

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 RESPONSE TO THE  
JOINT MOTION TO DISMISS PETITION FOR RULEMAKING AND THE  
ATTORNEY GENERAL'S MOTION TO REMAND THE  
PROPOSED RULE TO NMED**

Freeport-McMoRan Chino Mines Company, Freeport-McMoRan Tyrone Inc. and Freeport-McMoRan Cobre Mining Company (collectively "Freeport") hereby submit a consolidated response ("Response Brief") to the Joint Motion to Dismiss Petition for Rulemaking ("Joint Motion") of the Gila Resources Information Project, Turner Ranch Properties, Inc. and Amigos Bravos, and the Attorney General's Motion to Remand the Proposed Rule to NMED ("Motion to Remand")(the motions jointly are referred to as the "Motions" and the parties who filed the motions jointly are referred to as the "Movants"). This Response Brief contains a common response to the issues common to both the Motions and contains separate sections addressing a few issues raised only in one or the other of the Motions. Freeport opposes both Motions and urges the Water Quality Control Commission ("WQCC") to deny both Motions and to proceed with the scheduled hearing on the Petition to Adopt the Proposed Amendment to 20.6.2 NMAC (Copper Rule) ("Proposed Rule") submitted by the New Mexico Environment Department ("NMED"). As discussed below, the Proposed Rule is consistent with the New Mexico Water Quality Act ("WQA), and its consideration and adoption by the WQCC as proposed by NMED would not violate the WQA.

## **I. PRELIMINARY STATEMENT**

The Proposed Rules are required by 2009 amendments to the WQA. Those amendments mandate a paradigm shift in the regulation of discharges to ground water under the WQA. In changing the structure of how permit requirements are established, the Legislature recognized that the existing approach to regulation under the WQCC's existing regulations is broken and must be fixed. The Motions, however, ignore the changes mandated by the 2009 WQA amendments and argue for continuation of the same flawed approach that has resulted in a substantial burden on agency resources as staff endeavors to craft permits without clear regulatory guidance, uncertainty for regulated businesses and industries, and decades-long litigation.

The Joint Motion and the Motion to Remand both assert that the Proposed Rule would establish a "point of compliance" regulatory framework and argue that the WQA prohibits a "point of compliance" approach. *See* Motion at 1. Neither Motion defines what the Movants mean by "point of compliance," although they point to a few specific sections of the Proposed Rules that, they claim, embody a "point of compliance" approach. In support of this theory, the Attorney General argues that the state must work to "prevent ground water contamination underneath all sites." *See* Motion to Remand at 21. The Joint Motion asserts, in numerous places, that the Proposed Rule would create so-called "Sacrifice Zones" and grant mining companies a "license to pollute groundwater" in violation of the WQA.

The premise underlying both Motions is fundamentally flawed and is contradicted by the WQA requirements and judicial interpretations acknowledging that the WQA requires the WQCC to employ a balanced and practical approach in regulating discharges to ground water.

As the Court of Appeals noted in *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Commission*, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502 (hereinafter, “*Phelps Dodge*”):

...the legislature meant for impacts to be measured in a *practical and sensible fashion*, but the issue is complicated by the fact that groundwater and surface water systems are interconnected. Contaminated waters migrate into areas that were previously pristine. We have no doubt that the legislature intended to *limit* that kind of migration. On the other hand, mining is a necessary and important component of our economy and our modern way of life. We believe that the legislature intended that our laws, regulations, and any interpretation of them strike a wise balance between these competing interests.

*Id.* at ¶ 29 (emphasis added).

Ignoring the balancing of interests required by the WQA, the Motions construe the WQA such that the WQCC’s rules and permits issued by NMED must prevent discharges from lawful, permitted activity from causing *any* exceedance of ground water quality standards wherever ground water exists in New Mexico, regardless of whether proven and practicable technologies or measures exist to prevent those exceedances. Movants construction of the WQA would prohibit the WQCC from balancing competing interests so that its rules address impacts to ground water in a practical and sensible fashion. As the Court of Appeals expressly recognized, the WQCC is required by the WQA to consider the technical practicality and economic reasonableness of a regulation before adopting it. *University of California v. Water Quality Control Comm’n*, 2004-NMCA-073, 136 N.M. 45, 94 p. 3d 788; *see also Phelps Dodge*, 2006-NMCA-115, ¶33 (“it would be incorrect to conclude that [Tyrone Mine] must meet water quality standards everywhere”).

Under the logic presented in the Motions, the WQA would prohibit the otherwise lawful activity of copper mining because there is no practical way to prevent exceedances of water quality standards under certain defined mining facilities. As the evidence in support of NMED’s Proposed Rules will show, they strike a reasoned balance, establishing stringent measures where

they have been demonstrated to be practicable and effective, such as requiring double-liners with leachate collection systems for process water impoundments, but acknowledging that some mining activities inevitably affect ground water, such as by exempting hydrologically isolated open pit areas that contain ground water from compliance with ground water quality standards and specifying reduced requirements within those areas.

While arguing that the Proposed Rule, in exempting hydrologically isolated open pits from compliance with ground water quality standards, would violate the WQA, both Motions concede that the WQCC has authority under the WQA to allow such exceedances by granting variances or, in some instances, granting petitions to establish alternative abatement standards. Neither Motion explains how the WQA prohibits the WQCC from adopting clear and understandable rules that acknowledge that exceedances of standards may occur within a defined area, or temporarily, when reasonably necessary to allow for copper mining, yet authorizes the WQCC to do the same thing through a variance procedure. Indeed, the variances as authorized by the WQA apply to variances from the WQCC's regulations, not from the WQA itself. Accordingly, it is impossible to reconcile Movants' views that the WQA allows no exceedances of standards with their view that the WQCC could allow exceedances by variance. The Proposed Rule properly recognizes that the WQCC has the power to allow for lawful activities that may exceed standards as long as impacted ground water is contained to avoid adversely affecting other uses of ground water.

The Proposed Rule is important for at least two reasons. First, it establishes consistent, clear, and reliable expectations regarding the required measures to prevent water pollution and to monitor water quality today and for years after those operations cease. This new regulatory paradigm established by the WQA and implemented in the Proposed Rule specific to copper

mines is a dramatic improvement over the existing inconsistent and ad hoc process that has characterized the issuance of discharge permits under the current rules. The Legislature deemed the existing system broken, and has told the WQCC to fix it. Second, the Proposed Rule improves New Mexico's ability to attract and retain mining investments and jobs in this critical industry. The clear and consistent rules as set forth in the Proposed Rule will better protect New Mexico's ground water while allowing mining companies to better plan and invest in mining operations. The misplaced interpretations of the WQA and associated regulations presented in the Motions rely upon inapplicable and irrelevant adjudicatory permitting decisions dealing with one mine site, and in so doing seek to retain the broken system that the Legislature has directed to be changed.

The Proposed Rule is over fifty pages in length (including Attachments 1 and 2 to NMED's October 30, 2012 Petition) and contains a detailed and prescriptive set of requirements. Even a cursory review of the Proposed Rule reflects the enormity of the effort, as well as the expertise and thought that went into fulfilling the legislative mandates in the 2009 WQA amendments. The Motions' invitation to dismiss these efforts out of hand should be denied in the WQCC's sound judgment, and a hearing on the Proposed Rule should be allowed to proceed. *See Rio Grande Chapter of Sierra Club v. N.M. Mining WQCC*, 2003-NMSC-005, ¶25, 133 N.M. 97, 61 P.3d 806 (courts afford administrative agencies considerable discretion to carry out the purposes of their enabling legislation).

In asking the Commission not even to consider NMED's proposal at this stage of the proceedings, Movants have a very high burden to carry. Movants claim that the Proposed Rule cannot be "fixed," but this claim ignores the nature of the rulemaking process. Any party to the rulemaking process can present its own views regarding an appropriate rule for the WQCC to

adopt, whether that may be proposed changes to the rule language or even a completely different rule, as long as the rule proposals do not address entirely different topics that would stray outside the scope of the rulemaking. The WQCC is free to adopt any language changes or different versions of a rule, or to write its own rule language, as long as the rule adopted by the WQCC is supported by substantial evidence. Consequently, it is impossible to imagine how, within such a flexible rulemaking process, the WQCC could not fix any part of the Proposed Rule that the WQCC might conclude is either inconsistent with the WQA or should be adjusted considering the criteria for the WQCC's adoption of rules under the WQA. Of course, as discussed elsewhere in this brief, there is no such defect in the Proposed Rules. Furthermore, the Procedural Order issued in this case establishes an orderly process for the parties to submit evidence regarding the Proposed Rules, including any language changes. The Attorney General's Motion for Remand, however, seeks to present numerous exhibits containing voluminous evidence that purportedly is necessary to support the Motion for Remand. Considering these exhibits at this point, in advance of the time for the other parties to present rebuttal evidence, would be inconsistent with the Procedural Order issued in this case and would undermine an efficient and orderly rulemaking proceeding.

## **II. COMMON RESPONSE TO THE ARGUMENTS IN THE MOTIONS**

The Motions' primary premise is that rules adopted under the WQA must establish requirements designed to ensure that ground water quality standards are met everywhere at all times. This notion that *all* groundwater is required to meet groundwater standards at *all* times and in *all* places is simply incorrect when the WQA as a whole is considered, when the WQCC's existing regulations are taken into account, and when one considers the decades of permitting history under the existing regulations. Mines can be permitted under the WQA as long as water

contamination is adequately contained, without requiring that all groundwater meet standards at all locations within a mine site. *See Phelps Dodge*, 2006-NMCA-115, ¶33 (finding it “unrealistic” to require all water at the Tyrone Mine site to meet standards).

**A. The WQA gives the WQCC discretion to adopt rules for the copper industry that allow exceedances of water quality standards underneath a discharge site.**

As discussed above, the Motions contend that the Proposed Rules violate the WQA because they would allow exceedances of ground water quality standards within hydrologically isolated open pit areas and, potentially, underneath some discharging facilities. A review of the WQA as a whole, consistent with case law, shows that the WQA does not require such an inflexible approach, and that the Courts have recognized that the WQCC must balance competing interests to regulate discharges to ground water in a practical fashion.

**1. The Court of Appeals has unequivocally determined that all water at a mine site does not have to meet water quality standards so long as the outcome reflects a reasonable balance between protecting water and the needs to industry.**

Both Motions rely upon and extensively discuss pending litigation and a pending settlement process involving the Tyrone Mine, a large copper mining complex located in Grant County. The WQCC, NMED, and Phelps Dodge Tyrone, Inc. (now Freeport-McMoRan Tyrone Inc., hereinafter “Tyrone”) have been engaged in protracted litigation over conditions in Tyrone’s Supplemental Discharge Permit for Closure, DP-1341, since 2002. The dispute arose over the NMED’s imposition of permit conditions that changed the closure plan proposed by Tyrone, particularly conditions that required Tyrone to re-grade stockpile slopes to allow for placement of a three-foot thick cover.

In its appeal, relying on expert opinions and modeling results, Tyrone argued that those permit conditions were not necessary to prevent an exceedance of ground water quality standards

at a place of withdrawal of water for present or reasonably foreseeable future use. The gist of Tyrone's position was that, in the absence of specific rules regarding the closure requirements, NMED is required to determine locations in the vicinity of the mine that constitute a "place of withdrawal"; otherwise there is no objective technical criteria that can be used to establish the reasonable and necessary level of discharge controls. The WQCC upheld the NMED's imposition of the permit conditions, but the Court of Appeals overturned the WQCC's decision and remanded the case to the WQCC for further consideration. *See Phelps Dodge, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502.* In particular, the Court found that the WQCC's decision rested upon its conclusion that the entire Tyrone mine site was a "place of withdrawal," and that the WQCC's conclusion in that regard was "overly broad and impractical." *Id.* at ¶ 34.

In overturning the WQCC's decision, the Court looked to the Legislature's intent with regard to the "place of withdrawal" concept and noted:

[T]he standard's apparent simplicity leads to genuine uncertainty about the legislative intent for a site like Tyrone. . . . For example, it raises the question in this case as to the point which the legislature intended to measure compliance for a mine like Tyrone. That is, should water quality be measured at the bottom of a waste rock pile, at the bottom of the mine pit, at wells located at the perimeter boundary of the mine property, or at some other point or points?

*Id.* at ¶ 28. The Court then recognized that the WQCC struggled with an interpretation of the "point of withdrawal" concept and found that the WQCC reached an overly broad interpretation of the phrase in concluding that the entire Tyrone mine site was a place of withdrawal. The Court stated:

This decision could not have been more broad. As an indication of the overbreadth of the standard that may have been applied by the WQCC, at the evidentiary hearing there was evidence that it was "possible" that someday someone might drill a well into the side of, or adjacent to, waste rock piles. The WQCC relied, in part, on this possibility to support its conclusion that the entire facility was a place of withdrawal of water. This speculative scenario appears to stretch the statutory language too far, does not appear to represent reasonable

future use, and cannot support the conclusion that the entire facility is a place of withdrawal of water.

*Id.* at ¶ 32.

Since the entire Tyrone mine site was not a place of withdrawal, the Court decided that all water at the mine site does not have to meet water quality standards. The following guidance from the Court is instructive on this point:

Although the mine is a place where water is withdrawn for present use, it would be incorrect to conclude that, as a consequence, the entire mine site is a measuring point and must meet water quality standards everywhere. Not only is such a conclusion overbroad, it is also unrealistic to require all water at the Tyrone mine site to meet drinkable standards.... Thus, even though it is a conclusion that is arguably within the plain language of the statute, we *reject* such a broad and impractical interpretation of the Act; so interpreted, it would not reflect a balance between the competing policies of protecting water and yet imposing reasonable requirements on industry.”

*Id.* at ¶ 33.

Although the *Phelps Dodge* decision dealt with a specific mine site, the Court’s conclusion that an entire mine site cannot be consider a place of withdrawal is equally applicable to other copper mining sites. Any other conclusion would make it impossible to mine copper in this state. Therefore, to the extent the Motions argue that all water at a mine site must meet water quality standards, the *Phelps Dodge* decision instructs otherwise.

The Motions concede that there are some circumstances where a copper mine cannot practicably prevent ground water standards from being exceeded in at least some locations. The Motions argue that the only flexibility under the WQA is for the WQCC to authorize exceedances of standards is by granting variances. The Motions fail to explain why, if WQCC has the authority under the WQA to allow certain exceedances by a variance, it cannot do so by adopting a rule. Adopting clear rules that describe limited circumstances and areas where

ground water quality standards might be exceeded is preferable to authorizing activities only through a variance proceeding, which is subject to a very broad and vague standard, *i.e.*, that the rules would impose an “unreasonable burden.” A variance approach, therefore, would likely result in unpredictable and inconsistent results. Moreover, the Movant’s approach is poor public policy due to the increased need for variance proceedings that would occupy agency, WQCC, permittee and community resources and would perpetuate a poor business environment that would discourage investment.

**2. The Court of Appeals determined that a point of compliance approach is a reasonable proxy for determining a place of withdrawal.**

The Court of Appeals has acknowledged that the WQCC has discretion to decide how best to strike a reasonable balance in regulating discharges and that WQA provides the WQCC with flexible authority to do so. In *Phelps Dodge* decision, the Court provided specific guidance to the WQCC on factors that it might consider when dealing with the “place of withdrawal” concept. For example, the Court suggested that “[a] federal EPA regulation, 40 C.F.R. § 264.95(a)(2005), defining a point of compliance as ‘a vertical surface located at the hydraulically downgradient limit of the waste management area that extends down into the uppermost aquifer underlying the regulated units also may be appropriate for consideration insofar as it addresses the spread of contamination into groundwater outside the mine boundary.’” *Phelps Dodge*, 2006-NMCA-115 ¶ 36. Although the Court did not require the WQCC to adopt the point of compliance concept, it clearly concluded that such a concept was a reasonable interpretation of the “place of withdrawal” language when it stated: “It is possible that ‘point of compliance’ is a reasonably proxy for ‘any place of withdrawal . . . for present or reasonably foreseeable future

use' . . . and that authorities dealing with 'point of compliance' can and should be used in a case like this one." 2006-NMCA-115 ¶ 37.

**B. Under the WQA 2009 Amendments, the WQCC is required to specify measures to prevent water pollution based on the WQA's balancing criteria for the WQCC's adoption of regulations.**

The WQCC is required by the WQA to "...adopt, promulgate and publish regulations to prevent or abate water pollution in the state or in any specific geographic area, aquifer or watershed of the state or in any part thereof, or for any class of waters...." Section 74-6-4(E) NMSA 1978. This mandate has existed since 1976 and was initially satisfied in 1977 by the WQCC when it adopted the Ground Water Discharge Regulations, now contained in 20.6.2.1201 through 20.6.2.3114 NMAC. The WQCC supplemented this regulatory framework in 1996 when it adopted the Abatement Regulations, now contained in 20.6.2.4101 through 20.6.2.4115 NMAC.

The required content of the regulations to prevent water pollution, however, substantially changed in 2009 with the passage of Senate Bill 206 and created a paradigm shift in how facilities discharging to ground water would be regulated. In amending the WQA, the Legislature recognized that the existing WQCC rules and NMED's approach to permitting is not working and must be fixed. In particular, the legislation required the WQCC to "...specify in regulations the measures to be taken to prevent water pollution and monitor water quality...", which ultimately lead to the development of the Proposed Rule. Section 74-6-4(K) NMSA 1978.

**1. The fundamental principles of the WQA were altered by a new regulatory paradigm adopted in 2009 due to the passage of Senate Bill 206.**

Both Motions fail to address and acknowledge the new regulatory paradigm implemented by the WQA 2009 amendments for the copper industry. In fact, the "argument" section of the

Motion for Remand does not even cite to Section 74-6-4(K) NMSA 1978 . Instead, that Motion creatively outlines “five basic principles” of the WQA using alleged “decades-long” interpretations of the WQA rendered mostly in adjudicatory hearings dealing with closure permit conditions for one mine site. *See* Motion for Remand at 14-15. These selective and irrelevant interpretations of the WQA fail to account for the fact that the WQA 2009 amendments remove NMED’s authority to approve discharge control technologies and now require the WQCC to adopt rules specifying discharge control technologies to prevent water pollution. *See Tri-State Generation and Transmission Assoc., Inc. v. D’Antonio*, 2012-NMSC-029, ¶¶ 20 and 26, 289 P.3d 1232, 1238-39 (an agency is not limited by its previously existing authority where a new legislative enactment provides the agency with new authority complimenting broad, supervisory powers).

***a. Prior to the WQA 2009 amendments, NMED had authority to approve discharge control technologies.***

In order to appreciate this paradigm shift, it is important to understand how the WQCC regulations currently operate before the WQCC adopts new rules pursuant to Senate Bill 206. Prior to 2009, the WQCC was prohibited from promulgating regulations specifying the methods to prevent or abate water pollution, and the existing Ground Water Discharge Permit Regulations did not contain specific requirements to control discharges. Instead, the regulations required a permit applicant, in a permit application, to describe how the applicant proposes to control its discharges. 20.6.2.3106-3107 NMAC. The regulations provide virtually no guidance or limitations dealing with these control technologies, although NMED at one time published limited, non-binding guidance documents for some types of facilities describing the types and measures that NMED deemed adequate.

At the conclusion of the permitting process, NMED approves an applicant's proposal that satisfies the content and procedural requirements of the regulations if NMED determines that "neither a hazard to public health nor undue risk to property will result" and if the proposal meets one of three separate conditions: (1) if ground water that has a total dissolved solids concentration of 10,000 mg/l or less will not be affected by the discharge; (2) if "the person proposing to discharge demonstrates that approval of the proposed discharge plan, modification or renewal will not result in either concentrations in excess of the standards of 20.6.2.3103 NMAC or the presence of any toxic pollutant at any place of withdrawal of water for present or reasonably foreseeable future use;" or (3) if certain specific performance standards are met, as applicable. 20.6.2.3109(C) NMAC.

The Motions focus on a small portion of the language of one of the three approval criteria for a discharge permit, namely, "place of withdrawal of water for present or reasonably foreseeable future use." 20.6.2.3109(C) NMAC. That phrase also appears in the WQA, which requires NMED to deny an application for a permit if "the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. Determination of the discharges' effect on ground water shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use." Section 74-6-5(E)(3) NMSA 1978. Consequently, NMED historically interpreted "place of withdrawal" concept through permit approvals setting forth the measures to control discharges.

Unfortunately, the lack of specific regulatory requirements or guidance, and the difficulty and differences in technical interpretation that have arisen over the criteria for approval of a permit have resulted in protracted permitting timeframes and in longstanding disputes and litigation regarding the permit approval requirements. Historically, permitting decisions often

rested upon complex technical models designed to predict in advance the effectiveness of proposed discharge controls and other measures.

While the historical regulatory framework established a process for a permit applicant to propose measures to control discharges, the courts also allowed NMED to issue permits imposing permit conditions that specify pollution control measures instead of denying a permit application. *See Phelps Dodge*, 2006-NMCA-115, ¶ 24, 140 N.M. 464, 143 P.3d 502. In other words, NMED has been the entity responsible for establishing methods to prevent water pollution and monitor water quality, and the WQCC has been prohibited from promulgating such regulations.

- b. Subsequent to the WQA 2009 amendments, the WQCC now must promulgate regulations specifying measures to prevent water pollution and monitor water quality instead of leaving it up to NMED.***

In 2009, the New Mexico Legislature fundamentally changed the regulatory landscape when it passed Senate Bill 206. As a result of the WQA 2009 Amendments, the WQCC is no longer prohibited from adopting rules specifying the methods to prevent or abate water pollution, and the WQA now directs the WQCC to “specify in regulations the measures to be taken to prevent water pollution and to monitor water quality.” Section 74-6-4(K) NMSA 1978. This change represents a paradigm shift in the manner in which facilities that discharge to ground water are regulated under the WQA. It establishes a new approach to regulating discharging facilities that streamlines the permitting process, avoids protracted “battles of the experts” over modeling and model results and resolves many of the conflicts that have arisen over the existing regulations.

As a result of the WQA 2009 amendments, the WQCC is in uncharted territory. The new regulatory paradigm renders earlier precedents, policies, and decisions interpreting the pollution prevention methods and water quality monitoring measures either obsolete or distinguishable.

This change in the precedential value of previous regulatory decisions is due to the fact that prior to 2009, NMED was unable to decide on the appropriate discharge control technologies for the copper industry without first making a determination as to the “place of withdrawal” concept. In other words, the applicable discharge control technologies were dependent upon site-specific conditions.

Now, the WQCC is required to specify appropriate discharge control technologies. In other words, the WQCC is required to determine the applicable discharge control technologies for an industry as a whole, independent of site-specific considerations, although the rules may include variable requirements reflecting differences in site conditions. In this manner, the WQCC is charged with evaluating the discharge control technologies identified in the Proposed Rule based upon the criteria it must consider in adopting a rule, as discussed below, and without the WQCC having to consider in the rulemaking the “place of withdrawal” for reasonably foreseeable future use at any particular site.

Accordingly, the Attorney General’s argument that the WQCC must wholesale adopt and rely on the purported “long standing interpretation of the WQA,” previous decisions dealing with copper mine discharge permits and ground water contamination, and administrative adjudicatory decisions dealing with the Tyrone litigation is incorrect and simply ignores the impact of the WQA 2009 amendments. *See* Motion for Remand at 6-14. Even previous judicial decisions, such as the *Phelps Dodge* decision, must be thoroughly analyzed in light of the new

law because they may be distinguishable due to the subsequent statutory changes that became law in 2009.

**2. The WQCC’s rulemaking authority is broad and the WQA does not require a site-specific determination for assessing a “place of withdrawal.”**

The Motions argue that the WQCC’s rulemaking authority is constrained by the “place of withdrawal” language and that this concept does not allow for adoption of certain portions of the Proposed Rules. The Motions fail to recognize the breadth of the WQCC’s rulemaking authority and the number of factors that the WQCC must consider and balance in adopting practical rules.

The WQCC must consider eight separate factors in adopting regulations:

- (1) character and degree of injury to or interference with health, welfare, environment and property;
- (2) the public interest, including the social and economic value of the sources of water contaminants;
- (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;
- (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;
- (5) feasibility of a user or subsequent user treating the water before a subsequent use;
- (6) property rights and accustomed uses; and
- (7) federal water quality requirements . . . .

Section 74-6-4(E) NMSA 1978. The eighth factor is added by Subsection K of that section, which states: “The WQCC shall consider, in addition to the factors listed in Subsection E of this section, the best available scientific information.” Subsection E also provides additional flexibility to adopt regulations specific to a particular geographic area, a particular aquifer, a particular watershed or a particular part of the State.

Notably absent from these factors is consideration of the “place of withdrawal” concept. Moreover, these factors were not considered by the WQCC when it addressed the issues raised in the appeal of the Tyrone Mine permit because they apply to the WQCC’s rulemaking, not its

adjudicatory decision. Consequently, as discussed above, the WQCC's Decision and Order in the Tyrone Mine case, in which the WQCC did not consider these factors, and which is based on the existing WQCC's regulations and the WQA as it existed before the 2009 WQA amendments, is of little relevance to the WQCC's consideration of the Proposed Rules.

**3. The Proposed Rule's approach to ground water quality standards compliance and establishing varying requirements for different mine areas is within the WQCC's rulemaking authority and is consistent with past and existing regulations.**

The approach taken in the Proposed Rule regarding different requirements for a hydrologically isolated open pit area is consistent with the WQCC's authority to adopt regulations for "any specific geographic area, aquifer or watershed of the state" as provided in Subsection E of Section 74-6-4 NMSA 1978. Also, Subsection K of Section 74-6-4 NMSA 1978 specifically allows the WQCC to establish variable requirements that reflect differences in site conditions, such as geology and hydrology. In addition, exemptions contained in the existing WQCC regulations are examples of the flexibility afforded by the WQCC to make practical rules even when they could result in exceedances of ground water standards.

The WQCC's existing regulations regarding discharge permits state that "*[u]nless otherwise provided by this Part*, no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit issued by the secretary. When a permit has been issued, discharges must be consistent with the terms and conditions of the permit." 20.6.2.3104 NMAC (emphasis added). The "unless otherwise provided by this part" language refers, in part, to thirteen different exemptions from discharge permit requirements contained in the existing rules. 20.6.2.3105 NMAC.

One of the exemptions applies specifically to mining. It exempts from the permitting requirements "[n]atural 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.”

20.6.2.3105.K NMAC. The clear terms of this exemption allows the contamination of ground water without any permit or required controls and regardless of whether ground water at a “place of withdrawal” exceeds ground water quality standards. This exemption was in the original WQCC rules adopted in 1977. Yet, under the arguments presented in the Motions, how could this exemption be lawful?<sup>1</sup>

Significantly, the WQCC’s regulations exempt “effluent which is discharged from a sewerage system used only for disposal of household and other domestic waste which is designed to receive and which receives 2,000 gallons or less of liquid waste per day.”

20.6.2.3015.B NMAC. Such discharges naturally occur in and near residential areas where residents withdraw drinking water from private wells. The NMED has concluded that most of the ground water contamination in New Mexico is a result of nonpoint sources and that household septic tanks and cesspools are the predominant source of nonpoint sources of groundwater contamination. *2012 - 2014 State of New Mexico Clean Water Act §303(d)/§305(b) Integrated Report*, New Mexico Environment Department, p. 70. Yet, the exemption for household sewerage systems applies regardless of whether these discharges might cause ground water standards to be exceeded. If the WQCC has WQA flexibility to exempt various situations from discharge permitting requirements altogether, then surely it would not be an unlawful

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<sup>1</sup> While, as discussed above, there are many situations in which the WQCC regulations allow standards to be exceeded under circumstances where permits are not required, Freeport is not asserting either that its copper mining activity need not be permitted by the Department, nor that its permitted discharges need not meet standards at places of withdrawal of water for present or reasonably foreseeable future use.

exercise of its authority to bring those situations under regulations for the copper industry as a means of better managing, containing and controlling those situations.<sup>2</sup>

Several of the exemptions are qualified by a requirement that the exemption applies unless the Secretary of Environment determines that the discharge may result in a “hazard to public health.” This term is defined in section 20.6.2.7.Z NMAC as follows:

hazard to public health” exists when water which is used or is reasonably expected to be used in the future as a human drinking water supply exceeds *at the time and place of such use*, one or more of the numerical standards of Subsection A of 20.6.2.3103 NMAC, or the naturally occurring concentrations, whichever is higher, or if any toxic pollutant affecting human health is present in the water. In determining whether a discharge would cause a hazard to public health to exist, the secretary shall investigate and consider the purification and dilution reasonably expected to occur from the time and place of discharge to the time and place of withdrawal for use as human drinking water.

Under the clear terms of this definition, the types of discharges exempted, unless the Secretary determines that a “hazard to public health” exists, can result in exceedances of standards at some locations as long as drinking water standards are not exceeded at the time and place of a drinking water use. This approach hardly is consistent with the Movants’ unreasonably strict construction of the WQA.

As discussed above, the Court of Appeals clearly recognized that the Legislature did not intend that ground water quality standards must apply everywhere in the state where ground water exists.

Although the mine is a place where water is withdrawn for present use, it would be incorrect to conclude that, as a consequence, the entire mine site is a measuring point and must meet water quality standards everywhere. Not only is such a conclusion overbroad, it is also unrealistic to require all water at the Tyrone mine site to meet drinkable standards. . . . Thus, even though it is a conclusion that is arguably within the plain language of the statute, we *reject* such a broad and impractical interpretation of the Act; so interpreted, it would not reflect a balance between the competing policies of protecting water and yet imposing reasonable requirements on industry.

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2006-NMCA-115 ¶ 33 (emphasis added).

The Court of Appeals even invited the WQCC to consider a “point of compliance” approach. Within the Court’s interpretation of the Act, and consistent with the WQCC’s express authority to specify different regulations for “any specific geographic area, aquifer or watershed of the state or in any part thereof,” the WQCC clearly has the authority to specify locations where ground water quality standards do not apply even though the general purpose of the WQA, as recognized in *Bokum* and Section 74-6-4(E) of the WQA is to “prevent or abate ground water pollution.” See *State v. Cleve*, 1999-NMSC-017, ¶ 17, 127 N.M. 240, 247, 980 P.2d 23, 30 (“As a rule of statutory construction in determining legislative intent, ‘[w]here one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the letter will prevail . . . .’”(quoting Singer, *Southerland on Statutory Construction* § 5105 (5th ed. 1992); see also *Howell v. Heim*, 118 N.M. 500, 504, 882 P.2d 541, 545 (“[A]n agency’s authority is not limited to the express powers granted by statute, but also include those powers that arise from the statutory language by fair and necessary implication.”)).

**C. The WQCC has the authority to consider and adopt the Proposed Rule, and it should proceed with consideration of the regulatory provisions.**

The Motions also argue that the WQCC has no authority to adopt the Proposed Rule because it violates the WQA by allowing copper mines to exceed water quality standards without obtaining variance or alternative abatement standards. The WQCC is well within its authority to adopt the Proposed Rule, which is required under the WQA 2009 amendments. Freeport has previously briefed the scope of the WQCC’s authority in this rulemaking in a separate pleading entitled *Freeport McMoRan’s Brief on the WQCC’s Authority to Conduct a Copper Industry-Specific Rulemaking*, filed December 14, 2012 (“Freeport’s Brief on the WQCC’s Authority”).

Freeport hereby incorporates Freeport’s Brief on the WQCC’s Authority as if fully set forth herein.

The Motions’ objections focus on the varying requirements in the Proposed Rule depending on whether certain types of facilities are located inside or outside hydrologically isolated open pit areas. This distinction in the Proposed Rule is authorized by the WQA 2009 amendments that the copper industry regulations “may include variations in requirements based on . . . hydrologic conditions.” Section 74-6-4(K) NMSA 1978. Thus, for example, under the Proposed Rule, engineered design requirements for new waste rock stockpiles would vary depending on whether they are located inside or outside an open pit drainage area. *See* 20.6.7.21(B)(1) and (2) NMAC. Movants fail to mention or cite to the WQA 2009 amendments, much less analyze them, probably because they are an inconvenient reminder that the WQA contemplates a balanced approach to regulating economic activity such as mining, and such a balanced approach is antithetical to the inflexible positions they argue in the Motions.

### **III. SEPARATE RESPONSE TO ATTORNEY GENERAL’S MOTION TO REMAND<sup>3</sup>**

#### **A. Background Section**

The “Background” section of the Attorney General’s Motion to Remand begins by citing to various provisions of the WQA, regulations 20.6.2 NMAC and to the WQCC’s Decision and Order on Remand in the Matter of Appeal of Supplemental Discharge Permit for Closure (DP-1341) for Phelps Dodge Tyrone, Inc. for matter Nos. 03-12(A) and 03-13(A) (“Tyrone Permit Decision on Remand”), and language from various cases. The “Background” section then argues that these citations and references stand for the “long standing interpretation of the WQA” that the exceedances of water quality standards underneath a discharge site are prohibited unless: (1)

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<sup>3</sup> Freeport responds to the Attorney General’s Motion to Remand in this Response without intending to waive its view that it was inappropriate for the brief contesting the NMED’s position to have been authored by a legal representative who is taking positions adverse to her former client.

a site-specific determination is made that the discharge is not a “place of withdrawal”, or (2) the discharger obtains a variance or alternative abatement standards. *See* Motion to Remand at 6.

The Motion to Remand argues that these authorities control the WQCC’s decision in this case.

Freeport disagrees with the Attorney General’s claim that the Tyrone Permit Decision on Remand is somehow controlling relative to this rulemaking. Rulemakings are distinguished from an administrative adjudications by two principal characteristics: (1) rulemakings impact rights of broad classes of unspecified individuals, while adjudications resolve disputes amount specific individuals in specific case; and (2) rulemakings are prospective and have definite impacts on individuals only after the rule is subsequently applied, while adjudications have immediate impacts on specific individuals because they involve concrete disputes. *See Rauscher, Pierce, Refsnes, Inc. v. Taxation & Revenue Dep’t*, 2002-NMSC-013, ¶ 42, 132 N.M. 226, 46 P.3d 687; *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17, 102 L.Ed.2d 493, 109 S.Ct. 468 (1988) (the “central distinction” between rulemaking and adjudication is that the rules have legal consequences “only for the future”) (Scalia, J., concurring) (emphasis added).

The Tyrone Permit Decision on Remand was an adjudicatory decision on a permit, so it is inapplicable to this rulemaking. Although the Attorney General’s Motion to Remand cites to various portions of the Tyrone Permit Decision on Remand, the findings of fact and conclusion of law relative to closure conditions at this one site are inapplicable to this rulemaking which impacts a broader class of copper mines along with a broader set of requirements. The Proposed Rules will be prospective in nature, and the WQCC is charged by statute to chart a new path on how it regulates copper mining in the state; indeed, the WQCC has been mandated to so do by the 2009 WQA amendments.

The “Background” section of the Attorney General’s Motion to Remand further discusses and cites to previous mining-related legislation , newspaper articles related to this legislation, a procedural history of the litigation resulting in the Tyrone litigation referencing various pleadings, the Settlement Agreement and Stipulated Final Order dealing with the appeal of the Tyrone Permit Decision on Remand, Freeport’s 2011 Annual Report, and a procedural history dealing with the development of the Proposed Rule that cites to various e-mails, draft documents, and correspondence. Much of this information appears to be irrelevant to the Proposed Rules, but Freeport disputes and objects to such evidence being introduced at this point in the rulemaking proceeding. To the extent this information is relevant at all, it should be presented along with any direct testimony that may be offered by the Attorney General.

For the reasons set forth in Freeport-McMoRan’s Objections to the Procedural Order and Requests for Clarification (hereinafter, “Freeport’s Objections to the Procedural Order”), the introduction of evidence at this point in the rulemaking is inappropriate and prejudicial. Freeport incorporates this pleading as if fully set forth herein. Since a hearing has not been held on this rulemaking, at this point in time Freeport has been deprived of a “reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing” and offering such evidence. NMSA 1978, § 74-6-6(D).

Instead of engaging in a point-by-point discussion of why Freeport takes issue with the Attorney General’s section dealing with the “Background,” at its most fundamental level, the entire background mostly rests upon the Tyrone Permit Decision on Remand. Reliance on any facts or law cited in this administrative adjudication dealing with a permit is inappropriate because:

1. the Tyrone Permit Decision on Remand was appealed by Freeport, the appeal is still pending, and the WQCC, itself, authorized Tyrone and the Department to proceed with implementing the Settlement Agreement without being required to comply with the WQCC Final Order implementing its Tyrone Decision on Remand as set forth at pp. 84-85 of the decision;
2. the Tyrone Permit Decision on Remand was rendered before the Legislature passed and Governor Richardson signed the WQA 2009 amendments, so the WQCC's decision did not consider the paradigm shift in direction resulting from those amendments;
3. the WQCC must consider a different set of factors in adopting rules for the copper industry, including new factors specified in the WQA 2009 amendments, than it considered in reaching its Tyrone Permit Decision on Remand;
4. the Tyrone Court of Appeals Decision expressly concluded that the WQCC could interpret the "place of withdrawal" language as allowing for a "point of compliance" approach;
5. the Tyrone Court of Appeal Decision identified rulemaking as an alternative for the WQCC to resolve the issues raised in the Tyrone litigation, and the WQA 2009 amendments expressly require rulemaking for the copper industry;
6. the flaws of the Tyrone Permit Decision on Remand are illustrated by the terms of the Tyrone Settlement, wherein NMED and Freeport took a different approach than the WQCC specified to try to resolve the dispute; indeed, the WQCC's adoption of the copper industry rules are a necessary element to resolve the appeal

and could result in a clear and lasting resolution that can avoid future litigation;  
and

7. the WQCC, in any event, is not bound by its past decisions and may change its policies and interpretations of the law as long as it explains its reasons.

#### **IV. SEPARATE RESPONSE TO THE JOINT MOTION FILED BY THE ENVIRONMENTAL LAW CENTER ON BEHALF OF THEIR CLIENTS**

Without citing to the actual language in the Proposed Rule, the Joint Motion resorts to the insertion of inflammatory language such as “Sacrifice Zone” into the Proposed Rule language. In the first two pages of the Joint Motion alone, Movants assert five times that adoption of the proposed rule supposedly would “license” (a fabricated characterization of Movants’) mining companies to pollute groundwater. In the same first two pages, Movants four times also employ the invented term “Sacrifice Zone” in characterizing containment regimes employed in a variety of different ways by the proposed rule. Movants’ “license to pollute” and “Sacrifice Zone” themes pervade the Joint Motion. According to Movants, “mining companies can[not] lawfully pollute groundwater above standards within the Sacrifice Zone.” Joint Motion at 2. Movants argue that the Proposed Rule “runs afoul of the [WQA] and this WQCC’s (and the NMED’s) decades-long history of requiring *all* groundwater to meet standards.” *Id.*, p. 6 (emphasis added). Upon examination, Movants’ fabricated characterizations completely lack merit.

A key premise of the Joint Motion, in addition to the premise that the Proposed Rule violates the WQA, is that the Proposed Rule requires essentially no pollution prevention measures where hydrologic containment areas or open pit drainage areas are concerned. This premise is refuted by a straightforward review of the Proposed Rule language. For example, even where new stockpiles are located inside an open pit drainage area, stormwater run-on “shall be diverted or contained to minimize contact between stormwater run-on and the stockpiled material.” *See*

Proposed Rule 20.6.7.21(B)(2). Further, stormwater must be diverted outward and away from the perimeter of an open pit to the extent practicable, and may not be directed to an open pit. *See* Proposed Rules 20.6.7.24(A)(2). Water generated from within the perimeter of an open pit, meanwhile, “shall be managed according to a mine operation management plan.” *See* Proposed Rule 20.6.7.24(A)(3). Moreover, unless evaporation of water from pit impoundments creates the effect of a hydraulic sink (in which case groundwater standards would not apply at the bottom of the pit), hydrologic containment must be achieved by pumping and, after closure, the open pit water quality “must meet the groundwater standards of 20.6.2.3103 NMAC or be managed to mitigate exceedances of applicable standards outside the area of hydrologic containment.” *See* Proposed Rule 20.6.7.7(B)(42) and 20.6.7.33(D)(2).

The examples cited here are only examples. They demonstrate, however, that the Joint Motion mischaracterizes, grossly oversimplifies and/or misstates the robust requirements of the Proposed Rule. They also underscore the prudence of denying Movants’ premature and ill-conceived Joint Motion, and of allowing for testimony at the rulemaking hearing, and a sifting of evidence on the Proposed Rule from the agency proponent, from the parties, and from all interested members of the public.

The Joint Motion asserts that the Proposed Rule conflicts with the Tyrone Decision on Remand and the Tyrone Settlement. Joint Motion at 8-11. The WQCC clearly has the power, however, to adopt the Proposed Rule even if the WQCC concludes that the regulations are not consistent with the Tyrone Decision on Remand. As discussed in Freeport’s Brief on the WQCC’s Authority, the WQCC in this rulemaking is not bound by the Tyrone Decision on Remand and is free to change past WQCC policies as long as it explains its reasons for doing so. Moreover, Movants’ attempts to rely on various findings of fact in the Tyrone Decision on Remand relating to

“points of compliance” are neither here nor there because, as already discussed, the Proposed Rule does not expressly address either “points of compliance” or “places of withdrawal,” although the WQCC has the authority and discretion under the WQA to do so.

Further, although the Tyrone Settlement serves as the basis for both the stay of the pending appeal of the Tyrone Decision on Remand and the WQCC’s corresponding abeyance of its requirements, the Tyrone Settlement does not afford Movants’ any basis whatsoever to argue what should or should not be included in the Proposed Rule. Movants were not parties to the Tyrone Settlement. Moreover, although the Tyrone Settlement generally describes certain expectations of the parties about what might be included in a Proposed Rule, the parties amended out of the agreement certain references to variances.

**A. The Joint Motion’s invitation to dismiss the Proposed Rule based on scare tactics and self-serving mischaracterizations and oversimplifications should be rejected.**

Freeport strongly objects to the Joint Motion’s mischaracterizations of the Proposed Rule designed to cast doubt on the efficacy of the Proposed Rule in protecting groundwater resources in New Mexico. The Joint Motion states, for example, that monitoring wells would only have to be “located some distance down gradient,” implying that it is open-ended where they must be located. Joint Motion at 1. The Proposed Rule, however, is very explicit about where monitoring wells would have to be placed in relation to particular units of a typical copper mining facility and the requirements are prescriptive. For leach stockpiles, waste rock stockpiles and tailings impoundments, “[e]ach monitoring well shall be installed as close as practicable” to the unit, “including its leachate and solution capture and containment systems....” Proposed Rule 20.6.7.28(B)(2). Monitoring wells for process water and impaired storm water impoundments “shall be located down gradient and within 75 feet....” Proposed Rule 20.6.7.28(B)(3). Open pits

“shall” involve installing monitoring wells “around the perimeter” of the pit. Proposed Rule 20.6.7.28(B)(4). Monitoring wells are also required upgradient of new stockpiles and impoundments “to establish upgradient groundwater quality.” Proposed Rule 20.6.7.28. Other details regarding monitoring requirements appear in the same proposed rule at Proposed Rule 20.6.7.28.

The Joint Motion selectively and conveniently omits reference to many requirements of the Proposed Rule and mischaracterizes other provisions. What follows are numerous examples of how Movants’ parentheticals grossly oversimplify, misstate and/or mischaracterize the actual provisions themselves:

- 20.6.7.21(B)(1)(c)
  - **Movants’ parenthetical:** “(allowing leachate from waste rock stockpiles to pollute groundwater)”
  - **Actual Provision:** Requires installation and operation of interceptor wells or other measures to reduce, attenuate or contain any discharge of leachate that may cause groundwater to exceed applicable standards.
  
- 20.6.7.22(A)(4)(vi)
  - **Movants’ parenthetical:** “(allowing leachate from tailings stockpiles to pollute groundwater)”
  - **Actual Provision:** Provides for the design of seepage collection systems and a design report that includes an aquifer evaluation to demonstrate that interceptor wells will be able to efficiently capture seepage such that applicable standards will not be exceeded.
  
- 20.6.7.18.(F)(2)
  - **Movants’ parenthetical:** “(allowing existing impoundments to continue to pollute groundwater within the Sacrifice Zone)”
  - **Actual Provision:** Allows existing impoundments permitted to receive impacted water to continue to receive impacted water if monitoring shows they are functioning as designed, they have integrity, or they are covered by a variance; otherwise, the impoundment must be replaced or improved.
  
- 20.6.7.21(D)(4)

- ***Movants' parenthetical:*** “(no requirement to record or report leaks and spills inside the Sacrifice Zone)”
  - ***Actual Provision:*** Any leaks or spills of leachate escaping the waste rock stockpile and any associated contaminant containment shall be recorded and reported.
- 20.6.7.23(A)
- ***Movants' parenthetical:*** “(imposing no pollution prevention requirements on pipelines and tanks within the Sacrifice Zone)”
  - ***Actual Provision:*** Imposes engineering design requirements for *all* new pipelines and tanks to ensure, “at a minimum,” among other things: that they are constructed of impermeable materials that are compatible with their contents, and are resistant to degradation by ultraviolet light where exposed to sunlight; that all tank foundations are stable and free of irregularities that might jeopardize tank integrity; that all tank systems are designed to prevent overflow and the collection of surface water run-on; that all above-ground tanks are adequately bermed to particular specifications; and, that all below-grade tanks are designed with a secondary containment and a secondary containment leak detection system.
- 20.6.7.33(I)(4) and (6)
- ***Movants' parenthetical:*** “(no closure requirement to cover, revegetate, recover seepage or take other measures to stop pollution from impoundments and reservoirs within the Sacrifice Zone)”
  - ***Actual Provision:*** Requires covering and regarding of any reservoirs and impoundments if characterization of materials that are not naturally occurring show them to be a source or potential source of ground water contamination outside an open pit drainage area. Reservoirs and impoundments outside an open pit drainage area generally must be closed to achieve positive drainage. Also relevant are the definition of open pit drainage area and the specific requirements associated with closure of open pits that are either hydrologic sinks due to evaporation exceeding input volumes, or that are deemed to be flow through pits. The pit closure requirements appear at 20.6.7.33(D)(1) and (2).
- 20.6.7.20(B)(2)
- ***Movants' parenthetical:*** “(allowing existing leach stockpiles to continue to operate regardless of the pollution they may be causing)”
  - ***Actual Provision:*** An existing leach stockpile, including its associated collection or containment system, may continue to be operated as previously permitted without a synthetic liner, subject to the contingency requirements of 20.6.30 (which addresses corrective action plans and abatement plans,

etc.).

- 20.6.7.21(C)(2)
  - ***Movants' parenthetical:*** “(allowing existing waste rock stockpiles to continue to operate regardless of the pollution they may be causing)”
  - ***Actual Provision:*** Existing waste rock stockpiles may continue to operate as previously permitted unless groundwater monitoring of the stockpile pursuant to 20.6.7.28 requires implementation of corrective action under 20.6.7.30(A).
  
- 20.6.7.22(B)(2)
  - ***Movants' parenthetical:*** “(allowing existing pipelines and tanks to continue to operate regardless of the pollution they may be causing)”
  - ***Actual Provision:*** Existing pipelines and tanks may continue to operate as previously permitted, but if an existing tank or pipeline system cannot maintain integrity it shall be replaced in accordance with engineering requirements under 20.6.7.23 and 20.6.7.17.

At the very minimum, these examples make it clear the Joint Motion takes undue liberties with its parentheticals and has self-servingly misstated and/or oversimplified the Proposed Rule, in hopes of confusing the WQCC and/or to vent frustrations with the Proposed Rule.

## V. CONCLUSION

Setting aside rhetoric put forth in the Motions, the Proposed Rule represents NMED's policy choices on how to resolve competing interests under the WQA. Relying on a U.S. Supreme Court decision, the New Mexico Supreme Court has provided the necessary guidance on this point:

...an agency to which [the legislative branch] has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices-resolving the competing interests which [the legislative branch] itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, ¶ 16, 134 N.M. 472, 481, 79 P.3d 297 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66, 81 L. Ed. 2d 694, 104 S.Ct. 2778 (1984)).

Accordingly, the Proposed Rules reflects the incumbent administration's policy view on how to regulate the copper industry under the WQA. It is now time for the WQCC to take evidence on the Proposed Rule and decide upon competing policy interests that ultimately reflect the appropriate policies on copper mining for the State of New Mexico.

From Freeport-McMoRan's perspective, the Proposed Rule reflects a policy that allows for an economically viable and competitive copper mining industry using a regulatory approach that is technically practicable and ensures the highest reasonable level of ground water protection. That perspective will be supported by evidence in the hearing. Significant deviations from NMED's regulatory approach pose major risks for the copper industry in the State of New Mexico.

For the foregoing reasons, there is no legal basis to dismiss the Petition or any reason to remand the Proposed Rule to the Department for further consideration, and the WQCC should proceed with the hearing it previously scheduled to consider the proposed rule.

Respectfully Submitted,

GALLAGHER & KENNEDY, P.A.



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**CERTIFICATE OF SERVICE**

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

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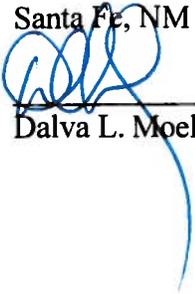
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