

STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION



In the matter of: )  
 )  
PROPOSED AMENDMENT TO )  
PART 20.6.2 NMAC (Copper Rule) )  
 )  
\_\_\_\_\_ )

No. WQCC 12-01(R)

**REPLY TO FREEPORT-MCMORAN'S RESPONSE TO  
JOINT MOTION TO DISMISS PETITION FOR RULEMAKING**

Various subsidiaries of Freeport-McMoRan, Inc. (collectively referred to herein as "FMI") filed a consolidated response to the Joint Motion to Dismiss Petition. The Gila Resources Information Project and Turner Ranch Properties, LLC, and Amigos Bravos, (collectively referred to herein as "Movants") hereby reply to FMI's consolidated response.

Most of FMI's consolidated response is devoted to mischaracterizing Movant's arguments and then responding to those mischaracterizations. However, to its credit, FMI at least admits that the New Mexico Environment Department's ("NMED") proposed copper rule would authorize FMI and all copper mining companies to pollute groundwater above water quality standards at all existing and new copper mines. FMI's response thus confirms that the question now before the Water Quality Control Commission ("the Commission") is purely legal. The question is:

Can the Commission, consistent with the Water Quality Act ("the Act"), adopt a regulation that allows exceedances of water quality standards in groundwater without any site-specific determination as to whether standards will be exceeded at "places of withdrawal of water for present or reasonably foreseeable future use" ("Place of Withdrawal of Water")?

As explained in the Joint Motion and in further detail below, the answer to this question is emphatically, no: the Commission cannot adopt such a regulation, because it would violate the express terms of the Act and undermine its protection of groundwater.

## ARGUMENT

1. NMED's proposed regulation conflicts with the Commission's authority under the Water Quality Act, not because the Act requires groundwater to meet standards everywhere, but because the Act requires groundwater to meet standards at Places of Withdrawal of Water.

In lieu of reasoned debate, FMI opts to grossly mischaracterize Movant's arguments. According to FMI, Movants labor under the false "notion that *all* groundwater is required to meet groundwater standards at *all* times and in *all* places." *Consolidated Response at 6*. FMI emphasizes "all" apparently to highlight the absurdity of Movants' supposed "notion." The problem is that Movants have no such notion. We simply point out that NMED's proposed regulation substantially conflicts with the Water Quality Act. The Act provides:

[NMED] shall deny any application for a permit ... if ... the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard ... at any [Place of Withdrawal of Water].

NMSA 1978, §74-6-5(E)(3) (2009). In contrast to this nondiscretionary statutory duty, NMED's proposed regulations would require NMED to *approve* permits that allowed "contaminant levels in excess of ... state standard[s]" at all existing and future copper mines. *See, e.g., NMED Proposed Regulation §20.6.7.24.A.4 and §20.6.7.33.D.1*. There is no dispute about this.

The reason that NMED's proposed regulation violates the Act is *not* that "*all* groundwater [must] meet ... standards at *all* times and in *all* places." The reason is that the regulation would authorize unlimited pollution within certain areas, arbitrarily defined by transient hydraulic gradients, without regard to whether these areas qualify as Places of Withdrawal of Water under the Act. *Consolidated Response at 2 (admitting that NMED's proposed regulation would exempt "hydrologically isolated open pit areas ... from compliance with ground water quality standards")*; *Consolidated Response at 16 (arguing that Place of Withdrawal of Water should not be considered in a rulemaking)*. In other words, NMED would

grant FMI and other mining companies the unique privilege of polluting our public groundwater supplies, in excess of standards, without any determination as to whether the impacted groundwater is “clean water that is currently being withdrawn for use, or clean water that is likely to be used in the reasonably foreseeable future ....” *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n, 2006 NMCA 115*, ¶ 27. NMED’s proposed regulation thus violates the Water Quality Act, because “[c]ertainly, the legislature meant to capture the concept” that such water “must be protected” under the Act. *Id.*<sup>1</sup> Accordingly, were the Commission to adopt NMED’s proposed regulation, the regulation would be set aside on appeal as arbitrary, capricious and contrary to law, thus further wasting taxpayer money.<sup>2</sup> NMSA 1978, §74-6-7 (1993).

2. Sections 74-6-4(E) and (K) of the Act do not authorize the Commission to adopt a regulation that authorizes copper mining companies to pollute groundwater above standards.

FMI admits that NMED’s regulations would authorize pollution of public groundwater supplies in excess of standards, but argues that this is permissible under the Act because the pollution would only occur within a so-called “hydrologically isolated open pit area.” *Consolidated Response at 16-17*. Relying on Sections 74-6-4(E) and (K) of the Act, FMI argues that the Commission can adopt NMED’s proposed regulation, which would preclude all these “hydrologically isolated open pit areas” from ever being protected Places of Withdrawal of Water under the Act. *Id.* FMI is mistaken.

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<sup>1</sup> And, indeed, every existing Commission regulation promulgated under the Act does protect Places of Withdrawal of Water. *See, e.g.*, §20.6.2.3103 NMAC (“the discharge at such concentrations will not result in concentrations at any place of withdrawal for present or reasonably foreseeable future use in excess of the standards”); §20.6.2.3106 NMAC (NMED may request of applicant “any additional information that may be necessary to demonstrate that the discharge permit will not result in concentrations in excess of the standards ... at any place of withdrawal of water for present or reasonably foreseeable future use”); §20.6.2.3109 NMAC (requiring “the person proposing to discharge [to] demonstrate[] that approval of the proposed discharge plan, modification or renewal will not result in ... concentrations in excess of the standards ... at any place of withdrawal of water for present or reasonably foreseeable future use”).

<sup>2</sup> Taxpayers already wasted money on the sham advisory committee process.

Neither Section 74-6-4(E) nor (K) of the Act negates the Commission's or NMED's basic statutory duty to protect Places of Withdrawal of Water from pollution in excess of standards. NMSA 1978, §74-6-4(E) & (K). Section 74-6-4(E) merely authorizes the Commission to "adopt ... regulations to prevent or abate water pollution," not only for the entire state, but also for "any specific geographic area, aquifer or watershed of the state or in any part thereof, or for any class of waters." These statutory subdivisions of the state are logically based on permanent and objectively ascertainable characteristics, such as geography, the boundaries of an aquifer or watershed, or some other permanent characteristic that rationally defines a "class of waters." In contrast, FMI's so-called "hydrologically isolated open pit area" is an induced transient condition, *i.e.*, it is not natural or permanent. It is defined by local hydraulic gradients, which are susceptible to constant change as pumping wells come online and go offline, both within and around the mining site. Moreover, the area covered by these changing hydraulic gradients at a given point in time depends on groundwater elevations, which in turn depends on proper monitoring well completion and competent professional judgment. Thus, the so-called "hydrologically isolated open pit area" is not the kind of objective or permanent subdivision of the state intended under Section 74-6-4(E), and therefore, FMI's reliance on this provision is misplaced.

Its reliance on Section 74-6-4(K) is also misplaced. This section requires the Commission to, among other things, "specify in regulations the measures to be taken to prevent water pollution" and allows such "regulations [to] include variations in requirements based on site-specific factors, such as depth and distance to ground water and geological and hydrological conditions." *NMSA 1978, § 74-6-4(K) (emphasis added)*. NMED's proposed regulation conflicts with this provision, because it does not specify measures to "prevent water pollution" within the so-called "hydrologically isolated open pit area." On the contrary, NMED's regulation would

expressly allow and encourage water pollution within this area, in excess of standards, at every existing and future copper mine in New Mexico. This obviously conflicts directly with the Commission's and NMED's express mandate under Section 74-6-4(K) of the Act, which is to prevent pollution of protected groundwater supplies.

Moreover, the Legislature has expressly defined truly isolated waters and exempted them from the Act. Thus:

[t]he Water Quality Act does not authorize the commission to adopt any regulation with respect to any condition or quality of water if the water pollution and its effects are confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters.

NMSA 1978, § 74-6-12(C) (1999) (emphasis added). NMED's proposed regulation does not require the so-called "hydrologically isolated open pit area" to meet this statutory definition of isolated waters, nor can it. Although a local gradient can be induced to converge around an open pit, this requires constant removal of water from the pit lake by evaporation and/or pumping, which necessarily draws groundwater from offsite.<sup>3</sup> This, in turn, induces groundwater "within the boundaries" of the mine site to "combine with other waters" from outside its boundaries. Accordingly, NMED's proposed regulation again violates the Act, because it treats certain waters as isolated and thus exempt from the Act's protection, even though these waters are not truly isolated and do not fall within the statutory exemption provided by Section 74-6-12(C).

3. The Commission's authority to grant variances from its regulations is not relevant to the issue of whether NMED's proposed regulation violates the Water Quality Act.

FMI takes issue with Movants for failing to "explain how the [Act] prohibits the [Commission] from adopting ... rules that acknowledge that exceedances of standards may occur within a defined area, or temporarily, when reasonably necessary to allow for copper mining, yet

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<sup>3</sup> The Commission is an expert agency, including members from both the NMED and the Office of the State Engineer. Accordingly, Movants request the Commission to take notice of basic groundwater hydrology.

authorizes the [Commission] to do the same thing through a variance procedure.” *Consolidated Response at 4*. The Commission’s authority under the Act to grant “an individual variance from any regulation of the commission,” *NMSA 1978, § 74-6-4(H)*, is completely irrelevant to the question of whether this Commission can adopt a regulation that authorizes water pollution in excess of standards. FMI’s contrary argument is irrational and based on a fundamental misunderstanding of the Act.

First, the Act only authorizes the Commission to grant variances from the *Commission’s* regulations. *Id.* The Act gives the Commission no power to waive statutory requirements, which would arguably violate separation of powers. Accordingly, the Commission has no power to dispose of the requirement to protect Places of Withdrawal of Water from pollution, by variance or by regulation, because this requirement arises directly from the Act.<sup>4</sup> *NMSA 1978, § 74-6-5(E)(3)*.

Second, the granting of variances is subject to a different legal standard than the adoption of regulations. Variances can only be granted under the Act for a limited time, on a site-specific and individual basis, following an adjudicatory public hearing. Thus:

[The Commission] may grant an individual variance from any regulation of the commission whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time. Any variance shall be granted for the period of time specified by the commission. The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted[.]

*NMSA 1978, § 74-6-4(H); see also NMAC § 20.1.3.18 (codifying the Commission’s adjudicatory procedures for variance hearings)*. The Commission cannot grant blanket variances through this

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<sup>4</sup> If this were not the case, an unwise Commission could, for example, grant variances to allow dischargers to pollute water supply wells.

or any other rulemaking, because rulemakings simply do not meet the requisite legal standard.<sup>5</sup> In contrast to variances and variance proceedings, regulations apply to the general population and thus rulemakings are never site-specific or otherwise based on individual circumstances.

Moreover, as a matter of law and common sense, the Commission cannot rationally determine whether to allow standards to be exceeded in a rulemaking, because it cannot possibly take into account all of the relevant site-specific circumstances. For example, the Commission cannot determine where the Places of Withdrawal of Water might be in relation to every existing and future mine site, because it cannot possibly know the present or likely future locations of water supply wells and population centers, the groundwater quality, or the aquifer characteristics at every existing and future mine site. Thus, FMI's reliance on the Commission's variance authority to support NMED's proposed regulation is very misplaced. The regulation as proposed would arbitrarily and capriciously allow water pollution above standards at all existing and future copper mines, and therefore, if adopted it would be overturned on appeal. NMSA 1978, § 74-6-7 (1993).

4. The regulatory exemptions created by the Commission are not relevant to the issue of whether NMED's proposed regulation violates the Water Quality Act.

FMI poses the question: If one or more exemptions available under NMAC § 20.6.2.3105 lawfully "allows the contamination of ground water without any permit ... regardless of whether ground water at a 'place of withdrawal' exceeds ground water quality standards," how can NMED's proposed regulation be unlawful? FMI is again comparing apples and oranges.

First, FMI's basic premise is false. Unlike NMED's proposed regulation, Section 3105 does not allow pollution above water quality standards but instead exempts certain activities

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<sup>5</sup> FMI complains that the variance standard is "very broad and vague" and that only allowing pollution above standards by variance will "result in unpredictable and inconsistent results." *Consolidated Response at 10*. Although FMI clearly prefers having a guaranteed right to pollute, which is ostensibly unavailable under the current variance proceeding, its complaints are neither here nor there. Only the Legislature can change the variance standard, which in any case has operated just fine since 1967 without any of FMI's "parade of horrors."

from discharge permitting requirements. Most of the discharges covered by the exemptions are regulated under other law. *See* §20.6.2.3105 (B), (E), (F), (I), (L) and (M). Moreover, the discharges described in Section 3105(A) must meet standards without a permit; the discharges described in Sections 3105 (C) and (G) are ubiquitous, unlikely to exceed standards, and would be very difficult to regulate; and the Secretary may require a permit for the discharges described in Sections 3105 (D) and (H). And the circumstances described in Section 3105(J) and (K) may not constitute discharges at all.

Second, whether any of the discharges or other activities described in Section 3105 would cause an exceedance of standards in groundwater is pure speculation. In contrast, NMED's proposed regulation would, by permit, expressly authorize mining companies like FMI to pollute groundwater above standards. Third, the question of whether the exemptions are lawful has never been decided by a Court, nor would the answer to this question have any bearing on whether NMED's proposed copper rule violates the Act. NMED is not proposing to exempt copper mines from the necessity of obtaining a discharge permit. On the contrary, NMED proposes to require discharge permits at all copper mines, but under its proposed regulations these permits would not prevent water pollution. They would do just the opposite, expressly permitting groundwater standards to be exceeded at all existing and future copper mines, thus utterly defeating the Legislature's purpose in requiring a permit. This obviously violates the Act and should not be considered by the Commission.

5. The 2009 amendments to the Water Quality Act did not authorize pollution of Places of Withdrawal above standards.

FMI devotes considerable effort arguing that the 2009 amendments to the Act constituted a "paradigm shift" that somehow reversed the purpose of the Water Quality Act from preventing water pollution above standards to expressly permitting it. *Consolidated Response at 11-16.*

This argument has no basis. The 2009 amendments did not touch Section 74-6-5(E)(3) or any other provision of the Act requiring Places of Withdrawal to be protected from water pollution in excess of standards. The 2009 amendments instead, for better or worse, require this Commission to adopt regulations that expressly describe the specific methods to be undertaken to prevent water pollution from copper mines and dairies. These amendments, however, did not change where standards must be met in groundwater or alter the site-specific nature of Places of Withdrawal of Water. Accordingly, the 2009 amendments cannot save NMED's proposed regulation, which would arbitrarily allow water pollution above standards at all existing and future copper mines.

6. NMED's proposed regulations conflict with the Court of Appeals' opinion in *Phelps Dodge Tyrone*, which FMI grossly mischaracterizes in its consolidated response.

Contrary to FMI's contention, the Court of Appeals never "unequivocally determined that all water beneath a mine need not meet standards ...." *Consolidated Response at 7*. On the contrary, the Court in *Phelps Dodge Tyrone* stated:

[We] do not necessarily agree with the Mining Association's position that water "underneath" a mine site need not be protected. We can conceive of a situation in which an aquifer underneath a mine site may be negatively impacted, and consequently it might be appropriate to protect that water.

*Phelps Dodge Tyrone* ¶ 36. Moreover, the Court confirmed that the determination of where Places of Withdrawal of Water are located depends on site-specific factors that must be evaluated on the basis of objective policies to guide the Commission's discretion. Thus:

The Commission, in the first instance, must create some general factors or policies to guide its determination [of where Places of Withdrawal of Water are located]. We offer no opinion as to whether the Commission should do so by way of rulemaking or by simply deciding the factors as a part of this specific case, or both.

... the unique geology and hydrology of the area and the particular site (including the mining or other operations and its scale) may be appropriate factors.

*Id at ¶¶ 35 and 36.* Thus, although the Commission could have devised “general factors and policies” by regulation, the actual determination of where Places of Withdrawal of Water are located can only be made on a site-by-site basis. Finally, contrary to FMI’s contention, the Court of Appeals never “determined that a point of compliance approach is a reasonable proxy for determining a place of withdrawal.” *Consolidated Response at 10.* This is what the Court actually said:

[At] this point we decline to adopt the standard as “point of compliance,” or to engage in the wholesale adoption of cases and federal regulations dealing with “point of compliance.” It is possible that “point of compliance” is a reasonable proxy for “any place of withdrawal . . . for present or reasonably foreseeable future use,” Section 74-6-5(E)(3), and that authorities dealing with “point of compliance” can and should be used in a case like this one. However, there may be reasons, such as differences in statutory language, that may make federal law or law from other jurisdictions inapplicable or inappropriate in New Mexico. These arguments were not well developed below or on appeal.

*Phelps Dodge Tyrone ¶ 37.* As already set out in the Joint Motion, this Commission unequivocally found that the “point of compliance” was indeed inconsistent with the language of the Water Quality Act.

### CONCLUSION

Nothing in FMI’s consolidated response rebuts the Movants’ basic claim: NMED’s proposed regulation violates the Act, because it would allow water pollution in excess of standards at all existing and future copper mines without regard to whether Places of Withdrawal of Water may be impacted.

WHEREFORE, Movants request the Commission to remand the copper rule back to the advisory committee with instructions to prepare a draft that complies with the Water Quality Act.

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 25, 2013 I sent the Reply to FMI's Response to Joint Motion to Dismiss Petition by email to the following:

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