

STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF PROPOSED AMENDMENTS  
TO 20.6.2, THE COPPER MINE RULE,

No. WQCC 12-01(R)

New Mexico Environment Department,  
Petitioner.

**ATTORNEY GENERAL'S MOTION TO REMAND THE PROPOSED COPPER MINE  
RULE TO NMED**

**Preliminary Statement**

The Attorney General of New Mexico hereby moves to remand the Proposed Copper Mine Rule to the New Mexico Environment Department ("NMED") on the ground that the rule as proposed would violate the Water Quality Act ("WQA" or "Act"). The Proposed Copper Mine Rule would allow discharges from copper mines to exceed water quality standards at "place[s] of withdrawal of water for present or reasonably foreseeable future use," in direct violation of Section 74-6-5.E(3) of the WQA.<sup>1</sup> As a necessary corollary to allowing exceedances of ground water standards at places of withdrawal, the Proposed Copper Mine Rule would establish "points of compliance" to determine compliance with water quality standards, allowing exceedances of water quality standards underneath a pollution source and up to designated monitoring wells located some distance away from a source. The WQA does not authorize a point of compliance regulatory framework. Rather, water quality standards must be met in New Mexico at "any place of withdrawal." NMSA 1978, § 74-6-5.E(3).

The Water Quality Control Commission ("Commission"), as an administrative body, is a creature of statute, and only has such power and authority granted by statute. *In re Proposed*

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<sup>1</sup> Throughout this motion, the Attorney General will refer to "place of withdrawal" as short hand for "place of withdrawal of water for present or reasonably foreseeable future use" under Section 74-6-5.E(3).

*Revocation of Food and Drink Purveyor's Permit for House of Pancakes*, 102 N.M. 63, 66, 691 P.2d 63, 67 (Ct. App. 1984). The Proposed Copper Mine Rule violates the WQA, and therefore promulgation of such a rule is outside the scope of the statutory authority of the Commission. The Commission should remand to NMED with direction work with the Copper Rule Advisory Committee ("CRAC") to develop a proposed rule that complies with the WQA.

Alternatively, even if the Commission finds that it has authority to consider the Proposed Copper Mine Rule, the Commission, in its discretion, should remand the rule to NMED. Under the WQA, the Commission determines whether or not to hold a hearing on a rulemaking petition, and its denial of any such petition is not subject to judicial review. NMSA 1978, § 74-6-6.B. The Commission has already held two evidentiary hearings, over the course of 34 days, and issued two decisions affirming that the WQA prohibits exceedances of ground water standards underneath a "place of withdrawal", and finding that the Tyrone copper mine site is a place of withdrawal under the WQA. *See* Commission's Partial Final Decision and Order Affirming Supplemental Discharge Permit and Requesting a Modification to Condition 22, Conclusions of Law ("COL") ¶ 29 (June 10, 2004) ("First Comm'n Decision") [attached as Ex. A] & Decision and Order on Remand, COL ¶¶ 26, 29-57 (Feb. 9, 2007) ("Comm'n Decision") [attached as Ex. B], *In the Matter of Appeal of Supplemental Discharge Permit for Closure (DP 1341) for Phelps Dodge Tyrone, Inc.*, Nos. 03-12(A) and 03-13(A) ("*Tyrone*"). As well, the Commission has determined that the WQA does not establish specific "points of compliance" to establish compliance with water quality standards. Comm'n Decision, COL ¶ 27.

It would be a waste of the Commission's resources to allow these same issues to be re-litigated, issues that were first raised before the Commission nearly a decade ago.<sup>2</sup> The Commission, therefore, has sound justification to deny the rulemaking petition of the New Mexico Environment Department ("NMED"), and to remand to NMED with directions to work with the CRAC to develop a proposed rule that complies with the WQA and the Commission's decisions in *Tyrone*.

### **Background**

#### **I. THE WQA, THE COMMISSION'S REGULATIONS, AND THE LONG STANDING INTERPRETATION OF THE WQA**

##### **A. The WQA**

In New Mexico, ground water "belong[s] to the public." NMSA 1978, § 72-12-1. Our state's ground water does not belong to the owners of private property above ground water. While individuals and entities may use ground water for "beneficial use," subject to appropriate authorization from the State, *id.*, ground water, in New Mexico, is a public resource to be protected.

The WQA is the primary statutory mechanism by which ground water in our state is protected. *See* NMSA 1978, §§ 74-6-1 to -17. The purpose of the WQA is "to abate and prevent water pollution." *Bokum Resources Corp. v. N.M. Water Quality Control Comm'n*, 93 N.M. 546, 555, 603 P.2d 285, 294 (1979); Comm'n Decision, COL ¶ 1. Specifically, the WQA prohibits issuance of a discharge permit if:

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

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<sup>2</sup> Tyrone filed its initial appeal petition with the Commission on July 7, 2003. Comm'n Decision, Findings of Fact ("FOF") ¶ 61.

water shall be measured *at any place of withdrawal of water for present and reasonably foreseeable use.*

NMSA 1978, § 74-6-5.E(3) (emphasis added). Therefore, under the WQA, ground water may not be contaminated above water quality standards at any “place of withdrawal.” Under the Act, “reasonable degradation of water quality” is permitted for beneficial use, provided that water quality standards are not exceeded. NMSA 1978, § 74-6-12.F.

The WQA provides for very limited blanket exemptions from water quality standards. For example, changes in dissolved oxygen, temperature, dissolved solids, sediment and turbidity attributed to the “reasonable operation of irrigation or flood control facilities” are exempt from standards under certain circumstances. NMSA 1978, § 74-6-12.H. There are no other similar exemptions in the Act. *See* NMSA 1978, § 74-6-12.

The Commission, however, has authority under the WQA to grant *individual* exceptions under limited circumstances after a public hearing. The Commission:

may grant *an individual variance* of 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 is granted . . . .

NMSA 1978, 74-6-4.G (emphasis added).

**B. The Commission's Regulations**

In 1977, the Commission promulgated regulations pursuant to its authority under the WQA. The Commission's regulations mirror the structure of the WQA. The purpose of the Regulations, now codified at 20.6.2 NMAC ("Commission Regulations"), is to:

control[] discharges onto or below the surface of the ground . . . to protect *all ground water* of the state of New Mexico which has an existing concentration of 10,000 mg/l [milligrams per liter] or less TDS [total dissolved solids], for present and potential future use as domestic and agricultural water supply . . . .

20.6.2.3101.A NMAC (emphasis added). The Commission's Regulations set numeric water quality standards and, in accordance with Section 74-6-5.E(3), provide that discharges "will not result in concentrations at any place of withdrawal for present or reasonably foreseeable future use in excess of the standards of this section." 20.6.2.3103 NMAC.

The Commission's Regulations allow for individual variances from the Regulations, in accordance with Section 74-6-4.G of the WQA. *See* 20.6.2.1210 NMAC. Variances may only be granted after a public hearing before the Commission, and may be granted up to five years.

20.6.2.1210.B & -C NMAC.

Pursuant to its variance authority, the Commission also has promulgated regulations that allow for alternative abatement standards – standards that can exceed the Commission's numeric standards under 20.6.2.3103 NMAC -- under certain, limited circumstances. 20.6.2.4103

NMAC.<sup>3</sup> In order to obtain alternative abatement standards, a discharger in the process of

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<sup>3</sup> Section 20.6.2.4103.F provides:

**Alternative Abatement Standards.**

(1) At any time during or after the submission of a Stage 2 abatement plan, the responsible person may file a petition seeking approval of alternative abatement standard(s) for the

abatement must petition the Commission, and the petition may be granted only after a public hearing. 20.6.2.4103.F(3) NMAC.

**C. The Long Standing Interpretation of the WQA**

For the last 35 years, NMED and its predecessor agency recognized that *all* ground water with a TDS concentration in ground water of 10,000 mg/l or less is protected under the WQA, and that “ground water not in present use is potentially usable unless demonstrated otherwise.” Comm’n Decision, FOF ¶¶ 60-62. NMED’s long standing interpretation of the WQA and Commission Regulations “has been to ensure that all ground water *underneath a discharge site* meets ground water quality standards.” *See id.* at ¶ 83 (emphasis added). Since promulgation of the Commission Regulations, neither NMED nor the Commission has interpreted the WQA or has adopted a practice to allow the exceedance of water quality standards *underneath a discharge site* or up to a designated “point of compliance” adjacent to or outside a discharge site, absent a site-specific determination that the discharge site is not a “place of withdrawal” or the discharger obtaining a variance or alternative abatement standards.<sup>4</sup>

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standards set forth in Subsections A and B of this section. The commission may approve alternative abatement standard(s) if the petitioner demonstrates that:

(a) compliance with the abatement standard(s) is/are not feasible, by the maximum use of technology within the economic capability of the responsible person; OR there is no reasonable relationship between the economic and social costs and benefits (including attainment of the standard(s) set forth in Section 20.6.2.4103 NMAC) to be obtained;

(b) the proposed alternative abatement standard(s) is/are technically achievable and cost-benefit justifiable; and

(c) compliance with the proposed alternative abatement standard(s) will not create a present or future hazard to public health or undue damage to property.

<sup>4</sup> A more detailed history of the long standing interpretation and practice to protect ground water directly underneath discharge sites is set forth in the Commission’s Decision, FOF ¶¶ 43-86.

## II. COPPER MINE DISCHARGE PERMITS AND GROUND WATER CONTAMINATION

The first discharge permit issued to Phelps Dodge Tyrone, Inc. (“Tyrone”) for the Tyrone mine site was in 1978. Comm’n Decision, FOF ¶ 15. Eight other discharge permits were issued through 2007. *Id.* None of the nine operational permits authorized exceedances of ground water standards. *Id.* at ¶ 18. “The fundamental purpose of each of the permits is to prevent ground water contamination underneath and around the areas of the mine that are permitted and to require abatement of ground water contamination where it has occurred.” *Id.* at ¶ 16. For over two decades, Tyrone did not challenge the permit requirements prohibiting contamination of ground water under its site. Environment Department’s Proposed Findings of Fact and Conclusions of Law on Remand (“NMED Remand Brief”), FOF ¶ 46 (Mar. 28, 2008).

Prior to open pit mining at the Tyrone mine site – located in Grant County, New Mexico and covering approximately 12,500 acres -- the water quality at the site was of good to excellent quality. Even more recently, ground water upgradient of Tyrone met ground water quality standards. Comm’n Decision, FOF ¶¶ 1, 6, 39-41.

However, despite the requirement that discharges from mining not cause ground water contamination, copper mining operations in New Mexico have resulted in extensive ground water pollution. In *Tyrone*, the Commission found that the leach piles, waste rock piles and tailing impoundments at the mine site all had contributed to contaminating ground water above standards as a result of acid rock drainage. *Id.* at ¶¶ 25-38. Tyrone studies have found that the acid rock generation from leach piles and waste rock piles will continue to occur for 300 years or more. The leach piles and waste rock piles cover approximately 2,800 acres. *Id.* at ¶ 2.

Regional ground water under the Tyrone’s central mining area is “severely degraded.” *Id.* at ¶ 33. Some of the ground water under the central mining area exceeds ground water standards by 10 times for TDS, sulfate, nickel, cobalt and copper, and by 1,000 times for aluminum, cadmium, manganese, iron, and zinc. *Id.* at ¶ 34. Ground water along the north, east, south and west perimeter of the mine site is degraded. *Id.* at ¶ 33. Ground water contamination has been discovered to be moving offsite and into the alluvial and regional aquifers. *Id.*

### III. PHELPS DODGE CORPORATION’S “MINING DISTRICT” LEGISLATION

During the 2003 New Mexico legislative session, Phelps Dodge Corporation promoted Senate Bill 473 (“SB 473”) [attached as Ex. C].<sup>5</sup> SB 473 proposed to amend the WQA and the state Mining Act to establish “mining districts” that would be exempt from water quality standards under the WQA. SB 473, p. 37, ll. 1-4; p. 42, l. 20 to p. 43, l. 2. “Mining districts” would have encompassed all land owned or leased by mining owners or operators. *Id.* at p. 4, ll. 3-7. During the session, SB 473 was withdrawn from all committees and tabled indefinitely.<sup>6</sup>

### IV. TYRONE LITIGATION<sup>7</sup>

What constitutes a “place of withdrawal of water for present and reasonably foreseeable use” under the WQA has been the subject of complex and protracted litigated before NMED and

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<sup>5</sup> See *Santa Fe New Mexican*, “Mining Company Seeks to Sidestep State Oversight,” (Feb. 12, 2003) [attached as Ex. D].

<sup>6</sup> <http://www.nmlegis.gov/lcs/session.aspx?Chamber=S&LegType=B&LegNo=473&year=03>.

An editorial in the *Santa Fe New Mexican* stated that, “The mining industry’s latest move [to leave our land and water contaminated by the poisons it takes to separate metal from rock] is so blatant that its sponsor should have been too embarrassed to introduce it.” *Santa Fe New Mexican*, “A Blatant Assault on Mining Law,” (Feb. 13, 2003) [attached as Ex. E].

<sup>7</sup> The course of the Tyrone litigation is more fully detailed in the NMED Remand Brief, FOF ¶¶ 55-86

the Commission for over a decade. Tyrone initially challenged NMED's draft closure permit during a 10 day evidentiary hearing in May 2002. First Comm'n Decision, FOF ¶ 2. On March 7, 2003, NMED's Hearing Officer issued a 106 page Hearing Officer's Report and 307 pages of Findings of Fact and Conclusions of Law. *Id.* at ¶ 3. NMED issued the closure permit for Tyrone based on the Hearing Officer's report, findings and conclusions. *Id.* at ¶ 6.

Tyrone challenged NMED's closure permit by filing an appeal petition with the Commission on July 3, 2003. *Id.* at ¶ 7. The Commission held a 10 day evidentiary hearing in October and November 2003. *Id.* at ¶ 13. By a decisive majority, the Commission upheld NMED's permit and, on June 10, 2004, the Commission issued a decision holding *inter alia* that the Tyrone copper mine was a "place of withdrawal," and the ground water underneath the site was protected under the WQA. *Id.* at COL ¶ 29.

Tyrone appealed the Commission's decision to the New Mexico Court of Appeals. The appellate court found, in 2006, that the Commission's determination 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. The court, also, declined to adopt as a standard a "point of compliance" regime for purposes of meeting water quality standards, as Tyrone had urged. *Id.* at ¶ 37.

During the 24 day hearing on remand before the Commission in 2007, NMED took the position that the ground water underneath the Tyrone mine site was a "place of withdrawal" that could not be contaminated above standards. Comm'n Decision, FOF ¶ 9. Tyrone took the position that that the lands inside its Mining and Minerals Division permit boundary were *not*

places of withdrawal, and that it could pollute ground water above standards up to that 12,500 acre boundary. *Id.* at ¶ 10.

The Commission issued its decision on February 9, 2007. The Commission held that the following factors must be considered in determining “place with 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. The Commission further held that the WQA protected ground water at “*any* place of withdrawal for present and reasonably foreseeable future use.” *Id.* at ¶ 26 (emphasis in original). The Commission found the planning horizon for the future is “at least 100 years.” *Id.* at ¶ 25. The Commission held that the WQA “does not establish any specific ‘point(s) of compliance’ for compliance with water quality standards.” *Id.* at ¶ 27. Applying the factors identified by the Commission, the Commission determined that “the regional and alluvial aquifers underlying portions of the Tyrone mine site are places of withdrawal of water for present and reasonable foreseeable future use pursuant to Section 74-6-5(E)(3).” *Id.* at ¶ 33.<sup>8</sup> Finally, the Commission held that “[i]f it is not technically feasible for water quality standards to be met underneath the Tyrone Mine, the appropriate remedy for Tyrone is to seek alternative abatement standards under the Commission Regulations at section 20.6.2.4103.F NMAC.” *Id.* at ¶ 52.

On March 9, 2009, Tyrone appealed again to the Court of Appeals challenging the Commission’s Decision.

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<sup>8</sup> The Commission identified numerous places within the mine site that are places of withdrawal. Comm’n Decision, COL ¶¶ 29-51, FOF ¶ 125.

## V. TYRONE SETTLEMENT

Tyrone's second appeal to the Court of Appeals has been stayed pending implementation of a Settlement Agreement and Stipulated Final Order ("Tyrone Settlement") finalized between NMED and Freeport-McMoRan Tyrone, Inc.<sup>9</sup> on December 20, 2010 [attached as Ex. F]. Tyrone Settlement, ¶¶ 47, 49. The Tyrone Settlement is consistent with the requirements of the WQA, the Commission's Regulations and the Commission's Decision in *Tyrone*. The Tyrone Settlement requires FMI to meet water quality standards at its mine site. *Id.* at ¶¶ 26, 27, 35. The Tyrone Settlement allows FMI to request variances from water quality standards during operations for existing and new facilities and to petition the Commission for alternative abatement standards upon closure, consistent with the requirements of the Commission's Regulations. *Id.* at ¶¶ 33, 38, 42.

## VI. THE PROPOSED COPPER MINE RULE

In 2009, the New Mexico Legislature amended the WQA to require the Commission to promulgate regulations for the copper industry to prevent water pollution. NMSA 1978, § 74-6-4.K. The legislation requires NMED to establish an advisory committee "composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders" to advise NMED on regulations to propose. *Id.*

In late 2011/early 2012, NMED formed the CRAC.<sup>10</sup> NMED contracted with Bill Olson, former Chief of the NMED Ground Water Quality Bureau and an expert in implementation of

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<sup>9</sup> Freeport-McMoRan Copper & Gold, Inc. ("FMI") acquired Phelps Dodge Corporation in 2007. FMI is an international copper, gold and molybdenum company with revenues in 2011 of \$20,880,000,000. FMI 2011 Annual Report, pp. 2, 22 ([http://www.fcx.com/ir/AR/2011/FCX\\_AR\\_2011.pdf](http://www.fcx.com/ir/AR/2011/FCX_AR_2011.pdf)).

<sup>10</sup> <http://www.nmenv.state.nm.us/gwb/documents/CopperRuleFinalSchedule.pdf>.

the WQA and Commission Regulations,<sup>11</sup> to coordinate the CRAC. The CRAC and its subcommittee, the Copper Rule Technical Committee, expended substantial time, effort and expertise to develop proposed rules.

On August 17, 2012, based on the work of the CRAC, NMED issued draft Supplemental Permitting Requirements for Copper Mine Facilities, 20.6.7 NMAC (“August Draft”) [attached as Ex. G], and draft Financial Assurance Requirements for Copper Mine Facilities, 20.6.8 NMAC. The ground water protection provisions in the August Draft were consistent with the WQA, the Commission’s Regulations, the Commission’s interpretation of the WQA in *Tyrone*, and the Tyrone Settlement: the August Draft required ground water standards to be met underneath copper mine sites during operations and upon closure unless variances or alternative abatement standards were obtained. *See* August Draft, 20.6.7.B(3), -31, -32 NMAC.

On September 5, 2012, FMI submitted comments on the August Draft [attached as Ex. H]. FMI proposed that water quality standards *not* apply to the operations of open pits and that standards only be met at monitoring wells – points of compliance in effect -- located around the perimeter of an open pit and downgradient of leach stockpiles, waste rock piles and tailing impoundments. Sept. 5, 2012 FMI Comments, 20.6.7.24.A(4) & -28.B NMAC.

On September 7, 2012, an internal NMED draft of the proposed Copper Mine Rule was circulated. Sept. 7, 2012 NMED 2<sup>nd</sup> Internal Discussion Draft, 20.6.7.24.A & -28.B NMAC. (“NMED September Internal Draft”) [attached as Ex. I]. The NMED September Internal Draft did *not* adopt FMI’s proposals to exempt open pits from water quality standards or to establish points of compliance for purposes of compliance with water quality standards. *See generally*

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<sup>11</sup> *See Tyrone* Transcript of Proceedings, vol. 7, p. 1870, l. 20 to p. 1872, l. 9 (Aug. 9, 2007).

NMED September Internal Draft. A memorandum attached to the draft, identifying “major issues” to NMED senior management authored by Mr. Olson and Kurt Vollbrecht, NMED Ground Water Quality Bureau staff, identified various provisions proposed by FMI that would violate the WQA. The memorandum stated in part:

**20.6.7.20.A(1)** Freeport deleted the agreed language developed as part of the Tyrone Settlement (paragraphs 36-40) that discusses the need for a variance for new leach piles within the open pit. . . . The Water Quality Act does not allow ground water contamination and without a variance *this would violate the WQA*. We set up the variance mechanism in the Tyrone Settlement to be able to legally permit these types of mining activities within the framework of the WQCC rules and the statute . . . .

. . .

**20.6.7.20.B(2), 20.6.7.21.C(2)** Freeport wanted to remove the variance requirement for existing facilities that have caused ground water contamination. We have retained it. Removing the variance requirement for existing facilities is not in accordance with the Tyrone Settlement (paragraphs 41-43) language and continuing to discharge without a variance *violates the WQA*.

**20.6.7.21(B) New Waste Stockpiles.** Freeport proposed to change the language such that it would allow ground water contamination from new waste rock stockpiles so long as the contaminated ground water is captured. The Water Quality Act does not allow ground water contamination and without a variance *this would violate the WQA* so we retained our language.

**20.6.7.22.A(4) New Tailing Impoundment Facilities.** Freeport proposed to change the language such that it would allow ground water contamination from new tailing impoundment facilities so long as the contaminated ground water is captured. The Water Quality Act does not allow ground water contamination and without a variance *this would violate the WQA* so we retained our language.

**20.6.7.21.A(2), 20.6.2.21.B(1)** Freeport added language regarding placement of materials inside (or outside) the open pit surface drainage area without a need for a variance. . . . This is not in accordance with the Tyrone Settlement and *would violate the WQA*.

**20.6.7.24[A](4)** Freeport proposed to allow ground water contamination in the open pit by rule. *This would violate the WQA*.

Major Issues in 9/7/12 NMED 2<sup>nd</sup> Internal Discussion Draft, pp. 1, 2 (emphasis added) [Ex. J].

On September 13, 2012, NMED released a draft Copper Mine Rule for public comment (“NMED September Public Draft”) [Ex. K]. The NMED September Public Draft adopted each of the eight provisions, cited above, that had been identified by NMED experts as violating the WQA. Indeed, the NMED September Public Draft adopted nearly wholesale the comments provided by FMI on September 5. *Compare* Sept. 5, 2012 FMI Comments *with* NMED September Public Draft.

On October 12, 2012, the Attorney General and a group of environmental organizations each filed comments on the NMED September Public Draft commenting the proposed rule violated the WQA, citing some of the same reasons already identified by Mr. Olson and Mr. Vollbrecht. *See* Oct. 12, 2012 ltr. from S. Farris, AGO, to K. Vollbrecht, NMED; Oct. 12, 2012 ltr. from B. Frederick, NMELC, to D. Martin, NMED.

On October 30, 2012, NMED filed its Petition to Adopt 20.6.7 and 20.6.8 NMAC and Request for Hearing with the Commission (“Petition”). Proposed 20.6.7 NMAC retains all eight provisions identified by NMED’s technical contractor and staff as violating the WQA. *See* Proposed 20.6.7 NMAC.

### **Argument**

#### **I. THE PROPOSED COPPER MINE RULE VIOLATES THE WQA**

The WQA establishes five basic principles with respect to compliance with water quality standards:

- Water quality standards must be met at “any place of withdrawal,” and not at “points of compliance” outside the source of pollution. NMSA 1978, § 74-6-5.E(3).

- Determination of what constitutes a place of withdrawal under the WQA is a site-specific determination. Comm’n Decision, COL ¶¶ 29-51; *accord Phelps Dodge Tyrone, Inc.*, 2006-NMCA-115, ¶ 35, 140 N.M. at 473, 143 P.3d at 511.
- Reasonable degradation of water quality is permitted for beneficial use, but such degradation may not result in exceedances of water quality standards. NMSA 1978, § 74-6-12.F.
- Exceptions to complying with water quality standards are very limited, and are enumerated only by the New Mexico Legislature in the WQA. *See, e.g.*, NMSA 1978, § 74-6-12.H (irrigation and flood control facilities).
- The Commission may authorize, on an individual basis, a variance from its Regulations under specified circumstances after a public hearing. NMSA 1978, § 74-6-4.G; *see also* 20.6.2.1210 & -1403 NMAC.

The Commission’s Regulations, the decades-long interpretation of the WQA, the Commission’s Decision in Tyrone, and the Tyrone Settlement each adopt and reflect these principles.

The Proposed Copper Mine Rule, however, ignores the fundamental principles of the WQA. The proposed rule exempts ground water underneath copper mining from the protections of the WQA, and represents a blanket determination for all existing and future copper mine facilities that they are not “places of withdrawal” under the WQA. The proposed rule would allow exceedances of water quality standards under all present and future mine sites during operations and after closure through various provisions, including but not limited to:

- Providing that, “During operation of an open pit,<sup>12</sup> *the standards of 20.6.2.3103 NMAC do not apply* within the area of hydrologic containment.”<sup>13</sup> 20.6.7.24.A(4) NMAC (emphasis added).

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<sup>12</sup> “‘Open pit’ means the area within which ore and waste rock are exposed and removed by surface mining.” 20.6.7.7.B(41) NMAC.

<sup>13</sup> “‘Area of hydrologic containment’ means the area containing ground water underlying or adjacent to an open pit that drains to the open pit and removed by evaporation and/or pumping and *is interior to the department approved monitoring well network installed around the perimeter of an open pit* pursuant to Paragraph (4) of Subsection B of 20.6.7.28 NMAC.” 20.6.7.7.B(5) NMAC (emphasis added).

- Providing that, upon closure, “If an open pit is determined to be a hydrologic evaporative sink, *the standards of 20.6.2.3103 NMAC do not apply* within the area of hydrologic containment.” 20.6.7.33.D(1) NMAC (emphasis added).
- Not requiring, upon closure, ground water quality from a “*flow-through pit*”<sup>14</sup> to meet standards, but instead allowing ground water only to “be managed to mitigate exceedances of applicable standards outside the area of hydrologic containment.” 20.6.7.33.D(2) NMAC.
- Allowing *new leach stockpiles* within an open pit surface drainage area not have a synthetic liner and thereby cause exceedances of ground water quality standards without a variance. 20.6.7.20.A(1)(f) NMAC.
- Allowing *existing leach stockpiles, waste rock piles and tailing impoundments* that have already caused exceedances of ground water quality standards to continue to do so without a variance. 20.6.7.20.B(2), -21.C(2), & -22.B(2) NMAC.
- Not requiring synthetic liners for *new waste rock piles and new tailing impoundments* and allowing new waste rock stockpiles and new tailing impoundments to cause exceedances of ground water contamination as long as the contaminated ground water is captured by interceptor wells or other measures. 20.6.7.21(B) & (C)(1), & -22.A(4) & B(1)NMAC.

As a necessary corollary to allowing ground water contamination at copper mine sites, the Proposed Copper Mine Rule would establish points of compliance, outside the sources of pollution, to determine compliance with water quality standards. The Proposed Copper Mine Rule would establish a point of compliance regulatory framework through various provisions, including but not limited to:

- Establishing monitoring wells “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 NMAC, and

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<sup>14</sup> “After closure, if water within an open pit is predicted to flow from the open pit into ground water and the discharge from an open pit may cause an exceedance of applicable standards at a designated monitoring well location, then the open pit shall be considered a flow-through pit and the open pit water quality must meet ground water standards of 20.6.2.3103 NMAC or be managed to mitigate exceedances of applicable standards outside the area of hydrologic containment.” 20.6.7.33.D(2) NMAC.

including within the area for monitoring “the leachate and solution capture and containment systems,” 20.6.7.28.B(2) NMAC.

- Measuring for compliance with water quality standards for a flow-through pit upon closure only “at a designated monitoring well location.” 20.6.7.33.D(2) NMAC.
- Not requiring compliance with ground water quality standards for new waste rock stockpiles outside the open pit surface drainage area<sup>15</sup> except “at a monitoring well located pursuant to 20.7.28 NMAC.” 20.6.7.21.B(1)(d) NMAC.
- Not requiring compliance with ground water quality standards for new tailing impoundments except “at a monitoring well located pursuant to 20.7.28 NMAC.” 20.6.7.22.A(4)(a)(vi) NMAC.

The Proposed Copper Mine Rule would establish a regulatory framework in which all ground water underneath the “area of hydrologic containment” of an open pit does not need to meet standards -- without need to obtain a variance or alternative abatement standards -- contrary to the WQA. *See* 20.6.7.24.A(4) NMAC. This would include ground water contaminated by a new leach stockpile. As such, the Proposed Copper Mine Rule does away with the requirement for a site-specific determination of what constitutes a “place of withdrawal”, contrary to the WQA, the direction from the Court of Appeals, and the Commission’s Decision in *Tyrone*. Indeed, the proposed rule makes the determination that *future* mine sites are not places of withdrawal -- a determination that is not even possible to make in the present.

Furthermore, ground water standards would only need to be met at the “approved monitoring well network installed around the perimeter of an open pit” – establishing a “point of compliance” framework for determining water quality standards -- contrary to the WQA and the Commission’s Decision. *See* 20.6.7.7.B(5) NMAC.

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<sup>15</sup> “‘Open 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 pit bottom.” 20.6.7.7.B(42) NMAC.

The Proposed Copper Mine Rule would establish a regulatory framework for flow-through open pits in which contaminated ground water that escapes the pit would only need to be managed so as to “mitigate exceedances” of water quality standards, not to meet standards, without need for a variance or alternative abatement standards, contrary to the WQA.

The Proposed Copper Mine Rule would establish a regulatory framework in which ground water under waste rock stockpiles and tailing impoundments is not required to meet water quality standards, and these sources are expressly allowed to cause water pollution in excess of water quality standards as long as the contamination is captured by an interceptor well system located some undefined distance away from the waste rock stockpile or tailing impoundment. Water quality standards would only need to be met at outside points of compliance downgradient of the associated interceptor well systems, without the need for a variance or alternative abatement standards, contrary to the WQA.<sup>16</sup>

## **II. THE COMMISSION HAS NO AUTHORITY TO PROMULGATE REGULATIONS THAT VIOLATE THE WQA**

It is well established that statutes create administrative agencies, and administrative agencies are limited to the power and authority that is expressly granted or necessarily implied by statute. *In re PNM Elec. Servs.*, 1998-NMSC-017, ¶ 10, 125 N.M. 302, 305, 961 P.2d 147, 150rhg denied; *AA Oilfield Serv., Inc. v. N.M. State Corp. Comm’n*, 118 N.M. 273, 27, 881 P.2d 18, 22 (1994); *Rivas v. Bd. of Cosmetologists*, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984). As

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<sup>16</sup> Allowing ground water contamination during operations and upon closure without the need to obtain a variance violates the Tyrone Settlement as well. That agreement specifically requires NMED to petition the Commission to adopt rules for obtaining variances, and provides that the proposed rule will include that a “variance will not be granted that would allow ground water contamination in excess of applicable standards to continue after closure of the facility and abatement is complete.” Tyrone Settlement, ¶¶ 44, 45(b). The Proposed Copper Mine Rule violates the Tyrone Settlement by omitting provisions, included in the August Draft, for variances.

such, administrative bodies have no common law or inherent powers, and can act only as to those matters which are within the scope of the statutory authority delegated to them. *Public Serv. Co. v. N.M. Envtl. Improvement Bd.*, 89 N.M. 223, 226, 549 P.2d 638, 641 (Ct. App. 1976) (finding that board exceeded statutory authority in promulgating regulations). Specifically, “[a]n agency cannot amend or enlarge its authority through rules and regulations. Nor may an agency, through the device of regulations, modify the statutory provision.” *In re House of Pancakes*, 102 N.M. at 66, 691 P.2d at 67 (internal citations omitted); *N.M. Mining Ass’n v. N.M. Mining Comm’n*, 1996-NMCA-098, ¶ 15, 122 N.M. 332, 337, P.2d 741, 746.

The Proposed Copper Mine Rule would exempt copper mine facilities from the protections and requirements of the WQA. The Commission does not have the authority under the WQA to wholesale exempt certain industries from the protections of the Act. Only the legislature may make such exemptions, and it has declined to do so for copper mines.

The legislature, through the variance mechanism, does allow for exceptions, but only after a discharger can show that it meets the applicable criteria and only after an opportunity for the affected public to weigh in before the Commission. In point of fact, the Commission has granted variances from operational requirements both to FMI’s Tyrone and Chino mines. The Commission has also granted alternative abatement standards to mines upon closure. These are the mechanisms authorized by the legislature, provided for in Commission Regulations, and endorsed by the Commission in the *Tyrone* Decision. They are mechanisms proven to work to both protect New Mexico’s precious ground water and to give flexibility to companies in their operations and upon closure.

NMED, however, in its Proposed Copper Mine Rule, asks the Commission to do what it is not authorized by statute to do – exempt copper mine facilities. The Commission, therefore, does not have authority to promulgate the Proposed Copper Mine Rule, and should remand to NMED to develop a rule consistent with the WQA, Commission Regulations and the Commission’s Decision in *Tyrone*.

### **III. THE COMMISSION, IN ITS DISCRETION, SHOULD REMAND THE PROPOSED COPPER MINE RULE**

Even if the Commission determines it has authority to entertain the Proposed Copper Mine Rule, the Commission should in its discretion decline to do so. The Commission has discretion to grant or deny a petition for rulemaking. NMSA 1978, § 74-6-6.B. Indeed, the Commission’s decision to deny a petition is not subject to judicial review. *Id.*

Because it is clear from the face of the Proposed Copper Mine Rule that its promulgation would violate the WQA, Commission Regulations and the *Tyrone* Decision, holding yet another extended hearing on the same issues that the Commission has already twice considered would represent a monumental waste of the Commission’s and the parties’ limited resources. Indeed, the Commission has already sat through 34 days of hearing, heard from over 30 technical witnesses, reviewed hundreds of pages of exhibits, been presented with thousands of pages of administrative record, entertained oral argument twice, and twice deliberated on whether copper mines may pollute underneath their sites. The Commission’s and the parties’ resources would be better spent developing a rule that meets the terms of the WQA, and is consistent with the Commission’s Regulations and its Decision in *Tyrone*.

## Conclusion

The Proposed Copper Mine Rule represents a blanket determination that ground water underneath a mine site does not constitute “a place of withdrawal of water for present and reasonably foreseeable future use,” in contravention of the WQA, and the Court of Appeal’s direction in *Tyrone* to the Commission to establish factors to determine “place of withdrawal.” It contravenes the Commission’s Regulations, which protect all ground water with 10,000 mg/l or above TDS. It contravenes the Commission’s Decision by ignoring the factors established by the Commission to establish “place of withdrawal” and the Commission’s specific determination that the Tyrone mine site is a “place of withdrawal.”

Allowing ground water to exceed standards under a discharge site not only puts at risk the ground water under a site, but risks excursions of contaminants offsite, further jeopardizing the public’s ground water.

For decades – through Republican and Democratic administrations -- the State has worked to prevent ground water contamination underneath all discharge sites. Allowing ground water to be contaminated underneath a mining site sets a precedent for allowing contamination underneath any site regulated under the WQA – dairy sites, domestic wastewater facilities, large capacity septic tank leachfields, power plants, commercial laundries, food processing plants, commercial land farms for treatment of contaminated soil, and other industrial discharge sites. If copper mines -- whose discharges have resulted in thousands of acre feet of ground water pollution -- may contaminate with impunity, there is no principled basis not to allow other dischargers to be accorded the same treatment.

Ninety percent of New Mexico's drinking water comes from ground water. Several independent reports predict that the demand for water in the Grant County area, where copper mining in the state is conducted, will exceed supply in the foreseeable future.<sup>17</sup> The distinct possibility of a "megadrought" in the Southwest between now and 2100, recently predicted by a team of Los Alamos National Laboratory and university scientists, does not bode well for New Mexico's ground water supply.<sup>18</sup> Given the state's reliance on and need for clean ground water now and into the future, the WQA's purpose to prevent ground water pollution should more than ever be preserved and enforced.

For over ten years, Phelps Dodge Corporation, now FMI, has tried unsuccessfully to exempt its mining activities from ground water quality standards. FMI has attempted through NMED, the Commission, the New Mexico courts and the New Mexico Legislature to be given reign to pollute under its site. Until NMED filed its Petition this October, the State of New Mexico had not given FMI license to pollute.

The Commission should continue to follow the WQA and stand by its 2007 Tyrone Decision; not incur the time, expense and resources of yet another hearing on whether FMI can pollute under its mine site with impunity; and remand the Proposed Copper Mine Rule to NMED with direction to work with the CRAC to develop a proposed rule that is consistent with the WQA, Commission Regulations, and the Commission's Decision in *Tyrone*.

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<sup>17</sup> See *Analysis of Effects of Ground-Water Development to Meet Projected Demands in Regional Planning District 4 Southwest New Mexico* (M. Johnson, et al., Office of State Engineer, Mar. 2002); *Projected Water Demands in Grant, Hidalgo and Luna Counties, New Mexico, 2000 to 2040* (Office of State Engineer, Dec. 16, 2001); *The Southwest New Mexico Regional Water Plan* (Daniel B. Stephens and Assoc., May 2005); *Supplement on Water Use and Wellfield Service – Town of Silver City Water Plan* (Balleau Groundwater, Inc., April 2006).

<sup>18</sup> A. Williams, et al., "Temperature as a potent driver of regional forest drought stress and tree mortality," *Nature Climate Change*, vol. 2, issue 10 (Oct. 2012), p. 3.

Respectfully submitted,

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Certificate of Service

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