to whether a mine site is a “place of withdrawal of water for present or reasonable foreseeable future use” prior to allowing water quality standards to be exceeded underneath a mine site.

b. The Proposed Copper Mine Rule gives blanket authorization for copper mine discharges to exceed water quality standards *underneath all mine sites*, including discharges from the Tyrone mine site.²

c. The Proposed Copper Mine rule allows the establishment of “points of

² Water quality exceedences underneath mine sites are allowed through various provisions in the Proposed Copper Mine Rule, including but not limited to:

- a. Not requiring an impervious synthetic liner for new waste rock piles, whether inside or outside an “open pit surface drainage area,” 20.6.7.21.B(1) &- (2) NMAC;
- b. Not requiring existing waste rock piles to meet new engineering requirements, including the requirement for an impervious synthetic liner, 20.6.7.21.C(2) NMAC;
- c. Not requiring an impervious synthetic liner for new tailing impoundments, 20.6.7.22.A(4) NMAC;
- d. At closure, requiring that ground water under “waste rock piles, leach stockpiles, tailing impoundments and other facilities that have the potential to generate leachate and cause an exceedance of the standards of 20.6.2.3103 NMAC” meet water quality standards only at a “designated monitoring well location,” 20.7.6.33.F NMAC;
- e. Providing that “the standards of 20.6.2.3103 NMAC do not apply” within the area of “hydrologic containment” of an open pit during operations and after closure, 20.6.7.24.A(4) & -33.D(1) NMAC;
- f. For new pipelines located inside the open pit surface drainage area, not requiring monitoring for integrity, secondary containment, or testing for integrity of pipelines inside the open pit surface drainage area, 20.6.7.23.A(1)(b) & (c);
- g. Not requiring ground water monitoring of new process water and impacted stormwater impoundments inside the open pit surface drainage area, 20.6.7.28.B(3); and
- h. Allowing, after closure, exceedences of ground water standards outside the area of “hydrologic containment” from a “flow-through pit,” 20.6.7.33.D(2) NMAC.

compliance” outside sources of contamination in order to determine compliance with water quality standards.³

13. The Commission’s *Guidelines for Water Quality Control Commission Regulation Hearings* (“*Comm’n Guidelines*”) provide that the “Hearing Officer *shall* admit *any* relevant evidence, unless the Hearing Officer determines that the evidence is incompetent or unduly repetitious.” *Comm’n Guidelines*, § 402.A (emphasis added).

14. The *Tyrone Permit Appeal* record is relevant to this Copper Mine Rule proceeding because the Commission has already made factual and legal determinations, based on an extensive record, on many of the *same factual and legal issues* raised by the Proposed Copper Mine Rule, as identified above. The record from the *Tyrone Permit Appeal* is therefore highly relevant to this proceeding, and should be admitted. *See id.*

15. In addition, admitting the record in the *Tyrone Permit Appeal* will likely save administrative and party resources because not all the evidence from the *Tyrone Permit Appeal* will need to be duplicated in the proceeding currently before the Commission.

16. Counsel for the Attorney General contacted counsel for NMED and Freeport

³ “Points of compliance” are established through various provisions in the Proposed Copper Mine Rule, including but not limited to:

- a. Determining that discharges from a waste rock pile “would cause ground water to exceed applicable standards at a monitoring well located pursuant to section 20.6.7.28 NMAC,” 20.6.7.21.B(1)(d) NMAC;
- b. Requiring that water quality standards underneath new tailing impoundments only be met “at monitor well locations specified by 20.6.7.28.N NMAC,” 20.6.7.22.A(4)(a)(vi) NMAC;
- c. Allowing water quality to be measured after closure at a “designated monitoring well location” for purposes of establishing ground water quality exceedences of a flow-through pit, 20.6.7.33.D(2) NMAC;
- d. Allowing water quality to be measured after closure at “a designated monitoring well location” for purposes of waste rock piles, leach stockpiles, tailing impoundments and other facilities that have the potential to generate leachate and cause an exceedance of water quality standards, 20.6.7.33.F NMAC;
- e. Siting monitoring wells to monitor ground water quality “around and downgradient of the perimeter” of each open pit, leach stockpile, waste rock stockpile, tailings impoundment, process water impoundment, and impacted stormwater impoundment, 20.6.7.28.B & -B(2) NMAC; and
- f. Siting monitoring wells “outside of the open pit surface drainage area,” 20.6.7.28.B(2) NMAC.

MacMoran, Inc., who oppose this motion, and counsel for Gila Resources Information Group, Amigos Bravos and Turner Ranch Properties, L.P, who support this motion.

Based on the foregoing, the Attorney General respectfully requests admission into the Record Proper of this Copper Mine Rule proceeding of the Transcript of Proceedings, all admitted exhibits, and the Commission's Decision from the *Tyrone Permit Appeal*.

Respectfully submitted,

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Certificate of Service

I certify that the following were served with the foregoing pleading by mail or hand delivery on November 1, 2012:

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