

STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION



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

No. WQCC 12-01(R)

New Mexico Environment Department,  
Petitioner.

**ATTORNEY GENERAL'S MOTION TO STRIKE  
NMED'S PROPOSED FINDINGS BASED ON LACK OF EVIDENCE**

**Preliminary Statement**

In its Proposed Statement of Reasons, the New Mexico Environment Department (“NMED”) proposes that the Water Quality Control Commission (“Commission”) modify its decision in the *Tyrone* adjudication by changing the general criteria adopted by the Commission to determine “place of withdrawal of water for present and reasonably foreseeable future use” under the Water Quality Act (“WQA”) and by changing the specific locations at the Tyrone Mine that the Commission determined in that adjudication to be actual places of withdrawal. *See* NMED Proposed Statement of Reasons, ¶¶ 1308-1331 [attached as Ex. A].

NMED does not support these proposed findings with citation to evidence in the record. *See id.* This is because there is *no evidence* in the record from this proceeding to support such findings. In fact, the 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 or with the specific locations at the Tyrone Mine that the Commission has determined to be actual places of withdrawal. *Skitbitski Test. Tr. vol. 2, p. 412, ll. 4-10; p. 334, ll. 16-24.*

NMED’s proposed findings must be supported by evidence in the record. *Accord* NMSA 1978, § 74-6-7(B)(2); NMRA 12-213(A)(3). There is *no evidence* in the record before the

Commission to support modifications of the Commission's decision in *Tyrone*. NMED's request to modify the decision therefore should be struck.

### **Background**

As the Commission is aware, it initially held a 10 day hearing in 2003 on an appeal brought by Phelps Dodge Tyrone, Inc. ("Tyrone") challenging NMED's closure permit for the Tyrone Mine. The Commission issued a decision in 2004 holding *inter alia* that the Tyrone Mine was a "place of withdrawal" under the WQA.<sup>1</sup>

Tyrone appealed the Commission's decision to the New Mexico Court of Appeals. The appellate court found, in 2006, that the Commission's determination was overly broad, and remanded the matter to the Commission to "create some general factors or policies to guide its determination" as to what constitutes a "place of withdrawal" under the WQA. *Phelps Dodge Tyrone, Inc. v. Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 35, 140 N.M. 464, 473, 143 P.3d 502, 511. The court stated that the Commission could create the general factors through the *Tyrone* permit adjudication or a rulemaking. *Id.*

Pursuant to the court's mandate, the Commission decided to create the factors to determine place of withdrawal through the *Tyrone* adjudication. Decision and Order on Remand, p. 1 ("Comm'n Decision"), *In the Matter of Appeal of Supplemental Discharge Permit for Closure (DP 1341) for Phelps Dodge Tyrone, Inc.*, Nos. 03-12(A) and 03-13(A) ("*Tyrone*") [AGO Ex. 1].

After 24 days of hearing, the Commission decided the general factors to determine place of withdrawal in its 2009 Decision. These seven factors are: site hydrology and geology, quality

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<sup>1</sup> Commission's Partial Final Decision and Order Affirming Supplemental Discharge Permit and Requesting a Modification to Condition 22, Conclusion of Law ¶ 29 (June 10, 2004).

of water prior to discharge, past and current land use in the vicinity, future land use in the vicinity, past and current water use in the vicinity, and population trends in the vicinity.

Comm'n Decision, COL ¶¶ 15-21. The Commission also determined that many locations at the Tyrone Mine site are in fact places of withdrawal. These non-exclusive locations include the Tyrone open pits, areas near the open pits, and areas around leach stockpiles, waste rock stockpiles and tailings impoundments.<sup>2</sup>

In 2009, the Legislature amended the WQA to require the Commission to promulgate regulations for the copper industry for “the measures to be taken to prevent water pollution and to monitor water quality.” NMSA 1978, § 74-6-4(K). NMED petitioned the Commission for this rulemaking in direct response to the 2009 amendments to the Legislature directing this rulemaking. *See* Petition to Adopt 20.6.7 and 20.6.8 NMAC and Request Hearing (Oct. 30, 2012) (petitioning Commission for this rulemaking pursuant to NMSA 1978, § 76-6-4(K) (2009)). The Commission granted the NMED’s Petition, and is holding this rulemaking to “establish new rules for the copper mine industry to specify measures to be taken to prevent

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<sup>2</sup> Applying the general factors decided by the Commission, the Commission determined that “the regional and alluvial aquifers underlying portions of the Tyrone mine site are places of withdrawal of water for present and reasonable foreseeable future use pursuant to Section 74-6-5(E)(3).” Comm’n Decision, COL ¶ 33.

The Commission determined that areas around the open pits are present and future places of withdrawal. *Id.* COL ¶¶ 40-41.

The Commission specifically identified the following areas as places of withdrawal: two drinking water wells, the Fortuna Wells; six parcels within the mine site not owned by Tyrone or affiliates; the north side of the mine around the Mangas Valley Tailings Impoundment; the area west and to the east of the 1A Tailings Impoundment; an area immediately south of the 1A Tailings Impoundment; an area to the southeast of the 3A Stockpile and to the east of the 3B Waste Rock Pile; open areas around the pits; the area on the east side of the mine south of the 5A Waste Rock Pile; an area south of the Gettysburg Pit; areas on the southwest corner of the mine; an area to the west of the Gettysburg Pit, along the 1C Stockpile; areas on the southeast side of the mine along and within Oak Grove Draw; an area on the east side of the mine to the southeast of the No. 1 Stockpile; areas in the southeast corner of the mine, around the reclaimed Burro Mountain Tailings; and areas on the west side of the mine in Deadman Canyon. *Id.* COL ¶¶ 46-49, FOF ¶ 125.

water pollution and to monitor water quality,” just as it is directed to do so by statute. WQCC Notice of Public Hearing. The scope of the rulemaking before the Commission did not include changing the general factors to determine place of withdrawal or the specific locations at the Tyrone Mine that are places of withdrawal. *See* AGO Motion to Strike NMED’s Request to Re-determine Place of Withdrawal as Outside Scope of the Proceeding (Sept. 4, 2013).

During the rulemaking hearing before the Commission, NMED’s policy witness, Tom Skibitski, testified that NMED did not disagree with any of the seven factors adopted by the Commission in the *Tyrone* proceeding to determine place of withdrawal. Skibitski Test. Tr. vol. 2, p. 412, ll. 4-10.<sup>3</sup> He further testified that NMED did not disagree with any of the Commission’s determinations of the specific places of withdrawal at the Tyrone Mine. *Id.* p. 334, ll. 16-24.<sup>4</sup>

The Commission’s general criteria to determine place of withdrawal was not re-litigated during the rulemaking hearing. The specific locations that the Commission determined are places of withdrawal at the Tyrone Mine were not re-litigated during the rulemaking hearing. Indeed, re-litigation of those determinations was not within the scope of the rulemaking hearing.

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<sup>3</sup> Q. Those are the criteria that the Court directed the Commission to adopt, are they not?

A. Okay. Yes. Yes.

Q. Okay. And does the Environment Department have any disagreement with those factors?

A. I am unaware of any disagreement with these factors. I believe we supported these factors.

Skibitski Test. Tr. vol. 2, p. 412, ll. 4-10.

<sup>4</sup> Q. So they -- they identified, you know, in their decision a number of places of withdrawal at the Tyrone Mine site.

So my question is, as a policy matter, does the Department have any disagreement with the findings of the Commission that -- about these specific places of withdrawal at the Tyrone Mine site?

A. No. To my knowledge, there is no disagreement.

Skibitski Test. Tr. vol. 2, p. 334, ll. 16-14.

*See* AGO Motion to Estop NMED from Taking Inconsistent Positions in Proceedings before the Commission (Sept. 4, 2013).

In its Proposed Statement of Reasons and closing brief, however, NMED for the first time in this proceeding requests the Commission change its Decision in the *Tyrone* matter. NMED requests that the Commission change the criteria to determine place of withdrawal and change the actual places of withdrawal at Tyrone determined by the Commission. *See generally* NMED Statement of Reasons ¶¶ 1308-31; *see specifically* ¶ 1325 (Commission should adjust criteria used to determine place of withdrawal); *see also* NMED Closing Arguments, p. 10 (Commission should adopt new factors that include “copper mining activity, water usage supported by water rights and land ownership”); Statement of Reasons ¶ 1328 (Commission should change locations at Tyrone Mine that have been determined to be places of withdrawal); NMED Closing Argument, pp. 2, 7 (open pits and mine units should not be places of withdrawal). NMED proposes that areas around open pits and active mine units are *not* places of withdrawal because, under NMED’s Proposed Copper Mine Rule, water quality standards are not required to be met within the area of open pit hydrologic containment and beneath mine units – such as leach stock piles, waste rock piles and tailings impoundments – and their associated capture systems up to the designated monitor well(s) for the particular mine unit. 20.6.7.24.A(4), -28.B(2), -33.D(2) NMAC [NMED].

NMED does not support these proposed findings – found in paragraphs 1308 through 1331 of its Proposed Statement of Reasons -- with citation to evidence in the hearing record. Curiously, for support, NMED cites sporadically to a response brief filed by Freeport

McMorRan, Inc., which was filed prior to the hearing (on January 11, 2013) and which contains no evidence, only argument. *See* NMED Proposed Statement of Reasons, ¶¶ 1318, 1320-23

### Argument

#### **I. PROPOSED FINDINGS MUST BE SUPPORTED BY EVIDENCE IN THE RECORD**

The Commission's decision in this matter must be supported by substantial evidence in the record. NMSA 1978, § 74-6-7(B)(2). As such, any decision to modify the Commission's Decision in the *Tyrone* matter must be supported by substantial evidence in the record as a whole. *Id.* Similarly, any proposed findings from NMED to modify the Commission's Decision in the *Tyrone* matter must be supported with evidence from the record. *Accord* 20.1.3.16.A(4)(a) NMAC (all statements of fact in briefing by the parties must contain citations to the administrative record before NMED in permit review before Commission); 20.1.3.21.B NMAC (proposed findings of facts in post-hearing briefs from parties must contain adequate citations to the record for abatement plan, variance and compliance order hearings before Commission); 20.1.5.500.B NMAC (same for adjudications before NMED); NMRA 12-213(A)(3) (each factual representation in appellate brief must be supported by citation to record proper, transcript of proceedings or exhibits); *Ross v. City of Las Cruces*, 2010-NMCA-015, ¶ 18, 148 N.M. 81, 85, 220 P.3d 1253, 1257 (where a party fails to cite any portion of the record to support its factual allegations, a court need not consider its argument on appeal); *Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 108, 835 P.2d 819, 824 (1992) (same).

## II. THERE IS NO EVIDENCE TO SUPPORT NMED'S PROPOSED FINDINGS TO MODIFY THE *TYRONE* DECISION

NMED requests the Commission to modify the fundamentals of the Commission's 2009 Decision in *Tyrone* by changing the criteria to determine place of withdrawal and changing the locations at the Tyrone Mine that the Commission determined to be places of withdrawal. The entire purpose of the remand hearing in *Tyrone*, as directed by the Court of Appeals, was to establish general criteria to determine place of withdrawal and to apply those general criteria to the Tyrone Mine site. The Commission heard 24 days of mostly expert testimony and admitted hundreds of pages of documentary evidence on those two issues. *See generally* Comm'n Decision.

There was *no evidence* taken during this rulemaking hearing to re-litigate these two issues. Indeed, NMED's policy witness affirmed under oath that NMED did not disagree with the general criteria established by the Commission and did not disagree with the specific locations at the Tyrone Mine that the Commission had found to be places of withdrawal. Skibitski Test. Tr. vol. 2, p. 412, ll. 4-10, p. 334, ll. 16-24.

Incredibly, NMED in its post-hearing brief proposes findings that the Commission modify the established criteria and change the established places of withdrawal at Tyrone. NMED Statement of Reasons, ¶¶ 1308-31. *NMED does not cite to any evidence in the hearing record to support these proposed findings.* NMED cannot support these findings with evidence in the record because no such evidence exists.

To prevent abuse of this rulemaking process and waste of the Commission's limited resources for deliberations, NMED's proposed findings to modify the Commission's *Tyrone*

Decision should be struck, and should not be considered by the Commission during its deliberations.

**Conclusion**

For the reasons set forth above, NMED's findings in paragraphs 1308 through 1331 of its Proposed Statement of Reasons, to modify the Commission's Decision in the *Tyrone* matter to change the general criteria to establish place of withdrawal of water for present and reasonably foreseeable future use and to change the established locations that are places of withdrawal at the Tyrone Mine, should be struck.

Respectfully submitted,

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WATER QUALITY CONTROL COMMISSION



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TO 20.6.2 NMAC, THE COPPER MINE RULE

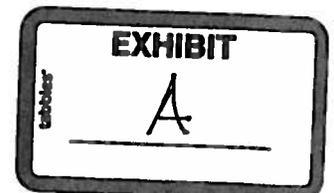
WQCC 12-01 (R)

New Mexico Environment Department,  
Petitioner.

NEW MEXICO ENVIRONMENT DEPARTMENT'S  
PROPOSED STATEMENT OF REASONS

THIS MATTER comes before the Water Quality Control Commission (hereinafter, "Commission") pursuant to the Petition to Adopt 20.6.7 and 20.6.8 NMAC and Request for Hearing (hereinafter, "Petition") filed by the New Mexico Environment Department (hereinafter, "NMED" or "Department") on October 30, 2012. On February 18, 2013, NMED filed a Notice of Amended Petition (hereinafter, "Amended Petition") which: (1) withdrew proposed 20.6.8 NMAC in its entirety, and (2) revised certain portions of proposed 20.6.7 NMAC. As a result of NMED's withdrawal of proposed 20.6.8 NMAC, the Commission took no evidence on that portion of the Petition and does not adopt it.

NMED attached proposed rule provisions to both the Petition and Amended Petition. The Commission held a hearing on this matter over the course of ten days between April 9, 2013, and April 30, 2013. The Commission allowed all interested persons a reasonable opportunity to submit data, views, and arguments and to examine witnesses. Thus, the record containing pleadings, written testimony, exhibits, the hearing transcript, public comments, and hearing officer orders has been submitted to the Commission for review in compiling this Statement of Reasons.



“places of withdrawal of water for present or reasonably foreseeable future use” than it did in 2009, the Commission will have to confront that decision and articulate a basis for any significant change in course.” Order on Attorney General’s Motion to Admit Tyrone Record, filed February 6, 2013, (Pleading 40).

1308. The “Tyrone Permit Appeal” referenced in the above-referenced Order was an appeal of a discharge permit, DP-1341, in which NMED prescribed permit conditions for closure of the Tyrone Mine. The appeal was made pursuant to the NMSA 1978, sections 74-6-1 to 74-6-17 and 20.6.2 NMAC and the Commission’s rule for adjudication of permit disputes.

1309. Tyrone initially challenged NMED’s draft closure permit during a 10-day evidentiary hearing in May of 2002 before NMED, and NMED issued the closure permit for Tyrone. *See* Attorney General’s Motion to Remand the Proposed Copper Mine Rule to NMED (hereinafter, “AG Motion to Remand”) at 9, filed December 14, 2012 (Pleading 16).

1310. Tyrone then challenged NMED’s closure permit by filing an appeal petition with the Commission on July 3, 2003, and the Commission held a 10-day hearing on the matter in October and November of 2003 with the Commission eventually issuing a decision. *See id.*

1311. Tyrone then appealed the Commission’s decision to the New Mexico Court of Appeals, and in 2006, the Court issued a decision and remanded the matter to the Commission for further consideration on particular issues. *See id.*; *see also Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n*, 2006-NMCA-115, ¶ 35, 140 N.M. 464, 143 P.3d 502 (hereinafter, “Tyrone Decision”).

1312. The 2006 decision of the Court of Appeals expressly recognized the difficulties of applying the phrase “places of withdrawal of water for present or reasonably future use” in the context of a large copper mining operation such as the Tyrone Mine, and its remand granted the

Commission substantial latitude in determining how that phrase should be interpreted for purposes of identifying the locations at which ground water quality compliance is to be determined.

1313. In 2007, the Commission held a 24-day hearing dealing with the Tyrone Decision on remand, and the Commission issued its decision on February 9, 2007 (hereinafter the “Tyrone Remand Order”). *See* AG Motion to Remand at 9-10.

1314. The Tyrone Remand Order made certain findings and conclusions relating, among other things, to factors to be considered by NMED in identifying “places of withdrawal,” and ordered the parties to the adjudication to perform certain actions by certain dates in applying the factors to the Tyrone Mine site as a means of identifying the locations where compliance with groundwater standards would be measured under Tyrone’s discharge permit for closure, DP-1341.

1315. Following the Tyrone Remand Order, Tyrone initiated a further appeal to the Court of Appeals on March 9, 2009, and during the pendency of that appeal, three of the four parties to the adjudication, including NMED and Tyrone, sought the Commission’s permission to depart from the Tyrone Remand Order so that certain regulatory solutions could be pursued to avoid further protracted litigation over “places of withdrawal.”

1316. The Commission granted the parties relief from the directives of the Tyrone Remand Order to allow for implementation of a settlement through various regulatory actions and processes. One of the regulatory processes agreed to in the settlement was this Copper Mine Rule proceeding, which is a proceeding that was also contemplated by directives of the New Mexico Legislature under its 2009 amendments to the WQA.

1317. The administrative and judicial proceedings starting with challenge of the draft closure permit in 2002 through the Commission's decision dealing with the Tyrone Decision on remand shall be collectively referred to as the "Tyrone Permit Adjudications."

1318. In June of 2009, the WQA was amended to require, among other things, that the Commission adopt these Copper Mine Rules. The statutory amendments occurred subsequent to the Tyrone Permit Adjudications. *See* Freeport Consolidated Response at 11-12.

1319. The Commission finds that the Tyrone Permit Adjudications occurred prior to the amendments to the WQA in 2009 and decisions were made based on the Commission's existing regulations and the WQA as it existed before 2009.

1320. The 2009 amendments to the WQA, which were enacted after the Tyrone Remand Order, implemented a new regulatory paradigm by requiring this Commission to enact by rule previously unauthorized specifications of the appropriate discharge control technologies for the copper mining industry as a whole. Freeport Consolidated Response at 15.

1321. The Commission finds that the new regulatory paradigm implemented through the 2009 Amendments to the WQA and these Copper Mine Rules render the Tyrone Permit Adjudications and any precedents, policies, and decisions interpreting such adjudications either obsolete or distinguishable. *See* Freeport Consolidated Response at 15.

1322. The Commission finds that prior to the 2009 amendments to the WQA, NMED had to determine and resolve the "place of withdrawal" concept before it could decide on appropriate discharge control technologies through permit conditions for the closure permit for the Tyrone Mine. *See* Freeport Consolidated Response at 15.

1323. The Commission finds that subsequent to the 2009 amendments to the WQA, the Commission (as opposed to the Department) is now required to specify appropriate discharge

control technologies for the industry as a whole in the first instance by rule (as opposed to the previous system of NMED identifying appropriate discharge controls through permit conditions), although the rules may include variable requirements reflecting differences in site conditions.

*See* Freeport Consolidated Response at 15.

1324. The Commission finds that the circumstances which have transpired since the Tyrone Remand Order, including but not limited to the Commission's prior grant of relief from the directives of that Order, the Legislature's 2009 amendments to the WQA, the opportunities for public input and stakeholder negotiations that ensued, the development of draft regulations forming the basis of this rulemaking proceeding, and the extensive testimony presented in these Copper Mine Rule proceedings, justify the Commission's departure from certain aspects of the Tyrone Remand Order.

1325. The Commission finds that, at least within the copper mining industry, the criteria adopted in the Tyrone Remand Order for identifying "places of withdrawal" where compliance is determined under the WQA requires certain adjustments to allow for consistency with industry practices, with past NMED permitting practices for copper mining units in New Mexico, and with the continued ability of existing and future copper mining to conduct their operations in a manner which is protective of ground water resources, as addressed in the evidence presented in this proceeding.

1326. The Commission finds that the necessary adjustments to the Tyrone Remand Order represented by the Copper Mine Rules that the Commission adopts in this proceeding fully comport with letter and spirit of the 2006 decision of the New Mexico Court of Appeals, and are well within the substantial latitude afforded by that Court in determining how the "place of

withdrawal” phrase should be interpreted and applied, particularly recognizing the 2009 amendments subsequently enacted by the New Mexico Legislature.

1327. One area of the Tyrone Remand Order the Commission finds it appropriate to supersede is to allow for the various containment and treatment methodologies specified in these Copper Mine Rules as reasonable and prudent means of ensuring a copper mine’s protection of groundwater resources. To the extent that application of the Tyrone Remand Order and its factors would not accommodate employment of these specified methods of discharge control technologies, this Commission expressly intends to supersede effectiveness of the Order.

1328. Another area of the Tyrone Remand Order the Commission finds it appropriate to supersede is to allow for the determination of the locations where compliance with ground water standards is required in relation to particular mine-related units. To the extent that application of the Tyrone Remand Order and its criteria would not allow for determining compliance at the specified locations, this Commission expressly intends to supersede the effectiveness of the Order.

1329. Another area of the Tyrone Remand Order the Commission finds it appropriate to supersede is to allow for the employment of containment, pump-back, pump and treat or dewatering wells associated with mining or mine closure without having those wells and the associated water withdrawals be deemed present or future uses water for purposes of the phrase “place of withdrawal of water for present or reasonably foreseeable future use” as that language or language like it is used in the WQA and this Commission’s regulations. To the extent that the Tyrone Remand Order and its factors would result in such wells being deemed as “places of withdrawal” where compliance with groundwater standards must be met, this Commission expressly intends to supersede the effectiveness of the Order.

1330. The Commission's bases for superseding the Tyrone Remand Order in these respects, and in any other respects that are incompatible with the Copper Mine Rules adopted herein, are as explained above, and are further supported by the Commission's belief that these Copper Mine Rules strike an appropriate policy balance of protecting the State's groundwater resources and allowing for the continued ability of the copper mining industry to positively support state and local economies.

1331. The Commission concludes as a matter of law that the Tyrone Permit Adjudications arose in the context of administrative adjudications under the existing regulations, while this matter before the Commission arises in the context of a rulemaking, thereby making the proceedings distinguishable. A rulemaking is a quasi-legislative function, not an adjudicatory function, and results in new law that need not follow prior adjudicatory precedents, particularly if the reasons for any departure are explained, as they are in this document.

1332. In adopting these Copper Mine Rules, the Commission is mindful that the measures specified herein to prevent water pollution rely upon containment strategies, as described in the testimony of Mr. Brown, that may allow ground water underlying certain units to exceed the standards of 20.6.2.3103 during mine operations.

1333. Mr. Brown's testimony supported a conclusion that, during mine operations, these areas are not available as "places of withdrawal" within the meaning of the WQA.

#### ***Public Comments***

1334. The Commission received many public comments during the hearing and in the hearing session held in Silver City. There were approximately the same number of public commenters who spoke in favor of the Copper Mine Rule as those who spoke in opposition.