



STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION

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

WQCC 12-01 (R)

New Mexico Environment Department,  
Petitioner.

NEW MEXICO ENVIRONMENT DEPARTMENT'S CLOSING ARGUMENTS

Introduction

The purpose of New Mexico's permitting regulations and groundwater standards is to protect groundwater for the present and future use of groundwater resources. 20.6.2.3101.B NMAC. From the beginning of the groundwater regulations, the Water Quality Control Commission ("Commission") exempted natural groundwater seeping or flowing into conventional mine workings from the regulations. Section 3105(K) NMAC. While this exemption expressly does not apply to solution mining, it is noteworthy in that the Commission exempted groundwater in conventional mines from the discharge permit requirements. *Id.* More recently, the Commission has approved variances from the regulations for copper mining permittees during the course of operations. See, NMED Exhibits 23 and 25. The rulemaking before the Commission concerns the applicability of groundwater standards at copper mines and is equally a matter of the Commission's authority.

Open pit copper mining is neither conventional underground mining nor solution mining. Open pit mining typically involves the disturbance of rock layers initially above, but ultimately below the groundwater table. Given the scale and nature of mining operations, the Department's proposed Copper Rule reflects the reality that it is infeasible to maintain water quality standards



directly below active mining units. This is hardly an exemption or variance from the Act, as opponents have inferred. Rather, it is a regulation by the Commission that is wholly within the purview of the Commission and one that reflects the viability of responsible copper mining in New Mexico.

The Department's proposed Copper Rule requires that groundwater below copper mine units is subject to Section 3103 standards following cessation of operations and upon completion closure requirements. The evidentiary basis for this position is persuasively laid out in the Department's technical witness testimony and substantiated in our proposed statement of reasons. The legal basis for the Department's position is as follows: One, the Water Quality Act (hereafter "Act") was amended to provide for a copper mining rule with prescriptive measures; two, the amendment did not change the fact that there is a determination to be made as to where Section 3103 standards apply within a copper mining facility; and three, the Commission has the expressly delegated authority to adopt regulations pursuant to the Act, which necessitates the interpretation of Act. As such, it is reasonable for the Commission to interpret that Section 3103 standards do not apply groundwater beneath an active mine unit, but must be met upon closure, thereby preventing or abating water pollution. Moreover, it is appropriate that the Commission's interpretation be given deference.

### Legal Arguments

- 1. Does the Commission have the legal authority to adopt a rule that, as proposed, does not consider groundwater beneath the individual mining units to be a place of withdrawal during mining activity?**

It does. When a court reviews an agency's construction of a statute which it administers, the reviewing court faces two questions: 1) "whether Congress has directly spoken to the precise question at issue," and 2) if the "statute is silent or ambiguous with respect to the specific issue,

the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, at 843 (1984). The Court noted that "if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" and that "such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* If the legislative delegation to an agency on a particular question is implicit rather than explicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator or an agency." *Id.* Finally, if an agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [the court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that congress would have sanctioned." *Id.* at 845.

**a. The Commission has express authority to conduct a rulemaking interpreting places of withdrawal.**

In this case, Senate Bill 206 amended the Act to require that the Commission adopt regulations for the copper industry and expressly provided that the Commission consider the best available scientific information. NMED Exhibit 4, and see, NMSA 1978, §74-6-4.K. The legislature also expressly deleted the phrase "shall not specify the method to be used to prevent or abate water pollution" from the Act. NMED Exhibit 4. The amendment did not touch the existing language in the Act that the agency shall deny an application if the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. NMSA 1978, §74-6-5.E(3). Further, the amendment did not alter or define the existing language that the "determination of the discharge's effect on groundwater shall be measured at any place

of withdrawal of water for present or reasonably foreseeable future use.” NMSA 1978, §74-6-5.E(3).

Since the Act requires that the determination for groundwater be made by measurement at any place of withdrawal, the Commission is within its authority to interpret any place of withdrawal for present or reasonably foreseeable future use in the copper rule. *U.S. v. Mean Corp.*, 533 U.S. 218, 226 (2001) (describing the *Chevron* doctrine as presumed agency discretion when the agency has been delegated authority and the agency interpretation is the exercise of that authority). The express language of the Act is evidence that the Commission has the power and is tasked with adopting a copper rule, that the Commission is to consider the best available scientific information in adopting a copper rule, and that the Commission is to specify the measures to be taken to prevent water pollution and to monitor water quality. NMSA 1978, Section 74-6-4.K. The Commission was given express authority to specify in regulation the measures to be taken to prevent water pollution and to monitor water quality. *Id.*, and see, *U.S. v. Mean Corp.*, 533 U.S. 218 (2001) (holding that expressly delegated lawmaking powers to write rules with the force of law is wholly within the *Chevron* application of statute interpretation). An interpretation of the discharge’s effect on groundwater in the process of copper mining is an express exercise of the Commission’s authority.

**b. The Commission has express authority to interpret places of withdrawal to not require a variance for groundwater that exceeds standards**

The opponents of the proposed Copper Rule argue that the variance procedure is the only mechanism for the Commission to deviate from the Act. See, GRIP NOI, Attachment 2, Kuipers P. 4, and see WCO NOI, p. 8. The Act states that if the discharge would cause or contribute to an exceedance of state or federal standards, the constituent agency must deny the discharge permit. NMSA 1978, Section 74-6-5(3). While it is true that the Act authorizes the Commission

to grant a variance whenever it is found that compliance with the regulation will impose an unreasonable burden upon a lawful business, it also true that the Act authorizes the Commission to adopt industry specific rules with specified measures to protect water quality. NMSA 1978, Sections 74-6-4.H and J, K (providing the Commission with multiple duties and powers, including the power to grant variances and the power to adopt regulations for particular industries). The Commission, in promulgating copper industry regulations with specified measures to prevent water pollution, must interpret the place of withdrawal of water language as contained in the Act. *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 351, 871 P.2d 1352, 1357 (1994) (relying on the plain language doctrine that if the law says x, it means x, and by extension, if a determination is to be made a determination is to be made). There is evidence that the Commission has previously determined that units within a copper mine are not places of withdrawal of water for present or reasonably foreseeable future use by granting variances from the regulations. NMED Exhibits 23 and 25. There is also evidence that the Commission-approved Settlement Agreement between the Department and Freeport provided for multiple variance proceedings from the Section 3103 standards for all existing contaminating units. See, AGO Exhibit 10. Simply stated, the Commission has already validly exercised its authority to adopt regulations exempting certain discharges from conventional mining and vary regulations from groundwater quality standards. The promulgation of the copper rule stems from the same legislative authority in the Act.

**c. *Chevron* deference applied**

In *Chevron*, the Supreme Court determined that the EPA “regulation allowing states to treat all pollution-emitting devices within [the] same industrial grouping as though they were encased within [a] single ‘bubble’ was based on permissible construction of the term ‘stationary

source' in Clean Air Act Amendments." 467 U.S. 842-845. The Clean Air Act was amended in 1977, requiring nonattainment States to establish a permit program regulating "new or modified major stationary sources" of air pollution. *Id.* at 840. An EPA regulation promulgated for the implementation of the permit requirement allowed the States "to adopt a plant-wide definition of the term 'stationary source'" under which "an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emission from the plant." *Id.* The question was whether EPA's definition of *stationary source* was a reasonable construction of the statutory term.

In determining that EPA's definition was reasonable, the Court stated: "with regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 837-8. The Court found that "examination of the legislation and its history support[ed] the ... conclusion that Congress did not have a specific intention as to the applicability of the 'bubble concept.'" *Id.* Furthermore, the Court noted that "to the extent any congressional 'intent' can be discerned from the statutory language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than confine, the scope of the EPA's power to regulate particular sources in order to effectuate the policies of the Clean Air Act." *Id.*

**d. Express basis for deference of the regulations adopted by the Commission**

In the Department's proposed Copper Rule, an interpretation of the discharge's effect on groundwater for open pits means that Section 3103 standards do not apply. 20.6.7.24.A(4) NMAC. The foundation for this interpretation is the fact that it is not possible to line an open pit

and to require standards to be met beneath an open pit would be a de-facto banning of copper mining in New Mexico, which the Act clearly does not intend. See, NMED, Brown, Rebuttal, P. 3. In addition, throughout the hearing there was a collective agreement by all parties that open pit copper mining should not be prohibited in New Mexico. (TR. Vol. 1, P. 20, L. 2-5), (TR. Vol. 1, P. 22, L. 6-11), (TR. Vol. 1, P. 30, L. 16-20), (TR. Vol. 1, P. 44, L. 11-17), (TR. Vol. 1, P. 58, L. 10-14), (TR. Vol. 1, P. 67, L. 1-4), (TR. Vol. 2, P. 239, L. 15-20), (TR. Vol. 3, P. 508, L. 2-7), (TR. Vol. 6, P. 150, L.9). Evidence was presented that open pit copper mining, by definition, renders groundwater beneath the pit unavailable for drinking water purposes. TR. Vol. 3, P. 556, L. 6-20. There is evidence that open pits of any significant size are likely to penetrate the water table, resulting in an in-pit lake with evaporative water loss causing groundwater inflow, or requiring pumping of water from the pit to maintain dry mining conditions. Either way, containment will be maintained. TR. Vol. 3, P. 564-565, L. 22-10.

In the Department's proposed Copper Rule, an interpretation of the discharge's effect on groundwater for tailings impoundments and waste rock stock piles means that groundwater that exceeds standards must be contained through the construction of inceptor systems. Section 21.B.(1)(c) and NMAC 22.A(4)(c) NMAC. Opponents of the proposed Copper Rule allege that while it is not possible to line an open pit, other mining units, namely waste rock stockpiles and tailings impoundments, should be lined. See, GRIP NOI, Attachment 2, Kuipers, p. 8. When deciding whether to adopt a proposed rule, the Commission is required to consider the "technical practicability and economic reasonableness" of that rule. NMSA 1978, § 74-6-4.E(3) (emphasis added). The Department's proposed rule acknowledges the reality that an active mine site, particularly an open pit that is hydrologically contained, is not presently a place of withdrawal. 20.6.7.24(4) NMAC. Evidence was given that consideration of the best available science does

not require that Section 3103 standards be met at all times beneath active mining units. NMED, Brown Rebuttal, TR. Vol. 3, P. 566, L. 1-13 (noting that the Act does not require “state-of-the-art” method to be applied, the Act requires that “groundwater protection” be met at the place of withdrawal regardless of how that is achieved).

The opposition would like the Commission to believe that the best science is required, that the best science is liner technology for waste rock piles and tailings impoundments, and therefore these mining units must employ liner technology. Olson NOI, P. 23, and see GRIP NOI, Kuipers P. 7; and see AGO NOI, Exhibit 2, P. 21-23. Evidence was provided to the Commission that a liner may not be the best solution for every situation. Brown Rebuttal, P. 4. The proposed Copper Rule allows, but does not require, liners as specific method of containment. 20.6.7.21.B. NMAC. If the rule were to require a liner, other issues related to the environment, such as long term leachate management and short term operability may come into play. NMED, Brown, Direct Testimony P. 19.

Specific to tailings impoundments, evidence was given that lining reduces the drainage of interstitial water from the tailings, thereby increasing the porewater pressure in the tailings which in turn reduces the static stability of the pile and the ability of the pile to withstand earthquake loading without liquefying. TR. Vol. 10, P. 2372, L. 8-10. Similarly problematic evidence of liner use in waste rock stockpiles is in the record. NMED, Brown, Rebuttal, P. 3. Testimony was also given that liner failure has the potential to create widespread impact to the water resources of New Mexico, both surface water and groundwater. NMED, Brown, Rebuttal, P. 2; TR. Vol. 10, P. 2554, L. 21-24. Lastly, evidence was provided that interceptor well systems are the same method used to maintain the long-term performance of liner systems in tailing piles. NMED, Brown, Rebuttal, P. 2.

In proposing the rule, the Department relied on and presented the best scientific information that it is both technically impractical and economically unreasonable to require all water underneath a mine site to meet groundwater standards during mining activity, but that it is technically possible to meet groundwater standards as a place of withdrawal upon closure. NMED, Brown Rebuttal, p. 4. The Act expressly provides the Commission with the power to adopt copper regulations after a considered and deliberative process. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257, 111 S.Ct. 1227. The express authorization for regulations, process, schedule and outlined considerations found within the Act are within the very definition of *Chevron* deference. *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) (indicating that congressional delegation to engage in the process of rulemaking is basis for deserving of *Chevron* deference).

**2. Is a determination that groundwater beneath individual mining units is unavailable during the course of copper mining operations a reasonable interpretation of the WQA?**

It is. Groundwater beneath individual mine units is not presently available as a source of drinking water or for agricultural use because it is simply unavailable. NMED, Brown, TR. Vol. 3, P. 556, L. 6-20. It is technically infeasible to access groundwater below an individual mining unit during operations. However the analysis does not end here, because the Act requires the protection of groundwater for the reasonably foreseeable future. The proposed copper rule requires the use of an interceptor system as a capture and containment method that must be used unless one of two decisions are made, either the Department determines that the interceptor system submitted by the applicant is insufficient and requires a liner or some other method (e.g. 20.6.7.21.B.1.e NMAC), or the applicant decides to propose another method to ensure protection of water quality (e.g. 20.6.7.21.B NMAC).

The Act was amended to allow site specific factors to allow for variations in the requirements of the regulations. NMED Exhibit 4. The proposed copper rule does just that: it lays out the requirements for interceptor systems, but allows for other methods in cases where site specific factors dictate. The factor that would dictate that another method be used is an exceedance of applicable standards at a designated monitoring well. NMED NOI, Brown, P. 7. Determination of what is a place of withdrawal during the permit application process proceeds as follows:

1. At time of submittal, factors such as copper mining activity, water usage supported by water rights, and land ownership are considered. 20.6.7.10 NMAC.
2. At the time of submittal, an aquifer evaluation is reviewed to determine if an exceedance of water quality standards may occur. 20.6.7.22.A(4)(d)(vii) NMAC.

During mining activity, monitoring data will be examined by the Department to evaluate whether there has been or may be groundwater in excess of applicable standards at any designated monitoring well location. 20.6.7.28 NMAC. This analysis supports the conclusion that the interpretation of place of withdrawal of groundwater is not underneath an active copper mining unit.

**3. Is a determination that groundwater beneath individual mining units becomes available and therefore could be a place of withdrawal upon the completion of closure of copper mining units a reasonable interpretation of the WQA?**

It is. "Closure" means all activities that are required pursuant to 20.6.7.33 NMAC through 20.6.7.35 NMAC and an approved discharge permit to monitor, minimize, control, mitigate, prevent or abate water pollution associated with a copper mine facility after operations at the facility, or at a part of the facility, have ceased. This means the interceptor well system is turned off, and a cover system is in place to prevent infiltration of meteoric water. NMED NOI, Brown, P. 29. The Department's proposed Copper Rule requires Section 3103 standards to be

met at closure at all wells but an open pit that has been determined to be a hydrologic evaporative sink. 20.6.7.33.D(1). The measurement of groundwater at any place of withdrawal of water is measured at monitoring wells located around the perimeter and downgradient of each unit. 20.6.7.28 NMAC, and see, NMSA 1978, Section 74-6-5.E(3). Had the legislature sought to determine all groundwater as a place of withdrawal it would have done so explicitly. *See e.g., Tenney v. Brandhove*, 341 U.S. 367 (1951). Rather, the Legislature has indicated its intent that copper mining continue. NMED Exhibit 4. The goal of the proposed rule is to balance environmental protection with the economic viability of copper mining in New Mexico. *Phelps Dodge Tyrone*, 2006-NMCA-115 ¶ 29 (stating that mining is a necessary and important component of our economy and our modern way of life).

### **Conclusion**

The proposed Copper Rule is just that, a Copper rule. The permitting and abatement regulations described in 20.6.2 NMAC are the groundwater regulations in New Mexico for all activities other than copper mine permitting (20.6.7 NMAC) and dairy permitting (20.6.6 NMAC). The application of this industry specific rule to any other industries is unwarranted and not supported by regulations and law. *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353; 871 P.2d 1352, 1359 (1994) (finding that statutes should be interpreted to achieve the legislature's purpose). The New Mexico legislature in 2009 decided that two particular industries, copper mining and dairies, may have specific regulations. NMED Exhibit 4. The Act was amended to provide for a copper mining rule with prescriptive measures but did not change that fact that a determination must still be made regarding where Section 3103 standards apply. The Commission has the express authority to adopt regulations pursuant to the Act, which necessitates the interpretation of the Act. *See, Morningstar Water Users Ass'n v. N.M. Pub. Util.*

*Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995). It is reasonable for the Commission to conclude that Section 3103 standards do not apply to groundwater beneath an active mine unit, but must be met upon closure, and the Commission's interpretation must be given deference. In consideration of all of the above arguments and for the reasons expressed in the Department's Proposed Statement of Reasons, we ask that the Commission adopt the Department's proposed Copper Rule in its entirety.

Respectfully submitted,

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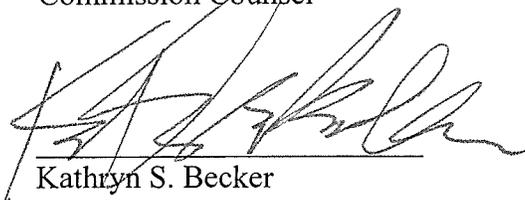
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