

**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)

JOINT REQUEST FOR STAY OF 20.6.7 NMAC

The Gila Resources Information Project (“GRIP”), Turner Ranch Properties, L.P. (“TRP”), and Amigos Bravos, referred to collectively as “Citizens,” respectfully file this Joint Request for Stay of 20.6.7 NMAC until the appeal process for this Rule is concluded in the New Mexico courts.

On October 30, 2012, the New Mexico Environment Department (“NMED”) filed a Petition with the Water Quality Control Commission (“the Commission”) to adopt 20.6.7 NMAC and requested a hearing. The Commission held a hearing on this matter over the course of eleven days between April 9, 2013 and April 30, 2013. With little deliberation and no independent support of its reasoning on the record, the Commission adopted, with one small non-substantive change, the Proposed Statement of Reasons submitted jointly by the copper mining company Freeport McMoRan, Inc. and NMED. The Citizens request the Commission to stay the Rule, which expressly allows groundwater pollution above standards and represents a radical departure from the Commission’s other regulations, pending the outcome of judicial review.

NMSA 1978, Section 74-6-7.C of the Water Quality Act (“Act”) states that “[a]fter a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted pending the outcome of the judicial review.” In “cases where a stay is sought of agency action during the pendency of an administrative appeal, in accord with the general rule requiring

a party to exhaust his administrative remedies, the party seeking the relief should first apply for a stay from the agency involved.” See *Tenneco Oil Co. v. New Mexico Water Quality Control Com’n*, 105 N.M. 708, 710, 736 P.2d 986, 988 (1986) (citing *Von Weidlein International Inc. v. Young*, 16 Or.App. 81, 514 P.2d 560 (1973) (*en banc*)); see also NMSA 1978, § 74-6-7.C (“[t]he stay of the action may be granted by the commission or by the court of appeals if the commission denies a stay within ninety days after receipt of the application.”)

There is good cause to stay the new Copper Rule. Using *Tenneco Oil* as a guide,¹ good cause exists because: (1) the Court of Appeals is likely to set aside the Rule on appeal; (2) Citizens will be irreparably harmed by the groundwater pollution and denial of due process that the Rule permits; (3) the other interested parties will not be substantially harmed if the Copper Rule is stayed pending appeal; and (4) the public interest will be protected by staying the Copper Rule. See *Tenneco Oil Co.*, 736 P.2d at 988.

A. The Copper Rule Will Likely Be Set Aside on Appeal.

Fundamentally, and as provided in Citizens’, William C. Olson’s and the Attorney General’s closing arguments and numerous other filings, the recently adopted Copper Rule violates the New Mexico Water Quality Act, the New Mexico Constitution, and applicable case law. Moreover, without providing any rational reason, the Commission’s Rule reverses its own and NMED’s decades-long practice of protecting all groundwater having total dissolved solids of 10,000 mg/l or less as a domestic and agricultural water supply. In 1967, the New Mexico Legislature recognized the importance of protecting groundwater and enacted the Water Quality Act. NMSA 1978, §§ 74-6-1 – 17. “The objective of the Water Quality Act ... is to abate and

¹ *Tenneco* was decided without the benefit of any statutory guide for granting stays. The Water Quality Act, since 1993, says “good cause” has to be shown for a stay to be granted and *Tenneco* has a four prong test: “(1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.” *Tenneco Oil Co.*, 736 P.2d at 988.

prevent water pollution.” *Bokum Resources Corp. v. New Mexico Water Quality Control Comm’n*, 1979-NMSC-090; *see also* NMSA 1978, §74-6-4(E). To accomplish this fundamental purpose, the Act requires the Water Quality Control Commission to, among other things, “adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the Water Quality Act.” NMSA 1978, §74-6-4(D). Pursuant to this mandate, the Commission in 1977 adopted numeric water quality standards to preserve *all* groundwater for present and reasonably foreseeable future use as a domestic and agricultural water supply. 20.6.2.3101 NMAC; *N.M. Mining Association v. N.M. Water Quality Control Comm’n*, 2007-NMCA-10, ¶¶ 7 & 9; *Bokum, supra* (upholding Commission’s adoption of water quality standards). The Commission’s other regulations are written so that “if the existing concentration of any water contaminant in groundwater exceeds the standards in Section 20.6.2.3103 NMAC, no degradation of the groundwater beyond the existing concentration will be allowed.” 20.6.2.3101.A.2 NMAC. In contrast, the Copper Rule allows degradation of groundwater without any regard to whether present or future use of the impacted groundwater might be adversely affected.

The Water Quality Act compels NMED to deny permit applications that would cause an exceedance of standards “at any place of withdrawal of water for present or reasonably foreseeable future use.” NMSA 1978, §74-6-5(E)(3). In interpreting the place of withdrawal language, the New Mexico Court of Appeals found that “[c]ertainly, the legislature meant to capture the concept that clean water that is currently being withdrawn for use, or clean water that is likely to be used in the reasonably foreseeable future, must be protected.” *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Commission*, 2006-NMCA-115, ¶27. The Court noted that the issue is complicated by the fact that groundwater and surface water systems are

interconnected and that “[c]ontaminated waters migrate into areas that were previously pristine” but the Court had “no doubt that the legislature intended to limit that kind of migration.” *Id.*, at ¶29. It was the Commission’s charge to limit this kind of migration in conformance with the Act.

The Rule adopted by the Commission will allow vast, acid-generating stockpiles of ore, waste rock and tailings at all copper mines to pollute groundwater above the numeric water quality standards set out at 20.6.2.3103 NMAC (“3103 Standards”). The Rule expressly waives 3103 Standards within the “area of hydraulic containment” during and after active mining operations. On its face, the Rule allows leaks and spills to pollute groundwater within the area of hydraulic containment, regardless of whether the leaking fluid is process water, pregnant leach solution, leachate, gasoline or some other toxic mixture. The Commission’s Rule would also allow mine units (e.g., leach, waste rock, and tailings stockpiles) located outside the area of hydraulic containment to pollute groundwater, provided the operator installs an interceptor system and at least one monitoring well.² *See, e.g.*, §20.6.7.21.B.1.c NMAC (waste rock piles); §20.6.7.22.A.4.c NMAC (tailings piles). The Commission’s Rule relieves mine operators from the usual duty to abate or even report groundwater pollution caused by unintended spills and leaks within the mine unit areas. No active abatement of the polluted groundwater would be required under the Rule, just monitoring and hydraulic containment. NMED’s witnesses testified that pollution containment systems never truly contain all the pollution. [Brown at 588] This new paradigm of permitting rather than preventing pollution is contrary to the Water Quality Act.

The scope and duration of the groundwater pollution allowed by the Commission’s Rule would essentially be unlimited. The area of hydraulic containment may extend over several square miles, is largely within the control of the mine operator, and will change as mining

² The Rule does not require any groundwater monitoring within the area of hydraulic containment. [Brown at 687, 693, 696; Blandford at 1455-56, 1458]

progresses and in response to offsite and onsite groundwater pumping. The area of hydraulic containment can also combine with groundwater containment systems associated with exterior units, further increasing the size of exempt areas where no water quality standards apply.

The Commission's Statement of Reasons for the Copper Rule also fails because it provides no insight into why the Commission adopted the Rule in derogation of its longstanding policy of protection groundwater. *City of Roswell v. New Mexico Water Quality Control Commission*, 1972-NMCA-160, 565, 505 P.2d 1237, 1241. The Statement of Reasons does not specifically respond to the concerns raised by the Citizens, the New Mexico Attorney General, William C. Olson and others at the hearing. In *City of Roswell*, the New Mexico Court of Appeals concluded that it could not effectively review a decision "unless the record indicate[d] what facts and circumstances were considered and the weight given to those facts and circumstances." *Id.* The Court held that formal findings were not required but that "the record must indicate the reasoning of the Commission and the basis on which it adopted the regulations." *Id.* Here, the Commission simply adopted FMI and NMED's inadequate findings, without any indication of its reasoning. Unlike the finding of the Court in *Regents of University of Cal. v. Commission*, 2004-NMCA-73, 94 P.3d 788, NMED did not present to the Commission a point-by-point rebuttal of Citizen's, the New Mexico Attorney General's or William C. Olson's arguments. As a result, the Commission cannot simply adopt FMI and NMED's statement of reasons without any explanation on what they based their decision. The failure to provide such an explanation is another basis for setting aside the Rule.

B. Citizens and the Public will Suffer Irreparable Harm Unless the Copper Rule is Stayed Pending Appeal.

Under this Rule, FMI will not be required to prevent pollution from waste rock stockpiles, tailings, or impoundments, nor will it be required to actively abate existing

groundwater pollution. It will merely be required to contain the pollution within poorly defined areas that may expand over time and underlie adjacent properties. The Rule allows this pollution without regard to whether there is any present or future use for the impacted groundwater.

GRIP is headquartered in Silver City, New Mexico, and has 300-400 active members in Grant County. Smith at 2450, 2452. Most of GRIP's members live in Silver City, which is only 10-15 miles of the FMI Tyrone mine. Smith at 2453. The resulting pollution will do irreparable damage to public groundwater, including the groundwater that is or will be relied on by GRIP and other Grant County residents.

Prior to the Copper Rule, the only possible way FMI or another person could legally pollute groundwater was to obtain a variance from the Commission or prove that no place of withdrawal for future use would be impaired by the pollution. If pollution occurred without a variance, then the polluter was subject to an enforcement action, including revocation of its permit. It could also be required to submit an abatement plan to remediate the polluted groundwater. If abatement to standards was not possible, then the polluter would have to petition the Commission to set alternative abatement standards. Both the variance and alternative abatement standard proceedings are site-specific adjudicatory proceedings in which potentially impacted property owners and the public are provided notice and an opportunity to protect their groundwater supplies from pollution above standards. The new Copper Rule dispenses with these due process protections in violation of the Water Quality Act. After the effective date of the Copper Rule, groundwater may be polluted above standards at all existing or new copper mines, as a matter of right, without any regard to present or future uses of the impacted groundwater. This not only irreparably harms the public groundwater on which Citizens and the public depend, it also violates Citizen's and the public's rights of procedural due process.

TRP owns Ladder Ranch, which is adjacent to the Copper Flat Mine in Sierra County, New Mexico. As discussed above and in numerous other filings, the Copper Rule allows groundwater pollution above water quality standards within poorly defined areas associated with the open pit and interceptor systems. The Rule will thus allow pollution of groundwater resources connected to those occurring and used at Ladder Ranch. Moreover, the emphasis on groundwater pumping to contain pollution will deplete surface streams on and near Ladder Ranch that receive base flow from groundwater. The Rule will allow groundwater pollution at Copper Flat Mine and potentially extensive groundwater pumping for containment without providing Ladder Ranch, other affected property owners, or the public any opportunity to object. Accordingly, Citizens and the public will be irreparably harmed unless the Rule is stayed pending appeal.

C. Substantial Harm Will Not Result to Other Interested Persons

Preventing pollution of groundwater and requiring abatement of inadvertently polluted groundwater, standard practices before adoption of the Copper Rule, will not harm any other interested persons. The main other interested person in this instance is FMI, an \$18 billion international mining company. From the 1970s, FMI, through its predecessor Phelps Dodge, Inc., has been regulated under existing 20.6.2 NMAC. For over 35 years, Phelps Dodge/FMI has continued to operate in New Mexico and any shutdown of a mine was caused by the market price of copper, not because of their failure to obtain a permit or variance under the Water Quality Act. A stay of the Copper Rule will not harm FMI. On the other hand, FMI could be harmed if it relies on the Copper Rule to pollute public groundwater and that Rule is subsequently held invalid by the Court of Appeals or the Supreme Court. Remediating the added contamination that results while this Rule is on appeal will be costly for any mining company that relied on the

Rule. In any event, as shown by the New Mexico Attorney General at the hearing, FMI does not consider the Commission's other regulations under 20.6.2 NMAC to be a shareholder risk. AGO Ex. 31, Brack at 115-116, 141. FMI would not be harmed by a stay of the Copper Rule and has not identified to its shareholders any risk of doing business in New Mexico under 20.6.2 NMAC.

D. A Benefit Will Result to the Public Interest

There will be no harm to the public if the Copper Rule is stayed. In fact, the public will benefit from not having public groundwater polluted by the copper mining companies. New Mexico's Constitution declares that all water in New Mexico "belong[s] to the public and [is] subject to appropriation for beneficial use" N.M. Const. Art. XVI, § 2; NMSA 1978, §72-12-1 (declaring groundwater "to belong to the public and is subject to appropriation for beneficial use"); NMSA 1978, §72-12-18. Public water in New Mexico is held in trust by the State for the benefit of the public. *See, e.g., New Mexico v. GE*, 467 F.3d 1223, 1243 (10th Cir. 2006) (holding that New Mexico has codified "the public trust doctrine as to groundwater"). Groundwater in New Mexico is held by the State as trustee for the benefit of the public, not private corporations like FMI. *New Mexico v. GE, supra; see also State ex rel. Bliss v. Dority*, 55 N.M. 12, 17 (1950). Allowing the Copper Rule to become effective will harm the public by allowing contamination of the public's water.

E. Conclusion

For all of the foregoing reasons, the Commission should stay FMI and NMED's Rule. The Rule is contrary to law, arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence. Accordingly, Citizen's will likely prevail in overturning the Rule on appeal, and, unless the Rule is stayed pending appeal, Citizen's and the public will be irreparably harmed.

Respectfully submitted,

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I hereby certify that on October 23, 2013, I sent Joint Request for Stay of 20.6.7 NMAC by email to the following:

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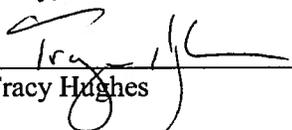
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