

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION



In the matter of:)
)
PROPOSED AMENDMENT TO)
PART 20.6.2 NMAC (Copper Rule))
_____)

No. WQCC 12-01(R)

**CLOSING ARGUMENT IN OPPOSITION TO THE COPPER RULE
AS PROPOSED BY THE NEW MEXICO ENVIRONMENT DEPARTMENT**

The Gila Resources Information Project (“GRIP”), Turner Ranch Properties, Inc., and Amigos Bravos (“the Aligned Parties”) respectfully submit this Closing Argument in Opposition to the Copper Rule proposed by the New Mexico Environment Department (“NMED”).¹ Under NMED’s Rule, waste rock stockpiles, tailings stockpiles, and impoundments at all copper mines will intentionally be designed to cause groundwater pollution rather than prevent it. The Rule places no clear limit on the extent, duration, or type of groundwater pollution it would allow, and the Rule would permit this pollution notwithstanding the fact that it is readily preventable through use of liners and other available means.

The Water Quality Control Commission (“the Commission” or “WQCC”) should not adopt NMED’s Rule. As described in detail below, the Rule violates the New Mexico Constitution, the Water Quality Act, the Natural Resources Trustee Act, the Public Trust Doctrine, and applicable case law. NMED’s Rule, moreover, would reverse NMED’s and this Commission’s decades-long practice of protecting all groundwater having a TDS² of 10,000 mg/l or less for use as a domestic and agricultural water supply. The only exception to this practice, provided on a case-by-case basis, was where the discharger obtained a variance or proved that

¹ NMED’s Proposed Copper Rule, filed February 18, 2013 (Doc. No. 45), is referred to herein as “NMED’s Rule” or “the Proposed Rule.”

² “TDS” means total dissolved solids.

there was no present or reasonably foreseeable use for the impacted groundwater. NMED's Rule dispenses with these requirements and would make pollution the rule rather than the exception.

For these reasons, as further explained in detail below, the Aligned Parties urge the Commission to reject NMED's Rule and remand it back to the Advisory Committee to develop a Rule that complies with law. Alternatively, the Aligned Parties ask the Commission to adopt the Joint Proposed Copper Rule submitted by the New Mexico Attorney General.

I. INTRODUCTION – THE WATER QUALITY ACT.

As described in detail below, the public owns all surface and ground water in New Mexico. New Mexico currently relies on groundwater for 50 percent of its needs. [Exhibit 52 - Shield's Pre-filed Testimony, Groundwater in New Mexico (2012), Darcy Bushnell, Esq., Water Matters! 2013, Utton Transboundary Resources Center] The reason groundwater is protected as an essential water supply in New Mexico is clear:

Approximately ninety percent of the people in New Mexico rely on groundwater for drinking water, and approximately ten percent of the population obtain their drinking water from private supply systems that are not subject to the federal drinking water standards.

N.M. Mining Association v. N.M. Water Quality Control Comm'n, 2007 NMCA 10, ¶ 23. The New Mexico Legislature recognized the importance of protecting groundwater and in 1967 enacted the Water Quality Act ("Act"). NMSA 1978, §74-6-1. The Act is the primary state law that protects water quality in the state. NMSA 1978, §§ 74-6-1 – 17. "The objective of the Water Quality Act ... is to abate and prevent water pollution." Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 555 (1979); see also NMSA 1978, §74-6-4(E). To accomplish this fundamental purpose, the Act requires the Commission to, among other things, "adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the Water Quality Act." NMSA

1978, §74-6-4(D). Pursuant to this mandate, the Commission in 1977 adopted numeric water quality standards to protect groundwater for present and reasonably foreseeable future use as a domestic and agricultural water supply. 20.6.2.3101 NMAC; N.M. Mining Association, 2007 NMCA 10, ¶¶ 7 & 9; Bokum, supra (upholding Commission’s adoption of water quality standards). The Commission’s existing regulations are written so that “if the existing concentration of any water contaminant in groundwater exceeds the standards in Section 20.6.2.3103 NMAC, no degradation of the groundwater beyond the existing concentration will be allowed.” 20.6.2.3101.A.2 NMAC.

The Water Quality Act compels NMED to deny permit applications that would cause an exceedance of standards at any place of withdrawal of water for present or reasonably foreseeable future use (referred to herein as the “place of withdrawal”). NMSA 1978, §74-6-5(E)(3). In interpreting the place of withdrawal language, the New Mexico Court of Appeals found that “[c]ertainly, the legislature meant to capture the concept that clean water that is currently being withdrawn for use, or clean water that is likely to be used in the reasonably foreseeable future, must be protected.” Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Commission, 2006 NMCA 115, ¶27. The Court noted that the issue is complicated by the fact that groundwater and surface water systems are interconnected and that “[c]ontaminated waters migrate into areas that were previously pristine” but the Court had “no doubt that the legislature intended to limit that kind of migration.” Id., at ¶29. It is the Commission’s charge to limit this kind of migration in conformance with the Act.

II. **NMED'S RULE IS DESIGNED TO PERMIT GROUNDWATER POLLUTION AT AND AROUND ALL COPPER MINES AND TO ALLOW THIS POLLUTION TO PERSIST WITHOUT ABATEMENT FOR HUNDREDS OF YEARS.**

It is undisputed that the vast, acid-generating stockpiles of ore, waste rock and tailings at many open-pit copper mines generate toxic leachate that can percolate into groundwater and cause pollution above the numeric water quality standards set out at 20.6.2.3103 NMAC ("3103 Standards").³ For example, NMED's independent consultant Adrian Brown testified:

Question: Can unlined waste rock piles and tailings piles cause groundwater contamination?

Answer: Yes.

Question: And is it possible that unlined waste rock piles that generate acid rock drainage or unlined tailings piles can -- impoundments can cause water pollution?

Answer: Yes.

Question: Does this typically occur on mine sites that you've worked on?

Answer: At least some of them, because not infrequently my work has revolved around developing remedies and containment strategies for them.

[Brown at 577-578] As admitted by witnesses from NMED and Freeport-McMoRan, Inc. ("FMI"), NMED's proposed Rule is designed to permit this and other types of water pollution at and around every copper mine in New Mexico. [Brack at 193, 197; Skibitski at 386, 985 (the Rule allows copper mines to pollute groundwater); Brown at 577-579, 587-588, 692-693 (the Rule allows unlined waste rock and tailings piles to pollute groundwater); Grass at 1889 (the proposed Rule allows leachate from waste rock and tailings piles to pollute groundwater above standards)] The Rule would, in fact, permit exactly the same kind of groundwater pollution that caused the New Mexico Natural Resources Trustee to bring a lawsuit against FMI for damages to natural resources, which FMI paid over \$13 million to settle. [NMAG Exhibit 11 (Doc. No. 51); Travers at 1593-1595; Kuipers at 2369; Smith at 2459-60]

³ As used herein, "pollution" refers to ground water pollution that exceeds 3103 Standards.

A. NMED's Rule creates "exempt areas" in which groundwater can be polluted at copper mines.

Several provisions of the proposed Rule are designed to accommodate mine operations that pollute groundwater. Most significantly, the Rule expressly waives 3103 Standards within the "area of hydraulic containment" during and after active mining operations. [Proposed Rule ("PR") §20.6.7.24.A.4 (providing that "... standards of 20.6.2.3103 NMAC do not apply within the area of open pit hydraulic containment" during mine operations); PR §20.6.7.33.D(1) (providing that "... standards of 20.6.2.3103 NMAC do not apply within the area of open pit hydraulic containment" during closure)] FMI's Vice President of New Mexico operations, John Brack, testified:

Question: All right. So if we go back to that section we were at before, it appears that the rule would waive standards within that area of open pit containment. Would you agree with that?

Answer: Yes.

[Brack at 197] The Rule would waive 3103 Standards for every water contaminant, including benzene and cyanide, not just those typically associated with copper mining. [PR §20.6.7.24.A.4; PR §20.6.7.33.D.1; see also Brown at 628-629, 636-637; Shelly at 1213; Blandford at 1435] On its face, the Rule allows leaks and spills to pollute groundwater within the area of hydraulic containment, regardless of whether the leaking fluid is process water, pregnant leach solution ("PLS"), acid mine drainage ("AMD"), gasoline, or some other fluid.

NMED's Rule would also allow AMD to leach freely into groundwater from mine units (i.e., leach, waste rock, and tailings piles) located outside the area of hydraulic containment (referred to herein as "exterior units"), provided the operator installs an interceptor system and one monitoring well.⁴ [See, e.g., PR §20.6.7.21.B.1.c (waste rock piles); PR §20.6.7.22.A.4.c

⁴ The Rule does not require any groundwater monitoring within the area of hydraulic containment. [Brown at 687, 693, 696; Blandford at 1455-56, 1458]

(tailings piles); see also, Brown at 531, 587-588]. For the purpose of monitoring, each exterior unit includes “its leachate and solution capture and containment systems.” [PR §20.6.7.28.B.2] Accordingly, unlined acid-generating exterior units actually consist of three components under NMED’s Rule—the source of pollution (*e.g.* an acid-generating waste-rock pile), the groundwater that the source pollutes, and the downgradient “capture and containment system.” Id. This arrangement enabled Mr. Brown to testify honestly that the Rule “stops [pollution] from getting out into the environment **from a unit**,” but only because the Rule treats each exterior “unit” as including the groundwater that it pollutes. [Brown at 583-584 (emphasis added); see also Brown at 661 (“there’s no such thing as escape [of pollution] out the sides” of an exterior unit)] Thus, the Rule allows mine operators to pollute groundwater both inside and outside the area of hydraulic containment. [Brown at 587, 813-814; Grass at 1889; Olson at 2130] These areas in which groundwater can be polluted under the Rule are referred to herein as “exempt areas.”

NMED’s Rule relieves mine operators from the usual duty to abate or even report groundwater pollution caused by unintended spills and leaks within exempt areas. [Brown at 737-742; Eastep at 1170; Shelly at 1170, 1179] No active abatement of the polluted groundwater would be required under the Rule, just monitoring and hydraulic “containment.” As eloquently summarized by Brian Shields, the clear effect of this new paradigm of permitting rather than preventing groundwater pollution will be to create sacrifice zones:

Our biggest concern is with the introduction of the whole new concept of creating a groundwater sacrifice zone where water quality standards do not apply without looking at site-specific criteria.

How can that be? How many groundwater sacrifice zones will we have in the state if this concept is adopted as general regulatory practice?

[Shields at 2499]

B. NMED's Rule imposes no limit on the extent of groundwater pollution it would permit.

The scope and duration of the groundwater pollution allowed by NMED's Rule would essentially be unlimited. The area of hydraulic containment (*i.e.*, one of the exempt areas where no water quality standards apply) may extend over several square miles, is largely within the control of the mine operator, and will change as mining progresses and in response to offsite and onsite groundwater pumping. [Brown at 627, 630, 635, 676; Blandford at 1380-1383, 1394, 1458; Travers at 1594] The area of hydraulic containment can also combine with groundwater containment systems associated with exterior units, further increasing the size of exempt areas where no water quality standards would apply. [Brown at 788]

Under NMED's Rule, exempt areas would be permitted to extend beyond the mine operator's property onto adjacent private, state, and federal lands. [Brown at 627, 635, 677, 732-734; Eastep at 1217-1218; Olson at 2134] Indeed, the Rule anticipates that some mines will be located entirely on leased property or on split estate (where the surface estate is owned by a third party). [PR §20.6.7.11.C.2; Eastep at 1217-1218] NMED is not even proposing to restrict the groundwater pollution to the mine operator's property, which was what Phelps Dodge had long proposed. [Decision and Order on Remand ("WQCC Order"), In the Matter of: Appeal of Supplemental Discharge Permit for Closure (DP-1341) for Phelps Dodge Tyrone, Inc.⁵ at 5, ¶ 10 (Doc. No. 51, NMAG Exhibit 1)]

⁵ Phelps Dodge is now FMI.

C. NMED's Rule places no limit on the duration of the groundwater pollution it would permit.

It is undisputed that the groundwater pollution permitted by NMED's Rule can and will persist for hundreds of years and possibly forever. As testified by Mr. Brown:

Question: That's where standards can be exceeded, and it appears that they can be exceeded if there's enough contaminant source forever.

Answer: Yes. The dynamics are such that sooner or later the pit will fill up and other things will happen, but I don't disagree with your characterization.

[Brown at 696; see also Brown at 618, 662, 667, 673-674, 804] The Court of Appeals took notice of the fact that copper mining can produce extensive and persistent groundwater pollution, finding that "the potential environmental impacts from a mine the size of Tyrone are enormous, both in scope and duration." Phelps Dodge Tyrone, Inc., 2006 NMCA 115, ¶33. The Court also stated:

The process of mining copper produces acid drainage that significantly and adversely affects groundwater. Piles continue to create acid drainage for hundreds of years after mining has ceased, as the piles are exposed to water and oxygen.

Phelps Dodge Tyrone, Inc., 2006 NMCA 115, ¶6 & ¶33; see also WQCC Order at 9, ¶¶ 28, 29 (finding that stockpiles at Tyrone Mine will produce acid mine drainage for hundreds of years). By creating ill-defined exempt areas where no water quality standards apply, NMED's Rule places no meaningful limit on either the scope or duration of groundwater pollution at copper mines.

D. The extensive groundwater pollution permitted by NMED's Rule cannot be contained for hundreds of years.

Contrary to decades of past agency practice, NMED now proposes to allow mine operators to pollute groundwater on the condition that they attempt to hydraulically contain the polluted groundwater, for hundreds of years. As Mr. Olson testified:

Question: And then would you -- would you characterize this rule as -- as one that allows groundwater pollution in excess of standards and then attempts to contain it?
Answer: Yes. . . .

[Olson at 2116-2117] However, Mr. Brown candidly admitted that pollution containment systems never truly contain all the pollution. [Brown at 588]

Moreover, several factors commonly cause containment systems to fail. For example, numerous containment systems had to be installed at FMI's acid-generating Tyrone Mine because several large waste rock stockpiles and other mine units there caused extensive groundwater pollution. [Shelly at 1197] These mine units will generate AMD and continue pollution groundwater for hundreds of years, and it is inevitable that the pumps and other mechanical systems that comprise the groundwater containment systems will eventually breakdown and fail during such an extended period of time. [Brown at 666-667] As long as the pumps are off there is no containment.

Even without mechanical failure a number of factors can cause containment and monitoring systems to fail. Anisotropy of an aquifer's hydraulic conductivity caused by fracturing, folding and faulting, which is common at hardrock mines, can cause pollution plumes to move substantially off-gradient rather than directly down-gradient where monitoring wells would be located under NMED's Rule. [Brown 781; Travers at 1589-1591; Kuipers at 2366] Groundwater gradients can be poorly characterized and they are subject to change over time as a result of onsite and offsite groundwater pumping. [Brown at 631-632; Kuipers at 2366-67] This creates considerable uncertainty, which increases with time, as to whether or how much a given containment system is actually stopping groundwater pollution from migrating into uncontaminated areas.

In the past this uncertainty prompted NMED to strongly oppose proposals to contain groundwater pollution rather than prevent it. For example:

NMED's expert testified that Tyrone's method was flawed for several reasons. He indicated that the pit capture zone might only protect one aquifer, while another aquifer became contaminated and allowed the contamination to move offsite. In addition to that problem, he indicated that there existed uncertainty about the actual location of the pit capture zone. Finally, NMED's expert testified that if contamination still exists after the pumping and treatment stop, nothing would prevent it from moving offsite and contaminating water elsewhere.

Phelps Dodge Tyrone, 2006 NMCA 115, ¶ 9. In the instant case, the experts agreed that prevention of groundwater pollution in the first place is superior to containment and remediation after-the-fact. [Brown at 594; Kuipers at 2360, 2361] It is just too difficult and costly to abate polluted groundwater to 3103 Standards. It is far easier to capture, collect and treat concentrated solutions of AMD **before** it enters groundwater than to capture and treat dispersed and relatively dilute solutions of polluted groundwater after-the-fact. [Kuipers at 2361] This is no doubt why Mr. Kuipers could not recall a single instance in which a mine unit was intentionally designed to pollute groundwater. [Kuipers at 2368] Yet this is exactly what NMED's Rule would do. Under the Rule, mine units would intentionally be designed to pollute groundwater.

III. NMED'S RULE VIOLATES THE WATER QUALITY ACT.

NMED created standard-free exempt areas in its Rule in order to permit vast stockpiles of acid-generating rock, impoundments of toxic chemicals, and other contaminant sources to be placed directly onto bare ground without a liner. NMED's Rule allows the leachate, effluent, and spills from these sources to migrate freely into groundwater, thus causing pollution for as long as the sources persist. [PR §20.6.7.21 (no requirement to line waste rock piles); PR §20.6.7.22 (no requirement to line tailings piles); Brown at 621-22, 658-659, 684 (the proposed Rule imposes no requirement to line acid-generating waste rock or tailings piles)] NMED's Rule would place

no clear limit on the extent, magnitude or duration of the pollution it would allow.⁶ [Skibitski at 435-436, 960, 975; Brown 605-608, 783; Olson at 2141] As set out in this section, the Commission has no authority to adopt such a rule or to otherwise legalize groundwater pollution.

A. NMED's Rule exceeds the Commission's authority under the Water Quality Act and violates separation of powers principles.

The fundamental purpose of the Water Quality Act is to protect and encourage present and future beneficial use of water in New Mexico. The Act accomplishes this purpose with respect to groundwater by forbidding pollution at “any place of withdrawal of water for present or reasonably foreseeable future use.” NMSA 1978, §74-6-5(E)(3). “Beneficial use” is the basis of all water rights in New Mexico (see, e.g., Walker v. United States, 2007 NMSC 38, 22) and therefore, the “place of withdrawal” language in the Act effectively protects existing and future water rights from being impaired by pollution. Cf. NMSA 1978, §72-12-3 (requiring State Engineer to protect existing water rights from impairment). In crafting the Act, the Legislature recognized that the beneficial use of water by mine operators and other dischargers might itself degrade groundwater quality. The Act allows this degradation but also expressly forbids it from impairing “water quality to the extent that water quality standards are exceeded.” NMSA 1978, §74-6-12(F). Finally, the Act mandates that the Commission adopt regulations “to prevent or abate water pollution” and “to specify in [such] regulations the measures to be taken to prevent water pollution.” NMSA 1978, §§74-6-4(D) & (K).

NMED's Rule does not comply with the forgoing basic legal requirements of the Water Quality Act. In fact, NMED's Rule is directly opposed to the Act's clear mandate of protecting groundwater quality for beneficial use. As set out above, the measures specified in NMED's

⁶ The Rule also wholly fails to include any requirements relating to the connection between surface water and groundwater. Cf. Phelps Dodge Tyrone ¶ 29 (“but the issue [of where standards must be met] is complicated by the fact that groundwater and surface water systems are interconnected”).

Rule are designed to **cause** extensive water pollution at and around copper mines, not prevent it. The Rule would allow this pollution without regard to places of withdrawal. On its face, therefore, the Rule violates the Water Quality Act.

Copper mines are not exempt from the Water Quality Act, which protects all groundwater water in New Mexico that has a present or reasonably foreseeable future use. NMSA 1978, §§ 74-6-2(H) & 74-6-4(K). In Tyrone Phelps Dodge the Court of Appeals described the general intent of the Act as follows:

Certainly, the legislature meant to capture the concept that clean water that is currently being withdrawn for use, or clean water that is likely to be used in the reasonably foreseeable future, must be protected.

2006 NMCA 115, ¶27. In another case, after reviewing the Act's clear mandate to protect water from pollution, the Court of Appeals found "it hard to believe" that this Commission would ever allow waste to be discharged directly into public water. Bybee v. City of Albuquerque, 120 N.M. 17, 20 (Ct. App. 1995). Yet this is exactly what NMED and FMI invite the Commission to do.⁷

The Commission should decline this invitation because it has no authority under the Act to permit groundwater pollution by rule. In re PNM Elec. Servs., 1998 NMSC 17, ¶ 10 ("Statutes create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute.") If the Commission were to adopt NMED's Rule, it would infringe on the Legislative branch of government and thus violate "separation of powers principles." State ex rel. Sandel v. New Mexico Pub. Util. Comm'n, 1999 NMSC 19, 12, 127 N.M. 272 ("[s]uch an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on

⁷ Acid mine drainage and other pollution generated by copper mining falls easily within the definition of "wastes" under the Water Quality Act. NMSA 1978, §74-6-2(D) (defining "wastes" to mean "sewage, industrial wastes or any other liquid, gaseous or solid substance that may pollute any waters of the state").

its own.”). The legislative policy clearly expressed in the Water Quality Act is that of preventing and abating water pollution, and it is not within the Commission’s prerogative to reverse that policy.⁸

B. NMED has misconstrued the meaning of “place of withdrawal.”

In order to justify its proposed legalization of groundwater pollution, NMED is forced to misconstrue the Water Quality Act. Among other things, NMED claims that the Act and the WQCC Regulations protect only **present domestic** and **agricultural** uses of water. [Brown at 594, 613-614, 622] This is not correct. The Act protects **all** places of withdrawal for **any** present and **any** reasonably foreseeable future beneficial use, not just present domestic and agricultural uses of water. NMSA 1978, §74-6-5(E)(3); Phelps Dodge Tyrone, 2006 NMCA 115, ¶27; see also State v. Trujillo, 2009 NMSC 12, ¶11 (“[we] will not read into a statute any words that are not there”). The Commission’s “regulations and standards,” in turn, are designed to protect “groundwater for use as domestic and agricultural water supply” regardless of how the water is presently being used. N.M. Mining Ass’n, 2007 NMCA 10, ¶7. This is consistent with the Act. It also takes into account the fact that the purpose of a water right can change at any time from industrial use, for example, to domestic or agricultural use. Clodfelter v. Reynolds, 68 N.M. 61, 66 (1961) (“a water right is a property right and inherent therein is the right to change the place of diversion, storage, or use of the water”); Brown at 614. This is no doubt why the Legislature requires the Commission’s regulations to take into account “successive uses [of water], including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses.” NMSA 1978, §74-6-4(E)(4).

A place of withdrawal is any aquifer that contains groundwater for which there is a present or reasonably foreseeable future beneficial use. By their nature, therefore, places of

⁸ As set out below, a policy of allowing groundwater pollution by law also exceeds the Legislature’s authority.

withdrawal can only be determined on a case-by-case basis. The Court of Appeals recognized this fact in Phelps Dodge Tyrone. It opined that “the unique geology and hydrology of the area and the particular site, including the mining or other operations and its scale, may be appropriate factors” for deciding how places of withdrawal are identified. 2006 NMCA 115, ¶36. [See also WQCC Order at 78-79, ¶¶ 15-21 (identifying site-specific criteria for identifying places of withdrawal on a case-by-case basis); Olson at 2332] NMED’s Rule includes no criteria for identifying places of withdrawal and, in fact, does not even use this language. The Rule would permit groundwater pollution with no regard to whether there is any present or reasonably foreseeable use for the polluted water. No prior administration, Republican or Democratic, has ever done this. [WQCC Order at 6, 7, 15-17, 22, 77, 80, 83]

C. NMED’s Proposed Rule is inconsistent with NMED’s and Commission’s long history of protecting all groundwater that has a TDS of 10,000 mg/l or less.

The Commission and NMED have a decades-long history of requiring all groundwater to meet standards unless the operator obtained a variance or demonstrated that the impacted groundwater was not a place of withdrawal. [Olson at 2010; (Doc. No. 54, WCO Exhibit 1); WQCC Order at 22 ¶83 (NMED’s expert “testified that NMED’s practice for at least the last 21 years has been to ensure that all ground water underneath a discharge site meets ground water quality standards”); WQCC Order at 77 ¶9 (“[e]xcept to the extent that existing conditions exceed standards, all ground water having a TDS of 10,000 mg/L or less ‘shall meet the standards of subsection A [human health standard], B [domestic water supply standards] and C [standards for irrigation use], unless otherwise provided.’ 20.6.2.3103 NMAC.”)] Accordingly, the discharge permits that NMED issued were intended to prevent groundwater pollution, not allow it. [Skibitski at 269; Brown at 832 (not aware of any permit that allowed pollution); Olson at 2137 (no permit has authorized pollution)] NMED successfully argued in the Phelps Dodge

Tyrone case, and the Commission concluded, that nothing in the Act permits groundwater pollution upgradient from points of compliance. [WQCC Order at 11-23, ¶¶43-86] Thus, NMED's instant proposal—to allow groundwater pollution within exempt areas without regard to places of withdrawal—represents a 180-degree change in position. NMED offered no rationale to justify this change.

D. The Water Quality Act provides for variances only on an individual basis.

The Water Quality Act allows the Commission to grant variances from its regulations, but only on an **individual** basis. NMSA 1978, §74-6-4(H). Nothing in the Act supports NMED's proposal to grant a “variance by rule” for an entire industry.

Before the Commission may grant a variance under the Act it must conduct a public hearing. This hearing is an adjudication at which parties enter appearances and have certain rights of due process. Id.; 20.1.3.18 NMAC. At the hearing the discharger must prove that “compliance with the regulation [at issue] will impose an unreasonable burden upon [the discharger's] lawful business, occupation or activity.” NMSA 1978, §74-6-4(H). Even if this burden it met, the “commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time,” which is no longer than five years under current regulations. Id.; 20.6.2.1210.C NMAC. NMED's Rule conflicts with these procedural and substantive requirements. These requirements are designed to guard against ill-advised variances and to protect the rights of all concerned—dischargers, nearby property owners, and other interested parties. In contrast, NMED's Rule would allow dischargers to pollute groundwater above standards at all copper mines without any site-specific hearing, without any showing of unreasonable burden, and without any requirement to abate the resulting pollution.

IV. NMED's RULE CONFLICTS WITH THE NEW MEXICO CONSTITUTION AND PUBLIC TRUST DOCTRINE.

In addition to violating the Water Quality Act, NMED's casual proposal to permit water pollution by rule is irreconcilable with the status of water under the New Mexico Constitution, statutory law, and the public trust doctrine. The Court of Appeals declared in Bybee v. City of Albuquerque:

Water has constitutional significance in New Mexico. ... Its scarcity and overall importance in our semiarid state precludes our taking ... a casual view of water.

120 N.M. 17, 20 (Ct. App. 1995). In Kaiser Steel Corp. v. W. S. Ranch Co., the New Mexico Supreme Court declared:

Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.

81 N.M. 414, 417, 467 P.2d 986, 989 (1970); see also, e.g., NMSA 1978, §74-1-12(A) (describing water as "the state's most precious resource."). These declarations by New Mexico's highest courts reflect the great importance given to public water in New Mexico's Constitution and statutes.

The New Mexico Constitution declares that all water in New Mexico "belong[s] to the public and [is] subject to appropriation for beneficial use" N.M. Const. Art. XVI, § 2; NMSA 1978, §72-12-1 (declaring groundwater "to belong to the public and is subject to appropriation for beneficial use"); NMSA 1978, §72-12-18 (same). Public water in New Mexico is held in trust by the State for the benefit of the public. See, e.g., New Mexico v. GE, 467 F.3d 1223, 1243 (10th Cir. 2006) (holding that New Mexico has codified "the public trust doctrine as to groundwaters"). The New Mexico Constitution declares that "water and other natural resources of this state" are "of fundamental importance to the public interest, health, safety and the general

welfare,” N.M. Const. Art. XX, § 21, and the Legislature declared the pollution of public water to be a criminal public nuisance. NMSA 1978, §30-8-2. NMED’s proposal to pollute public water cannot be reconciled with these authorities. If the Commission were to adopt this Rule, it would not merely exceed its statutory authority; it would breach its fiduciary duty to protect public water for use by the public.

Groundwater in New Mexico is held by the State as trustee for the benefit of the public, not for private corporations like FMI. New Mexico v. GE, *supra*; *see also* State ex rel. Bliss v. Dority, 55 N.M. 12, 17 (1950) (“The public waters of this state are owned by the state as trustee for the people, Murphy v. Kerr, D.C., 296 F. 536”); State ex rel. Erickson v. McLean, 62 N.M. 264, 271 (1957) (“there is no ownership in the corpus of [public] water but the use thereof may be acquired and the basis of such acquisition is beneficial use.”). Pursuant to its fiduciary duty as trustee, the State must preserve “such waters for the use of the public.” Illinois C. R. Co. v. Ill., 146 U.S. 387, 453 (1892). NMED’s Rule violates this duty.

NMED’s Rule would grant private mining corporations the exclusive right to use public groundwater for the purpose of disposing of their toxic leachate and other wastes generated by their operations. Mr. Brown stated the following about the groundwater pollution that the Rule allows in exempt areas:

The Rule establishes a groundwater protection system that takes into account the fact that groundwater immediately under waste rock and leaching piles is not protected as domestic or agricultural use because it is **presently in use for mining activities**.

[Brown at 817 (emphasis added)] In response to questioning, Mr. Brown elaborated on the implication of this aspect of the Rule:

Question: So the groundwater, you're saying, is presently in use by mining activities. That's what you're saying?

Answer: Yes.

Question: And you would have to extend that to the entire area of open pit hydrologic containment, would you not, not just the area -- the groundwater immediately below waste rock facilities and leaching piles, would you not?

Answer: Yes, I believe so.

Question: So the present use of the groundwater by the mining company -- are you saying the present use of the groundwater by the mining company precludes all other uses?

Answer: Under the units, yes, or can. It doesn't have to, but it can.

Question: Okay. And you're -- are you aware that in New Mexico groundwater belongs to the public?

Answer: I am.

Question: So the mining company is using public groundwater as part of its mining system. Is that -- is that what you're saying?

Answer: Yes, at least in part.

[Brown at 817-818]

The mining company's alleged "right to use" public groundwater under the proposed Rule consists of polluting it to such a degree that the public would be precluded from using it for domestic and agricultural purposes for hundreds of years. *Id.*; see also N.M. Mining Ass'n, 2007 NMCA 10, 7 (holding that 3103 Standards and abatement regulations "protect groundwater ... for use as domestic and agricultural water supply"). [See also Lande at 1222 (domestic and agricultural use requires 3103 Standards to be met)] FMI testified, moreover, that it would defend its exclusive right to pollute public groundwater under the Rule by, among other things, protesting proposed new uses by the public.⁹ [Eastep at 1204] However, not even the Legislature could grant such a right to pollute public water to a private corporation, much less the Commission, without breaching the public trust doctrine. Illinois, supra.

Nothing in the record indicates that pollution of groundwater is, or ever could be, within the scope of a water right in New Mexico. Indeed, beneficial use is the only basis of a water right

⁹ There is no right to file such protests against new domestic and stock-watering rights. NMSA 1978, §72-12-1.

in New Mexico, and the Water Quality Act expressly forbids beneficial use that would cause an exceedance of 3103 Standards. NMSA 1978, §74-6-12(F). Accordingly, the Commission cannot adopt NMED's Rule without violating the public trust doctrine and exceeding its authority under the Act.

V. **NMED'S RULE CONFLICTS WITH THE PHELPS DODGE TYRONE DECISION.**

NMED's Rule suffers from the same fundamental problem that caused the Court of Appeals to reverse the Commission in Phelps Dodge Tyrone— it fails to make any determination as to whether places of withdrawal might be impacted by a discharge. During and after active operations at a copper mine, the Rule would allow groundwater pollution across-the-board with no regard to the present or reasonably foreseeable future water rights of third parties. The Rule also fails to consider the mine operator's present or intended future water rights. In addition to drinking water wells, mine operators withdraw groundwater in connection with pollution interceptor systems and open-pit dewatering, all of which require water rights to operate. [Brown at 616, 790, 2524; Eastep at 1204; Blandford at 1406] Finally, if the Rule actually does require 3103 Standards to be met "everywhere" in groundwater at some point after closure, as testified by Mr. Brown and others,¹⁰ then this too violates the Phelps Dodge Tyrone decision. Indeed, this is exactly the same overbroad, arbitrary requirement that caused the Court of Appeals to reverse the Commission in the Tyrone case. Phelps Dodge Tyrone at ¶¶ 26, 32-35.

In Phelps Dodge Tyrone, Inc., FMI complained that the Commission arbitrarily deemed its entire Tyrone Mine a place of withdrawal under the Water Quality Act, thus requiring all groundwater beneath the Mine and the pit lake to achieve 3103 standards. 2006 NMCA 115, ¶26. Because neither the Act nor the regulations provide guidance for determining what constitutes a place of withdrawal, the Court of Appeals reversed the Commission on two permit conditions

¹⁰ Whether the Rule does this or not is unclear, as discussed below.

and remanded the case to the Commission to develop “some general factors or policies to guide its determination” as to what constitutes a place of withdrawal. *Id.*, 2006 NMCA 115, ¶¶ 34, 35. The Court instructed the Commission that it could impose the same permit conditions as before, so long as these conditions related to “a reasonable place, or reasonable places, of withdrawal” based on “appropriate factors.” *Id.*, 2006 NMCA 115, ¶37.

As shown above, NMED’s proposed Rule commits the same error that led to reversal of the Commission in Phelps Dodge Tyrone—it imposes permit conditions relating to groundwater quality without first defining “a reasonable place, or reasonable places, of withdrawal” based on “appropriate factors.” *Id.* at ¶ 37. Although NMED’s Rule would establish conditions that are intended to **permit** groundwater pollution, whereas those conditions at issue in Phelps Dodge Tyrone were intended to **prevent** it, the underlying legal problem is identical.¹¹ Nothing in NMED’s proposed Rule or in any of the Commission’s existing regulations provide any guidance to assist the Commission or NMED in ascertaining reasonable places of withdrawal. The only existing guidance is that which the Commission provided in its WQCC Order on remand from Phelps Dodge Tyrone, which NMED seeks to disregard and re-litigate.¹²

VI. NEITHER NMED NOR THE COMMISSION CAN RE-LITIGATE ISSUES FINALLY DECIDED IN THE PHELPS DODGE TYRONE CASE.

GRIP was a party to the Phelps Dodge Tyrone case. The Hearing Examiner in the instant case allowed GRIP a standing objection to the attempt by NMED and FMI to re-litigate issues that the Commission finally decided in the Phelps Dodge Tyrone case after conducting an extensive evidentiary hearing. [Frederick at 1022] GRIP reinstates this objection and specifically

¹¹ Despite the absence of any supporting language in the Rule, NMED’s expert eventually came to the conclusion that the Rule would require mine operators to hydraulically contain polluted groundwater until 3103 standards are met everywhere at every mine—even if it required hundreds of years. [Brown at 668, 766, and 817; see also Blandford at 1422] If the Rule actually does require this, then it would again run afoul of Phelps Dodge Tyrone.

¹² The inconsistencies between NMED’s proposed Rule and the WQCC Order have already been extensively briefed by the NMAG and the Aligned Parties. WQCC 12-01 (R) Doc. Nos. 5, 11, 12, 16, 18, 20, 21, 25, 30, 31, 33, and 34. This Closing Arguments incorporates this briefing by reference.

objects to the relitigation of any finding of fact or conclusion of law set out in the WQCC Order. See Shovelin v. Central N.M. Elec. Coop., 850 P.2d 996, 115 N.M. 293 (1993).

The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of “facts or issues actually and necessarily decided in a prior suit.” Shovelin, 850 P.2d at 1000 (citing International Paper Co. v. Farrar, 102 N.M. 739, 741, 700 P.2d 642, 644 (1985) and quoting Adams v. United Steelworkers, 97 N.M. 369, 373, 640 P.2d 475, 479 (1982)). Collateral estoppel also applies to the decisions of administrative agencies, such as the WQCC Order the Phelps Dodge Tyrone case. See Shovelin, 850 P.2d at 1000 citing Restatement § 83 (“[A] valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.”).

VII. NMED’S RULE VIOLATES THE NATURAL RESOURCE TRUSTEE ACT.

Under federal law each state is required to appoint a natural resource trustee to act on behalf of the public as trustees for natural resources. 42 U.S.C. 9607(f)(2)(B). “[T]he authorized representative of any State, **shall act on behalf of the public as trustee of such natural resources** to recover such damages.” 42 U.S.C. 9607(f)(1) (emphasis added). Currently in New Mexico, the Natural Resource Trustee designated by the Governor is the Secretary of Environment. <http://onrt.nmenv.state.nm.us/Trustees.html>. As Trustee, the Secretary of Environment is required to “act on behalf of the public to protect New Mexico's natural resources by recovering damages for injury to, destruction of or loss of those resources.” NMSA 1978, §75-7-3(A)(1). The Trustee has a duty to act on behalf of the public to protect New Mexico’s groundwater. It is a conflict of interest and a breach of trust for the Secretary to allow groundwater pollution as proposed by NMED’s Rule.

In 2010, the Trustee filed a Complaint and Consent Decree seeking damages for injury to the loss of groundwater resources belonging to the State resulting from releases of hazardous substances from the Chino, Tyrone, and Cobre Mines. [NMAG Exhibit 11 (Doc. No. 51)] At the Chino Mine the estimated areal extent of groundwater pollution was 13,935 acres; at the Tyrone Mine it was 6280 acres; and at the Cobre Mine it was 528 acres. [NMAG Exhibit 11 (51)] Ultimately, FMI paid \$13 million to settle the case. Id.

NMED's Rule is contrary to the Trustee's duty to protect and represent the state's interest under applicable federal laws regarding injury to or loss of natural resources within the state. NMSA 1978, §75-7-2. NMED's Rule will allow extensive and virtually permanent groundwater pollution within the exempt areas at copper mines. [Brown at 587-588; Grass at 1889; Olson at 2115-17] The Rule would impose no requirement to determine whether these polluted areas are within present or future places of withdrawal. This pollution represents the same kind of injury to the natural resources that the Trustee has a duty to protect. Accordingly, NMED's Rule is a breach of the Trustee's duty and a violation of the Natural Resources Trustee Act. [PR §20.6.7.21.B.1; PR §20.6.7.22.A.4; PR §20.6.7.33.D]

VIII. NMED's RULE WILL ENCOURAGE OTHER INDUSTRIES TO SEEK THE RIGHT TO POLLUTE GROUNDWATER BY RULE.

As extensively discussed above, NMED's Rule effectively waives 3103 Standards, thus granting the copper mining industry the right to pollute public groundwater. Other industries will no doubt want the same right. [Leavitt at 2209-2214] In fact, the dairy industry recently filed a petition to amend this Commission's dairy regulations to accomplish just that—to obtain right for dairies to pollute New Mexico's public groundwater by rule. August 5, 2013, SECOND PETITION TO AMEND 20.6.6 NMAC (DAIRY RULE) AND REQUEST FOR HEARING, In

the Matter of PROPOSED AMENDMENT TO 20.6.6 NMAC, No. WQCC 13-08 (R).¹³ Others, such as subdivision developers, dry cleaners, gas station owners, and the federal government will likely follow suit. [Leavitt at 2212] This Commission should recognize that we depend on New Mexico's limited groundwater resources for survival. Containment and treatment of polluted groundwater to standards is difficult and expensive, and in many cases, impossible to achieve. Accordingly, prevention should be the rule not the exception.

IX. NMED'S RULE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IT IS AMBIGUOUS, AND IT IS IMPROPERLY DESIGNED TO BENEFIT ONE PRIVATE CORPORATION—FREEPORT MCMORAN.

A. NMED failed to provide competent testimony in support of its Rule.

A fundamental problem with NMED's petition is the fact that not one competent NMED staff member testified in support of it. NMED put on only two witnesses—Mr. Skibitski and Mr. Brown. Mr. Skibitski admitted that he was only temporarily "acting" in his current position and that he had no knowledge, experience or training relevant to copper mining. [Skibitski at 262, 337, 369-372, 499] And although Mr. Brown has extensive experience working for the mining industry, he testified as an independent contractor, admitting that he had no authority to bind NMED to his various interpretations of the Rule. [Brown at 595-598] Both NMED witnesses admitted that NMED has competent technical personnel on staff, but neither knew why none of them appeared at hearing to provide testimony to the Commission. [Skibitski at 374-375; Brown at 601] In any event, because of Mr. Skibitski's lack of competence and Mr. Brown's lack of authority, NMEkD failed to meet its burden of providing substantial evidence to support its petition. See Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 471 (Ct. App. 1987) (the burden is on the petitioner of a regulation); City of Santa Fe v.

¹³ The Aligned Parties ask the Commission to take notice of this Petition.

Woodard, 122 N.M. 449, 11 (1996) (“[to] be substantial, the evidence must be both competent and relevant.”).

B. NMED’s Rule is ambiguous.

NMED’s failure to provide competent testimony leaves several substantial ambiguities regarding key provisions of its proposed Rule unresolved. Most importantly, it is unclear under the Rule whether any of the groundwater that is polluted by a copper mine would ever be required to meet 3103 Standards. On the one hand, Mr. Brown and other witnesses testified that all groundwater at a mine site would ultimately have to meet 3103 Standards—even if it takes hundreds of years—before the mine operator would be allowed to cease its groundwater monitoring and containment activities. [Brown at 668, 766, 817; Blandford at 1422]

On the other hand, no express language in the Rule imposes this requirement. This led several witnesses to testify that it was unclear whether, where, or when 3103 Standards would ever have to be met under the Rule. [Travers at 1601; Olson at 2128; Kuipers at 2376, 2381-2383; Smith at 2464] As if to underscore this uncertainty, NMED’s and FMI’s witnesses testified earlier in the hearing that 3103 Standards need only be met at certain monitoring wells, contradicting other testimony by the same parties that 3103 Standards had to be met everywhere, although it may take hundreds of years. [Brack at 187; Skibitski at 367; Brown at 588, 762; Blandford at 1405; see also PR §20.6.7.33.D.2 (referring to exceedance of “applicable standards” at monitoring wells)] Moreover, the Rule refers repeatedly to “applicable standards” rather than 3103 Standards, and it defines “applicable standards” to include “alternative abatement standards.” [PR §20.6.7.7.B.3] Alternative abatement standards by definition allow polluted groundwater to exceed 3103 Standards where remediation to 3103 Standards is infeasible. [20.6.2.4103 NMAC] Accordingly, on its face, NMED’s Rule never unequivocally requires

groundwater polluted by a copper mine to be abated to meet domestic and agricultural use standards.

Another ambiguity is caused by NMED's failure to limit the definition of a "copper mine facility" to one that mines copper:

"Copper mine facility" means all areas within which mining and its related activities that may discharge water contaminants occurs and where the discharge will or does take place including, but not limited to open pits; waste rock piles; ore stockpiles; leaching operations; solution extraction and electrowinning plants; ore crushing, ore milling, ore concentrators; tailings impoundments; smelters; pipeline systems, tanks or impoundments used to conveyor store process water, tailings or impacted stormwater; and truck or equipment washing facilities.

[PR §20.6.7.7.B.13] Nothing in this definition requires extraction of "copper." Similarly, although the Rule defines "open pits," "tailing impoundment," and "waste rock," nothing in the Rule requires these units to be related to the mining of copper ore. It is unclear on the face of NMED's Rule whether it applies only to copper mines or whether it would also apply to other types of mines, such as gold, silver or molybdenum mines. As in other instances, Mr. Brown could not definitively speak to NMED's intentions. [Brown at 641]

C. It is not necessary to permit groundwater pollution by rule in order to allow copper mining in New Mexico.

This Commission does not need to permit groundwater pollution by rule or waive all 3103 standards in order to accommodate copper mining in New Mexico. Not all copper mines pollute groundwater. [Brown at 577; Shelly at 1207; Lande at 1209, 1210; Kuipers at 2354-2355] Moreover, groundwater pollution at sulfide copper mines—which do pollute groundwater—can be prevented by lining acid-generating stockpiles and impoundments and through other available measures that prevent contaminants from contacting groundwater in the first place. [Scott at 1815-1818 (admitting that tailings comprising several hundred acres can be lined); Grass at 1884, 1886-1888, 1896, 1897; Deichmann at 2073, 2074; Kuipers at 2356, 2357, 2359, 2360,

2363, 2370-2373] Another copper mine in New Mexico, Copper Flats, is engineering a 530 acre liner for its tailing storage to prevent pollution. [Deichmann at 2073, 2077] Lined stockpiles are routinely engineered to prevent drainage and structural problems [Grass at 1886; Kuipers at 2370-2373], and tailings can be paste-stacked or dry-stacked so that they generate little or virtually no leachate. [Kuipers at 2358-2359, 2391-2392, 2418-2420] Indeed, dry-stack stockpiles are standard operating practice in countries like Chile where water is scarce—as it is in New Mexico. [Id.; Garland at 2473-2476]

The only unavoidable groundwater pollution at copper mines is pollution generated by exposing sulfide rocks to air and water in an open pit. [Brown at 673, 674; Lande at 1208; Olson at 2142-2144; Kuipers at 2400, 2401] This generally causes the pit lake to have elevated total dissolved solids and metals and an acidic pH. Id. These exceedances, however, will naturally terminate after mining stops and the pit fills with water. [Finely at 1941] Thus, there is no need to permanently waive all 3103 Standards to accommodate copper mining. NMED's proposal to do so is not only contrary to law, it is bad public policy. It would encourage mine operators to view the groundwater beneath their mines as standard-free dumping grounds, and it would set a bad precedent of allowing pollution by rule—an advantage that others industries will no doubt seek to obtain.

Finally, the types and amount of pollution that a given copper mine will produce can only be determined on a site-specific basis. [Brown at 663, 664, 673, 674; Olson at 2144, 2437; Kuipers at 2401] If a particular open pit will unavoidably generate groundwater pollution at a place of withdrawal, then the Commission may where appropriate grant a variance after due notice and a public hearing. NMSA 1978, §74-6-4(H). The availability of variances under the Act means that there is no need to allow pollution across-the-board by rule at all copper mines,

as NMED is proposing.¹⁴ Thus, although the Commission may in appropriate circumstances decide to allow groundwater pollution, the Water Quality Act requires that it do so only in the context of a variance or other site-specific adjudicative hearing.

X. CONCLUSION

For all of the foregoing reasons, the Commission should not adopt NMED's proposed Rule. The Rule is contrary to law, ambiguous, and not supported by substantial evidence. This Commission would, moreover, act capriciously if it were to reverse its decades-long policy of preventing water pollution and enforcing 3103 Standards in favor of one corporation—Freeport-McMoRan. Furthermore, as stated succinctly by Ms. Smith:

I don't think that I could possibly overstate the negative impacts these rules could have on the communities near where I live.

... I think these rules might allow the same kind of pollution at new mines in different communities that they have -- that these existing mines have already created, and that seems to me to be a shame because we should learn from our past mistakes.

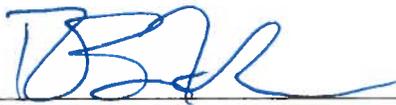
Also, I think they set a very dangerous precedent for other industries, as Mr. Olson has been very clear about. I think of water as a lifeblood of our state. I think it's precious. I think we should protect it. I think the integrity of this Water Quality Commission and the Environment Department are at stake if you actually approve these regulations as written. I truly believe that.

[Smith at 2464] Ms. Smith has lived and worked in a community that has for decades suffered the substantial adverse impacts of groundwater contamination and other forms of pollution caused by irresponsible copper mining practices. These practices would be codified permanently under NMED's proposed Rule, and therefore, we urge the Commission to reject it.

¹⁴ Substantial evidence in the record shows clearly that although NMED is proposing to allow groundwater pollution at all copper mines, it is doing so as a special accommodation to FMI whose mines have caused such extensive groundwater pollution in New Mexico and elsewhere. [Skibitski at 357-360; Shelly at 1197, 1199, 1235; Olson at 2107, 2126, 2127, 2130, 2131; Smith at 2461]

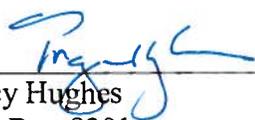
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I hereby certify that on August 22, 2013, I sent Closing Argument in Opposition to the Copper Rule as Proposed by the New Mexico Environment Department by email to the following:

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