

**STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT**



**IN THE MATTER OF COPPER FLAT MINE,  
DISCHARGE PERMIT DP-1840**

**No. GWB 18-06(P)**

**NEW MEXICO COPPER CORPORATION'S MOTION IN LIMINE**

**Introduction**

The public hearing scheduled to commence on Monday, September 24, 2018, in this matter relates to New Mexico Copper Corporation's ("NMCC") application for a discharge permit in connection with the Copper Flat Mine under the Water Quality Act ("WQA") and pertinent regulations of the Water Quality Control Commission ("WQCC") at 20.6.2 NMAC, as supplemented by regulations specifically applicable to the copper mining industry at 20.6.7 NMAC (the "Copper Rule"). Pursuant to the June 15, 2018 Scheduling Order and the powers of the Hearing Officer to avoid delay and otherwise maintain an orderly, efficient and fair proceeding under 20.6.2.3110(E) NMAC, by this motion ("Motion in Limine") NMCC hereby (1) respectfully requests that the Hearing Officer limit the scope and duration of testimony and public comment in this hearing in order to keep the focus of the hearing on the matters that are actually at issue in this discharge permit hearing, and (2) states a continuing objection to what NMCC anticipates will be excessive and duplicative testimony and public comment on issues that are not germane to whether the draft Discharge Permit ("DP-1840"), initially made public by the New Mexico Environment Department ("NMED") in February 2018 and offered with certain proposed amendments with NMED's Statement of Intent, should be granted. Recognizing that the Hearing Officer may prefer to err on the side of not excluding particular evidence, NMCC respectfully requests that the Hearing Officer make rulings and instructions as appropriate to limit any impertinent offerings.

**I. Three of the Four Technical Witnesses Identified by the Elephant Butte Irrigation District (“EBID”) In Its Statement of Intent Are Offered Principally to Address Water Supply, Water Rights and Dam Safety Issues That Fall Under the Purview of Agencies Other than the New Mexico Environment Department, and that Are Not Relevant to this Hearing on a Discharge Permit**

According to EBID’s Statement of Intent (“EBID SOI”), Dr. James Phillips King is a professor at NMSU who “specializes in water resources, agriculture, and STEM education.” EBID SOI, p. 2. Dr. King is being offered to present *three hours* of direct testimony as an expert in “riparian and irrigation system hydrology, water resources management, [and] Rio Grande Project [RGP] organization, operations, and accounting.” EBID SOI, pp. 7 and 9. Acknowledging that “one could quibble about the magnitude and timing,” Dr. King proposes to testify about water supply-related concerns over time that are not relevant to the question of water quality protections afforded by DP-1840 and the discharges addressed by the permit; specifically, Dr. King proposes to quibble about the magnitude and timing by offering his views that there will be “significant depletions of RGP water that will occur above Caballo Dam, primarily from Caballo Reservoir, and from the Rio Grande downstream of Caballo Dam,” and that “[t]hese impacts will begin affecting the river while the mine is in operation and continue for several decades after the mine has been closed.” EBID SOI, p. 10. Dr. King further would testify that it is “reasonable to assume that the impacts of the mining activity will not be offset” despite acknowledging that “NMCC has committed to offset the effects [with leased water rights] to the Rio Grande system during and after the operation of the Copper Flat Mine to ensure no net reduction in flows of the Rio Grande, in a manner approved by the NMOSE.” EBID SOI, pp. 10-13. Dr. King will offer wide-ranging testimony that would accuse NMCC of bad faith, discuss shortages affecting water availability through the San Juan-Chama Project, details about RGP accounting, and fears about a “significant likelihood of an international complaint if the mining operation proceeds.” EBID SOI, pp. 10-17.

EBID also proposes two hours' worth of direct testimony from Mr. Erek Fuchs, EBID's Groundwater Resources Manager in Las Cruces, who will be offered as an "expert in water rights administration in New Mexico, particularly as it applies to hydrologic considerations and related surface-groundwater interactions in the Lower Rio Grande stream system." EBID SOI, pp. 3, 7 and 17. Mr. Fuchs proposes to "begin with an overview of NM Office of the State Engineer (OSE) regulations and administrative guidelines as they apply to ground and surface water with attention to the fully appropriated condition of the Lower Rio Grande stream system." EBID SOI, p. 17. He then proposes to "describe the present status of the proposed Copper Flat Mine's water rights," and address such topics as the necessity of valid water rights in sufficient quantities, and the need to offset with valid water rights "to prevent any impairment of existing, senior rights to water." EBID SOI, pp. 17-18. Finally, Mr. Fuchs would posit reasons why NMED should consider NMCC's need for "water rights in sufficient quantities . . . that can be exercised without impairment to other, existing rights to water . . ." EBID SOI, p. 19.

Although EBID wishes to use the forum of this discharge permit hearing to accuse NMCC of "bad faith" and of "trivializ[ing]" the issues of water supply, water rights validity, and impairment, it is abundantly clear from EBID's own SOI that the matters it professes to be passionately concerned about are appropriately considered, and in many cases are already being considered, in other fora. EBID's first two offered witnesses would address issues that currently are, or will in the future be, appropriately the subject of OSE proceedings, or proceedings before the Interstate Stream Commission, or cases pending in the New Mexico and United States Supreme Court. They are offered to distract the Hearing Officer and/or unfairly inflame the public against NMCC, and they have nothing whatsoever to do with the core issues of whether NMCC's discharge permit application and Copper Flat Mine plans meet the requirements of the Copper

Rule and other groundwater regulations, or whether DP-1840 would be sufficiently protective of groundwater quality. The five hours' worth of direct testimony of these two witnesses, which is roughly the same duration of the direct testimony from all five of NMCC's offered experts, should be limited accordingly, and EBID should be admonished to address only such matters as its witnesses can reasonably establish are pertinent to the issues at hand.

A third witness offered by EBID, Mr. Zack Libbin, EBID's District Engineer in Las Cruces, would testify for an hour on direct as "an expert in compliance with Office of the State Engineer regulations pertaining to dam safety from the perspective of a dam owner." EBID SOI, pp. 4, 7 and 20. Mr. Libbin, who professes difficulty commenting, since NMCC's discharge permit application does not include a permit issued by OSE's Dam Safety Bureau, would "testify regarding Office of the State Engineer dam construction regulations and the need for Office of State Engineer review prior to approval of NMED Discharge Permitting." EBID SOI, p. 20. He would offer an opinion that the matters OSE's Dam Safety Bureau would consider and decide "should be considered as part of discharge permitting." EBID SOI, p. 21. He also finds it "noteworthy that the Discharge Application is lacking dam breach analysis and emergency response planning specific to the TSF/dam," citing OSE's dam safety regulations at 19.25.11.2(C). EBID SOI, p. 22. He also advances the incredible position that a hazard ranking under OSE's hazard ranking classification system, which under that program determines the level of design rigor required for a dam, would create a "hazard to public health and undue risk to property in violation of NMAC 20.6.7.10(J)," a legal position which, if adopted, would effectively trump the Copper Rule and serve as a veto over tailings dams despite construction in compliance with OSE Dam Safety Bureau regulations.

Just as EBID's first two offered witnesses propose to address issues appropriately considered by the OSE or other agencies or courts in other fora besides this one, so too EBID's third witness proposes to steer this proceeding into matters more appropriately considered in the context of permitting proceedings by the OSE Dam Safety Bureau under an entirely distinct and detailed set of regulations—in 19.25.12 NMAC—that entail a separate process for ensuring the safety of dams including the tailings dam facility (“TSF”) that will be constructed at the Copper Flat Mine. Although the Copper Rule and the DP-1840 offered by NMED with its SOI appropriately require “documentation of compliance” with OSE's dam safety requirements before the TSF can be constructed, EBID's effort to bootstrap substantive dam safety issues into this public proceeding on discharge permitting issues, or argue for an ordering of permitting proceedings among the distinct agencies that is nowhere mandated by statute or regulation, should be addressed through an appropriate order or admonition limiting Mr. Libbin's testimony, and steering him away from legal issues about the affect of OSE's hazard ranking classifications on the ability to obtain a discharge permit in compliance with the Copper Rule and other groundwater protection regulations.

**II. Three of the Four Technical Witnesses Identified by the Environmental Law Center for Turner Ranch Properties and Hillsboro Pitchfork Ranch (collectively “ELC”) Similarly Include as Part of Their Offered Testimony Water Supply, Water Rights and Dam Safety Issues That Are For Other Fora**

Although ELC's four offered witnesses are, for the most part, more relevant and appropriately considered in this discharge permit proceeding than are the first three witnesses offered by EBID, the testimony summaries provided do reflect that some of their testimony strays beyond the scope of this hearing. ELC apparently proposes to have Mr. Cunningham, for example, testify about water supply impairment concerns involving two wells in the vicinity of the

headwaters of Grayback Canyon on the Hillsboro Pitchfork Ranch upgradient from the Copper Flat Mine, which he plans to speculate would impact mule deer in the area. ELC SOI, pp. 9-11. It is clear from the summary of his testimony that his concerns about impairment will rely on opinions being offered by Dr. Tom Myers. ELC SOI, pp. 9 and 18. These water supply and impairment concerns relate to groundwater availability, however, and not concerns about protecting groundwater from discharges permitted by DP-1840, or concerns about contamination migrating from the mine to the groundwater underneath Mr. Cunningham's ranch.

Moreover, the ELC's complaints—which it proposes to offer through these two witnesses—that groundwater will be drawn to the pit and become contaminated, are examples of what NMCC expects will be many attempts by the ELC to use this proceeding as an opportunity to effectively re-litigate the propriety of various aspects of the Copper Rule. The Copper Rule, however, was mandated by a legislative change to the WQA in 2009, was the subject of a year-long working group process involving many stakeholders, was publicly debated in hearings in which the ELC participated, and was upheld after promulgation through multiple administrative and judicial appeals culminating in the Supreme Court's unanimous affirmance in *Gila Res. Info. Project v. WQCC*, 2018-NMSC-025, 417 P.3d 369, *aff'g* 2015-NMCA-076, 355 P.3d 36. In short, all three branches of New Mexico's government and numerous stakeholders have participated in the development and affirmance of the Copper Rule, which is final. Attempts to challenge the merits of particular aspects of the Copper Rule, in the context of a proceeding to assess NMCC's compliance with the rule, would wholly unwarranted and legally inappropriate.

A further witness offered by ELC, Jim Kuipers, proposes to discuss the "possibility of catastrophic failure of the [TSF]." ELC SOI, p. 13. He also proposes to testify that certain water NMCC proposes to use for dust control under the permit application depend upon certain water

rights that have been deemed valid, but the validity of which have been appealed. ELC SOI, p. 15. These two areas of testimony offered by Mr. Kuipers venture into the same areas of impertinent testimony being offered by three of EBID's witnesses, namely the topics of dam safety and water rights falling under the jurisdictional purview of OSE, not NMED.

NMCC respectfully submits that the ELC's witnesses, as well as EBID's witnesses, be limited to issues relevant to the discharge permit that NMED proposes to issue to NMCC under the Copper Rule and other WQCC groundwater quality regulations administered by NMED under the WQA. The public hearing on DP-1840 is neither the time nor place to adjudicate water supply or water rights issues, evaluate the safety of TSF designs under OSE's Dam Safety permitting regulations, delve into Lower Rio Grande water rights validity issues, speculate about effects on interstate, or international stream and delivery requirements involving the Rio Grande, put a microscope to allocation accounting among participants in the Rio Grande Project, or re-visit the propriety of the Copper Rule. NMCC requests that the Hearing Officer put appropriate limitations in place to prevent such unwarranted excursions, and by this Motion in Limine NMCC also interposes a continuing objection to testimony of EBID and ELC witnesses, as well as any other members of the public who may be inclined to markedly stray from the discharge permitting issues at hand.

**III. The Combined Estimates of EBID and ELC for the Time Duration of Their Witnesses Total Sixteen Hours of Direct Testimony, Compared to the Six Hours' Worth of Direct Testimony Offered By NMCC, Amounts to An Attempt by Opponents of Copper Flat Mine to Co-opt and Delay Proceedings**

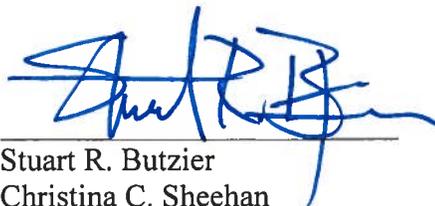
It should not escape notice that the parties opposing the Copper Flat Mine and the NMED's proposed issuance of DP-1840 are offering 16 full hours just of direct testimony, as compared to the 5 or 6 hours of testimony being offered by NMCC. This fact, combined with assertions of

“bad faith” and “trivializ[ation]” of water supply issues, and wild speculation about “catastrophic” tailings dam failures that are not relevant issues going to compliance with the Copper Rule, suggests that the mine opponents hope to co-opt the hearing, engender ill-will against NMCC and fear in members of the public, and otherwise abuse the opportunity of public participation in hopes of further delaying the resolution of DP-1840.

In the interest of avoiding having the hearing devolve into a spectacle of constant legal arguments and objections, NMCC hereby states its continuing objections, requests that the Hearing Officer impose reasonable limitations to keep proceedings within the bounds of what the parties should be addressing, and otherwise requests such relief as the Hearing Officer deems just and appropriate for the orderly, efficient, non-duplicative airing of issues without undue delays.

NMED has indicated that it concurs in this Motion in Limine. NMCC assumes both EBID and the ELC will oppose.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Stuart R. Butzier', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 7, 2018, a copy of the foregoing **Motion in Limine** was hand delivered to the following:

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