

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

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

No. WQCC 12-01 (R)

New Mexico Environment Department,
Petitioner.

**REPLY IN SUPPORT OF ATTORNEY GENERAL'S MOTION TO ADMIT RECORD
FROM TYRONE PERMIT APPEAL INTO RECORD PROPER**

The New Mexico Environment Department (“NMED”) opposes the Attorney General’s motion to admit the transcript of proceedings, exhibits and decision from the *Tyrone Permit Appeal* into this record. NMED argues that the *Tyrone Permit Appeal* involved the discharge permit from one copper mine and this proceeding involves regulation of all copper mines in New Mexico and, therefore, (1) the proceedings are “entirely different” and (2) the evidence from the *Tyrone* matter “would result in confusion” for the Commission. NMED Response, p. 2. Neither of NMED’s arguments is sound.

The *Tyrone Permit Appeal* represented a remand from the New Mexico Court of Appeals in which the court directed the Water Quality Control Commission (“Commission”) to “create some *general factors or policies* to guide its determination” as to what constitutes a “place of withdrawal” of water for present or reasonably foreseeable future use under Section 74-6-5.E(3) of the Water Quality Act (“WQA”). *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n*, 2006-NMCA-115, ¶ 35, 140 N.M. 464, 473, 143 P.3d 502, 511 (emphasis added). The court stated that the Commission could undertake this task “by way of *rulemaking* or by simply deciding the factors as a part of this specific case, or both.” *Id.* (emphasis added.)

The *Tyrone* proceeding, while complex factually and technically, involved the determination of this critical legal issue under the WQA: the establishment of “general factors or

policies” to determine “place of withdrawal” under the act. The factors established by the Commission apply to *all* copper mines in New Mexico, of which there are only three in the state. These are the Tyrone, Chine and Cobre mines -- all located in the same general area in the state, all having similar geologic and hydrologic characteristics, and all owned by one international copper company. While the *Tyrone Permit Appeal* involved the Tyrone mine site, the Commission was directed to and did establish criteria for *all* copper mines in New Mexico.

NMED’s draft Copper Rule, as explained in the Attorney General’s motion, proposes to do away with the *general* factors established by the Commission for determining place of withdrawal as well as to do away with the Commission’s holding, applicable to *all* copper mine facilities, that the WQA does not establish specific “points of compliance” for compliance with water quality standards. Indeed, its holding that the WQA does not allow for “points of compliance” applies to *all discharge permits* in New Mexico. That the vehicle for the Commission’s generally applicable decision was the appeal of one discharge permit is not a good reason not to admit the record in this rule making proceeding. The two proceedings are not “entirely different.” Both the *Tyrone* proceeding and this proceeding apply to the critical issue of whether copper mines in New Mexico are “places of withdrawal” under the WQA.

NMED does not explain, in making its second argument, why inclusion of the *Tyrone Permit Appeal* record would “confuse” the Commission. While the record in the *Tryone Permit Appeal* is complex, this complexity did not “confuse” the Commission previously, and will not confuse the Commission now. The Commission, intentionally, is composed of individuals with technical expertise who have the ability to consider and weigh technical and scientific evidence. The complexity of the *Tyrone Permit Appeal* record underscores the fact that the decisions previously made by the Commission – which NMED proposes to undo now through its draft

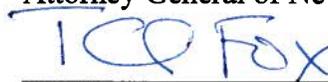
Copper Rule – were made after thoughtful and deliberate consideration of an abundance of evidence. The evidentiary basis for the Commission’s prior decision should not be swept aside, as if that Commission proceeding and the Commission’s resulting decision did not occur.

NMED proposes that, if the *Tyrone* record is admitted, “each document be introduced by a competent witness and be subjected to cross-examination of the parties.” NMED Response, p. 3. Such a procedure is unnecessary, would represent an extraordinarily poor use of time for the Commission and parties, and would elevate form over substance. All witnesses in the *Tyrone* proceeding were already subject to *voir dire* and cross-examination, and all exhibits were subject to objection. The vetting of that evidence before the Commission has already occurred. And, the Commission’s decision itself, is precedent established by the Commission which the Commission cannot ignore.

For the reasons set forth above and in the Attorney General’s original motion, the transcript of proceedings, exhibits and the Commission’s decision from the *Tyrone Permit Appeal* proceeding should be admitted in this proceeding.

Respectfully submitted,

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Certificate of Service

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