

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 REPLY TO NEW MEXICO MINING ASSOCIATION IN SUPPORT  
OF ATTORNEY GENERAL'S MOTION TO REMAND**

**Preliminary Statement**

The New Mexico Mining Association ("Mining Association"), first, misrepresents the position of the Attorney General by asserting that the Attorney General proposes that "every drop of groundwater within the exterior boundaries of a mine site must attain drinking water quality . . . ." NMMA Resp., p. 5. The Mining Association sets up a straw man argument, and decries it as "absurd." *Id.* at p. 8.

The position of the Attorney General, as reiterated throughout his briefs, is that ground water underneath a "place of withdrawal of water for present and reasonably foreseeable future use" under the Water Quality Act ("WQA") must meet ground water quality standards, not drinking water quality standards. The determination of whether a site is a "place of withdrawal" is a site-specific determination based on factors established by the Water Quality Control Commission ("Commission"), as directed by the Court of Appeals in *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 Attorney General has not argued that "every drop of water" at a mine site is located under a "place of withdrawal."

The Mining Association, second, argues that the New Mexico Environment Department's ("NMED") proposed Copper Mine Rule, establishing a "point of compliance" regulatory regime, represents good policy. NMMA Resp., pp. 11-16. That, however, is not the policy of the Legislature as announced through the WQA.

The WQA strikes a balance between economic development and ground water protection. That balance allows for degradation of water quality under "places of withdrawal" as long as water quality standards are not exceeded, and allows for "individual variances" from Commission regulations if they

impose an “unreasonable burden” on a discharger. NMSA 1978, § 74-6-5(E)(3), -12(F), -4(H). The balance struck by the Legislature does not include the wholesale exemption from water quality standards for mining facilities. If the Mining Association believes that establishing a “point of compliance” system is best for New Mexico, its remedy lies with the Legislature and amendment of the WQA, not with the Commission.

### **Argument**

#### **I. THE PROPOSED COPPER MINE RULE IS INCONSISTENT WITH THE WQA, AND MAY NOT BE ADOPTED BY THE COMMISSION**

The Mining Association mischaracterizes the Attorney General’s position on the meaning of the WQA, claiming his position is that “every drop of groundwater” within a mine site must meet “drinking water quality” standards. NMMA Resp., p. 5. First, the applicable standards that must be met under the WQA, as consistently identified by the Attorney General, are *ground* water standards, not *drinking* water standards. See NMSA 1978, § 74-6-4(C) (Commission has authority to adopt water quality standards for ground water); 20.6.2.3103 NMAC (Commission’s standards for ground water).

Second, and more fundamentally, the Attorney General has not taken the position that “every drop of water” under a mine site must meet ground water quality standards. The position of the Attorney General – consistent with that of the Court of Appeals in *Tyrone*, the Commission in the Tyrone appeal, and NMED in its interpretation and practice for 35 years – is that the determination of what constitutes a “place of withdrawal of water for present and reasonably foreseeable future use” under Section 74-6-5(E)(3) is a site-specific determination.

The Commission, in accordance with the direction from the Court of Appeals, identified the factors by which such a determination must be made, and determined that “the regional and alluvial aquifers underlying portions of the Tyrone mine site are places of withdrawal of water for present or

reasonably foreseeable future use pursuant to Section 74-6-5(E)(3).” Comm’n Decision, COL ¶ 33.<sup>1</sup> Tyrone’s own expert, Dr. John Shoemaker, a respected hydrogeologist in New Mexico, testified at hearing that there are places adjacent and contiguous to the Tyrone mine site that are “places of withdrawal, *id.* FOF ¶¶ 102, 105, and that there are places *within* the mine site that are capable of supporting domestic wells and larger capacity wells, *id.* FOF ¶¶ 113-14. At hearing, Tyrone identified places where ground water was currently being withdrawn, *id.* FOF ¶ 87,<sup>2</sup> and did not dispute that the two drinking water wells on site, the Fortuna Wells, were in fact “places of withdrawal,” *id.* FOF ¶ 119.

Common sense informs that -- under the many thousands of acres occupied by copper mine sites in New Mexico -- there is ground water that has a present use or reasonably foreseeable future use. Indeed, the Commission found that, “Tyrone did not meet its burden of going forward with the evidence to demonstrate that, with limited exception, none of the ground water underneath the Tyrone Mine site . . . is a place of withdrawal . . . .” *Id.* COL ¶ 45.

Wholesale exempting ground water under and around open pits, leach piles, waste piles and tailing impoundments from the protections under the WQA, as allowed under NMED’s proposed Copper Mine Rule, is not permitted under the WQA. The structure of the WQA is straightforward: ground water under “places of withdrawal” must meet ground water quality standards unless (1) a discharger obtains an individual variance or alternative abatement standards or (2) the WQA provides an exemption, such as

---

<sup>1</sup> The Commission found that “places of withdrawal” at the Tyrone mine site included two drinking water wells, the Fortuna Wells; six parcels within the mine site not owned by Tyrone or affiliates; the north side of the mine around the Mangas Valley Tailing Impoundment; the area west and to the east of the 1A Tailing Impoundment; an area immediately south of the 1A Tailing Impoundment; an area to the southeast of the 3A Stockpile and to the east of the 3B Waste Rock Pile; open areas around the pits; the area on the east side of the mine south of the 5A Waste Rock Pile; an area south of the Gettysburg Pit; areas on the southwest corner of the mine; an area to the west of the Gettysburg Pit, along the 1C Stockpile; areas on the southeast side of the mine along and within Oak Grove Draw; an area on the east side of the mine to the southeast of the No. 1 Stockpile; areas in the southeast corner of the mine, around the reclaimed Burro Mountain Tailings; and areas on the west side of the mine in Deadman Canyon. Comm’n Decision, COL ¶¶ 46-49, FOF ¶ 125.

<sup>2</sup> Tyrone withdrew 4000 to 5000 acre-feet of water per year for mining purposes from the open pits, variable amounts of water for mining purposes from approximately 75 pump-back wells, and 60 acre-feet from the drinking water Fortuna Wells. Comm’n Decision, FOF ¶ 87.

that given to “irrigation and flood control facilities.” See NMSA 1978, § 74-6-4(E)(3), -(H), § 74-6-12(F), -(H). The Commission may not grant a blanket exemption to copper mines or any other industry through rule. Any such exemption must come from the Legislature. The determination as to whether an area is a “place of withdrawal” is site-specific. Likewise, petitions for variances and alternative abatement standards must be assessed on an individual basis. See NMSA 1978, § 74-6-4(H); 20.6.2.1210, - 4103 NMAC.

The Mining Association, curiously, contends that the Commission has recognized and accepted that mining will necessarily contaminate ground water, claiming that “the Commission must have understood that fundamental concept because it exempted ‘[n]atural ground water seeping or flowing into conventional mining workings from compliance with the Section 3103 standards. 20.6.2.3105(K) NMAC.’” NMMA Resp., p. 1.

Section 20.6.2.3105(K) reads in full:

Natural ground water seeping or flowing into conventional mine workings which re-enters the ground by natural gravity flow prior to pumping or transporting out of the mine and *without being used in any mining process; this exemption does not apply to solution mining;*

(Emphasis added.) Contrary to the Mining Association’s assertion, this narrowly drawn exemption – affecting ground water flowing by natural gravity through conventional mine workings, *not* used in a mining process and *not* applying to solution mining – clearly supports the opposite conclusion. The exemption expressly does not apply when ground water is used in a mining process and when solution mining is undertaken. In those circumstances -- which apply to New Mexico’s copper mine operations – the Commission requires water quality standards to be met.

## **II. CONTINUING THE GROUND WATER PROTECTIONS OF THE LAST 35 YEARS DOES NOT THREATEN THE ECONOMIC VIABILITY OF MINING IN NEW MEXICO**

The Attorney General recognizes and respects that mining has been and is an important economic activity in New Mexico. The Mining Association however charges that the Attorney General’s interpretation of the WQA “would threaten the viability of the mining industry . . . .” NMMA Resp., p. 5.

This is not true. The Mining Association's unsupported claim is belied by the success of the mining industry in New Mexico over the last 35 years during which time the Commission's regulations have required ground water with total dissolved solids ("TDS") of 10,000 milligrams per liter ("mg/l") or less to meet standards, 20.6.2.3103 NMAC, and NMED has required ground water directly under discharge sites to meet standards, Comm'n Decision, FOF ¶¶ 68, 83. The economic success of the mining industry in New Mexico has not been compromised by New Mexico's longstanding interpretation of the WQA, and there is no reason to believe that continuation of that interpretation poses a threat to the mining industry. Rather, the success of mining is dependent upon various, complicated market forces.<sup>3</sup> New Mexico's past protection of the ground water resource underneath mines has not hurt mining, and the Mining Association supplied no evidence to show otherwise.

### **III. THE WQA STRIKES A BALANCE BETWEEN GROUND WATER PROTECTION AND MINING DEVELOPMENT**

Rather than threaten the viability of the mining industry, the WQA strikes a balance between economic development and ground water protection. The WQA requires that ground water quality standards be met at "any place of withdrawal" where ground water has present or future use. NMSA 1978, § 74-6-3(E)(3). The WQA allows "reasonable degradation" of ground water for "beneficial use" as long as standards are not exceeded. NMSA 1978, § 74-6-12(F). Mining is an example of a beneficial use, the discharges of which may result in water quality degradation not to exceed standards. The WQA provides for certain, limited blanket exceptions, such as for irrigation and flood control facilities. NMSA 1978, § 74-6-12(H). And, finally, the WQA allows the Commission, after a public hearing, to grant

---

<sup>3</sup> As FMI's 2011 Annual Report, p. 27, states:

We believe the underlying fundamentals of the copper business remain positive, supported by the significant role of copper in the global economy, limited supplies from existing mines and the absence of significant new development projects. Future copper prices are expected to be volatile and are likely to be influenced by demand from China (which represented approximately 40 percent of global consumption in 2011), economic activity in the U.S. and other industrialized countries, the timing of the development of new supplies of copper and production levels of mines and copper smelters.

individual variances from regulations. NMSA 1978, § 74-6-4(G). Variances and alternative abatement standards (a type of variance) allow dischargers flexibility in operations and upon closure to exceed standards upon a showing that meeting the Commission's requirements is an "unreasonable burden" or not technically feasible. *Id.*; 20.6.2.1210.A(8) NMAC (variances); 20.6.24103.F NMAC (alternative abatement standards).

The Mining Association argues:

If, as here, meeting the primary regulation is infeasible, and if the only way to mine would be to see a variance, that would necessarily vest in the WQCC discretionary control over whether the owner of mineral rights could develop its property.

NMMA Resp., p. 10. There are a number of responses to this argument. First, the precise purpose of a variance or alternative abatement standard is to allow the activity when meeting a Commission regulation is unreasonably burdensome or infeasible. The Legislature foresaw that dischargers may not be able to meet Commission regulations in every case. The Legislature, quite expressly and intentionally, vested in the Commission the authority to grant a variance when regulations could not be met and imposed an unreasonable burden. If the Mining Association disagrees with that policy choice, its remedy lies with the Legislature, not the Commission.

Second, the Commission has authority to set water quality standards, and owners of mineral rights are subject to those standards. There is no broad exemption for mineral rights development. That mineral owners must meet standards does not equate to arbitrary or excessive control over them.

Third, there are limits to the Commission's exercise of discretion. It may not act arbitrarily or capriciously or abuse its discretion. NMSA 1978, § 74-6-7(B)(1). The courts are not shy to reverse discretionary actions by the Commission that are arbitrary. *See, e.g., Gila Information Resources Project v. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 41, 138 N.M. 625, 124 P.3d 1164 (reversing Commission's dismissal of an appeal petition as a sanction for failure to comply with unclear regulations as arbitrary and capricious).

Fourth, two petitions for alternative abatement standards – both from mining companies – have been submitted to the Commission and two have been granted. Both the Tyrone and Chino mines have petitioned for variances from meeting water quality standards for certain operations, and both petitions have been granted. The Commission’s record, therefore, in giving mining companies, in particular, flexibility in their operations and upon closure demonstrates that the structure of the WQA accommodates the needs of mining. While the Mining Association espouses fear that operations cannot begin or will be shut down if the *status quo* continues, it gives no examples over the 35 year history of the WQA in which this has actually happened. The Legislature’s balance in the WQA between economic development and ground water protection works.

#### **IV. NMED’S RECENT INTERPETATION OF THE WQA IS NOT ENTITLED TO DEFERENCE**

The Commission’s regulations have protected ground water with 10,000 mg/l TDS or less at “places of withdrawal” since their inception in 1977. NMED has interpreted the WQA and Commission regulations to protect ground water under discharge sites for decades, unless there was a showing the water had no present or reasonably foreseeable future use. The longstanding interpretation of the WQA is detailed in the Commission’s Decision. Comm’n Decision, FOF ¶¶ 43-86. Contrary to the Mining Association’s unsupported claims, the phrase “place of withdrawal” has not “bedeviled” regulators and has not been the subject of “decades of controversy and uncertainty.” *See* NMMA Resp., pp. 2, 3.

NMED’s new interpretation, as of October 2012, of the WQA -- allowing ground water under and around open pits, leach piles, waste rock piles and tailing impoundments to be contaminated above standards to an undefined point of compliance – will not be entitled to deference from the courts. In general, only longstanding interpretations of a statute by an administrative agency are entitled to deference. *Smith v. Bd. of Co. Comm’rs*, 2004-NMCA-1, ¶ 11, 134 N.M. 737, 741, 82 P.3d 547, 551 (2003) (administrative agency interpretation of ordinance amended for six weeks is not longstanding and is not entitled to deference); *San Pedro Neighborhood Ass’n v. Bd. of Co. Comm’rs of Santa Fe Co.*,

2009-NMCA-45, ¶ 20, 146 N.M. 106, 117, 206 P.3d 1011, 1112 (declining to defer to agency interpretation because agency’s interpretation was the first definitive interpretation; because to the extent that the agency has previously interpreted the ordinance, it interpreted it differently; and because the issue presented a question of law subject to *de novo* review); *see also Lantz v. Santa Fe Extraterritorial Zoning Authority*, 2004 NMCA 90, ¶ 11, 136 N.M. 74, 78, 94 P.3d 817, 821 (administrative agency interpretation of its own ordinance or regulation may be entitled to deference even if not longstanding, but “the requirement for longstanding interpretation applies to an agency’s interpretation of a statute”).<sup>4</sup>

Moreover, even longstanding administrative agency interpretations of statutes will not be given deference if they are “unreasonable and unlawful.” *Kirkpatrick v. Co. Comm’rs of Santa Fe Co.*, 2009 NMCA 110, ¶ 18, 147 N.M. 127, 131, 217 P.3d 613, 617; *Alba v. Peoples Energy Res. Corp.*, 2004-NMCA-84, 136 N.M. 79, 94 P.3d 822. NMED’s newly-invented interpretation of the WQA is entitled to no deference.

**V. THE MINING ASSOCIATION’S CITATIONS TO POINT OF COMPLIANCE LAWS HIGHLIGHT THAT THE NEW MEXICO LEGISLATURE DID NOT INTEND TO ESTABLISH A POINT OF COMPLIANCE REGULATORY SYSTEM**

The Mining Association supports its argument by pointing to other states’ statutes and regulations that establish “point of compliance” regulatory schemes. NMMA Resp., pp. 8-9. These laws demonstrate, however, that when legislatures intend to establish point of compliance frameworks, they do so clearly and expressly. For example, the Mining Association cites to Ariz. Rev. Stat. § 49-244 [attached

---

<sup>4</sup> Courts review the interpretation of statutes *de novo*. *Smith*, 2005-NMSC-12, ¶ 18, 137 N.M. 280, 110 P.3d 496; *Alba v. Peoples Energy Res. Corp.*, 2004-NMCA-84, ¶ 14, 136 N.M. 79, 94 P.3d 822; *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-50, ¶ 5, 126 N.M. 413, 970 P.2d 599. In their *de novo* review, they follow three rules of statutory construction:

The first rule is that the plain language of a statute is the primary indicator of legislative intent. Courts are to give the words used in the statute their ordinary meaning unless the legislature indicates a different intent. The court will not read into a statute or ordinance language which is not there, particularly if it makes sense as written. The second rule is to give persuasive weight to *long-standing administrative constructions of statutes* by the agency charged with administering them. The third rule dictates that where several sections of a statute are involved, they must be read together so that all parts are given effect.

*Smith*, 2005-NMSC-12, ¶ 12, 137 N.M. 280, 110 P.3d 496 (emphasis added).

as Ex. A]. NMMA Resp., p. 8. Section 49-244, entitled “Point of Compliance,” is a detailed statute that requires the designation of “a point or points of compliance for each facility” that receives a permit. By way of sharp comparison to the WQA, Section 49-244 of the Arizona statutes makes it crystal clear that the Arizona Legislature established a point of compliance regime.

The Mining Association also cites to Colorado water quality regulations, 5 Colo. Code Regs. 1002-41:41.6 [attached as Ex. B]. NMMA Resp., p. 8. That regulation, like the Arizona statute, is entitled “Point of compliance” and establishes a point of compliance regulatory regime in substantial detail. *See* 5 Colo. Code Regs. ADC 1002-41:41.6. The issue here, however, is not whether another state’s *regulation* establishes a point of compliance regulatory framework. That is a policy choice a state legislature may make. The issue here is whether the WQA authorizes the Commission to establish a point of compliance regulatory scheme for purposes of meeting ground water standards. In Colorado, like in Arizona, there is express statutory authority *requiring* points of compliance to be adopted. The authorizing statute provides:

The [water quality control] commission shall be solely responsible for the adoption of water quality standards and classifications for state waters affected by such discharges. Except as set forth in paragraph (b) of this subsection (7), such classifications and standards shall be implemented by the implementing agencies, after consultation with the division and the commission, through their own programs. For the purpose of subsection (7), water quality standards and classifications under this section for state waters other than surface waters shall not specify applicable points of compliance, *but such points of compliance shall be adopted, in accordance with criteria established through rule-making after public hearing and consultation with the commission and division, by the appropriate agency with jurisdiction* as specified in paragraph (b) of this subsection (7) so as to protect present and future beneficial uses of water.

Colo. Rev. Stat. § 25-8-202(7)(a) (emphasis supplied).

The WQA – unlike Arizona’s and Colorado’s statutes – does not expressly authorize a point of compliance system. Nor can such a system be implied from the WQA. The WQA establishes a different regulatory system, requiring water quality standards to be met at all “places of withdrawal of water for present and reasonably foreseeable future use.” The Mining Association’s citation to other states’ statutes and regulations demonstrates, quite clearly, that when a legislature intends to establish a point of

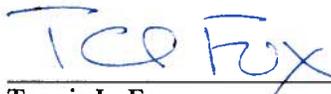
compliance system, it does so clearly and unequivocally. The Court of Appeals, in “declin[ing] to adopt the standard as ‘point of compliance,’ or to engage in the wholesale adoption of cases and federal regulations dealing with ‘point of compliance’”, recognized that “there may be reasons, such as differences in statutory language, that may make federal law or law from other jurisdictions inapplicable or inappropriate in New Mexico.” *Tyrone*, 2006-NMCA-115, ¶ 37, 140 N.M. 464, 143 P.3d 502. Because of these stark differences in statutory language, the Mining Association’s remedy, once again, is with the New Mexico Legislature if it wants to change the policy of that body.

**Conclusion**

For the reasons set forth herein and in the Attorney General’s Motion to Remand, the Commission should remand NMED’s Copper Mine Rule Petition to NMED with direction to develop a rule, in conjunction with the Copper Rule Advisory Committee, that complies with the WQA.

Respectfully submitted,

GARY KING  
ATTORNEY GENERAL OF NEW MEXICO



---

Tannis L. Fox  
Assistant Attorney General  
Water, Environmental and Utilities Division  
Office of the New Mexico Attorney General  
P.O. Box 1508  
Santa Fe, New Mexico 87504  
T 505.827.6695  
F 505.827.4444  
[tfox@nmag.gov](mailto:tfox@nmag.gov)

Counsel for the Attorney General

Certificate of Service

I certify that the following were served with the foregoing pleading by email on January 25, 2013:

Andrew Knight  
Kathryn Becker  
Assistant General Counsels  
Office of General Counsel  
New Mexico Environment Department  
P.O. Box 5469  
Santa Fe, New Mexico 87502-5469

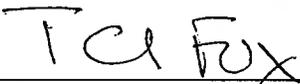
Dalva Moellenberg  
Anthony J. Trujillo  
Gallagher and Kennedy, P.A.  
1233 Paseo de Peralta  
Santa Fe, New Mexico 87501-2758

Bruce Frederick  
Staff Attorney  
New Mexico Environmental Law Center  
1405 Luisa Street, #5  
Santa Fe, New Mexico 87505-4074

Tracy Hughes  
High Desert Energy + Environment Law Partners, L.L.C.  
P.O. Box 8201  
Santa Fe, New Mexico 87504

Louis W. Rose  
Montgomery & Andrews, P.A.  
P.O. Box 2307  
Santa Fe, New Mexico 87504-2307

John J. Indall  
Comeau, Maldegen, Templeman & Indall LLP  
P.O. Box 669  
Santa Fe, New Mexico 87504-0669

  
\_\_\_\_\_  
Tannis L. Fox



Fifty-first Legislature - First Regular Session

[change session](#) | [printer friendly version](#)
[Email a Member](#) | [Email Webmaster](#)
[Senate](#)[House](#)[Legislative Council](#)[JLBC](#)[More Agencies](#)[Bills](#)[Committees](#)[Calendars/News](#)
[ARS TITLE PAGE](#) [NEXT DOCUMENT](#) [PREVIOUS DOCUMENT](#)
**49-244. Point of compliance**

The director shall designate a point or points of compliance for each facility receiving a permit under this article. The point of compliance is the point at which compliance with aquifer water quality standards shall be determined. The point of compliance shall be a vertical plane downgradient of the facility that extends through the uppermost aquifers underlying that facility. For an aquifer which has no existing or reasonably foreseeable drinking water beneficial use, the director may establish monitoring for compliance in another aquifer in lieu of monitoring in the uppermost aquifer. The point of compliance shall be determined as follows:

1. Except as provided in paragraph 2, for a pollutant that is a hazardous substance the point of compliance is the limit of the pollutant management area. The pollutant management area is the limit projected in the horizontal plane of the area on which pollutants are or will be placed. The pollutant management area includes horizontal space taken up by any liner, dike or other barrier designed to contain pollutants in the facility. If the facility contains more than one discharging activity, the pollutant management area is described by an imaginary line circumscribing the several discharging activities.
2. A point of compliance for hazardous substances other than that identified in paragraph 1 may be approved by the director if the facility owner or operator can demonstrate either:

(a) That it is technically impracticable or inappropriate considering the likely fate or transport of a pollutant in an aquifer to monitor at the boundary specified in paragraph 1.

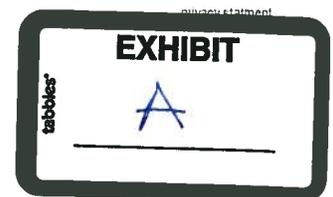
(b) The alternative point of compliance will allow installation and operation of the monitoring facilities that are substantially less costly. Such a request by a facility owner or operator under this paragraph must be supported by an analysis of the volume and characteristics of the pollutants that may be discharged and the ability of the vadose zone to attenuate the particular pollutants that may be discharged, including such factors as climate, hydrology, geology and soil chemistry. In no event shall an alternative point of compliance be further from the boundary specified in paragraph 1 than is necessary for purposes of this paragraph, subdivisions (a) and (b), and in no event shall it be so located as to result in an increased threat to an existing or reasonably foreseeable drinking water source. In addition an alternate compliance point for a hazardous substance pursuant to this subdivision shall never be further downgradient than any of the following:

(i) The property boundary.

(ii) Any point of an existing or reasonably foreseeable future drinking water source.

(iii) Seven hundred fifty feet from the edge of the pollutant management area.

3. For pollutants that are not hazardous substances the director, in identifying a point of compliance, shall take into account the volume and characteristics of the pollutants, the practical difficulties associated with implementation of applicable water pollution control requirements, whether the facility is a new facility or an existing facility, water conservation and augmentation and the site-specific characteristics of the facility, including, but not limited to, climate, hydrology, geology, soil chemistry and pollutant levels in the aquifer. The point of compliance must be so located as to ensure protection of all current and reasonably foreseeable future uses of the aquifer.





[History](#) | [Display Entire Rule](#)

[CCR Home](#)  
**Department:** 1000 Department of Public Health and Environment  
**Agency:** 1002 Water Quality Control Commission (1002 Series)  
**CCR Title:** 5 CCR 1002-41 REGULATION NO. 41 - THE BASIC STANDARDS FOR GROUND WATER

**41.6 POINT OF COMPLIANCE**

- A. In order to effect compliance with ground water standards, one or more points of compliance shall be established. The term "point of compliance" shall be as follows: with one or several points of compliance. An activity shall comply with ground water quality standards established under section 41.5 at the point of compliance. A point of compliance shall not be required at the time of classification of any ground water pursuant to section 41.4. The point of compliance for those activities where an implementing agency is discussed in subsection B of this section. Unless modified by the applicable implementing agency or the Commission, the criteria for compliance for the statewide standards established in section 41.5(C)(2) and (3) are set forth in subsection (C) of this section. For those activities regulated by the Control Division through permit or control regulations, the point of compliance shall be established under the provisions of subsection (D) of this section. Notwithstanding, the Division shall retain its authority to consider these ground water standards when setting limits for surface water discharges which impact ground water. The Division may establish points of compliance in lieu of those established by the Division or this rule, on a case-by-case basis as described in subsection (E).
- B. For the purposes of this subsection, the following agencies are referred to as "implementing agencies": [EH 05/31/2008](#)  
 The Division of Reclamation, Mining and Safety; the State Engineer; the Oil and Gas Conservation Commission; and the state agencies responsible for the federal "Resource Conservation and Recovery Act of 1976", as amended, and related state programs. [EH 05/31/2008](#)
- Per the provisions of section 25-8-202 C.R.S., implementing agencies shall establish the point of compliance for those activities under their control. The point of compliance established in section 41.6 (C) and (D) of this regulation shall not apply to activities regulated by an implementing agency, unless the Commission has determined that the point of compliance established by the implementing agency is not adequate to satisfy the requirements of section 25-8-202(7). The Commission may, through rulemaking, a site-specific point of compliance which shall supersede any point of compliance established by the implementing agencies. [EH 05/31/2008](#)
- C. In the absence of a point of compliance established by the Division, and unless modified by the Commission in accordance with section 41.6 (E) or subject to the requirements in accordance with section 41.5 (C)(5), the point of compliance for the statewide standards established in section 41.5 (C)(2) and (3) shall be the following:
1. For facilities at which ground water contamination existed as of September 30, 1989:
    - a. If the contamination is identified and reported to the division or other appropriate implementing agency on or before September 30, 1992, then the point of compliance shall be at whichever of the following locations is closest to the contamination source:
      - i. The site boundary; or
      - ii. The hydrologically downgradient limit of the area in which contamination exists when identified.
    - b. If the contamination is not identified and reported to the division or other appropriate implementing agency on or before September 30, 1992, then the point of compliance shall be at whichever of the following locations is closest to the contamination source:
      - i. The site boundary; or
      - ii. The hydrologically downgradient limit of the area in which contamination exists as of September 30, 1989; or
      - iii. If the location specified in (ii) can not be identified, then at the hydrologically downgradient limit of the area below the activity potentially impacting ground water quality.
  2. For all other facilities, at the hydrologically downgradient limit of the area below the activity potentially impacting ground water quality.
- D. Within a specified area for which ground water quality classifications have been established and unless modified by the Commission in a site-specific hearing under section 41.6 (E), the point of compliance for those activities regulated by the Division through discharge permit regulations or control regulations shall be established in accordance with the following criteria:
1. For all existing activities the point of compliance will be set as follows:
    - a. Except for surface water discharges, at some distance hydrologically downgradient from the activity that is causing, or which has the potential to cause ground water contamination, based on one of the following criteria, and selecting that distance closest to the activity:
      - i. A specified distance, as determined by (b) below; or
      - ii. The hydrologically downgradient limit of the area in which contamination has been identified; or

