

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 MR. OLSON'S EXHIBITS OF
WRITTEN TESTIMONY AND TRANSCRIPTS
FROM PRIOR PERMIT APPEAL PROCEEDINGS

The New Mexico Environment Department ("NMED") moves to exclude Exhibits 9, 15 and 16 in the Notice of Intent of William Olson. These Exhibits contain the 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 in Exhibits 9 and 15 include expert opinion, much of it legal in nature as to the interpretation of the Water Quality Act that should not be allowed in the current proceeding. Specifically, NMED seeks to exclude the following Olson Exhibits:

Olson Exhibit 9: Written Testimony of William Olson (2007)

Olson Exhibit 15: Direct Testimony of Clint Marshall, NMED (2007)

Olson Exhibit 16: Transcript of Proceedings DP-1341 Appeal (2007)

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 witness subject to cross-examination may well result in confusion and the unnecessary expenditure of Commission time and resources".

The situation remains unchanged. The three exhibits identified in this motion for exclusion are three exhibits from the same permit appeal (Docket Nos. WQCC 03-12(A) and WQCC 03-13(A) (Consolidated). The three exhibits identified in this motion are nothing more than a second attempt to put some of these same 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 *Dunlap v. City of Oklahoma City*, 12 Fed. Appx. 831, 834 (10th Cir. 2001)(unpublished), the Court of Appeals upheld the District Court's Rule 11-403 exclusion of two witness testimonies "because the nature of their proposed testimony had changed to such an extent that permitting them to testify would cause unfair surprise" to the party for whom they had originally agreed to testify. The Court

emphasized that the surprised party had no “opportunity to cure the surprise that such a change” would produce. *Id* at 834.

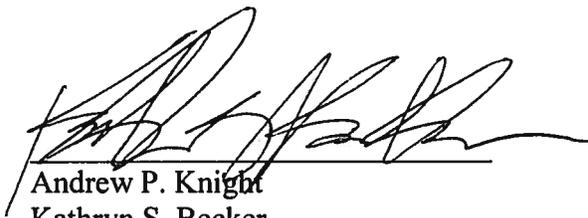
In addition, the Federal Rules of Evidence Rule 11-702 governs testimony by expert witnesses. With regard to Rule 11-702, many courts do not admit expert testimony rendering legal opinions, because such legal conclusions invade the province of the court to determine the law. *CMI-Trading, Inc.*, 98 F.3d 887, 890 (6th Cir. 1996). In *United States v. Weitzenhoff*, 1 F.3d 1523, 1531-32 (9th 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 (11th Cir. 1990) (holding that expert testimony giving legal conclusions should have been excluded). The partial testimony of William Olson and Clint Marshall both include statements interpreting the Water Quality Act.

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 the full record of examination to reflect the sum and substance of the limited testimony. Mr. Olson has filed a Notice of Intent to File Technical Testimony in the present matter and his present participation will allow a full examination of his opinions before the Commission. In light of the nature of this motion, concurrence from other parties was not sought.

WHEREFORE, NMED moves to exclude Exhibits 9, 15, and 16 of Mr. Olson.

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 25th day of March, 2013:

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