

STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION

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

New Mexico Environment Department,  
Petitioner.



No. WQCC 12-01(R)

**FREEPORT-McMoRAN's CONSOLIDATED REPLY TO THE  
"CITIZENS" AND THE ATTORNEY GENERAL'S RESPONSES TO THE  
BRIEF'S ON THE COMMISSION'S AUTHORITY**

**Preliminary Statement**

Freeport-McMoRan Chino Mines Company, Freeport-McMoRan Tyrone Inc. and Freeport-McMoRan Cobre Mining Company (collectively "Freeport") hereby submit a consolidated reply ("Reply Brief") to the "Citizens' Joint Response to FMI's Brief on the Commission's Authority to Conduct Rulemaking (Freeport's Initial Brief) and NMED's Brief on Commission's Authority to Consider Petition," the "Attorney General's Response to FMI's Brief on the Commission's Authority," and the "Attorney General's Response to NMED's Brief on Authority of Commission to Consider Petition" (collectively the "Responses"). The Attorney General and the groups who filed the Joint Response are referred to below as the "Respondents."

It is apparent that all of the Respondents wish to prevent the Commission from hearing testimony explaining how NMED's proposed copper rules work, as a whole, to prevent water pollution consistent with the Water Quality Act while balancing the protection of water quality with the state's economic interest in authorizing and encouraging mining of copper resources. That balancing of interests has been directed by the Legislature through the establishment of specific balancing criteria that the Commission must consider in adopting rules, and has been acknowledged by the courts as the Legislature's intent. Instead, the Respondents attempt to

divert the Commission from considering the Proposed Rule and, instead, to argue that the WQA precludes the establishment of clear, transparent rules that can be understood and applied to any copper mine, yet allows for variances to authorize a copper mine to operate under the same or similar conditions as would be authorized under the Proposed Rule. Respondents also seek to cast aspersion on isolated provisions of the Proposed Rules by injecting rhetorical terms such as “sacrifice zone.” The Commission can and should proceed with its scheduled hearing on the proposed copper rules so it can consider the testimony and evidence that will explain more fully how NMED’s proposed rules are fully consistent with the Water Quality Act, considering all of the factors specified by the Legislature for the Commission’s consideration of copper industry rules.

**I. THE PROPOSED RULE IS CONSISTENT WITH THE WQA AND THE COMMISSION IS NOT CONSTRAINED BY ITS 2009 DECISION ON “PLACE OF WITHDRAWAL” IN THE TYRONE ADJUDICATION.**

The Responses largely agree with Freeport’s opening brief describing the Legislature’s mandate for the Commission to adopt copper industry rules under the Water Quality Act. “Citizens” Response at 1, Attorney General’s Response at 1. The Responses also do not dispute the principles laid out in Freeport’s brief regarding the Commission’s rulemaking process. As discussed in detail in Freeport’s Consolidated Response to the two motions made by the Attorney General and the “Citizens,” the Proposed Rules are entirely consistent with the requirements of the Water Quality Act, refuting the arguments made in the Responses. Freeport’s Consolidated Response further refutes the mistaken legal analysis presented in the memorandum from the Department’s technical consultant and attached to the Attorney General’s Response as Exhibit “A”.

The Responses take issue with the point that the 2009 Amendments to the Water Quality Act establish a “new paradigm” for regulation and permitting because the Department still has authority to impose permit conditions. “Citizens” Response at 2, Attorney General’s Response at 7-11. As discussed in Freeport’s Initial Brief, the “paradigm shift” is that the Commission now is required to adopt rules describing the methods for pollution control, whereas before the 2009 Amendments the Commission was prohibited from adopting such rules. The Responses suggest that this is an insignificant change, as if the Department, unfettered by those rules, will be free to ignore the detailed and specific rules and return to the failed permitting practices that the 2009 Amendments required to be changed. If that is what the Legislature intended, why would it have put the Department and the Commission through the arduous task of rulemaking? While it is true that under the Water Quality Act, as well as the Proposed Rules, the Department retains authority to impose permit conditions in addition to those specified by the Commission’s rules, it is equally clear that the Commission’s rules will establish a clear, transparent set of rules for the permitting requirements, and that the Department will have a substantial burden to demonstrate that any additional permit conditions are justified based on site-specific conditions. This is quite different from the Department’s authority to establish “reasonable” permit conditions reflecting the ambiguous and non-specific requirements of the existing rules.

The Attorney General’s Response incorrectly cites the Court of Appeals opinion in *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n*, 2006-NMCA-115, ¶¶ 35-36, 140 N.M. 464, 143 P.3d 502, 511, for the proposition that a determination whether a site is a “place of withdrawal” must be a site specific determination. That case does not stand for the proposition asserted by the Attorney General. In that case, Tyrone claimed that the Department and the Commission were required to make a determination regarding “place of withdrawal” for

the Tyrone Mine in order to assess the validity of the permit conditions imposed by the Department upon Tyrone under the Commission's existing rules. No other mines were at issue. The Court found that the Department's and the Commission's determination that the entire Tyrone site was a "place of withdrawal" was arbitrary and capricious and directed that appropriate factors be established to guide discretion in determining "place of withdrawal" in order to reassess the validity of the Tyrone permit conditions. *Tyrone*, 2006-NMCA-115, ¶¶ 35, 38.

Unlike the existing Commission discharge permit regulations, the Proposed Rules do not rely upon a site-specific determination regarding the "place of withdrawal" in order to determine the validity of site-specific permit conditions. The Proposed Rules would establish the required methods to prevent and monitor water pollution for copper mines that are supported by the Department's consideration of technologies available to and used by the mining industry. This would replace the process under the existing rules under which a permit applicant may propose any technology, the Department may respond by imposing a permit condition specifying a different technology, and the parties and the Commission (in the event of an appeal) are left to resolve the dispute based upon the ambiguous "place of withdrawal" criterion. The Proposed Rule provides some flexibility to depart from the technologies and methods specified in the rule to account for site-specific conditions through (1) variations in the specified technologies and methods different site-specific conditions, such as for areas inside the open pit surface drainage area, (2) allowances for the Department to approve alternative technologies if they achieve equivalent performance compared to the methods specified by the Commission, (3) variances, and (4) additional conditions that can be imposed by the Department. Moreover, the Proposed Rule does not ignore the "place of withdrawal" concept, but provides for a reasoned, transparent

and balanced application of that concept that can be readily understood, consistent with the Court of Appeals decision.

The Court of Appeals in *Tyrone* did indicate that certain site-specific factors, such as unique geology of hydrology of an area, *may* be appropriate factors, but left that decision up to the Commission to apply in the Tyrone permit appeal. 2006-NMCA-115, ¶ 36. The Court of Appeals, however, did not *require* the Commission to adopt site-specific factors, and in no way held that the Commission is bound to make a site specific determination in all instances. Indeed, the Attorney General's statement that "plainly, for *future* sites, no such site-specific determination can be made through rule" is refuted by the Court's invitation to the Commission to establish rules addressing the issue. *Id.*, ¶ 35. Indeed, the Court invited the Commission to establish, by rule, a "point of compliance" approach similar to federal regulations, which do not rely upon an untransparent, subjective determination regarding "place of withdrawal." *Id.*, ¶ 36. Consequently, although the Court's decision was made before the Water Quality Act was amended to require the copper industry rules, it is also consistent in its direction with the Legislature's separate directive to this Commission to make rules specific to the copper industry, while allowing for variation from the specific requirements when appropriately based on site-specific conditions.

The preceding discussion further illustrates the distinction between an adjudication, such as was at issue in the *Tyrone* case, and a rulemaking such as this. In the *Tyrone* case, the parties were adjudicating one permit's conditions at one mine site based on the WQA and without the benefit of clear Commission's rules that provide specificity as to the conditions that should be applied to copper mining. In the absence of specific and transparent rules, that case became focused on the parties' very different interpretations of the "place of withdrawal." In considering

the Proposed Rule, the Commission is guided by the changes made by the 2009 WQA Amendments and the broad set of criteria for the adoption of rule intended to balance the competing factors recognized by the Court of Appeals in *Tyrone*. NMSA 1978, Section 74-6-4.E and .K. Indeed, it is obvious that one purpose of the 2009 Amendments and this rulemaking is to remedy the shortcomings of the existing rules that depend entirely upon a subjective interpretation of “place of withdrawal” that lacks predictability and transparency.

After the Court’s ruling in *Tyrone*, the Commission, in early 2009, decided to adopt broad factors that would apply to a subsequent site-specific determination of the “place of withdrawal” at the Tyrone Mine. Respondents argue that this decision binds this Commission to a site-specific determination of the “place of withdrawal.” As discussed in Freeport’s Initial Brief and its Consolidated Response to the Motions, the 2009 WQA Amendments obviate the need for a site-specific determination for each copper mine by requiring the Commission to adopt more specific rules, resulting in a more clear and transparent decision-making process for the copper mining industry. Moreover, aside from the game-changing 2009 WQA Amendments, the Commission’s prior decision also is not binding on the current Commission with respect to its consideration of the Proposed Rules. *See City of Albuquerque v. N.M. Public Regulation Comm’n*, 2003-NMSC-028, ¶ 16; Freeport’s Initial Brief at 10-11.

**II. A HEARING ON THE PROPOSED RULE IS NECESSARY FOR THE COMMISSION TO CONSIDER THE EVIDENCE AND TO BALANCE THE COMPETING INTERESTS AS REQUIRED BY THE WQA AND ACKNOWLEDGED BY THE COURT OF APPEALS.**

The Responses similarly ignore the Court of Appeals’ directive that the Commission must balance competing interests of protecting ground water quality and allowing legitimate use of ground water by mining and other industries. The Responses encourage a rigid, unbalanced interpretation of the law that make irrelevant the practices of a specific industry sector and the

state's interest in fostering a transparent regulatory environment that encourages jobs. As the Court of Appeals recognized, such an approach would unduly restrict activities, such as mining, that conduct operations below the water table and that invariably will impact ground water to some degree. The Court of Appeals wisely recognized that the approach advocated by the Attorney General and the "Citizens" is not mandated by the WQA.

### **III. THE ATTORNEY GENERAL'S "DEFERENCE" ARGUMENT IS A RED-HERRING.**

The Attorney General argues that the Department's "newly minted interpretation of the WQA" is not entitled to deference. Attorney General's Response at 4. This red-herring argument is misplaced and inappropriate for the Response, as neither Freeport's nor the Department's briefs have argued that the Department's position is entitled to any particular legal "deference." The Department simply has made a reasoned, balanced judgment regarding the content of the Proposed Rule and has asked the Commission to consider the proposal using the criteria specified in the WQA, based on the evidence to be presented in a hearing.

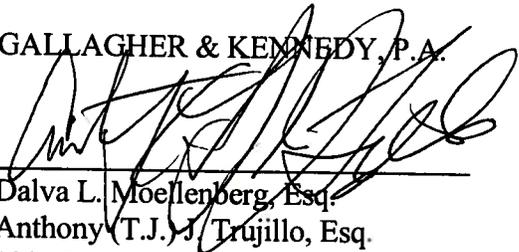
### **IV. CONTINUING WITH A HEARING ON THE PROPOSED RULE IS THE MOST EFFICIENT AND APPROPRIATE COURSE OF ACTION FOR THE COMMISSION.**

The Responses ultimately urge the Commission to conclude that it should reject the Department's Petition and/or "remand" the rules to the Department for further consideration as a matter of efficiency. It is difficult to comprehend how a rejection of the Petition or a remand of the rules would be more efficient, as this would require the parties to expend additional resources in a new process to attempt to develop a different set of rules before returning to the Commission. Moreover, such a process would postpone the Commission's receipt of comments from the broader public through the public hearing process. A new set of rules in the form proposed by the Attorney General and the "Citizens" would, in effect, prohibit new copper mines

in New Mexico without a variance from the Commission. In the unlikely event that the Department decided to propose a set of rules using that approach, Freeport would oppose such an unnecessarily restrictive set of rules, and the Commission would be faced with the same issues in a rulemaking hearing, the only difference being that the parties would sit in different chairs. Even assuming, for the sake of argument, that the Commission might accept some part of the argument made in the Responses, there is no merit to the arguments that the Commission cannot “fix” the Proposed Rules in the upcoming hearing. The Attorney General, for example, concedes that the Commission may modify the Proposed Rule to cure defects. The Attorney General argues that “because the proposed rule so pervasively violates the WQA, and many provision are dependent on and related to others, it would not be a sound use of the Commission’s and the parties’ resources to hold an hearing on the rule, as proposed.” Attorney General’s Response at 6. Given the time and resources already spent in developing the Proposed Rule, it would be a better use of resources for the parties who object to the Proposed Rule to simply present their own rule proposals and the evidence they believe would support those versions and let the Commission decide.

Respectfully Submitted,

GALLAGHER & KENNEDY, P.A.



Dalva L. Moellenberg, Esq.  
Anthony (T.J.) J. Trujillo, Esq.  
1233 Paseo de Peralta  
Santa Fe, NM 87501  
Phone: (505) 982-9523  
Fax: (505) 983-8160  
[DLM@gknet.com](mailto:DLM@gknet.com)  
[AJT@gknet.com](mailto:AJT@gknet.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing pleading was mailed to the following parties this January 25, 2013:

Andrew Knight  
Assistant General Counsel  
New Mexico Environment Department  
PO Box 5469  
Santa Fe, NM 87502-5469

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

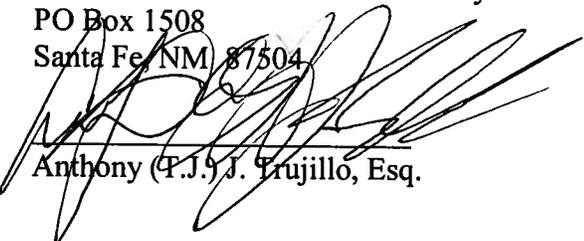
Bruce Frederick  
New Mexico Environmental Law Center  
1405 Luisa Street, #5  
Santa Fe, NM 87505-4074

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

Tracy Hughes  
High Desert Energy + Environment Law Partners, LLC  
P.O. Box 8201  
Santa Fe, NM 87504

Sean Cunniff  
Office of the Attorney General  
Civil Division  
P.O. Box 1508  
Santa Fe, NM 87504

Tannis L. Fox  
Assistant Attorney General  
Water, Environmental and Utilities Division  
Office of the New Mexico Attorney General  
PO Box 1508  
Santa Fe, NM 87504

  
Anthony (F.J.) J. Trujillo, Esq.