

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 RESPONSE TO
NMED'S MOTION TO EXCLUDE AGO EXHIBITS**

Preliminary Statement

The New Mexico Environment Department (“NMED”) moves to exclude prior testimony from the 2003 and 2007 *Tyrone* hearings¹ before the Water Quality Control Commission (“Commission”), relied upon in this proceeding by the Attorney General’s experts, on the grounds that (1) the Hearing Officer has already excluded the material, (2) the testimony includes legal conclusions without the opportunity for cross-examination, and (3) the testimony is a “waste of time,” will “unduly delay” the proceeding, is “cumulative,” and may “unfairly bias” the Commission. NMED Mot. to Exclude, pp. 1-2.

As to the first argument, while the Hearing Officer did not admit the entire hearing record from the 2007 hearing, as requested by the Attorney General, the Hearing Officer left open the door for “winnowing” of the record for admission of portions, as the Attorney General has done by introducing the testimony of three witnesses from the prior proceedings. As to the remaining allegations, NMED does not support its conclusory claims with any facts or explanation. The testimony proffered by the Attorney General is relevant, was relied upon by the Attorney General’s experts, is not cumulative or wasteful, and does not give legal opinions; it should be admitted.

¹ *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).

Background

The Attorney General offers the following testimony:

- An excerpt from the 2003 testimony of Clint Marshall, NMED hydrologist, on the ground water contamination caused by mining activities at the Tyrone mine [AGO Ex. 12];
- The 2007 written direct testimony from Mr. Marshall on the geological and hydrological setting of the Tyrone mine, the present and past water quality at the Tyrone mine, and the present and past use of ground water in the vicinity of the Tyrone mine, Marshall Testimony, p. 2 [AGO Ex. 13];
- The 2007 written direct testimony of Michael Johnson, hydrologist with the Office of the New Mexico State Engineer (“OSE”), on the adequacy of the municipal water supply of Silver City to meet future demand over the next 40 to 60 years, Johnson Testimony, p. 3 [AGO Ex. 20]; and
- The 2007 written direct testimony of Craig Roepke, Deputy Director of the New Mexico Interstate Stream Commission (“ISC”) and a water resources manager, whether ground water surrounding the Tyrone mine has a future use and should be protected for future use, and on a proposal presented by Phelps Dodge Corporation to the ISC and OSE to pump between 4,300 and 6,000 acre feet per year from the Tyrone mine open pit, after closure of the mine, to Silver City, Deming, Hatch, Las Cruces and surrounding areas, Roepke Testimony, p. 3 [AGO Ex. 23].

The Attorney General’s hydrogeologic expert, Connie Travers, relied upon Mr.

Marshall’s testimony regarding the contamination at the Tryone site, which was consistent with her understanding of the contamination from her work on the natural resource damages at that site, and regarding the present and future use of ground water in and around the site. Travers Direct Testimony, pp. 7, 19 [AGO Ex. 3]. The Attorney General’s water resource expert, Bruce Thomson, Ph.D., P.E., also relied upon Mr. Marshall’s testimony for background on the ground water contamination at the Tyrone mine site from mining operations. Thomson Direct Testimony, p. 9 [AGO Ex. 16]. He relied upon Mr. Johnson’s testimony, among many other

reports (including a separate report from Mr. Johnson himself²), regarding water demand and supply in the Grant County area, and upon Mr. Roepke's testimony regarding Tyrone's proposal to pump and treat water from its main pit for distribution to communities as far away as Las Cruces upon closure of the mine. *Id.* at pp. 6, 9; *see also* References Consulted by Bruce M. Thomson, attached to testimony.

Argument

NMED argues that the Hearing Officer has already ruled on the admission of the above testimony, and that this is a "second attempt" by the Attorney General to have the testimony admitted.³ The Attorney General has no intent to try to circumvent the Hearing Officer's order denying admission of the entire record from the 2007 hearing. In her order, the Hearing Officer stated that there had been no "winnowing" of the record, and that inclusion of the entire *Tyrone* record might result in an unnecessary expenditure of time and confusion on the part of the Commission. Order on Attorney General's Motion to Admit Record, p. 2. In response, the Attorney General has "winnowed" from the thousands of pages of the record in *Tyrone*, and has introduced as exhibits selected testimony from only three witnesses that has particularly high value and relevance to this rulemaking proceeding.

Furthermore, the basis upon which the testimony is offered by the Attorney General from the prior *Tyrone* proceedings is fundamentally different than that of his prior motion to admit the entire 2007 record. The testimony now offered by the Attorney General has been relied upon by the Attorney General's experts, and is offered in support of their testimony, as are other reports,

² Analysis of Ground-Water Development to Meet Projected Demands in Regional Planning District 4, Southwest New Mexico (OSE Hydrology Report 02-04, Mar. 2002) [AGO Ex. 19].

³ The Attorney General did not previously request that Mr. Marshall's testimony from the 2003 hearing be admitted.

articles and data relied upon by the Attorney General's experts. There is no good reason to distinguish between *testimony* relied upon experts, and *other reports, articles and data* relied upon. There is no legal basis to exclude testimony because it is the form of testimony, and NMED has offered no case law support of the proposition.

These selected materials are not overly burdensome, in light of the size of the record in this proceeding. Therefore, review of these materials will not result in an inordinate expenditure of time for the Commission. The testimony from the three witnesses is fully comprehensible, and will not confuse the Commission. The testimony does not represent cumulative evidence; the *Tyrone* testimony offered is not replicated in this proceeding. The testimony, which was given under oath and represented the technical opinion of NMED, will not "unfairly bias" the Commission, and NMED does not explain how such technical testimony could possibly do so.

NMED claims that the testimony from Mr. Marshall, Mr. Johnson and Mr. Roepke represents inadmissible legal conclusions. NMED Mot. to Exclude, pp. 1, 3. There is no basis to this claim. First, NMED cites to no specific legal opinions in any of the testimonies that are objectionable. Without citing to a specific opinion or opinions, there is no basis to exclude any portion of their testimony on this ground. Second, none of the three witnesses are lawyers, and none was put forward as a legal expert for the purpose of giving legal opinion testimony. Mr. Marshall, Mr. Johnson and Mr. Roepke were all technical experts. Mr. Johnson's testimony is highly technical, relating to supply and demand in the Grant County area and modeling that was done to evaluate that, and there is no hint in his testimony of any legal conclusions being offered. Mr. Roepke's testimony is from the viewpoint of water resource manager charged with managing and protecting water resources for the State. He testifies that, in his opinion as a water

resource manager familiar with the Grant County area, the resource should be protected. This is not a legal conclusion. His recitation of Phelps Dodge Corporation's proposal to pump and treat water from the pit at Tyrone for use by surrounding communities is factual testimony, not opinion testimony. Mr. Marshall's testimony as well was entirely technical. While, at the end of his 2007 testimony, on page 14, he states in one sentence that, in his opinion as a hydrologist and regulator, the Tyrone Mine is a place of withdrawal of ground water for present and reasonably foreseeable future use, his judgment is essentially a technical one, based on the preceding 13 pages of pure technical testimony. In any event, opinion on an ultimate issue in a case is not objectionable, Rule 11-704 NMRA, even if it concerns a "legal conclusion." *Herrera v. Fluor Utah, Inc.*, 89 N.M. 245, 249, 550 P.2d 144, 148 (Ct. App.), *cert. denied*, 89 N.M. 321, 551 P.2d 1368 (1976).

Finally, NMED argues that the testimony should be excluded because it is not subject to cross-examination. First, all the testimony offered was NMED's own testimony. Therefore, the testimony was fully vetted through NMED, was made under oath, and has a high degree of reliability. Second, the testimony *was* subject to cross-examination, and was even subject to cross-examination by FMI's predecessor. Third, and most importantly, all parties' experts in this proceeding attach as exhibits various materials, such as reports, articles and other data, that they relied upon in preparing their testimony. None of the authors of these reports, articles and data is subject to direct cross-examination in this proceeding. Rather, the parties' experts -- who have relied upon these reports, articles and data -- are subject to cross-examination on their use of the materials in this proceeding. NMED counsel may cross-examine the Attorney General's experts on the NMED testimony that they relied upon. The material relied upon by the Attorney

General's experts should not be excluded simply because it is the form of testimony, as opposed to a report, article or other data. Indeed, the testimony objected to by NMED may be more reliable than reports or articles relied upon by other experts because it was made under oath and was subject to cross-examination.

Under the Commission's *Guidelines for Rulemaking* and the Procedural Order in this matter, the Hearing Officer "shall admit any relevant evidence." *Guidelines*, § 402.B; Procedural Order, § 402.B (emphasis added). The testimony from Mr. Marshall, Mr. Johnson, and Mr. Roepke was relied upon by the Attorney General's experts to form their opinions, is relevant to the issues in this proceeding, and is entitled under the *Guidelines* and Procedural Order to be admitted.

Conclusion

For the reasons set forth herein, the Attorney General respectfully requests denial of NMED's Motion to Exclude the testimony of Mr. Marshall, Mr. Johnson and Mr. Roepke.

Respectfully submitted,

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