

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  
MOTION TO EXCLUDE AGO EXHIBITS OF  
WRITTEN TESTIMONY AND TRANSCRIPTS  
FROM PRIOR PERMIT APPEAL PROCEEDINGS

The New Mexico Environment Department ("NMED") moves to exclude Exhibits 12, 13, 20 and 23 from the Notice of Intent of the Office of the New Mexico Attorney General (AGO). These Exhibits contain written testimony and excerpts of transcribed testimony in the matter of the Appeal Petition of Phelps Dodge Tyrone, Inc.'s, Proposed Groundwater Supplemental Discharge Permit for Closure (DP-1341). These materials should be excluded because the Hearing Officer has already ordered that the Commission's Decision and Order of February 4, 2009 is the only document from this prior proceeding that shall be admitted into the record of the Copper Mine Rule proceeding. To do otherwise would be a waste of time, and a needless presentation of cumulative evidence. Furthermore, the testimony includes expert opinion, much of it legal conclusions that should not be allowed in the current proceeding without an opportunity to cross examine the witnesses. Specifically, NMED seeks to exclude the following AGO Exhibits:

**AGO Exhibit 12:** Testimony of Clint Marshall, NMED (2003) [excerpts]

**AGO Exhibit 13:** Testimony of Clint Marshall, NMED (2007)

AGO **Exhibit 20**: Testimony of Michael Johnson, New Mexico Office of the State Engineer (2007)

AGO **Exhibit 23**: Testimony of Craig Roepke, New Mexico Interstate Stream Commission (2007) and Proposal (Sept. 24, 2003)

Previously, the Office of the Attorney General sought to admit the entire record from the Tyrone Permit Appeal into the Record Proper in this proceeding. *See*, AGO Motion to admit filed November 2, 2012 (Docket No. 5). NMED timely objected to the motion. *See*, NMED Response filed on November 19, 2012 (Docket No. 9). The Hearing Officer Ordered that the record, with the exception of the Commission's Decision and Order of February 4, 2009, be excluded and the motion denied. *See*, Order on AGO Motion to Admit Tyrone Record on February 6, 2013 (Docket No. 40). The Hearing Officer stated that the entire record "without any winnowing, and without presentation by witnesses subject to cross-examination, may well result in confusion and the unnecessary expenditure of Commission time and resources". *Id.*

The situation remains unchanged. The four exhibits identified in this motion for exclusion are four exhibits from the same consolidated permit appeal (Docket Nos. WQCC 03-12(A) and WQCC 03-13(A) (Consolidated)). The four exhibits identified in this motion are nothing more than a second attempt by the Office of the Attorney General to put these materials into the record. Out of context, and selectively excerpted, the admission of these exhibits into the record will unduly delay the current proceedings, confuse the issues, and may unfairly bias the Commission.

For non-binding guidance, Rule 11-403 of the Federal Rules of Evidence permits a court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of

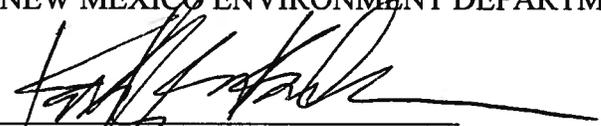
unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

In addition, the Federal Rules of Evidence Rule 11-702 governs testimony by expert witnesses. With regard to Rule 11-702, many courts do not admit expert testimony rendering legal opinions, because such legal conclusions invade the province of the court to determine the law. *CMI-Trading, Inc.*, 98 F.3d 887, 890 (6<sup>th</sup> Cir. 1996). In *United States v. Weitzenhoff*, 1 F.3d 1523, 1531-32 (9<sup>th</sup> Cir. 1993), the Court held that it was error and an impermissible delegation of the Court’s duty to allow expert testimony on interpretation of a permit under the Clean Water Act. See e.g., *Montgomery v. Aetna Casualty & Sur. Co.*, 898 F.2d 1537 (11<sup>th</sup> Cir. 1990) (holding that expert testimony giving legal conclusions should have been excluded). The partial testimony of Clint Marshall, Michael Johnson, and Craig Roepke all provide legal conclusions. The appropriate remedy is to exclude these exhibits because they have already been excluded and allowing them would result in a waste of time, cumulative evidence, and expert opinion offered without an opportunity to cross examine the witnesses. In light of the nature of this motion, concurrence from other parties was not sought.

WHEREFORE, NMED moves to exclude AGO Exhibits 12, 13, 20 and 23.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by email on the following on this 7<sup>th</sup> day of March, 2013:

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