

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**



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

No. WQCC 12-01(R)

**New Mexico Environment Department,
Petitioner.**

**WILLIAM C. OLSON RESPONSE
TO
NEW MEXICO ENVIRONMENT DEPARTMENT
MOTION TO EXCLUDE MR. OLSON'S EXHIBITS OF WRITTEN TESTIMONY AND
TRANSCRIPTS FROM PRIOR PERMIT APPEAL PROCEEDINGS**

I, William C. Olson, hereby submit this response to the New Mexico Environment Department's (Department) "Motion to Exclude Mr. Olson's Exhibits of Written Testimony and Transcripts from Prior Permit Appeal Proceedings" filed with the New Mexico Water Quality Control Commission (Commission) on March 25, 2013.

In its motion, the Department moves to exclude WCO Exhibit's 9, 15 and 16 containing the prior sworn testimony of Department witnesses William Olson and Clint Marshall. This testimony was given during the 2007 Commission hearings (Commission Docket No.'s WQCC 03-12(A) and WQCC 03-13(A)) in the matter of the Appeal of the Supplemental Discharge Permit for Closure (DP-1341) for Phelps Dodge Tyrone (Tyrone Appeal). The Department states that the rationale for exclusion of these exhibits is because the Hearing Officer has already ordered that the only document from the 2007 Tyrone remand hearing that shall be admitted into the record of the Copper Mine Rule proceeding is the Commission's February 4, 2009 Decision and Order on Remand. The Department also asserts that the exhibits would be "*a waste of time,*

and a needless presentation of cumulative evidence”, and that expert opinion in these exhibits is legal in nature and provides legal opinion and conclusions.

The Department’s motion is not supported by the Hearing Officer’s Order or the facts as discussed below:

A. Hearing Officer’s Order on Admission of the Record from the Tyrone Permit Appeal

The New Mexico Attorney General Office filed a motion to admit the **entire** record from the Tyrone Appeal on November 2, 2012, including 24 volumes of transcripts, all exhibits and the Commission’s February 4, 2009 Decision and Order on Remand. The Department opposed the motion. On February 6, 2013, the Hearing Officer issued an order denying submission of the **entire** record from the Tyrone Appeal. However, the Hearing Officer qualified her decision stating that *“inclusion of the entirety of that evidence prior to this rulemaking hearing, 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”* (emphasis added). This statement indicates that submission of selective portions of the Tyrone Appeal proceeding may be submitted as evidence by a party to the hearing if presented by a witness subject to cross-examination. WCO Exhibits 9, 15 and 16 are consistent with the qualifications of the Hearing Officer’s Order and should be admitted as evidence for the following reasons:

1. WCO Exhibits 9, 15 and 16 are winnowed from thousands of pages of records in the Tyrone Appeal and submitted for the purpose of providing specific factual information to assist the Commission in its decision making process in the adoption of a Copper Mine Rule.

2. Facts contained in WCO Exhibits 9, 15 and 16 were relied upon to support my expert opinion as shown in my February 22, 2013 written direct testimony.

3. WCO Exhibit 9 is a winnowed 25-page portion of the Tyrone Appeal containing my sworn Department written direct testimony that I prepared.

4. WCO Exhibit 15 is a winnowed 16-page portion of the Tyrone Appeal containing Mr. Clint Marshall's sworn Department testimony that was prepared under my direct supervision when I was Bureau Chief of the Ground Water Quality Bureau of the Department.

5. WCO Exhibit 16 is a winnowed 13-page portion of the 24-volume transcript in the Tyrone Appeal containing the sworn testimony of Department witness Clint Marshall.

6. I either prepared or have direct knowledge of the facts contained in WCO Exhibits 9, 15, and 16. I am a technical witness participating in the Commission rulemaking hearing on the proposed Copper Mine Rule. I have also presented these exhibits subject to cross-examination at the Commission rulemaking hearing in this matter.

7. The Department maintains that this is "*a second attempt to put some of these same materials into the record*". I have only requested to place the winnowed records in WCO Exhibits 9, 15 and 16 in the record as exhibits in support of my written direct testimony as contained in my February 22, 2013 Notice of Intent to Provide Technical Testimony. I have not made any another attempt to submit these exhibits for the hearing record.

B. The exhibits would be "a waste of time and a needless presentation of cumulative evidence".

The Department provides no facts or specific information to support its assertions. WCO Exhibits 9, 15 and 16 are directly relevant to the Commission hearings on the proposed Copper Mine Rule, as they were part of the record for a discharge permit appeal related to a copper mine.

They are succinct winnowed records that provide information about specific issues related to the proposed copper mine rule. They are not extensive exhibits and it will not take the Commission a large amount of time to review them. They also do not present cumulative evidence. These exhibits assist the Commission by providing specific targeted information in an efficient manner.

C. The Expert Opinion in these Exhibits is Legal in Nature and Provides Legal Opinion and Conclusions

The Department provides no facts or specific information in support of its assertions. WCO Exhibits #9, 15 and 16 do not represent legal opinions and conclusions. These exhibits contain technical testimony provided by technical experts of the Department. A review of these exhibits shows that:

1. The educational background and experience sections of the exhibits contain information demonstrating that Mr. Marshall and I testified as technical witnesses of the Department with long-term regulatory experience in the enforcement and implementation of the Water Quality Act and Commission rules.

2. My 2007 Commission testimony presented technical evidence and technical expert opinion on:

- a. proposed criteria for determining a place of withdrawal of ground water for present or reasonably foreseeable future use; and
- b. the application of those criteria to the Tyrone copper mine site.

3. Mr. Marshall's 2007 Commission testimony provided technical evidence and technical expert opinion on:

- a. geological and hydrological settings at the Tyrone Mine;
- b. present quality of ground water at the site;

- c. ground water quality at the site prior to discharges at the facility; and
- d. past and current use of ground water in the vicinity of the site.

In addition, my February 22, 2013 Notice of Intent to Provide Technical Testimony uses these exhibits for the purpose of providing factual information to the Commission and support my expert technical opinion which is based upon my experience in the implementation and enforcement of the Water Quality Act and Commission rules.

For the above reasons, the Department's March 25, 2013 "Motion to Exclude Mr. Olson's Exhibits of Written Testimony and Transcripts from Prior Permit Appeal Proceedings" should be dismissed.

Respectfully submitted,

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Certificate of Service

I certify that the following were served with the foregoing pleading by mail or hand delivery on March 28, 2013:

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