

**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)

**CITIZENS' REPLY TO
NMED'S RESPONSE TO REMAND OR DISMISS AND
NEW MEXICO MINING ASSOCIATION'S RESPONSE**

Pursuant to the Procedural Order, the Gila Resources Information Project and Turner Ranch Properties, Inc., and Amigos Bravos (collectively "Citizens") respectfully file this Reply to NMED's Response to Motion to Remand or Dismiss and the New Mexico Mining Association's Response.

I. NMED'S RESPONSE

A. NMED's Proposed Copper Rule Ignores the Water Quality Act's Requirement to Protect any Place of Withdrawal of Groundwater for Present or Reasonably Foreseeable Future Use.

In its Response to the Citizens' Joint Motion to Dismiss the Petition for Rulemaking, the New Mexico Environment Department ("NMED") misrepresents the Citizens' position and then rebuts those misrepresentations. While the Water Quality Act ("Act") requires the Water Quality Control Commission ("Commission") to adopt regulations to "prevent and abate" water pollution, NMED describes the Citizens' argument as expanding that provision to require all water under a discharge site to meet water quality standards. NMED Response p. 1. This is not the Citizens' position. The Citizens' contention is that groundwater must be protected at every "place of withdrawal for present or reasonably foreseeable future use" ("Place of Withdrawal"). NMSA 1978, §74-6-5(E)(3).

NMED further mischaracterizes the Citizens' position by asserting the Citizens' argument to be that all groundwater within the state is a Place of Withdrawal and must be

protected. NMED Response p. 1-2. Again, NMED's assertion is incorrect. The Citizens recognize the plain language of the *Tyrone* case that directed the Commission to develop "some general factors or policies to guide its determination" as to what constitutes a Place of Withdrawal. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006 NMCA 115, ¶ 35. In *Tyrone*, the Court of Appeals was referring to Section 74-6-5.E of the Act that requires a constituent agency to deny a permit application if "the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. Determination of the discharges effect on ground water shall be measured at any *place of withdrawal of water for present or reasonably foreseeable future use.*" NMSA 1978, §74-6-5.E(3) (italics added). In conformance with the *Tyrone* decision, the Commission, in its *Decision and Order on Remand* ("WQCC Order"), adopted seven objective criteria to determine whether an aquifer in a given location should be considered a Place of Withdrawal. The criteria are:

- [1] Site hydrology and geology.
- [2] The quality of ground water prior to any discharge from a facility,
- [3] Past and current land use in the vicinity of facility,
- [4] Future land use in the vicinity of a facility,
- [5] Past and current water use in the vicinity of the facility,
- [6] Potential future water use and potential future water demand in the vicinity of the facility, and
- [7] Population trends in the vicinity of the facility.

WQCC Order, 78-79, ¶¶ 15-21, Exhibit A to the Citizens' Joint Motion.

In its proposed Copper Rule, NMED disregards the statutory mandate requiring groundwater standards to be met at any Place of Withdrawal. NMED also ignores the Court of Appeals directive that the "Commission, in the first instance, create some general factors or policies to guide its determination." *Tyrone*, 2006 NMCA 115, ¶ 35. Though the *Tyrone* Court recognized that the *Tyrone* mine is a place of withdrawal for present use, they clearly saw the need for interpretive guidance that would be provided by establishing criteria for determining a Place of Withdrawal. *Id.*, 2006 NMCA 115, ¶ 33. The Court expressly rejected the position that

water underneath a mine site need not be protected. *Id.*, 2006 NMCA 115, ¶ 36. “We can conceive of a situation in which an aquifer underneath a mine site may be negatively impacted, and consequently it might be appropriate to protect that water.” *Id.*, 2006 NMCA 115, ¶ 36.

The 2009 statutory amendments to the Water Quality Act support the criteria adopted by the Commission pursuant to the *Tyrone* decision. The amendments require the Commission to “specify in regulations the measures to be taken to *prevent water pollution*” and provide guidance that the “regulations may include variations in requirements based on *site-specific factors*, such as depth and distance to groundwater and geological and hydrological conditions.” NMSA 1978, §74-6-4.K (italics added). The Act’s 2009 amendments do not allow for blanket variances for all mine sites. The Commission’s criteria are consistent with this statutory amendment.

NMED’s proposed Copper Rule does not require a site specific determination on whether a mine site is a Place of Withdrawal based on the Commission’s adopted criteria. The *Tyrone* Court, interpreting §74-6-5.E(3), and the Commission, in its *Decision and Order on Remand*, require that a Place of Withdrawal determination be made in deciding whether to allow water quality standards to be exceeded underneath a mine site. *Tyrone*, 2006 NMCA 115, ¶ 35 and *WQCC Order*, 78-79, ¶¶ 15-21. Nonetheless, NMED’s proposed Copper Rule allows exceedances of water quality standards, without a variance or a determination that the mine site is not a Place of Withdrawal, underneath mine sites in the following proposed sections:

- a. Not requiring an impervious synthetic liner for new waste rock piles, whether inside or outside an “open pit surface drainage area,” 20.6.7.21.B(1) and (2) NMAC;
- b. Not requiring existing waste rock piles to meet new engineering requirements, including the requirement for an impervious synthetic liner, 20.6.7.21.C(2) NMAC;
- c. Not requiring an impervious synthetic liner for new tailing impoundments, 20.6.7.22.A(4) NMAC;
- d. At closure, requiring that ground water under “waste rock piles, leach stockpiles, tailing impoundments and other facilities that have the potential to generate leachate and cause an exceedance of the standards of 20.6.2.3103 NMAC” meet water quality standards only at a “designated monitoring well location,” 20.7.6.33.F NMAC;

- e. Providing that “the standards of 20.6.2.3103 NMAC do not apply” within the area of “hydrologic containment” of an open pit during operations and after closure, 20.6.7.24.A(4) and 33.D(1) NMAC;
- f. For new pipelines located inside the open pit surface drainage area, not requiring monitoring for integrity, secondary containment, or testing for integrity of pipelines inside the open pit surface drainage area, 20.6.7.23.A(1)(b) and (c);
- g. Not requiring ground water monitoring of new process water and impacted stormwater impoundments inside the open pit surface drainage area, 20.6.7.28.B(3); and
- h. Allowing, after closure, exceedances of ground water standards outside the area of “hydrologic containment” from a “flow-through pit,” 20.6.7.33.D(2) NMAC.

See, Attorney General's Motion to Admit Record from Tyrone Permit Appeal into Record

Proper, page 4, fn 2.

B. Industry Specific Rules Must Comply with the Water Quality Act.

The Citizens agree with NMED that allowing for an industry specific permit by rule is efficient. NMED Response p. 3. However, such a permit by rule must comply with the Water Quality Act and cannot simply disregard the objective of the Act to prevent and abate water pollution. Section 74-6-4.K of the Act reinforces the Commission’s and NMED’s basic statutory duty to protect the Place of Withdrawal, because it requires industry specific regulations to “prevent water pollution.”

The proposed Copper Rule allows the establishment of “points of compliance” outside sources of contamination to determine compliance with water quality standards. Such “points of compliance” are contrary to the Act. The 2009 industry specific amendment, Section 74-6-4.K, does not allow certain areas of the State to be exempt from water quality standards; rather, it requires the adoption of regulations that prevent water pollution. Similarly, Section 74-6-5.E(3) does not establish any specific “points of compliance” for water quality standards, but instead requires a determination of the discharge’s effect on groundwater measured at *any* place of withdrawal of water for present or reasonably foreseeable future use. NMSA 1978, §74-6-5.E(3).

C. Authority of the Commission.

At page 7, NMED again misrepresents the Citizens' position, that the Commission does not have authority to hear the proposed Copper Rule because some provisions of the proposed rule violate the Act. NMED Response p. 7. Contrary to NMED's assertion, the Citizens' argue that the Commission has authority under the Act to *dismiss* a petition that is not in accordance with the law; not that the Commission does not have authority to *hear* a petition that is contrary to law. NMSA 1978, §74-6-6.B (“[t]he commission shall determine whether to hold a hearing within ninety days of submission of the petition. The denial of such a petition shall not be subject to judicial review”).

NMED again cites *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, for the proposition that purely legal challenges to a proposed rule must wait until the administrative body has had a chance to consider and correct any perceived errors. NMED Response p. 7. However, here we are asking the administrative body itself to determine whether the proposed rule is within the confines of the Water Quality Act. We are not asking a court to make this determination, as was the case in *Shoobridge*. *Shoobridge* does not apply here, it only applies when a court interferes in an administrative matter. *New Energy Economy v. Shoobridge*, 2010-NMSC-049, ¶¶10-14. This is not a separation of powers issue, it is simply a motion to an administrative body on whether it has authority to adopt the rules as proposed.

Finally, NMED argues that there is no process for the Commission to remand a rulemaking petition. NMED Response p. 8. However, NMED admits that the Commission can dismiss such a petition by declining to hear it. NMED Response p. 8. The Act at §74-6-4.K requires the Commission to adopt industry specific regulations for the copper industry; therefore, the Commission must act at some point to promulgate lawful rules under the Act. A remand or dismissal from the Commission would require NMED to reconvene the Copper Rule Advisory

Committee (“CRAC”) to comply with the statute. Moreover, the Advisory Committee Guidelines furnished to the Committee by NMED provide, in Section VIII, Terms of Existence:

NMED intends to maintain the CRAC and associated Technical Group until copper mining discharge regulations are adopted by the Water Quality Control Commission which is anticipated to occur in December 2012. The Secretary may extend the term of the CRAC.

Advisory Committee Guidelines, Section VIII, Terms of Existence. In contravention of its own Guidelines, NMED terminated the CRAC prior to submittal of the regulations to the Commission. NMED can reconvene the CRAC at anytime even if the Commission dismisses the Petition.

II. NEW MEXICO MINING ASSOCIATION’S RESPONSE

A. The Water Quality Act Allows Regulations That Prevent or Abate Water Pollution at Places of Withdrawal and Not Across-the-Board Waivers.

The New Mexico Mining Association (“NMMA”), with refreshing frankness, explains that NMED’s proposed Copper Rule confirms that a mine site is not a place of withdrawal for present or reasonable foreseeable future use. NMMA’s Response, p. 3. So rather than apply the criteria developed by the Commission in the *Tyrone* case or conduct a variance hearing, NMED’s proposed Copper Rule simply abdicates its statutory mandate to protect groundwater located beneath the mining areas of “hydrologic containment” and “open pit surface water drainage.” See List of Water Quality Exceedances in NMED’s proposed Copper Rule, p. 3, above. These areas may cover hundreds of acres and include tens of thousands of acre-feet of groundwater.

NMMA points out that the Commission is empowered to consider “technical practicability and economic reasonableness” when enacting regulations. NMMA’s Response, p. 5. NMMA fails to point out the other criteria that the Commission must consider, including the “character and degree of injury to or interference with health, welfare, environment and

property;” “the public interest, including the social and economic value of the sources of water contaminants;” the “successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;” and the “property rights and accustomed uses.” NMSA 1978, §74-6-4.E(1), (2), (4) and (6) (partial list).

NMMA then explains that the Water Quality Act’s prohibition against discharges without a discharge permit cannot be violated unless the discharger knows where the “place of withdrawal is located.” They reason that by defining the Place of Withdrawal, the Commission would be sanctioning violations of the Act. NMMA fails to acknowledge that the Commission, in response to the *Tyrone* case, established criteria to determine whether a specific area is a Place of Withdrawal. *See WQCC Order, 78-79, ¶¶ 15-21*. By following an established process of applying the criteria, the Commission would not be sanctioning water quality violations, but rather weighing, within the confines of the criteria, whether certain water is required to be protected. The Commission would be complying with the directive from the Court of Appeals in the *Tyrone* case to “create some general factors or policies to guide its determination.” *Tyrone*, 2006 NMCA 115, ¶ 35. Conversely, if NMED’s proposed Copper Rule were adopted, the Commission would be sanctioning violation of the standards by blanket waivers instead of making a determination based on site-specific factors. The 2009 amendments to the Act propose that industry specific regulations include criteria “based on site-specific factors, such as depth and distance to groundwater and geological and hydrological conditions.” NMSA 1978, §74-6-4.K.

NMMA cites the recently decided *Tri-State* case for the proposition that the Commission has authority to decide where the 6.2.3103 NMAC (“Section 3103”) standards should apply. *Tri-State Generation and Transmission Ass’n, Inc. v. D’Antonio*, 2012-NMSA-039; NMMA’s Response, p. 6. In the *Tri-State* case, the New Mexico Supreme Court decided that a statute

provided adequate delegation of authority to the Office of the State Engineer to adopt regulations to administer water resources according to administrative interim priority determinations based on a number of factors. *Id.* In this rulemaking, the Commission has authority to disregard the Section 3103 standards only if requirements such as whether a discharge would cause water contamination in excess of any standard at a place of withdrawal of water for present or reasonably foreseeable future use and other requirements in the Water Quality Act are met. NMSA 1978, §74-6-5.E(3). Further, the Commission is required by the Act to “specify in regulations the measures to be taken to *prevent water pollution.*” NMSA 1978, §74-6-4.K, (italics added).

NMMA then presumes that “[a]s long as water outside the monitoring system envisioned by the proposed rule remains unimpaired, public health will be protected.” NMMA’s Response, p. 6-7. In other words, the mines can pollute as much as they want within a system of monitoring wells. NMMA attempts to square this position with Section 74-6-12.F by again arguing that they cannot tell what a Place of Withdrawal is and thus they will not know if standards can be exceeded. Section 74-6-12.F states that in the adoption of regulations “reasonable degradation of water quality resulting from beneficial use shall be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded.” NMSA 1978, §74-6-12.F. In arguing to abandon the quality of groundwater within a range of monitoring wells, NMMA shows its reckless disregard for groundwater in New Mexico.

B. The Water Quality Act Provides for Variances and Alternative Abatement Standards.

The current regulatory scheme for protecting groundwater requires permitted discharges to meet the water quality standards or the discharger must seek a variance or alternative abatement standards. 20.6.2 NMAC. This is the same regulatory scheme the Citizens’ advocate

for in this rulemaking. By analogy, NMMA labels the current regulatory scheme as unattainable. NMMA's Response, p. 9. They cite *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000), for the proposition that a waiver provision may be legitimate, but it "cannot save a rule that on its own has no rational basis." NMMA's Response, p. 10. Here, the rational basis that is of utmost importance to the state – protection of New Mexico's groundwater. NMMA's reliance on *Alenco* is misplaced. Preventing and abating contamination of New Mexico's groundwater has been the law governing water quality for almost 40 years and is not some arbitrary obstacle as it was in *Alenco*.

Creating rules that prevent and abate water pollution is the Commission's charge in this rulemaking. The Act allows the Commission to "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." NMSA 1978, §74-6-4.H. Such a statutory provision protects the interests of all interested parties, including the copper industry.

C. Copper Rules Will Set Precedent for Other Discharges.

Finally, NMMA argues that NMED's proposed Copper Rules should be promulgated because mining is "vital to the welfare of New Mexico." NMMA's Response, p. 10. They seem to argue that mining should be allowed to pollute groundwater and be treated differently by the Commission than other groundwater dischargers.

As previously explained, the Water Quality Act requires the Commission to only adopt regulations that will prevent or abate water pollution, whereas NMED's proposed Rule would expressly permit discharges by mining companies above water quality standards. The purpose of WQCC Regulations 20.6.2.3000 to 20.6.2.3114 is "controlling discharges onto or below the surface water ... to protect all ground water of the state of New Mexico which has an existing

concentration of 10,000 mg/l or less total dissolved solids, for present and potential future use as domestic and agricultural water supply, and to protect those segments of surface waters which are gaining because of ground water inflow, for uses designated in the New Mexico Water Quality Standards.” 20.6.2.3101.A NMAC All groundwater having a TDS of 10,000 mg/l or less shall meet the standards of Subsection A and B of 20.6.2.3103. However, NMED’s proposed Copper Rule does not comply with these requirements and would be an exception from this regulatory requirement. All other discharges to New Mexico’s groundwater will follow the precedent set by this proposed Copper Rule if adopted. Discharges from dairies, wastewater treatment plants, oil and gas facilities, petroleum storage tanks and others sources will all have areas of “hydrologic containment” or “sacrifice zones.” Rather than alternative water quality standards being the limited exception to the WQCC’s regulations, such standards will be normal because pollutants discharged directly to groundwater will no longer have to meet the regulatory standards. The rule proposed by NMED in this proceeding would be precedent setting and could have far reaching negative effects.

CONCLUSION

NMED’s proposed Copper Rule would permit mining companies to pollute groundwater and is irreconcilably at odds with the Water Quality Act’s fundamental purpose to prevent and abate water pollution. Therefore, the Commission should dismiss NMED’s Petition and proposed Copper Rule and direct NMED to reconvene the CRAC for further development.

Respectfully submitted:

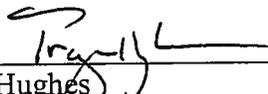
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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2013 I sent the Citizens' Reply to NMED and the Mining Association's Responses by email to the following:

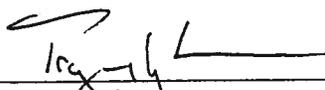
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