STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

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

No. WQCC 12-01(R)

WRITTEN STATEMENT OF DOUGLAS C. LITTLEJOHN

My name is Douglas C. Littlejohn, and I am presenting this written statement in the New Mexico Water Quality Control Commission ("Commission") rule-making hearing, Case No. WQCC 12-01(R). I submit this written statement in two capacities: first, as a private citizen who will be directly affected by this rule-making proceeding, and second, as a licensed attorney in good standing in the State of New Mexico (State Bar No. 20340) who is interested in the protection of New Mexico's precious and scarce water resources. I am presenting this written statement in response to the New Mexico Environment Department ("NMED") Petition for Copper Mine Rules ("Rules") filed with the Commission on October 30th, 2012. I represent myself only, do not have a client, am not a party, and am expressing my own views and understanding only in this Statement.

I. BACKGROUND AND EXPERIENCE

I have been a homeowner in Silver City, Grant County, New Mexico since October, 2000, and have lived in Silver City since September, 2001. I am an attorney at law, licensed to practice and in good standing in the State of California since 1983, and in the State of New Mexico since 2004. The Tyrone Mine lies to the west of my home, and the Chino and Cobre Mines lie to the east.

After graduation from UC Davis, Martin Luther King, Jr. School of Law in 1983, I began my law career with firms primarily emphasizing insurance defense and the then-raging asbestos litigation. Next, starting in 1985 I was a Deputy District Attorney for the County of Alameda (Oakland,

Berkeley, Fremont, San Lorenzo and Livermore), and also an Assistant District Attorney for the City and County of San Francisco. A significant portion of my tenure as an Assistant D.A. in San Francisco was in the Writs and Appeals Division.

Thereafter in private practice in California beginning in 1992, and in New Mexico from 2004 to 2008, in the aggregate I represented hundreds of individual clients. A large part of my private practice in California and in New Mexico involved the drafting of appellate writs and appeals, and I was both a privately-retained and court-appointed counsel in numerous writ and appellate matters, under appointment for the California First District, Second District, Third District and Fifth District Courts of Appeal, as well as the California Supreme Court (see, *e.g. People v. Panizzon*, 13 Cal.4th 68 (1996)). In my appointed capacity I worked with the First District Appellate Project ("FDAP," San Francisco), the Central California Appellate Program ("CCAP," Los Angeles), and the Third District Appellate Project ("TDAP," Sacramento). As an appellate attorney I wrote somewhere between 250-300 full-length writ and appellate briefs. In New Mexico my practice centered primarily around construction defect litigation. As a privately-retained trial lawyer in both states I drafted hundreds of trial briefs, both civil and criminal.

II. PURPOSE OF THIS WRITTEN STATEMENT

After careful review of the State Water Quality Act ("Act") as read against these proposed Rules now under consideration, in my professional opinion the Rules are both arbitrary, capricious, and contrary to the law as set forth in the Act. These proposed Rules violate both the spirit *and* the letter of the Act, are diametrically opposed to the Act's legislative intent, purpose, and history, and flatly contradict all previous Commission interpretations of the Act. If approved by the Commission these Rules would set a dangerous and destructive precedent for the protection of New Mexico's most precious and increasingly scarce natural resource - *water*.

My purpose therefore in submitting this Written Statement is to draft a Memorandum of Points and Authorities that bolsters the legal authorities heretofore furnished the Commission. In my judgment no matter whether the Commission ultimately adopts or rejects these Rules, the matter will be appealed. As such, in the interest of assisting the Commission in its task of evaluating these Rules, these Points and Authorities are respectfully submitted to help to assess the relevant issues.[1]

III. MEMORANDUM OF POINTS AND AUTHORITIES ON HOW TO CONSTRUE THE PROPOSED RULES VIS-A-VIS THE ACT

A. Legislatures Create Statutes, and Statutes Create Administrative Agencies. Administrative Agencies Are Confined to the Powers and Authority Expressly or Impliedly Granted By Statute:

In New Mexico, as elsewhere, "[s]tatutes create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute." As such, NMED's authority to act must be derived from and is limited by statute. *In re Application of PNM Electric Services*, 1998-NMSC-017, ¶ 10, 125 N.M. 302, 961 P.2d 147; accord, *N.M. Mining Association v. N.M. Water Quality Control Commission*, 2007-NMCA-010, ¶ 7, 141 N.M. 41, 150 P.3d 991; *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission*, 2006-NMCA-115, ¶¶ 11 & 15, 140 N.M. 464, 143 P.3d 502.

This Commission is likewise a creature of statute. It was created by enactment of the Water Quality Act. Section 74-6-3(A) NMSA 1978; accord, *N.M. Mining Association v. N.M. Water Quality Control Commission*, *supra*, 2007-NMCA-010, ¶ 7, 141 N.M. at 44; *Bokum Reservation Corp. v. N.M. Water Quality Control Commission*, 93 N.M. 546, 555, 603 P.2d 285 (1979). The Separation of Powers doctrine "directs administrative agencies to their duty of implementing legislation. The

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1 I adopt by reference and incorporate as though fully set forth herein the following briefs previously submitted in this rule-making proceeding: (1) GRIP, Amigos Bravos and Turner Ranch Properties, Inc. "Response to Petition for Rulemaking," filed 11/12/12; (2) Attorney General's "Motion to Remand the Proposed Copper Mine Rule to NMED," served 12/14/12; (3) Attorney General's "Response to FMI on Commission's Authority," served 1/13/13; and, (4) the "Written Testimony of William C. Olson," complete with all these briefs' supporting exhibits.

Legislature grants agencies the discretion of promulgating rules and regulations which have the force of law." *City of Albuquerque v. N.M. Public Regulation Commission*, 2003-NMSC-28, ¶ 8, 134 N.M. 472, 79 P.3d 297; *Duke City Lumber Co. v. N.M. Environmental Improvement Board*, 101 N.M. 291, 292, 681 P.2d 717 (1984).

In order to effectuate the protection of the quality of water in New Mexico, the Commission "shall adopt, promulgate and publish regulations to prevent or abate water pollution in the state or in any specific geographic area, ..." Section 74-6-4(E) NMSA. Stated conversely, the Commission is not authorized to adopt, promulgate or publish regulations that do not prevent or abate water pollution in the state or in any specific area thereof. Specifically, "[t]he Commission: ... (C) shall not adopt or promulgate a standard or regulation that exceeds a grant of rulemaking authority listed in the statutory section of the Water Quality Act authorizing the standard or regulation." Section 74-6-4(C) NMSA. As such, in promulgating regulations pursuant to the Water Quality Act, the Commission must not contradict the Legislature's clear intent. See generally, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 at fn. 9 (1984); accord, *Wedelstedt v. Wiley*, 477 F.3d 1160, 1165 (10th Cir. 2007).

The Legislature has authorized the Commission to adopt water quality standards that shall "*at a minimum protect* the public health or welfare, *enhance the quality of* water *and serve the purposes* of the Water Quality Act." Section 74-6-4(D) NMSA (emphasis added). The Commission is charged, *inter alia*, with administering regulations regarding the abatement of water pollution. Section 74-6-4(E) NMSA. The purpose of the abatement regulations "is to remediate or protect *all ground water* for use as domestic and agricultural water supply." 20.6.2.4104(A)(1) NMAC; *N.M. Mining Association v. N.M. Water Quality Control Commission, supra*, 2007-NMCA-010, ¶ 9, 141 N.M. at 44 (emphasis added). In sum, then, the Act is the primary statutory mechanism whereby ground water in New Mexico is protected. *See*, Sections 74-6-1 to 74-6-17 NMSA.

B. Canons of Statutory Construction to Assist the Commission In Conforming Its Decision to the Rule of Law:

1. Statutory Language Given Its Plain Meaning in Context:

The starting point in every case involving construction of a statute is "the language itself." *Greyhound Corp. v. Mr. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); accord, *Regents of the University of California v. N.M. Water Quality Control Commission*, 2004-NMCA-073, ¶ 18, 136 N.M. 45, 94 P.3d 788 ["{w}hen construing a statute, we begin with the plain language, and we assume that the ordinary meaning of the words expresses the legislative intent"]. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1147 (10th Cir. 2004). However, if the plain language of a statute creates an absurd or unreasonable result, "we will reject the literal language." *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Commission*, *supra*, 2006-NMCA-115, ¶ 15, 140 N.M. at 467; *Medina v. Berg Construction, Inc.*, 1996-NMCA-087, ¶ 26, 122 N.M. 350, 924 P.2d 1362.

A further fundamental canon of statutory construction is that the words of a statute must be read "in their context and with a view to their place in the overall statutory scheme." *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007); *Fort Peck Housing Authority v. U.S. HUD*, 367 Fed.Appx. 884, 889 (10th Cir. 2010). Courts ascertain a legislature's intent by "reading all the provisions of a statute together, along with other statutes *in pari materia* ['upon the same matter or subject' - Black's Law Dictionary, Fifth ed.]." *N.M. Mining Association v. N.M. Water Quality Control Commission*, *supra*, 2007-NMCA-010, ¶ 12, 141 N.M. at 44. The court must "interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 132 (2000); *Pharmanex v. Shalala*, 221 F.3d 1151, 1151-1152 (10th Cir. 2000).

2. Construction Must Not Defeat the Statute's Purpose:

Courts are restrained from imposing statutory interpretations that serve to defeat the purpose of the statute. *United States v. Soto-Ornelas*, 312 F.3d 1167, 1172 (10th Cir. 2002).

3. Identical Words Used in a Statute Have the Same Meaning:

The U.S. Supreme Court has further recognized that it is a "normal rule of statutory construction ... that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Estate of Coward v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) [noting the "basic canon of statutory construction that identical terms within an Act bear the same meaning"].

Thus, for example, when the Water Quality Act uses the phrase, "all ground water," the phrase means all ground water wherever used, and not all ground water *except* .... And when the Act uses the phrase "at any place of withdrawal for present or reasonably foreseeable future use," it means at any place of withdrawal for present or future use, and not at any place *except*....

4. *Chevron U.S.A.* and "Chevron Deference:"

Applying the foregoing fundamental canons, the next question becomes how courts go about interpreting the language of the Act and the proposed Rules in question, for the judiciary is the "final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear [legislative] intent." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-118 (1978).

First off, if a court, employing traditional tools of statutory construction, ascertains that the legislature "had an intention on the precise question at issue, *that intention is the law and must be given effect.*" *Chevron U.S.A. v. Natural Resource Defense Council, supra*, 467 U.S. at 866, at fn 9 (emphasis added). If however the legislature has left a *gap* with respect to the question at issue, either explicitly or implicitly, the agency is empowered to formulate the policy. *Morton v. Ruiz*, 415 U.S.

199, 231 (1974). If the legislature has *explicitly* left a gap for the agency to fill, there is an *express* delegation of authority to the agency to "elucidate a specific provision of the statute by regulation." If, however, there exists an *implicit* gap for the agency to fill, there is an implied delegation of authority. *Chevron, U.S.A., supra*, 467 U.S. at 844.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether [the legislature] has directly spoken to the precise question at issue. If the intent of [the legislature] is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of [the legislature]. [Footnote omitted.] If, however, the court determines [the legislature] has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute [footnote omitted], as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [Footnote omitted.] *Id.*, at 842-843.

"Considerable weight" is accorded to an agency's construction of a statutory scheme it is entrusted to administer, and the principle of *deference* to administrative interpretations "has been consistently followed by [the U.S. Supreme Court] whenever a decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the give situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Id.*, at 844. In Administrative Law, this granting of weight to the agency's determination is referred to as "Chevron deference." *See, e.g., United States v. Mead Corp., supra*, 533 U.S. at 222; *Sorenson Communications, Inc. v. FCC, supra*, 659 F.3d at 1042.

Thus, applying Chevron deference, an agency's construction of a statute it administers is generally owed judicial deference when "the statute is silent or ambiguous" on the precise issue in question and the agency's reading represents a "permissible construction of the statute." *Chevron, U.S.A., supra*, 467 U.S. at 843. Crucial for present purposes, the agency must establish a record indicating its *reasoning* and the basis upon which it construes the statute and adopts regulations.

Regents of the University of California v. New Mexico Water Quality Control Commission, *supra*, 2004-NMCA-073, ¶¶ 12-13, 136 N.M. at 48; accord, *City of Roswell v. New Mexico Water Quality Control Commission*, 84 N.M. 561, 565, 505 P.2d 1237 (1972).

Thus, Chevron deference entails two steps: first, even though the legislation may be explicitly or implicitly silent, courts consider whether the legislative intent is clear, using traditional tools of statutory construction (including the statutory language, the legislative history, and policy concerns) to determine whether the agency has room to interpret. If the legislative intent is clear on how the question is to be answered, the court's analysis ends and the legislative intent is given effect. *Chevron, U.S.A., supra,* 467 U.S. at 842-843; *FDA v. Brown & Williamson Tobacco Corp., supra,* 529 U.S. at 132; *Wright v. Federal Bureau of Prisons*, 451 F.3d 1231, 1233 (10th Cir. 2006).

If however after statutory construction analysis the legislature's intent is still ambiguous, courts proceed to the "second step" under *Chevron* and ask whether the agency's answer is "based on a permissible construction of the statute." *Chevron, U.S.A., supra*, 467 U.S. at 843; *Qwest Corp v. FCC*, 689 F.3d 1214, 1224 (10th Cir. 2012). If the agency's construction is permissible, the court defers to the agency. Stated another way, "Chevron deference" is warranted when it "appears that [the legislature] delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Gonzales v. Oregon*, 546 U.S. 243, 254 (2006); *Toomer v. City Cab*, 443 F.3d 1191, 1195 (10th Cir. 2006). Under this standard, "[t]he agency's interpretation need not be the only one it could have adopted, or the one that th[e] court would have reached had the question initially arisen in a judicial proceeding." *Anderson v. U.S. DOL*, 422 F.3d 1155, 1180 (10th Cir. 2005).

Chevron deference is not absolute, and courts "will reject an agency's interpretation even of an ambiguous statute if it appears unreasonable or inconsistent with legislative intent." *Chevron, U.S.A., supra*, 467 U.S. at 843; accord, *Dona Ana Mutual Domestic Water Consumers Association v.*

N.M. Public Regulation Commission, 2006-NMCA 336, ¶ 10, 140 N.M. 6, 139 P.3d 166. Important to bear in mind and critical for present purposes, "*[a]n agency cannot amend or enlarge its authority through rules and regulations.* ***Nor may an agency, through the device of regulations, modify the statutory provision.***" *In re House of Pancakes*, 102 N.M. 63, 66, 691 P.2d 64 (1984).

5. Statutory Ambiguity Can Be Resolved By Evaluating Legislative Intent, History, and Purpose:

A statute is ambiguous when it is capable of being understood by "reasonably well-informed persons in two or more different senses." If an ambiguity is found, the court may seek guidance from the legislative intent, and is aided "by reviewing the legislative history." The court can also resolve an ambiguity by "looking at the purpose behind the statute." *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1172 (10th Cir. 2004).

6. When a Statute Has a Broad Remedial Purpose It Deserves a Liberal Interpretation:

New Mexico's Water Quality Act has a broad, remedial purpose, *i.e.*, to "abate and prevent water pollution." *Bokum Resources Corp. v. New Mexico Water Quality Control Commission*, *supra*, 93 N.M. at 555:

> The Act applies to 'all water, including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface waters.' See NMSA 1978, § 74-6-2(H); see also, 20.6.2.7(ZZ) NMAC; *N.M. Mining Association v. Water Quality Control Comm'n*, 2007 NMCA 84, ¶¶ 25, 30, 164 P.3d 81, 88, 90.

Commission Decision of 2/4/09, Conclusions of Law ("COL"), ¶ 2. As noted, *supra*, in order to effectuate the protection of the quality of water in New Mexico, the Commission "shall adopt, promulgate and publish regulations to prevent or abate water pollution in the state or in any specific geographic area, ..." Section 74-6-4(E) NMSA. Specifically, water quality is to be protected and pollution abated "at any place of withdrawal of water for present and reasonably foreseeable use."

Section 74-6-5(E)(3) NMSA.

As such, the Act and the Commission's regulations promulgated thereunder have a broad, remedial purpose, *i.e.*, to protect the State's numerous and wide-ranging surface and ground water resources for present and reasonably foreseeable use. Why? Because "[a]pproximately ninety percent of the people in New Mexico rely on ground water 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 Commission, supra*, 2007-NMCA-010, ¶ 23, 141 N.M. at 52.

Since the Act and the Commission's regulations promulgated thereunder were enacted in response to serious environmental and health risks posed - in large part by industrial pollution caused by large-scale mining operations - both the Act and its underlying rules and regulations *must be interpreted liberally so as to accomplish their remedial goals*. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998); accord, *Sierra Club v. Seaboard Farms, Inc., supra*, 387 F.3d at 1173.

7. Agency Rules Are Construed Just Like Statutes:

"Agency rules are construed in the same manner as statutes." *N.M. Department of Health v. Ulibarri*, 115 N.M. 413, 416, 852 P.2d 686 (1993); *N.M. Mining Association v. N.M. Water Quality Control Commission, supra*, 2007-NMCA-010, ¶ 12, 141 N.M. at 49. For example, the statutory term "any place of withdrawal for present or reasonably foreseeable future use" has already been construed. See, *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission, supra*, 2006-NMCA-115, ¶¶ 27-35, 140 N.M. at 472-474. The Court determined 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." *Id.*, 2006-NMCA-115, ¶ 27, 140 N.M. at 472 (emphasis added). Neither the statute itself nor the *Phelps Dodge* construction thereof makes any exception for areas where water does not need to be protected. *Id.*, see,

e.g., Section 74-6-5(E) NMSA. The Commission has also established criteria to determine where a place of withdrawal is. *Infra.*

Therefore, and again, it may be taken as a "given" in this Rule proceeding that the clear legislative intent of the Water Quality Act, and any rules or regulations promulgated thereunder, is that there is no place in the State of New Mexico where clean water that is now being used or may foreseeable be used in the future is not protected and must therefore meet applicable standards.

In the briefing previously submitted, the multiple public and private parties opposing adoption of these Rules have likewise iterated loud and clear the Legislature's firm intent to protect all water in the state.[2] This intent is repeated often and throughout the Act, and the Act's intent and purpose *are now beyond any reasoned dispute. N.M. Mining Association v. N.M. Water Quality Control Commission, supra,* 2007-NMCA-010, ¶¶ 7-8, 141 N.M. at 44. In point of fact, none of the parties advocating adoption of these Rules, such as Freeport McMoRan, Inc. ("FMI") or NMED itself, directly disputes that the effect on ground water must be measured at any place of withdrawal for present or reasonably foreseeable future use.[3]

Therefore it may be taken as a further "given" in these Rules proceedings that the Legislature's clear intent is that the Act protects all water at any place of withdrawal for present or reasonably foreseeable use.

IV. THE *TYRONE* COURT CASE SETTLED LITTLE IF ANYTHING

Unfortunately, and with all due respect, the *Tyrone Decision* court, which previously grappled with these issues, *strayed* from its constitutionally limited role of applying the facts to the law in determining whether substantial evidence supported the Commission's conclusion that re-sloping and re-covering stockpiles after closure of the Tyrone Mine were required. The court in effect

2 See, *e.g.*, Attorney General's "Motion to Remand," pp. 3-4; GRIP, Amigos Bravos, *et alia's* "Response to Petition for Rulemaking," pp. 3-12; and, Attorney General's "Response to FMI on Commission Authority," pp. 2-5.

3 Instead, it appears they seek to regulate around it.

superimposed its own factual assessment on the Commission's conclusion as to what a reasonably foreseeable "place of withdrawal" might be, by opining that the Commission's decision to consider the entire Tyrone mine site as a place of withdrawal "could not have been more broad."

> As an indication of the overbreadth of the standard that may have been applied by the Commission, 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 Commission 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.* [Citation omitted.] *Id.*, at ¶ 32 (emphasis added).

Again, with all due respect, it is not the province of a court to substitute its own factual notions and override the considerable expertise of and evidence taken by the parties "on the ground" - there and here, the Commission, the stakeholders, and NMED. It is indeed quite possible someone might want to drill a well "adjacent to" a stockpile in the reasonably foreseeable future. The court's role therefore should have been limited to determining whether "substantial evidence" supported the agency's choices.[4] The court should confine itself to a review of the entire record and consider all the evidence, both favorable and unfavorable to the agency's determination, to determine its sufficiency. "We do not reweigh the evidence but decide, on balance, whether there was substantial evidence to support the agency's decision." *Perkins v. Department of Human Services*, 106 N.M. 651, 655, 748 P.2d 24 (1987).

While neither adopting nor rejecting Phelps Dodge's "point of compliance" scheme, and shedding much heat but little light on the phrase "any place of withdrawal," the *Tyrone* court made a "limited remand" to the Commission in such a way as to satisfy ultimately *no one* - as has been painfully evidenced by the subsequent appeal to the same court on those same issues, the resulting

4 That is, "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Regents of the University of California v. N.M. Water Quality Control Commission, supra*, 2004-NMCA-073, ¶ 29, 136 N.M. at 53; *Oil Transport Co. v. N.M. State Corporations Commission*, 110 N.M. 568, 571, 798 P.2d 169 (1990).

"Tyrone Settlement" in 2010, the 2009 Amendment to the Act, and now the instant and prolonged Technical/Advisory Committee meetings and Rules proceedings.[5]

As a result of the remand, the industry, now remarkably with NMED's *backing* instead of opposition, continues to pursue its re-fashioned "point of compliance" scheme; the opposing parties seek to uphold the "any place of withdrawal" language contained in the Act to mean "all ground water," and the litigation continues to spin, year over year.

V. ON REMAND THE COMMISSION FORMULATED CRITERIA AS DIRECTED

Responding to the directives of the Court of Appeal in *Tyrone*, in 2007 the Commission held hearings on the criteria necessary to establish "place of withdrawal." On February 4th, 2009 the Commission issued its "Decision and Order on Remand," concluding and reiterating its long-standing conclusions that: (1) the Act protects water at "any place of withdrawal for present and reasonably foreseeable future use;" COL, ¶¶ 11 & 26, (2) the Act "does not establish any specific 'point(s) of compliance' for compliance with water quality standards," COL, ¶ 27, and (3) adopted NMED's seven proposed criteria for determining place of withdrawal: (1) site hydrology and geology; (2) the quality of ground water prior to any discharge from that facility; (3) past and current land use in the vicinity; (4) potential future land use in the vicinity; (5) past and current water use in the vicinity; (6) potential future water use in the vicinity; and, (7) population trends in the vicinity. COL, ¶¶ 15-21.

After a second appeal by Phelps Dodge, the parties (now successor-in-interest FMI) entered into a Settlement Agreement on December 10th, 2010. The Agreement still required FMI to

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5 The Tyrone court opined, "We believe the appropriate course is to reverse the Commission's decision only as to [the two conditions at issue] and to remand for further limited proceedings. [Citations omitted.] ... Because the Commission made findings of fact and conclusions that the entire mine is a place of withdrawal for the purposes of Section 74-6-5(E), we must assume that it considered its findings and conclusions to affect its determination to affirm the conditions. The Commission, in the first instance, must create some general factors or policies to guide its determination. We offer no opinion as to whether the Commission should do so by way of rulemaking or by simply deciding the factors as a part of this specific case." *Tyrone Decision, supra*, 2006-NMCA-115, ¶ 35, 140 N.M. at 474.

meet applicable water quality standards at its mine sites, or meet alternate abatement standards. It allowed FMI to seek "variances" from standards during operations for new and existing mines, and to petition the Commission for alternative abatement standards upon closure that are consistent with the Commission's criteria established in its Decision and Order on Remand. Finally the Agreement gave FMI latitude to construct facilities "that do not employ full technological controls for the protection of ground water through the variance process *as long as water pollution is abated to applicable standards upon closure*." *See*, Attorney General's "Motion to Remand," p. 11 (emphasis added).

VI. THE COMMISSION HAS SPECIFICALLY FOUND THAT NEW MEXICO'S GROUND WATER BELONGS TO THE PUBLIC, AND THAT THE ACT APPLIES TO ALL PUBLIC GROUND WATER

A. All Ground Water Belongs to the Public, and the Act Applies to All Public Ground Water.

The Commission has specifically found as a conclusion of law that New Mexico's ground water "belong[s] to the public," and not to private owners of the overlying land. Section 72-12-1 NMSA 1978. It has concluded that the purpose of the Act is "to abate and prevent water pollution," citing *Bokum Resources Corp. v. N.M. Water Quality Control Commission, supra*, 93 N.M. at 555. COL, ¶ 1. The Commission has also found that "[t]he Act applies to 'all water, including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water.' See NMSA 1978, § 74-6-2(H); see also, 20.6.2.7(ZZ) NMAC; *N.M. Mining Ass'n v. Water Quality Control Comm'n*, 2007 NMCA 84, ¶¶ 25, 30, 164 P.3d 81, 88, 90." COL, ¶ 2.

Indeed, the purpose and intent of the Water Quality Act and the Commission's implementation thereof, dating back to 1977, are to protect the public ground water. The declared purpose and intent of these regulations with respect to discharge permits is to: "protect ***all*** *ground*

water of the state of New Mexico which has an existing concentration of 10,000 mg/l or less TDS, for present and potential future use as domestic and agricultural water supply, ..." Section 20.6.2.3101(A) NMAC (emphasis added). The declared purpose and intent of these regulations with respect to prevention and abatement of water pollution is to "abate pollution of subsurface water so that ***all*** *ground water* of the state of New Mexico which has an existing concentration of 10,000 mg/l or less TDS, is *either remediated or protected for use as domestic and agricultural water supply* ...." Section 20.6.2.4101(A) NMAC (emphasis added). There are no stated exceptions to these mandates.

B. The Act Applies to "Any Place of Withdrawal for Present and Reasonably Foreseeable Future Use:"

The Commission has further specifically found that the Act prohibits any polluting discharge into New Mexico's ground water if "the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. Determination of the discharge's effect on ground water shall be measured at *any place of withdrawal of water for present and reasonably foreseeable future use*." Section 74-6-5(E)(3) NMSA (emphasis added). COL, ¶¶ 6, 10-11, 26.[6]

As such, all ground water in New Mexico with a TDS concentration of 10,000 mg/l or less is protected under the Act. The Commission has also specifically found that "ground water not in present use is *potentially usable unless demonstrated otherwise*." Commission Decision of 2/4/09, Findings of Fact ("FOF"), ¶¶ 60-62. Indeed the historical purpose and intent of the Act "has been to ensure that ***all*** *ground water* underneath a discharge site meets ground water quality standards." FOF, ¶ 83 (emphasis added). Again, no exceptions to these imperatives exist.

The Act's mandate that ground water protection is enforced at "*any place of withdrawal of water for present and reasonably foreseeable future use*," is found in numerous places, for example with respect to:

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6 The Legislature has revisited the Water Quality Act as recently as 2009. If it wanted to amend the Act to specify a new or different ground water standard, *it knew how to do so.*

(1) hazard to the public [Section 20.6.2.7(AA) NMAC];

(2) numeric water quality standards [Section 20.6.2.3103 NMAC];

(3) modification of abatement permits [Section 20.6.2.3109(E)(1) NMAC];

(4) hazard to public health [Section 20.6.2.3109(H) NMAC];

(5) ground water abatement standards [Section 20.6.2.4103(B) NMAC];

(6) Stage 2 abatement plans [Section 20.6.2.4106(E) NMAC];

(7) Stage 2 abatement plan approval [Section 20.6.2.4109(F) NMAC]; and,

(8) abatement plan completion approval [Section 20.6.2.4112 NMAC].

And "any place of withdrawal" as adopted by the Commission is governed by the seven criteria, *supra*, proposed by NMED and adopted on remand from the court in 2007. COL, ¶¶ 15-21.

As a further Conclusion of Law the Commission also specifically considered and *rejected* any sort of "point of compliance" scheme for determining what a "place of withdrawal" is.

> 26. Section 74-6-5(E)(3) of the Act provides that determination of the discharges' effect on ground water shall be measured at *any* place of withdrawal of water for present or reasonably foreseeable use. See NMSA 1978, Section 74-6-5(E)(3) (emphasis added).
> 27. Section 74-5-6(E)(3) does not establish any specific 'point(s) of compliance' for compliance with water quality standards. NMSA 1978, Section 74-6-5(E)(3).
> 28. Nothing in the Act or the Commission Regulations provides for a 'point of compliance,' hydraulically up-gradient of which ground water need not be protected. See NMSA 1978, Sections 74-6-1 to 74-6-17; 20.6.2 NMAC. *Id.*, at ¶¶ 26-28.[7]

C. Despite the Prophylactic Provisions of the Act, Pollution Can and Does Occur, In Which Case a Person May Obtain a Variance from Commission Regulations So Long As An Abatement Is Included:

Nevertheless, ground water pollution does occur and already exists in New Mexico. With respect to the existing and extensive ground water pollution historically documented at the Tyrone

7 The industry-proffered use of "institutional controls" was also firmly rejected by the Commission: "The use or application of institutional controls is not an appropriate criterion for determining place of withdrawal of water for present or reasonably foreseeable future use under section 74-6-5(E)(3). ... The use of institutional controls to restrict access to ground water beneath the surface and thus to conclude that the ground water is not at a place of withdrawal for reasonably foreseeable future use would be contrary to the WQA. (FOF 298-323)." COL, ¶¶ 23-24.

Mine Site, previous Commission Findings of Fact indicate that the mine leach piles, waste rock piles and tailing impoundments have all contributed to contaminating ground water above the specified concentrations [FOF, ¶¶ 25-38], and that the region's ground water under the central Tyrone mining area is "severely degraded." FOF, ¶ 33. The Act and regulations provide for this reality. The regulations specify that "if the existing concentration of any water contaminant in ground water exceeds the standard of Section 20.6.2.3103 NMAC, *no degradation of the ground water beyond the existing concentration will be allowed.*" Section 20.6.2.3103(A)(2) NMAC (emphasis added).

In accordance with the Act, the Commission has recognized that a balance must be struck between "policies of protecting ground water and yet imposing reasonable requirements on industry, [therefore] the Act allows for reasonable degradation of water quality resulting from beneficial use, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses; *provided that 'such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded.*'" Section 74-6-12(F) NMSA; FOF, ¶ 6 (emphasis added). The Commission has further specifically required that "Section 74-6-5(E)(3) of the Act provides that '[d]etermination of the discharges' effect on ground water *shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use.*' NMSA 1978, Section 74-6-5(E)(3)." FOF, ¶ 6 (emphasis added). Under the regulations, "except under limited circumstances, NMED can approve a discharge plan only if the applicant demonstrates that the discharge will not result in either concentrations in excess of the standards in section 3103 or the presence of any toxic pollutant *at any place of withdrawal of water for present or reasonably foreseeable future use*. 20.6.2.3109.C NMAC." FOF, ¶ 11 (emphasis added).

Under the "limited circumstances" contemplated in the regulations, the Commission has the authority to grant individual "variances" from a given regulation if it would "impose an unreasonable burden upon any lawful business, occupation or activity." However, the variance is

granted "conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time." The Commission adopts regulations specifying the procedure to follow for the variance sought, including "the *holding of a public hearing before any variance is granted* ...." Section 74-6-4(G) NMSA (emphasis added). A variance from a regulation is only granted after a public hearing before the Commission, and is valid for a maximum of five years. Section 20.6.2.1210(B)&(C) NMAC.

Under the Act the Commission has also promulgated regulations allowing for "alternative abatement standards" - standards that exceed the standards of Section 20.6.2.3103 NMAC - under certain "limited circumstances," but again, only after submitting a petition and after a public hearing. In order to obtain alternative abatement standards, the petitioner must already be in the process of abatement, then thereafter petition the Commission, which shall grant the alternative abatement variance only after a public hearing. Section 20.6.2.4103(F)(3) NMAC. There is also a mechanism at Section 74-6-4(H) NMSA for considering site-specific variances provided in Section 20.6.2.1210 NMAC, that contains provision for individual variances in accordance with the Act. Again, the Commission may only grant these variances after a public hearing, and for only five years.

D. History of the Water Quality Act and Regulations:

The history of the Act and its regulations, and resulting litigation over the years, has been fully outlined in the briefing previously submitted, as well as in the Written Testimony of William C. Olson. This history is incorporated here by reference as if fully set forth herein. See, *e.g.*, Attorney General's "Motion to Remand," pp. 3-14; "Written Testimony of William C. Olson," pp. 11-17.

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VII. THE PROPOSED COPPER MINE RULES ARE ARBITRARY, CAPRICIOUS, LACK SUBSTANTIAL EVIDENCE, AND ARE MANIFESTLY CONTRARY TO THE ACT. THEY DESERVE NEITHER WEIGHT NOR DEFERENCE

A. Definitions:

1. "Arbitrary and Capricious" Agency Action Defined:

An agency action is arbitrary and capricious "if it is unreasonable, if it provides no rational connection between the facts found and the choices made, or if it entirely omits consideration of important aspects or relevant factors of the issue at hand." *N.M. Mining Association v. N.M. Water Quality Control Commission, supra*, 2007-NMCA-010, ¶ 22, 141 N.M. at 52. Put another way, "[a]n action is arbitrary or capricious if it is unreasonable, irrational, willful, and does not result from a sifting process," *Oil Transportation Co. v. N.M. Corporations Commission, supra,* 110 N.M. at 572; *Regents of the University of California v. N.M. Water Quality Control Commission, supra*, 2004-NMCA-073, ¶ 35, 136 N.M. at 55; *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 965 P.2d 370.

2. "Substantial Evidence" Defined:

Substantial evidence is that quantum of evidence "that a reasonable mind would regard as adequate to support a conclusion." *Regents of University of N.M. v. Federation of Teachers*, 1998-NMSC-020, ¶ 17, 125 N.M. 401, 962 P.2d 1236; *Dona Ana Mutual Domestic Water Consumers Association v. N.M. Public Regulation Commission, supra*, 2006-NMCA-032, ¶ 14, 140 N.M. at 9. Put another way, substantial evidence is "evidence that a reasonable mind would recognize as adequate to support the conclusions reached by a fact-finder." *Wagner v. AGW Consultants*, 2005-NMCA-016, ¶ 85, 137 N.M. 734, 114 P.3d 1050; *N.M. Mining Association v. N.M. Water Quality Control Commission, supra*, 2007-NMCA-010, ¶ 30, 141 N.M. at 53.

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3. "Not in Accordance With Law" Defined:

An agency decision is not in accordance with law and will be reversed "if the agency unreasonably or unlawfully misinterprets or misapplies the law." *Archuleta v. Santa Fe Police Department*, 2005-NMSC-006, ¶ 18, 137 N.M. 161, 108 P.3d 1019; *N.M. Mining Association v. N.M. Water Quality Control Commission, supra*, 2007-NMCA-010, ¶ 16, 141 N.M. at 48.

B. The Proposed Regulations Are Clearly Arbitrary and Capricious, and Not In Accordance With Law:

1. The Proposed Rules Would Allow Permanent Pollution of Water Above Standards By Rule, Resulting In Permanently Contaminated "Standard-Free Zones:"

a. Existing and New Mines:

Proposed 20.6.7.17(D)(3), (4) & (5) - Impoundment of impacted process water and storm water do not require liners: This obtuse and convoluted statutory scheme must be read very, very carefully to reach its result. Subsection (D)(3) provides that the impoundment of *long-term* (more than 30 days) process water and impacted storm water must be lined, unless "located within an open pit surface drainage area of an existing copper mine facility [which] may be designed and constructed in accordance with ... Paragraph (4) ...." Subsection (D)(4) provides that *short-term* (less than 30 days) process water and impacted storm water must also be lined, unless "located within an open pit surface drainage area of an existing copper mine facility [which] may be designed and constructed in accordance with ... Paragraph (5) ...." Subsection (D)(5) provides that "Impoundments that store non-impacted stormwater and are not located over disturbed areas ... ***do not require a liner system***." (Emphasis added).

Subsection (D)(5) does not mention process water or impacted storm water, does not mention short-term or long-term, and does not mention open pit surface drainage areas of existing copper mine facilities. Nor does its heading denote that these matter are addressed. The result, buried

in this statutory game of hide-and-seek, is that *neither short-term nor long-term process water or impacted storm water in an open pit surface drainage area of an existing copper mine* (also characterized as the"Standard-Free Zone") *requires a liner system.* This scheme is clearly arbitrary and capricious, omits consideration of important aspects or relevant factors of the issue at hand such as how to maintain standards, and its result - unlined contamination of ground waters in the areas in question - is clearly contrary to the Act.

Proposed 20.6.7.18(F)(2) - Unlined existing impoundments in an open pit surface drainage area of an *existing* mine facility can continue to receive process water or impacted storm water: This subsection dovetails with Subsection 20.6.7.17(D)(3), (4) & (5), *supra.* Because already existing and permitted, these impoundments in an open pit "may continue to receive process water or impacted storm water [because] located within the open pit surface drainage area."

In order to reach the desired objective here of continuing to use unlined existing open pit impoundment, or "Standard-Free" areas, the regulation "bounces" the reader from subsections .17(D)(3), to .17(D)(4), to .17(D)(5), to .18(D)(2). Once again, because there is lacking any connection between the facts and the choices made, such as what the difference is between an existing and a new impoundment in such an area, this scheme is arbitrary and capricious. And its result - continuing contamination of ground waters under the areas in question - is clearly contrary to the Act.

Proposed 20.6.7.20(A)(1)(f) - Under an "Alternate design," new leach stockpiles would not require state-of-the-art liners: After a long regulatory scheme setting forth liner requirements for new leach stockpiles at subsections .20(A)(1)(a)-(e), the entire scheme is effectively gutted at subsection (f), which provides that "[a]n applicant may propose and the department may approve an alternative design for a leach stockpile located within an open pit surface drainage area provided that the stockpile and solution capture systems are designed to maximum [*sic* "maximize{?}"] leach solution capture considering the site-specific condition of the open pit, underlying geology and

hydrology, and leach solutions will not migrate outside of the open pit surface drainage area."

Boiled down, under this exception, so long as a new leach stockpile points into an open pit drainage area where water supposedly can't migrate, the contaminated water can drain into the pit and stay there polluted without any liner barriers underneath. The result is untreated water draining into existing pits with no liners and no abatement plan. Notably missing here is any requirement that the corrective action plan *meet standards* at any place of withdrawal for present or reasonably foreseeable future use. As a result, subsection (f) renders the entire liner scheme of subsections (a) through (e) nugatory and mere surplusage, constitutes a "disconnect" between the facts on the ground and the choices made, and as such is both arbitrary, capricious, and contrary to the Act.

Proposed 20.6.7.20(B)(2) - Existing leach stockpiles would not need liners: *existing* leach stockpiles would not be "required to meet the design and construction requirements of Subsection A of 20.6.7.20 NMAC [requiring liners under *new* leach stockpiles] and may continue to operate as previously permitted under a discharge permit subject to compliance with the contingency requirements of 20.6.30 NMAC."[8] Missing here once again is any requirement that the corrective action plan meet standards at any place of withdrawal. Nor is any apparent rationale provided for the distinction between new and existing leach stockpiles. Also apparent is the creation of what has been characterized as a "dual system" pervading the proposed Rules, wherein existing facilities are treated differently than new ones. All of this appears to be quite arbitrary and capricious, unsupported by any apparent factual connection to the choices made, and is contrary to law.

Proposed 20.6.7.21(A)(2)(f) - Exempts contaminant source materials generated from *within* an open pit surface drainage area from meeting the requirement that a "material handling plan" be formulated and approved by NMED. Only such materials from "outside" the open pit area need

8 Section 20.6.30, which is largely permissive, not mandatory, provides that if contaminated water above standards is detected, the permittee notifies NMED, submits a corrective action plan and *perhaps* an abatement plan, governed by whether the contamination was *before or after* adoption of this regulation.

comply with this planning and approval requirement.

A second "dual system" scheme is injected into these proposed Rules, the "inside/ outside" distinction drawn at open pit surface drainage areas, again with no discernible rhyme or reason given. What is the difference between "waste rock that may generate or release water contaminants" emanating from inside as opposed to outside the pit? Because there is no connection between the facts on the ground and the choices made, this proposed rule is arbitrary, capricious, and contrary to the Act.

Proposed 20.6.7.21(B)(1)&(2) - New waste stockpiles can pollute stormwater and run-on water: Here, subsection (1) provides that new waste stockpiles *outside* an open pit drainage area can be engineered to guide "run-on, run-off and stormwater diversion structures ... [into] headwalls keyed to bedrock ... in impoundments located outside the open pit surface drainage area to be lined consistent with the requirements for containment of impacted stormwater." Interceptor wells "*or other measures*" shall be installed "*where applicable*." (Emphasis added). These wells need only "reduce, attenuate or contain the discharge of leachate that may cause ground water to exceed applicable standards ...," but do not need to abate the contamination back to standards. If this diversion structure/interceptor well system fails, NMED *may* require "additional controls, including but not limited to, a liner system."

Subsection (2) provides that at new waste stockpiles *inside* an open pit surface drainage area, "stormwater run-on shall be diverted or contained to minimize contact between stormwater run-on and the stockpiled material." Whatever this arguably abstruse provision may mean, it is clear that no additional controls or abatement are required - not even *maybe* a liner. These two proposed regulations entirely omit consideration of important aspects or relevant factors of the issue at hand (*e.g.*, returning the water to standards), are vague, ambiguous, and clearly contrary to the Act.

Proposed 20.6.7.21(D)(4) - Creates a distinction requiring reporting of "leaks or spills of leachate" *outside* but not elsewhere at waste rock stockpiles or any associated containment system: "Any leaks or spills of leachate *outside* the waste rock stockpile and any associated containment system

shall be recorded and reported pursuant to 20.6.2.1203 NMAC." (Emphasis added).

This proposed Rule appears to ignore a leak or spill of leachate *on top of* or *on the side of* a stockpile, which is where leachate is also used. Under a plain reading of this proposed Rule, if, for example, a leachate delivery system is supposed to deliver only *X* gallons of leachate on the top or side of the stockpile, but instead has a leak, spill or other mishap and delivers *Y* gallons, no recording or reporting is required, whereas it *is* required outside the stockpile. Moreover there is no clear definition of where "outside" a stockpile is - or outside an open pit, for that matter.

Thus, this dual-system *outside* the stockpile leak and spill distinction is plainly lacking in reason, leaves leaks and spills of leachate on the tops and sides of the stockpiles unregulated, does not connect back to water standards, does not rationally correlate the facts and choices made, is arbitrary and capricious, and therefore violative of the Act.

Proposed 20.6.7.21(D)(5) - "Seeps" at the toe or downgradient of stockpiles must be monitored only, not abated: This subsection appears to do an "end-run" around the Notification of Discharge-Removal requirements of Section 20.6.2.1203. Under 20.6.2.1203, a discharge is a "spilling, leaking, pumping, pouring, emitting, emptying, or dumping into water ... where there is a reasonable probability that the discharged substance will reach surface or subsurface water." Notably absent from this definition is "seeps." Under subsection 20.6.7.21(D)(4), "leaks or spills" must be reported "pursuant to 20.6.2.1203 NMAC," whereas under 20.6.7.21(D)(5) "seeps" do not, but rather must be "monitored on a monthly basis," "estimated" as to flow rate, and "[r]ecords" of inspections and flow rates maintained in the site monitoring reports. Also lacking under (D)(5) is the more stringent reporting requirement under 20.6.2.1203.

The result here is that "seeps" at the toe or downgradient of stockpiles, which, using the plain and ordinary meaning of that term, *occur slowly and steadily over long periods of time* (rather than suddenly, as do "spilling, leaking, pumping, etc.") need not be reported in the same manner or time

frame, *even though no reasonable argument can be made that "seeps" are any less responsible for impacting ground water than sudden events*. As such, this statutory scheme is clearly arbitrary and capricious, a genuine disconnect between the facts on the ground and choices made, and therefore not in accordance with the history, intent or purpose of the Act.

Proposed 20.6.7.22(A)(4) - New tailings impoundments can pollute water up to point-of-compliance type monitoring and interceptor wells: With respect to construction of *new* tailings impoundments, the applicant shall submit design plans that describe how six enumerated criteria were "***considered*** in developing the design plans." 20.6.7.22(A)(4)(a) (emphasis added). Similarly, under subsection (A)(4)(a)(iv), a design for seepage collection systems can be "***considered*** where substantial seepage may report [*sic*] to ground water, including 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 at monitor well locations specified by 20.6.7.28 NMAC." If such a six-criteria scheme has been *considered* but looks like it will not work, "the permittee *may* propose, or the department *may* require ... additional controls, including but not limited to, a liner system." 20.6.7.22(A)(4)(b) (emphasis added). Therefore, since maintenance of water quality standards is *permissive* only in the areas specified, not mandatory, this regulation does not connect the facts to the Act's requirement of maintaining water quality standards, is arbitrary, capricious, and contrary to law.

Proposed 20.6.7.22(B)(2) - Allowing existing crushing, milling, concentrating, smelting and tailing impoundments to continue to operate regardless of any contamination caused: Whereas under 20.6.7.22(B)(1), *new* crushing, milling, concentrating, smelting and tailing impoundments must comply with liner and other construction requirements, *existing* such operations are "not required to meet the liner, design, and construction requirements ... and may continue to operate as previous permitted ...." Existing permit discharge conditions are also "grand-fathered" in, rather than being

considered "additional conditions" under subsection 20.6.7.10(I).

There is no reasoned distinction under this "dual-system" form of regulation between the contamination caused by new and existing crushing, milling etc. operations. If the mine operator cannot place a liner under an existing operation, then an abatement scheme should be required. The same activity occurs at both new and old operations, with the same results - ground water contamination. Therefore, once again a proposed Rule creates a distinction without any reasonable justification, is thus arbitrary and capricious, and by allowing continuing contamination of ground water sources is clearly contrary to the Act's water standards.

Proposed 20.6.7.23 - Practically no pollution controls for new and existing pipelines and tanks containing process water or impacted stormwater: This section outlines the requirements for constructing and maintaining pipelines and tanks that contain process water or impacted stormwater. Whereas requirements are established for methods and materials for construction, monitoring, and inspection of containment systems to control "leaks and spills" from these pipelines and tanks, there are *no such requirements* for pollution control or abatement from "seeps," no monitoring system for contamination - basically *no contamination detection or abatement requirements* whatsoever beyond a reporting requirement for "leaks or spills" only under Section 206.2.1203.

There is no reason why a compromised pipeline or a tank holding processed water or impacted stormwater is any less contaminating than an impoundment with the same contaminants. Yet these regulations as to pipes and tanks do not even mandate point-of-compliance style monitoring or interception of these potential contaminant sources. As such, this proposed regulation is a complete disconnect between the realities of the situation and the choices made, and therefore both arbitrary, capricious, and contrary to the law as set forth in the Act.

Proposed 20.6.7.24(A)(4) - Open Pit Mines do not need to comply with water quality standards: Here is probably the most defective proposed Rule, creating what have been previously

characterized as massive Sacrifice-Zone or Standard-Free Zones: "During operation of an open pit, the standards of 20.6.2.3103 NMAC *do not apply* within the area of hydrologic containment." (Emphasis added). In contrast, section 20.6.2.3103 limits pollution "at any place of withdrawal for present or reasonably foreseeable future use in excess of the standards of this section" and *has no exceptions*.

Under a plain reading of this regulation, no water quality standards would apply to any water in a "contained" open pit, either new or existing. The Chino Mine open pit has been in operation since approximately 1910; the Tyrone Mine open pit since 1967.[9] The ground water under these sites has been continuously contaminated for decades to over a century. There is no reasonable explanation for why, given existing and proven technology, these "contained" open pits should be entirely exempt from the requirements of section 20.6.2.3103. Without question therefore this regulation omits critical aspects of the issues and the law at hand - abatement back within standards - is arbitrary and capricious, and contrary to law as set forth in the enabling legislation - the Water Quality Act.

Proposed 20.6.7.28 - Institutes use of point-of-compliance style monitoring wells previously considered and rejected by the Commission: This proposed regulation, boiled down, creates a resuscitated point-of-compliance scheme previously considered and rejected by the Commission, by allowing so-called "monitoring wells" for open pits, leach stockpiles, waste rock stockpiles, tailings impoundments, processed water impoundments and stormwater impoundments (*i.e.*, most all sources of pollution). Under subsection 20.6.7.28(B)(2) the monitoring wells for leach and waste rock stockpiles and tailings impoundments are to be located downgradient "as close as practicable" to the contamination site, "considering [1] the slope of the land surface, [2] hydrogeological conditions, [3] geologic controls, [4] infrastructure, [5] engineering design plans, [6] depth to ground water, [7] working distance and [8] safety." No apparent mention is made as to who would be responsible for

9 And - provided commodity prices continue to make for profitable operation - will continue to operate *far into the future*.

making these determinations. *Id.*

Boiled down, the permittee would be allowed to drill an unspecified number of "monitoring wells," at some rather nebulous distance downgradient of these sources of contamination, based on these eight criteria - *the most distant of which would presumably determine the eventual location of the well*.

Common sense dictates that the farther away a monitoring well is from an area of contamination, (1) the *less likely* it will be to detect pollution, and (2) the *longer it will take* to detect it. So whereas subsection 20.6.7.28(B) would require locating monitoring wells at positions "to detect ... exceedance(s) ... at the earliest possible occurrence, ..." these eight criteria pull in the *opposite* direction, moving the wells farther and farther away to a point where all eight criteria are satisfied. Moreover, and once again, this previously considered and rejected point-of-compliance scheme would sacrifice all water inside the mine itself, as well as downgradient from *any* contamination site but upgradient from the monitoring well, creating the so-called Sacrifice- or Standard-Free Zone, all of which is clearly contrary to law under the "*all ground water*" and "*any* place of withdrawal" language of the Act.

The same repackaged and revamped point-of-compliance scheme is trotted out for new and existing process water and impacted stormwater impoundments under subsection 20.6.7.28(B)(3)(a)-(b), and for new and existing open pits under subsection (4)(a). The *existing* open pit monitoring well requirement of subsection (4) is arguably the most vague, requiring a "sufficient" number of monitoring wells around the perimeter to "adequately" monitor around the pit. No definition as to what is "sufficient" or "adequate" is supplied. Once again any reviewing court is confronted with an arbitrary and capricious distinction that does not appear to have any reasoned basis.

These schemes also contemplate drilling monitoring wells *up*gradient of contamination under subsection (5), "to establish upgradient ground water quality conditions not likely to be affected

by each contamination source that is being monitored." In other words, a plain reading here suggests upgradient wells establish what type(s) of pollution the permittee is *not* responsible for.

Subsection 20.6.7.28 would also govern the placement of the repackaged point-of-compliance monitoring wells under Subsection 20.6.7.21(B)(1), *supra*, for *new* waste rock stockpiles, so that even new contamination sites would only need monitoring wells - unless they didn't work - and then "additional controls, including but not limited to, a liner system" *may* be required by NMED. Subsection 20.6.7.21(B)(1)(d). The same recycled point-of-compliance downgradient monitoring wells would be used for *existing* waste rock stockpiles under Subsection 20.6.7.21(C)(2).

These Rules continue to propose a "dual system" of regulation: *new* versus *existing*, and *inside* versus *outside*. No rationale or justification for these distinctions appears in the Act. Nor is any explanation provided as to why contamination from the one sort of facility would be any less damaging than from the other. This dual system of regulation once again appears to represent a disconnect between the facts known and choices made, is therefore irrational and willful, arbitrary and capricious, and clearly outside the maintenance-of-standards provisions contained in the Act.

Further distillation of these proposed Rules, read together in context, reveals that not only are the historical and legislatively-mandated water quality standards mostly ignored, but also that the best available technology to protect ground water in the first instance, *i.e.*, using state-of-the-art liners, is not only largely not mandated, but only *may* be required when all else fails. Thus these proposed regulations are not a rational choice made between clearly existing alternatives and are patently contrary to law.

b. <u>Mine Closures</u>:

The same repackaged point-of-compliance scheme is advocated for mine closures.

<u>Proposed 20.6.7.33(C)(3) - No closure requirement to re-grade outslopes of stockpiles within an open pit surface drainage area</u>: Contrary to the *Tyrone Settlement* of 2010, this proposed Rule

would obviate the necessity to re-grade the outslopes of stockpiles within the "Standard-free Zone."

Proposed 20.6.7.33(D)(1) - If open pit evaporation exceeds water inflow, water quality standards would not apply: Under this subsection, if upon closure an open pit's surface evaporation rate is predicted to exceed water inflow, the pit "shall be considered to be a hydrologic evaporative sink ... [wherein] the standards of 20.6.2.3103 NMAC do not apply within the area of hydrologic containment." No rhyme or reason is given for this *fait accompli*. Common knowledge dictates that when water contaminated with metals and other pollution evaporates, it leaves the contaminants behind. Over the course of hundreds of years these contaminants will accumulate. Then, when the 100-year or 500-year storm (or other "Act of God") occurs, those contaminants would be unleashed into the aquifers and ground water. This regulation once again defies common sense and therefore is arbitrary, capricious, and contrary to law.

Proposed 20.6.7.33(D)(2) - The "flow-through pit" requirement comports with standards but has a vague exception: Under this subsection, after closure, if water in the open pit is predicted to flow into ground water, then it is not a hydrologic evaporative sink, but "a 'flow-through pit,' and the open pit water quality must meet ground water standards of 20.6.2.3103 NMAC, *or be managed to mitigate exceedances of applicable standards outside the area of hydrologic containment*." (Emphasis added). Note that the "management of exceedances" languages does not tie back into 20.6.2.3103, so that the legislatively-mandated water quality standard does not necessarily need to be met because the contamination need only be "mitigated" - whatever that means. This proposed regulation is vague and uncertain, willful, arbitrary and capricious, and as such violates both the letter *and* the spirit of the Act.

Proposed 20.6.7.33(F) - Creates the same revamped point-of-compliance scheme with respect to mine closure cover systems, and exempts pre-rule soil cover systems from regulation: The re-cycled point-of-compliance approach is once again utilized here with respect to "soil cover systems" upon mine closure. Under this subsection, facilities that have the potential to generate leachate and

cause an exceedance of applicable standards "*at a designated monitoring well location*" shall be covered with 36 inches of earthen materials that *can* grow plants without watering and have erosion resistant characteristics.[10]

Subsection 20.6.7.33(F) also provides no soil cover system regulation for pre-copper mine rule soil cover systems. "Any soil cover systems installed before the effective date of the copper mine rule are not subject to the requirements of the copper mine rule unless the department determines that an exceedance of applicable standards has occurred or is likely to occur as a result of the existing installed cover system, ..." This portion of the subsection basically allows the mine operator to "walk-away" from soil coverage systems employed prior to the effective date of the Rules, unless NMED detects current or likely contamination from the system employed.

Proposed 20.6.7.33(I)(4) & (6) - Impoundments *inside* as opposed to *outside* an existing open pit surface drainage area do not need to be re-covered, re-vegetated, or re-sloped to drain away from the impoundments: This subsection provides that when non-naturally occurring materials exist within or beneath a reservoir or impoundment that are or can be a source for contamination "*outside*" the open pit surface drainage area, the reservoir or impoundment must be re-covered and re-vegetated, and shall be closed "in a manner that creates positive drainage away from the impoundments ...." (Emphasis added.) In contrast, "[l]arge reservoirs located *in* the open pit surface drainage area of an *existing* copper mine facility are *exempt* from the requirement to establish positive drainage." (Emphasis added.)

Once again these proposed Rules attempt to establish a dual-system inside/outside regulation. Upon closure there does not appear to be any rational or reasonable basis to draw a distinction between reservoirs and impoundments inside as opposed to outside the open pit surface

10 There is no requirement that plants *actually grow*, and from what I saw during a mine tour last March, they don't.

drainage area. After all, the mine is being closed, and the requirements to re-cover, re-vegetate and re-slope would not interfere with ongoing operations within the open pit. Once again the goal here seems to be to simply "walk away" from the insides of the open pit area. Therefore, these subsections do not appear to make a rational connection between the existing facts on the ground and the choices made, are arbitrary, capricious, and contrary to both the spirit *and* the letter of the Act.

Proposed 20.6.7.33(L) - Expands the Subsection (F) repackaged point-of-compliance scheme to all aspects of mine closure: This subsection provides: "During closure the permittee shall continue monitoring pursuant to 20.6.7.28 NMAC and 20.6.7.29 NMAC. The permittee *may* propose and the department *may* approve modifications to the required monitoring to reflect changes in conditions during closure, *including abandonment of monitoring wells*." (Emphasis added).

Notable under this subsection, monitoring wells are *perhaps* required *during* closure and may be abandoned, whereas monitoring wells *after* closure *are not addressed at all.* It is as if, once a mine is closed, the sources of contamination somehow *magically disappear*, and no further monitoring is required. This recycled scheme, yet again, is lacking in any reasonable basis to the rational mind, and as such is both arbitrary, capricious, and clearly contrary to law.

In the aggregate, these proposed Rules substitute the existing emphasis under the Act from *prevention* of ground water contamination in the first instance, to mere *containment* of it afterwards - and even that goal may not be achieved as drafted. This substituted orientation is the true "paradigm shift" in copper mine regulation, any claims to the contrary notwithstanding.

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VII. THE PROPOSED RULES IGNORE THE VARIANCE/PUBLIC HEARING REQUIREMENTS OF THE ACT, AND INCLUDE "ALTERNATE MEASURES" THAT "GUT" BOTH THE RULES AND THE ACT ITSELF

A. The Variance and Public Hearing Mandate of the Act is Ignored:

The Act mandates a variance procedure from any regulation shown to be too onerous, and provides for a public hearing before it may be granted:[11] The Commission "shall" adopt regulations specifying the procedure under which variances may be sought. *Id.* In contrast the proposed Rules define a "variance" as "a commission order establishing requirements for a copper mine facility or a portion of a copper mine facility that are *different than the requirements in the copper mine rule*," and do not advert to the Act *at all*. 20.6.7.7(B)(61) (emphasis added).

In the aggregate these proposed Rules have largely deleted the need for a variance for new leach stockpiles within the open pit that cause ground water contamination above standards. 20.6.7.20(A)(1). They have further deleted the need for a variance for existing facilities that have already caused ground water contamination above standards. 20.6.7.20(B)(2) and 20.6.7.21(C)(2). They have omitted any need for a variance from standards for ground water contamination from new waste rock stockpiles. 20.6.7.21(B). They have further omitted any need for a variance for new tailing impoundments that will cause ground water contamination above standards. 20.6.7.22(A). The proposed rules have deleted any need to obtain a variance for placement of contaminated materials both inside and outside the open pit surface drainage area. 20.6.7.21(A)(2). And they allow for ground water contamination within the open pit by rule, without a variance. 20.6.7.24(A)(4).

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11 "The Commission: ... (H) may grant an individual variance from any regulation of the commission whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time. Any variance shall be granted for the period of time specified by the commission. The commission shall adopt regulations specifying the procedure under which variances may be sought, *which regulations shall provide for the holding of a public hearing before any variance may be granted*[.]" Section 74-6-4(H) NMSA 1978 (emphasis added).

Under the Act, the only way a person can contaminate ground water above standards is by obtaining a variance from standards and undertaking abatement measures in the manner prescribed by NMED. In stark contrast, by rule these proposed regulations authorize contamination above standards without a variance. As such, the rules are plainly contrary to the Act and cannot be adopted.

B. "Alternate Measures" In Practically Every Category of Abatement Render Nugatory The Primary Means of Abatement Specified:

These proposed rules are also rife with "Alternate measures" for virtually every substantive requirement pollution prevention or abatement requirement. See, *e.g.*, subsection 20.6.7.17(D)(4) (allowing "alternate measures" to impoundments of impacted stormwater); 20.6.7.20(A)(1) (allowing "alternate measures" for leach stockpile designs); 20.6.7.23(A) (allowing "alternate measures" for pipelines and tanks); 20.6.7.26(A) (allowing "alternate measures" for "monitoring well" construction); 20.6.7.33(C)(3)&(4) (allowing "alternate measures" for surface re-grading); 20.6.7.33(F) (allowing "alternate measures" for re-cover design); 20.6.7.33(I)(7) (allowing "alternate measures" for closing impoundments); and, 20.6.7.33(M) (allowing NMED to approve modification of any "closure design criteria").

These alternate measure schemes create massive "wiggle room" in practically every prophylactic prevention or abatement requirement. If enacted as presently drafted, these proposed Rules would be an enormous "gift" to the *beneficial user*, the mining industry, with no parallel benefit for the *owners* of New Mexico's water - the public. These win-lose "alternate measure" schemes threaten to leave all other New Mexicans "holding the bag" when the mines close - which they ultimately will - and the surrounding water resources remain contaminated. As such, these "alternate measures" are patently arbitrary and capricious, omit consideration of important aspects and are violative of the letter, the spirit, the history, the purpose, and the legislative intent the Water Quality Act.

VIII. POLICY REASONS WHY THESE RULES SHOULD BE REJECTED

A. The Proposed Rules Mostly "Skip" the "Any Place of Withdrawal For Present or Reasonably Foreseeable Future Use" Requirement:

Whereas the Act itself is rife with the oft-repeated standard of protecting New Mexico's water resources at "any place of withdrawal of water for present or reasonably foreseeable future use," in many places these proposed Rules remain essentially *silent* as to this requirement, or provide for a way around it. A plain reading of the Rules in their entirety and in context leaves one with the justifiable impression that the *Tyrone* decision of 2006, the subsequent Commission hearings on place of withdrawal, the Commissions Findings of Fact and Conclusions of Law of 2009, the "Tyrone Settlement Agreement" and the Technical/Advisory Committee proceedings *never existed.*

These proposed rules do not incorporate the seven criteria specified by the Commission to determine where a "place of withdrawal" is. Under the "dual systems" approach, ground water quality need only be maintained in some areas but not others, or contamination need only be "mitigated." By repeatedly injecting the re-issued point-of-compliance scheme into practically every aspect of contamination detection, the industry and NMED essentially "thumb their nose" at the Commission's specific rejection of the self-same scheme in its 2009 Conclusions of Law.

Indeed, NMED's rejection of the Commission's previous conclusions, rejection of the Tyrone Settlement Agreement previously agreed to, rejection of the recommendations of its own Staff - as well as rejection of the recommendations of the legislatively-mandated Advisory and Technical Committees - bespeaks, frankly, of an agency that is thoroughly "in bed" with the very industry it is *supposed* to regulate. If adopted these copper mine rules will result in horrific public policy, severely diminish and impugn any semblance of respect for the Rule of Law, and generate abject cynicism in the eyes of the public at large. These dire policy results simply must be avoided by a stern and firm rejection of these rules *in toto*.

B. These Rules Will Decrease Certainty and Increase Protracted Litigation:

Industry and NMED believe that these proposed rules will provide "certainty" and clarity, so that the parties may make informed investment and planning decisions without fear of continuous and protracted litigation, thereby purportedly providing secure jobs and economic vitality to the State. These themes of certainty and clarity, jobs and economic boost have been developed at considerable length by the mine operators in their past and current testimony before the Commission.

Yet as has been presciently pointed out by William C. Olson in his "Written Testimony:"

> there will be a direct conflict between the new Copper Mine Rule and the WQA including the potential for public hearings. When [NMED] attempts to approve a discharge permit pursuant to the Copper Mine Rule that allows pollution by rule from unlined facilities, *it is likely the public will challenge the permit.* Since the WQA in 74-6-5.E(3) 1978 requires that a permit be denied if the discharge would cause an exceedance of standards at any place of withdrawal of water for present or reasonably foreseeable future use, *the public would have a good case* to seek denial of a permit. *Id.*, at pp. 21-22 (emphasis added).

Thus, rather than *eliminating* protracted litigation, these proposed rules *practically invite it*. If adopted and then challenged, defending these rules in the courts will further squander precious and scarce NMED resources, over and over again with each new permit application, until another whole rule-making or other procedure attempts yet again to rectify the situation. Such repeated and protracted litigation and re-regulating, and the concomitant turmoil they cause - for the mine operators as well as everyone else - were *never the intent or purpose* of the Water Quality Act or the Commission's charge thereunder. If adopted these copper mine rules will simply keep spinning in litigation for *years into the future,* caused by the patently obvious "disconnect" between their result-oriented, poorly-conceived and poorly-drafted provisions and the Act itself. This again is poor public policy, a poor use of public resources, defeats the purpose for which the rules are intended and simply cannot be allowed to stand.

C. The Murky, "Back-Room" Manner Surrounded the Genesis of These Rules Further Militate Against Their Adoption:

As chronicled in the Attorney General's "Motion to Remand" at pp. 11-14, the origin of these proposed rules is steeped in mystery and possibly even collusion. The Legislature charged NMED with the responsibility of establishing an advisory committee, "composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders," to advise NMED on these rules. Section 74-6-4(K) NMSA, 2009 Amendment. As such both an Advisory and a Technical Committee were duly formed, and diligently worked on the rules from January through August, 2012. On August 1st however both Committees were *abruptly and summarily discharged* by NMED, *without prior notice and without any chance to finalize their mandated tasks.*

Thereafter, based on the Committees' work, on August 17th, 2012 NMED issued draft "Supplemental Permitting Requirements for Copper Mine Facilities" and draft "Financial Assurance Requirements for Copper Mine Facilities." Review of these drafts reveals that they were largely *consistent* with the Act, with this Commission's existing regulations, and with the Tyrone Settlement. The drafts required ground water standards to be met underneath the mines both during and upon closure of operations, unless variances and abatements measures were requested and granted.

On September 5th, 2012, FMI submitted comments on these drafts, proposing that water quality standards mostly *not* apply inside their open pits, and that point-of-compliance style monitoring wells be the only places where water quality standards be met. On September 7th, 2012 however, NMED circulated an internal draft of the rules that did *not* adopt FMI's proposals.

Then, in an abrupt 180-degree reversal of position, representing the real "*paradigm shift*" in current copper rule regulation in New Mexico, on September 13th, 2012, NMED released for public comment a *new* draft, adopting "nearly wholesale" FMI's September 5th comments (Motion to Remand, p. 14), and then submitted it in Petition form to the Commission on October 30th. And this is

the draft that has now (with minor modifications) been presented to the Commission for adoption.

The question becomes: What happened during September at NMED? Who actually, physically "set hand to paper" (or keyboard, as it were) in drafting the present proposal, and when? As of this writing, apparently no one really knows. Unbelievable though it may seem, as of this writing ***no one at NMED has stepped forward as being the person(s) who actually, physically wrote these proposed rules, not to mention when they were written or with whose final input***!

The critical question becomes: What does this state of affairs suggest? Answer: a murky, "back-room" style regulatory process. What does such a state of affairs grossly diminish? Any semblance of open or "blue-sky" government, any semblance of the "public" part of "public agency," and any degree of public confidence in these rules.[12] The current state of agency affairs is so contrary to established norms that now the Attorney General's Office, no less, is obliged to "stand-in" to defend the *public's* water quality, in the place and stead of the agency actually charged with this responsibility - the State Environment Department.[13] It is not a stretch of the facts here to conclude that something *illegal* may be occurring here, and this Commission is being invited to *compound* the offense.

As if this weren't enough, no one from NMED with any substantive knowledge concerning the genesis or reasons for the choices made in these proposed Rules has come forward to testify in support of *the agency's own Petition.* The near-complete lack of knowledgeable support before the Commission *by members of the agency itself* (instead of retained private consultants) speaks

12 Such an occluded, shrouded-in-secrecy style of public agency regulation supposedly went out with *The Gilded Age* - but apparently not. Moreover, if protection of water quality in New Mexico is the "hen-house," now there appear to be not one but *two foxes* guarding it - FMI and NMED.

13 It is also sufficiently unique that, despite considerable research, I have been unable to find a fact pattern in *any* appellate opinion to match it. Ever since the inception of the Water Quality Act, NMED has been on the "enforcement" side of the fence and the mine operators have been on the "no enforcement" side. Suddenly, NMED and the miners have *joined forces* - a new alignment which has resulted in an apparent *lack* of will or effort to enforce the Water Quality Act. NMED is petitioning the Commission to adopt rules that water down and render largely nugatory, or as mere surplusage, whole swaths of the Act, extracting in large part the "teeth" of the Act. This "unholy alliance" serves among other things to mock the Legislature, which enacted the Act originally and has resisted industry attempts to water it down ever since.

volumes about a thorough-going lack of conviction in its own proposals.

As such, and with all the respect that is due, NMED appears to have been transformed into the proverbial "captive agency," advocating almost *verbatim* the self-same positions as the industry it was created to regulate, rather than maintaining a detached and objective approach to prevention of water pollution, its time-honored legislative mandate. It is no exaggeration to state that this "jumping of the fence" by NMED makes a mockery of the Separation of Powers Doctrine, whereby the Legislature enacts and the Executive enforces *as authorized*, in an objective, non-aligned manner. Therefore, any sort of "Chevron deference" to these proposed rules is thoroughly unwarranted because both on their face and in their genesis they are *flat-out* contrary to law.

CONCLUSION

These proposed Copper Mine Rules represent poor policy, a poor use of taxpayer resources, a jaundiced and compromised regulatory process, set a dangerous and destructive precedent for other contaminant-generating industries in the state, and in all likelihood will result in threatening the very health and safety of the public both now and far into the future. These rules categorically benefit the *few* at the expense of the *many*. While their adoption may bring *short-term benefit* to the beneficial users and a relative handful of employees and suppliers, they will bring *long-term detriment to everyone else in the state*, in the form of seeping, leaking, leaching and wind-blown pollution, failed-slope stockpiles, unsightly pits and waste piles, and contaminated ground water for decades and *even centuries* to come.

Therefore, this Petition should be summarily *denied* and the matter remanded to the committees to devise rules that comport with both the spirit and the letter of the Water Quality Act.

Respectfully submitted,

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