

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**



_____)
In the Matter of:)

_____)
PROPOSED AMENDMENT)
TO 20.6.2 NMAC (Copper Rule))
_____)

No. WQCC 12-01(R)

**FREEPORT'S CONSOLIDATED RESPONSE TO THE ATTORNEY
GENERAL'S MOTION TO ESTOP AND MOTIONS TO STRIKE**

I. INTRODUCTORY STATEMENT

Freeport-McMoRan Tyrone Inc., Freeport-McMoRan Chino Mines Company, and Freeport-McMoRan Cobre Mining Company (collectively, "Freeport") respectfully submit the following response to the Attorney General ("AG")'s Motion to Estop and two Motions to Strike. As discussed in more detail below, all three of the motions should be denied. In particular, the motion relying upon the doctrine of judicial estoppel is misplaced, as that doctrine does not apply in this rule-making proceeding, would not apply under the circumstances anyway, and the AG mischaracterizes the testimony of the Department's witness upon which the motion is based. Regarding the first Motion to Strike, the "place of withdrawal" issue clearly has been raised and addressed in this hearing and it is disingenuous to argue that anyone did not have sufficient notice that the Commission would address the issue; indeed the Hearing Officer advised the Commission that to the extent that it departed from its prior decisions, the Commission would need to provide an explanation. *See* Pleadings Index #40. Moreover, the Commission's consideration and adoption of a rule does not decide the "place of withdrawal" issue for the Tyrone Mine or any other particular mine. Regarding the Motion to Strike for lack of evidence, as discussed in detail below, there is ample evidence in the record for the Commission to make the contested findings.

II. RELATIONSHIP BETWEEN THIS RULE-MAKING AND THE TYRONE PERMIT ADJUDICATION

As discussed in the legal briefs filed before the hearing, this proceeding is a rule-making, and the Commission's rule-making is a quasi-legislative, policy-setting action that will apply

prospectively to all copper mines in New Mexico. In contrast, the Tyrone matter involved the adjudication of a dispute over specific permit conditions imposed by the Environment Department for one specific mine.

In the Tyrone case, following the 2006 Court of Appeals decision overturning the Commission's first decision upholding the contested discharge permit conditions, the Commission heard evidence and issued a Decision and Order dated February 4, 2009. That Decision and Order was appealed by Tyrone and the appeal remains pending before the Court of Appeals. Moreover, the Decision and Order itself remands the matter back to the Department for various actions, once of which is stated in paragraph A on page 84: "NMED shall, consistent with the Commission's findings and conclusions, identify places of withdrawal of water for present or reasonably foreseeable future use, and identify appropriate locations at which Tyrone's discharges' effects on ground water shall be measured." AG Exhibit 1. Importantly, the Commission left the final decision on "places of withdrawal" and the determination of appropriate locations for measurement to NMED, and there is no evidence that NMED has ever made any such determination. *See Id.* Yet the AG argues that the copper mine rule somehow overturns a final determination regarding "places of withdrawal" at Tyrone when no such determination has been made.

Indeed, the Commission ordered the 2009 Decision and Order on Remand in abeyance until the Department and Tyrone could complete the actions required by the Settlement Agreement (including the Commission's adoption of these very rules). *See* Commission's Order of January 20, 2011, attached hereto as Exhibit 1. Furthermore, a goal of the Settlement Agreement, as acknowledged by the Commission's January 2011 Order, is to "obviate the need to engage in the matters appearing in paragraphs A through D" or the Commission's 2009 Decision and Order. *See id.* Consequently, a Department determination on "places of withdrawal" at Tyrone may never be necessary under the Settlement Agreement.

III. THE DOCTRINE OF JUDICIAL ESTOPPEL DOES NOT APPLY IN THE CONTEXT OF A RULE-MAKING.

The AG's Motion to Estop argues that the NMED should not be able to submit argument and proposed findings to the Commission relating to the "place of withdrawal" issue because of the doctrine of judicial estoppel – *i.e.*, because NMED allegedly prevailed in a previous judicial proceeding by arguing an inconsistent position. In order to understand why the doctrine of judicial estoppel cannot apply to the current situation, it is necessary to explain the difference

between an *adjudicative, or quasi-judicial* and a *legislative, or quasi-legislative* proceeding. Several general principles and benefits of rule-making have been described in previous briefs. *See, e.g.*, Pleadings Index #17 at 6-9. Put succinctly, an administrative agency acts in “quasi-legislative” capacity when it adopts a rule applicable to *all* future cases, and in an adjudicative capacity when it determines a single party’s rights under *then-existing* law with regard to a single, *specific* fact situation. *E.g., William S. Hart Union High School Dist. v. Regional Planning Com.* 226 Cal.App.3d 1612, 1625 (1991). Because the Commission is considering the adoption of a new rule that would apply to *all* future situations, this rule-making falls squarely within the definition of a quasi-legislative proceeding. Courts have made clear that the doctrine of judicial estoppel can apply only in the context of a judicial or adjudicative proceeding, and does not apply to **quasi-legislative** rule-making proceedings such as this one. As one California appellate judge explained:

“Judicial Estoppel applies to judicial or quasi-judicial administrative proceedings. [The agency at issue] is a **quasi-legislative** administrative agency. [It] did not act in a judicial capacity...”

Gaviota Coast Conservancy v. Santa Barbara Local Agency Comm., No. B215836 (Cal. App., April 29, 2010, unpublished decision); *accord San Miguel Consol. Fire Protection Dist. v. Davis* 25 Cal.App.4th 134, 152 (1994) (“Accordingly, since [the agency at issue] did not act in a judicial capacity, collateral estoppel has no applicability to its determinations”).

While the doctrine of “judicial estoppel” does indeed apply to adjudicative proceedings, none of the cases cited by the AG apply the doctrine in a rule-making context. Rather, in rule-making proceedings, the Commission is free to evaluate the presented evidence and make decisions on the merits -- without regard to the new rule’s consistency with the Commission’s or the petitioners’ previous legal positions. *See, e.g., Atchinson, Topeka & Santa Fe Ry. Co. v. Wichita Bd. Of Trade*, 412 U.S. 800, 1192 (1973) (holding that an administrative agency is not bound by “rigid adherence” to prior precedent).

IV. EVEN IF THE DOCTRINE OF JUDICIAL ESTOPPEL APPLIED IN A RULE-MAKING CONTEXT, THE ELEMENTS OF JUDICIAL ESTOPPEL ARE NOT MET IN THIS SITUATION.

While the doctrine of judicial estoppel does not apply to rule-making proceedings, the elements of the doctrine are not met even for application in a quasi-judicial proceeding. Under the doctrine of “judicial estoppel,” a party which successfully assumes a certain position in a judicial proceeding may not then assume an inconsistent position in a subsequent judicial

proceeding. See *Citizens Bank v. C & H Constr. & Paving Co.*, 552 P.2d 796, 802 (Ct. App. 1976), cert. denied, 558 P.2d 619 (1976); accord *Johnson v. Aztec Well Servicing Co.*, 875 P. 2d 1128 (Ct. App. 1994). The rationale for the doctrine is to prevent a party from “abusing” the courts by winning twice based on incompatible positions. See, e.g. 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4477 (supp. 1992), citing *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1547-49 (7th Cir. 1990). Both proceedings at issue must have been judicial proceedings, and success in the prior judicial proceeding is a necessary ingredient of the doctrine. See, e.g., *Universal City Studios, Inc. v. Nintendo Co.*, 578 F. Supp. 911, 921 (S.D.N.Y.1983), *aff'd*, 746 F.2d 112 (1984). Likewise, it is a requirement that the legal positions at issue must be “necessarily inconsistent” with each other.

A. The positions taken by the NMED are not “necessarily inconsistent.”

i. The Testimony of Tom Skibitski was mischaracterized by the AG.

In its Motions, the AG argues repeatedly that the testimony of Tom Skibitski constitutes evidence of change in the policy of the NMED. For example, in its Motion to Strike NMED’s Proposed Findings, the AG states: “...evidence in the record from NMED’s policy witness is that NMED has *no disagreement* with the general criteria established by the Commission in the *Tyrone* matter to determine place of withdrawal...” Setting aside the distinction between an individualized permit condition and a broad public policy position, which are two distinct questions, the testimony of Tom Skibitski was mischaracterized and taken out of context. In fact, when prompted to make a broad policy stance on the subject, Mr. Skibitski stated the following:

Q. So as far as you know, does the Department, as a policy matter, have any disagreement with that statement?

A. I do not know that the Department disagrees.

Q. Is that it does not disagree, or you don't know?

A. I don't know if there is a disagreement.

Q. Who would know, as a policy matter?

A. I don't know.

WQCC Transcript, p. 335, 18-16.

Thus, based on the actual language and context of Mr. Skibitski’s testimony, the NMED, from a broad policy perspective, may well have had a disagreement with some or all of the *Tyrone* factors. Indeed, later in the hearing, Ms. Fox questioned Mr. Skibitski seeking clarification of his testimony on the “place of withdrawal” issue. Part of her question was: “So isn’t it true that a goal of the – your proposed rule is to address the ongoing issue with what place

of withdrawal means? TR p. 484, l. 24 through p. 485, l.1. Mr. Skibitski answered: “So yes. Addressing issues surrounding place of withdrawal would be one of the goals that had been – is one of the many goals.” TR p. 485, l. 14-16.

ii. Materially different circumstances exist between the first and second proceeding.

The AG is asserting that the position taken by the NMED in an adjudicative proceeding in 2006 is “necessarily inconsistent” with the position it took in the present rule-making. However, the fact that the NMED may have supported the Tyrone factors: 1) for the limited purpose of a single adjudicatory decision, 2) under that situation’s specific facts, and 3) within the framework of then-existing law, is not “necessarily inconsistent” with the NMED’s subsequent decision to support a modified – or even an entirely different – set of factors, when considering that the new assertion arose 1) for the purpose of discussing an entirely new rule applicable to *a range of* present and future situations, 2) under an *expanded set of facts* and expanded range of presented evidence, and 3) under a materially *different legal framework* given the 2009 WQA amendments in the wake of SB 206.

An assertion that is true in a single, specific adjudicatory case can and does have entirely different policy implications that are equally true when viewed in a broader context of a new rule. Due to the changed scope of discussion, a party such as the NMED can advocate both the support of the Tyrone factors in an initial, narrow factual situation, and the promotion of changes to those factors for the purposes of a legally distinct and much broader rule-making context, without any logical inconsistencies.

That is particularly true here. In the Tyrone proceeding, NMED sought to impose permit conditions regarding closure, particularly conditions regarding the extent to which portions of the copper mine must be regraded and covered at closure. Under the Tyrone Settlement Agreement, the parties agreed on regrading and cover requirements for the Tyrone Mine. The copper mine rule establishes specific requirements for regrading and covering copper mines at closure, and no party contends that the closure requirements of the copper mine rule are inconsistent with the Tyrone Settlement Agreement. Consequently, through the copper mine rule, NMED is obtaining a resolution of the matters at issue in the Tyrone permit adjudication through specific rule requirements, to be implemented more specifically at Tyrone through its permit.

B. Judicial estoppel requires a “victory” in a prior judicial proceeding.

As stated earlier, victory in the prior judicial proceeding is a necessary ingredient of the doctrine of judicial estoppel, because the doctrine is meant to prevent the abuse of the judicial system by having a party win twice using mutually-exclusive or contradictory arguments. *See, e.g., Universal City Studios, Inc. v. Nintendo Co.*, 578 F. Supp. 911, 921 (S.D.N.Y.1983). In this case, as discussed above, the Commission’s Decision and Order, relied upon by the AG, is under appeal and has been held in abeyance by the Commission pending implementation of the Tyrone Settlement Agreement. Consequently, the outcome of the prior litigation is not final and, as discussed above, the Decision and Order may not even be implemented based on the Settlement Agreement.

C. Neither Judicial nor Collateral Estoppel doctrines apply in administrative proceedings where the pertinent statutory provisions or regulations have materially changed between the first and second proceeding.

It is a well-established legal principle that estoppel does not apply in cases where the shift in position takes place as "the result of a change in public policy," *United States v. Owens*, 54 F. 3d 271, 275 (CA6 1995); *cf. Commissioner v. Sunnen*, 333 U. S. 591, 601 (1948) (estoppel does not apply to Commissioner where pertinent statutory provisions or regulations have changed between the first and second proceeding), or the result of a change in facts essential to the prior judgment, *cf. Montana v. United States*, 440 U. S. 147, 159 (1979) (“changes in facts essential to a judgment render estoppel inapplicable in a subsequent action raising the same issues” [because the subsequent action takes place in a completely new legal framework]).

The Tyrone Decision and Order was made under the Commission’s existing regulations. In the present situation, the Commission is adopting rules as required by the 2009 Amendments to the Water Quality Act and within new statutory framework requiring the Commission, rather than the Department, to specify the required measures to prevent water pollution. It would be inappropriate to apply any principle of estoppel based on a decision made under a prior legal framework. The Commission is currently on a brand new playing field, and the outcome of the present rule-making is entirely independent from the course of action parties took in previous proceedings – including any proceedings related to the *Tyrone* decision.

V. THE COMMISSION IS WELL WITHIN THE SCOPE OF ITS AUTHORITY TO CHANGE ITS MIND WITH RESPECT TO ANY PRIOR ADMINISTRATIVE DETERMINATION; THIS INCLUDES ANY PRIOR INTERPRETATION OF PRECEDENTS, POLICIES, AND DECISIONS RELATED TO THE PLACES OF WITHDRAWAL CRITERIA AND THE TYRONE PERMIT ADJUDICATIONS.

One of the main arguments propounded by the AG is that an administrative agency, when it reaches a decision on a particular interpretation of a statute, is then bound with that precedent in all subsequent proceedings. This interpretation is incorrect because it fails to take into account the fact that Agencies can and do “change their mind” in regard to implementation of their statutory mandates in light of policy considerations.

Agencies can and do change their policy even in an adjudicative context. For example, in the adjudicative context, where adherence to past precedent matters the most, the courts recognize that an agency is not forbidden from changing policy when such changes are supported by substantial evidence:

“An Administrative agency concerned with furtherance of the public interest is not bound to rigid adherence to precedent. ... An agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent.”

Atchinson, Topeka & Santa Fe Ry. Co. v. Wichita Bd. Of Trade, 412 U.S. 800, 1192 (1973) (citations and internal quotation marks omitted). Furthermore, “an agency’s view of what is in the public interest may change, either with or without a change in circumstances.” *Greater Boston Television Corp. v. FCC*, 143 U. S. App. D. C. 383, 394; 444 F. 2d 841, 852 (1970) (footnote omitted), cert. denied, 403 U. S. 923 (1971). In a rule-making context, agencies have even greater discretion to advocate their public policies, and such determinations ordinarily have the effect of law, not to be disturbed unless they are arbitrary and capricious, wholly unsupported by the evidence. *See, e.g., Atkins v. Rivera*, 477 U.S. 154, 162 (1986). This is particularly true in the instant case, where the rule-making proceeding has been expressly mandated by statute. In fact, according to the U.S. Supreme Court:

“[A] regulation... supported by the plain language of the statute and ... adopted pursuant to [an] explicit grant of rule-making authority ... is ‘entitled to more than mere deference or weight.’ Indeed, it is entitled to ‘legislative effect’ and is controlling ...”

Id. at 162 (internal citations omitted). In summary: because this is a quasi-legislative rule-making mandated by statute, the Department has discretion to reconsider a prior position, and the Commission has discretion to adopt whatever policy it deems necessary to achieve the purposes

of the Water Quality Act. Any allegedly conflicting prior precedent is not only non-binding, but is actually irrelevant with respect to this rule-making proceeding.

VI. PUBLIC NOTICE IS NOT REQUIRED TO BE TECHNICAL OR ISSUE SPECIFIC, BUT INSTEAD MUST AFFORD THE PUBLIC A REASONABLE OPPORTUNITY TO PARTICIPATE.

The “place of withdrawal” issue was addressed in the parties legal briefs filed at the outset of this matter, and was one of the major points of contention asserted by the AG and other parties throughout the hearing. *See, e.g.*, Pleadings Index #15. The AG’s motions repeat much of what has been contained in the AG’s previous filings in this case, and are largely a rehash of the same issues that have already been discussed extensively before the Commission in this proceeding. Further legal briefing on this issue is hardly necessary for the Commission to deliberate and render a decision on the Proposed Rules.

Yet, the AG now contends in its Motion to Strike that neither it nor the public received adequate notice that the hearing would have implications concerning the re-determination of criteria to determine what constitutes a “place of withdrawal” within the meaning of the WQA. Section 74-6-6 of the Water Quality Act sets forth the notice and hearing requirements relevant to this rule-making proceeding. The AG cannot dispute that it received direct as well as constructive notice of this petition and hearing. In addition, the AG, as well as its co-parties in opposition, were the parties who first brought up and briefed to this Commission the issues related to the place of withdrawal factors and determination; the very issues it now contends it lacks notice of. The AG’s sole remaining claim, then, is that the public notice given by the Commission failed to indicate with sufficient specificity the subject matter of the hearing such that a reasonable person (i.e., an average member of the public), could not understand what this hearing was about – and thus could not participate in the process.

The AG’s argument falls short because the law does not require public notice to be highly technical or issue specific. Rather, “[i]t is well settled that the fundamental requirements of procedural due process in an administrative context are “*reasonable* notice and opportunity to be heard” *Jones v. New Mexico State Racing Comm’n*, 671 P.2d 1145, 1146 (1983) (emphasis added) (citing *McCoy v. New Mexico Real Estate Comm’n*, 94 N.M. 602, 614, 614 P.2d 14, 16 (1980)). The notice requirement is even less stringent in a rule-making, as opposed to adjudicative, context because “[p]rocedural due process does not apply when government makes a policy decision that has an [alleged] adverse impact on an entire classification of individuals....,

even if the decision has the same [alleged] adverse effect on the interests of the members of the group as would an individualized deprivation." *Miles v. Board of County Comm'rs*, 964 P.2d 169, 172 (Ct. App. 1998). As one New Mexico court pointed out,

"[t]he distinction between individualized [fact-based] deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process ... underlies both the distinction between legislation and judicial trial and the distinction between rule-making and adjudication." *Id.*

The notice given in this case made it clear to all members of the public that the hearing was going to consider new rules with implications on water quality standards for copper mines. The subject matter of the notice encompasses within itself all aspects that may be significant to this rule-making, including any sub-topics related to the various legal provisions of the Water Quality Act as well as all relevant policies and regulations: including the "places of withdrawal" criteria. Thus, contrary to the AG's assertions, the notice in this case complied with both statutory and constitutional notice requirements, and afforded the public a reasonable opportunity to comment on and otherwise participate in the rule-making process.

VII. THE AG'S MOTION TO STRIKE NMED'S PROPOSED FINDINGS HAS NO LEGAL BASIS.

A. Commission can consider logically related evidence in the Record as a whole in support of NMED's proposed findings.

The AG has moved to strike NMED's proposed findings due to lack of evidence. Notably, the AG does not contest that technical testimony and other evidence exists in support of the NMED's position. Rather, the AG's contention is that the evidence that does exist lacks specificity and is therefore insufficient.

In this rule-making, the rules of evidence do not apply. The only requirement for the Commission's adoption of the statement of reasons is that the findings are supported by "substantial evidence." "Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Oil Transp. Co. v. N.M. State Corp. Comm'n*, 798 P.2d 169, 172 (1990); *Wolfley v. Real Estate Comm'n*, 668 P.2d 303, 305 (1983). The evidence in question must only be relevant to the subject matter of the hearing in terms of the record as a whole. *E.g.*, *Perkins v. Dep't of Human Servs.*, 748 P.2d 24, 27 (Ct.App.1987) (reviewing the whole record in considering sufficiency of the evidence). Further, contrary to the AG's assertions, the statement of reasons findings need not *specifically*

correspond to and address every single concern raised during testimony. As the New Mexico Court of Appeals pointed out:

“We disagree ... that the statement of reasons must state why the [Water Quality] Commission adopted each individual provision of the standards or must respond to all concerns raised in testimony. Such a requirement would be unduly onerous for the Commission and unnecessary for the purposes of appellate review.” *Regents of the University of California v. New Mexico Water Quality Commission*, 94 P.3d 788 (Ct.App. 2004).

Thus, “substantial evidence” for the Commission’s findings exists when the record, viewed as a whole, provides a reasonable person with logical support for its conclusions. This determination is always made in the light most favorable to the action of the Commission that is being challenged. *Rinker v. State Corp. Comm’n*, 84 N.M. 626; 506 P.2d 783 (1973).

B. Substantial Evidence exists in support of NMED’s proposed findings.

Given the standards discussed above, it is clear that the Record as a whole can and does provide Substantial Evidence in support of NMED’s proposed findings. It is a natural logical as well as legal implication to conclude that a *new* rule for copper mines will have prospective implications and will *possibly* overrule existing regulations to the extent any inconsistency exists. *Cf., e.g., Securities & Exchange Comm’n v. Chenery Corp.*, 332 U.S. 194, 202 (1945) (acknowledging that an agency has “the ability to make new law prospectively through the exercise of its rule-making powers”); *Richey v. District of Columbia Dep’t of Employment Services*, 531 A.2d 244, 250 (D.C. 1987) (pointing out that new rules adopted through the rule-making process have a “virtually automatic” prospective effect). The premise that the adopted rule will have *some* effect on the *Tyrone* factors is nothing more than a natural logical conclusion; and existing law does allow Commissioners to use their logic and common sense in adopting the statement of reasons. Further, the determination of what *precise* effect the new rule will have on any specific permit needs not be resolved by the Commission at this time, and will inevitably be addressed in due course when that permit comes up for renewal.

Contrary to the AG’s assertions, this Commission has access to substantial evidence, including hundreds of combined pages of technical testimony that do address the implications of the Proposed Rule on the *Tyrone* factors. Many of these are cited in the Department’s closing argument. Also, Mr. Brown’s direct testimony explains in detail the approach of the Proposed Rules regarding containment of contamination within units of an active copper mine and why that approach is justified. *See Brown Direct* at p. 11-45; *Brown Rebuttal* p. 1-10, 13. *See also,*

e.g., TR p. 12, l. 8-10; p. 217, l. 11-13; p. 218, l. 14-15; p. 424, l. 4-8. As indicated by the Hearing Officer, and consistent with the cases cited above, to the extent that the Commission's adoption of the Copper Mine Rule constitutes a departure from its past decisions, it is appropriate for the Commission to explain its reasoning. Moreover, it is not necessary for a witness to have said exactly what is in the proposed Statement of Reasons; the Commission can reach a conclusion based on the totality of the evidence. Consequently, should the Commission decide to do so, it is entirely appropriate for the Commission to include the contested portions of the Statement of Reasons when it adopts the rule.

VIII. CONCLUSION

Because the proposed findings are consistent with logical reasoning and the state of existing law, and because the Record does contain substantial evidence to support said findings, Freeport urges the Commission to deny all three of the AG's motions.

Respectfully Submitted,

GALLAGHER & KENNEDY, P.A.



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing pleading was hand-delivered to the following parties on Monday, September 09, 2013:

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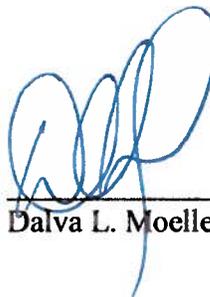
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**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**



**IN THE MATTER OF:
APPEAL OF SUPPLEMENTAL DISCHARGE
PERMIT FOR CLOSURE (DP-1341) FOR
PHELPS DODGE TYRONE, INC.**

**Docket Nos.
WQCC 03-12(A)
WQCC 03-13(A)
(Consolidated)**

PHELPS DODGE TYRONE, INC.,

Petitioner.

**ORDER HOLDING THE FEBRUARY 4, 2009 DECISION ON REMAND IN
ABEYANCE AND JOINING THE PARTIES' MOTION TO STAY THE
PENDING JUDICIAL APPEAL TO ALLOW FOR SETTLEMENT**

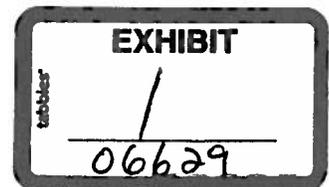
This matter came before the Commission on the joint presentation of Phelps Dodge Tyrone, Inc. ("Tyrone"),¹ and the New Mexico Environment Department ("Department")

Having considered the parties' presentation, and otherwise being fully advised in the premises, the Commission FINDS as follows:

1. Tyrone and the Department are party to an agreement that seeks to comprehensively settle the protracted administrative and judicial proceedings that resulted in this Commission's February 4, 2009 Decision and Order on Remand herein, and the subsequent appeal to the Court of Appeals taken by Tyrone, which appeal is pending at the time of this Order. The agreement is referred to as the "Tyrone Settlement Agreement."

2. Among other things, the Commission is informed that the Tyrone Settlement Agreement contemplates that the parties will jointly seek to stay the pending judicial appeal to allow the parties to pursue certain State regulatory proceedings, including but not limited to proceedings that will be brought before this Commission for later decision.

¹ Tyrone is now known as Freeport McMoRan Tyrone, Inc.



3. The Commission also is informed that one goal of the Tyrone Settlement Agreement is to resolve the parties' differences in a way that will obviate the need to engage in the matters appearing in paragraphs A through D of the section entitled "Final Order" in this Commission's February 4, 2009 Decision and Order on Remand.

4. In order to be allowed the opportunity to pursue all the terms of the Tyrone Settlement Agreement for the ultimate resolution of this matter, the parties have requested the Commission to hold in abeyance the requirements of paragraphs A through D of the Final Order, and to join the parties in a joint motion to stay the judicial appeal.

5. Without prejudging matters that may hereafter be brought before the Commission in the parties pursuit of final resolution as provided in the Tyrone Settlement Agreement, or in any way prejudicing this Commission's ability to fulfill its regulatory responsibilities in any proceeding hereafter brought before the Commission, the Commission finds that the parties' request is well-taken, is supported by a public policy of favoring settlements over protracted litigation, and is consistent with the Water Quality Act and this Commission's regulations adopted thereunder.

WHEREFORE, the Commission ORDERS as follows:

1. Paragraphs A through D of the section entitled "Final Order" in this Commission's February 4, 2009 Decision and Order on Remand are held in abeyance until further order of the Commission in the event the parties are unable to achieve final resolution pursuant to the terms of the Tyrone Settlement Agreement.

2. The Commission will join in the parties' joint motion to the New Mexico Court of Appeals requesting a stay order, which joint motion and proposed order is attached hereto as Exhibit A.

Signed and entered this 20th day of January, 2011

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

For the Water Quality Control Commission