

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

IN THE MATTER OF:)
TWO PETITIONS FOR REVIEW OF THE)
SECRETARY’S DECISION TO ISSUE)
DISCHARGE PERMIT NO. DP-1840)
FOR THE COPPER FLAT MINE,)
)
ELEPHANT BUTTE IRRIGATION)
DISTRICT, and)
)
TURNER RANCH PROPERTIES, L.P.,)
HILLSBORO PITCHFORK RANCH, LLC,)
AND GILA RESOURCES INFORMATION)
PROJECT,)
)
Petitioners.)
_____)

Docket No. WQCC 19-02(A)



**ANSWER BRIEF OF NEW MEXICO COPPER CORPORATION WITH
RESPONSES TO THE BRIEFS-IN-CHIEF OF THE RANCHES AND EBID**

INTRODUCTION

New Mexico Copper Corporation (“NMCC”) submits this consolidated Answer Brief, pursuant to 20.1.3.16.A(4)(b) NMAC, in order to fully respond to the five permit review issues raised by Turner Ranch Properties, L.P., Hillsboro Pitchfork Ranch, LLC and Gila Resources Information Project (collectively, “the Ranches”), and the two permit issues raised by the Elephant Butte Irrigation District (“EBID”). Because the two issues raised by EBID substantially overlap with one of the Ranches’ issues, the argument section of this Answer Brief is organized by the five overall appeal issues that have been raised. As discussed herein, NMCC respectfully submits that the record and law amply support affirmance of the issuance of Discharge Permit No. 1840 (“DP-1840”) to NMCC by the New Mexico Environment Department (“NMED”), and that the issues raised by the Ranches and EBID either are without merit or are issues that may be adequately

considered and addressed to the extent necessary in due course in the context of separate proceedings by appropriate authorities to which the law delegates regulatory responsibility.

I. PETITIONERS' SUMMARIES OF PROCEEDINGS

With minor exceptions, NMCC believes the summaries of proceedings offered in the Briefs-in-Chief of the Ranches and EBID (collectively "Petitioners") adequately describe the proceedings that led up to the issuance of DP-1840 by the NMED Secretary. The minor exceptions largely relate to Petitioners' characterizations relating to the Hearing Officer's Report. Although the Ranches appropriately acknowledged that "[t]he Hearing Officer generally recommended that the proposed discharge permit be issued," the Ranches characterized the fact that she left to the NMED Secretary the determination of whether the issuance of DP-1840 would not create a "hazard to public health nor undue risk to property" as an "unusual tack," and also that she "suggested" the NMED Secretary might add conditions to require a fuller characterization of andesite bedrock and installation of additional groundwater monitoring wells. Ranches' Brief at 13. These pointed characterizations, which appear designed to signal a particular substantive viewpoint or hesitation on the part of the Hearing Officer, are unhelpful, particularly given the acknowledged general recommendation of the Hearing Officer to issue DP-1840 "as fully compliant with the Copper Rule," and the separate acknowledgment of the Ranches that the Hearing Officer in fact "did not recommend" that the NMED Secretary add conditions to require increased characterization of the bedrock or the installation of additional monitoring wells. Ranches' Brief at 13.

For its part, EBID used the occasion of its Statement of Proceedings to interject arguments that its "property interest is adversely affected by the permitting action;" that the Hearing Officer supposedly "was required to give some meaning to the term 'undue risk to property' but did not know what meaning to give given the overwhelming evidence presented by EBID regarding the

impact this proposed mine will have on the downstream water supply of two states and another nation (Mexico);” and that the Secretary “far too narrow[ly]” focused on whether there would be undue risks from “potential impacts to water quality from the permitted discharges, not to depletion of groundwater.” EBID’s Brief at 2-3. NMCC objects to the insertion of these misguided arguments in EBID’s Summary of Proceedings, but nonetheless responds to the substance of them under NMCC’s discussion of the fifth issue under the Argument section herein.

II. STANDING OF THE PETITIONERS

NMCC does not contest the standing of the Ranches and EBID to petition the Water Quality Control Commission (“Commission”) for a review of NMED’s issuance of DP-1840, and fully respects their rights to present their differing viewpoints and otherwise participate herein. By conceding standing in this context only, however, NMCC does not concede that the Ranches and EBID would be “adversely affected” by the issuance of DP-1840, nor that there would be “very serious consequences” from “[c]ontamination or depletion of groundwater or surface water by mining operations” as Petitioners (*see* EBID’s Brief at 2; Ranches’ Brief at 15-16) and certain of their witnesses intend to suggest, notwithstanding NMCC’s full compliance—as noted by the Hearing Officer—with New Mexico’s very stringent and environmentally protective Copper Rule requirements.¹

¹ *See* Hearing Officer Report (“H.O. Rpt.”) at 4 (“my recommendation goes so far as to say that the final draft of DP-1840 as presented by the Bureau is fully compliant with the Copper Rule and that the application for discharge permit should be granted”); at 40, Finding 247 (“there will be no water quality impacts to groundwater or surface water from the WRSPs”); at 48, Finding 303 (“there will be no water quality impacts to groundwater or surface water from the TSF”); at 90, Conclusion 34 (The liner systems described in the various impoundments met or exceed the requirements of 20.6.7 NMAC...the monitoring well network proposed in the permit meets or exceeds the requirements of 20.6.7 NMAC); at 91, Conclusion 43 (“the permit complies with all the requirements of the Water Quality Act...the New Mexico Ground and Surface Water Protection regulations...and the supplemental permitting requirements for copper mine facilities.”)

III. WATER QUALITY ACT AND REGULATION DISCUSSION

The Ranches' Brief includes a lengthy discussion of the Water Quality Act, the water quality regulations, and the copper mine regulations that more recently have been adopted by this Commission and made a part of the water quality regulatory regime for copper mine facilities. Although not all of the Ranches' discussion of these topics is relevant or germane to the issues in this permit review proceeding, for the most part NMCC finds it to be useful background and does not take issue with the discussion, with one significant exception. The exception is the gratuitous aspersions the Ranches wish to cast upon what they refer to as the "Copper Mine Regulations," and what EBID refers to as the "Copper Mine Rule." Specifically, although the Ranches acknowledge that that the Copper Mine Regulations were upheld by the New Mexico Supreme Court, the Ranches nonetheless assert that "[t]he Copper Mine Regulations have been *very controversial*, particularly provisions that allow, *rather dubiously*, groundwater to be contaminated in excess of standards within an 'area of open pit hydrologic containment.'" Ranches' Brief at 5-6, citing 20.6.7.7.B(5) NMAC.

There are at least two points that must be made in response to these gratuitous remarks. First, not only were the Copper Mine Regulations upheld by the New Mexico Supreme Court; they were *unanimously upheld by the Supreme Court on the very point the Ranches posit to be rather dubious*. *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2018-NMSC-025, ¶¶ 17-61, 417 P.3d 369 ("*GRIP*") (noting that hydrologic containment is a legally permissible mechanism the copper rule employs to protect against, rather than allow, groundwater contamination from copper mining and the outward migration of ground water contamination into previously pristine areas), citing *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n* (Phelps Dodge), 2006-NMCA-115, ¶ 29, 140 N.M. 464, 143 P.3d 502. Second, after the

New Mexico Supreme Court's unanimous affirmance of the Copper Rule Regulations in *GRIP*, it is legally flawed for the Ranches (and GRIP) to speak in terms of groundwater standards being exceeded within an "area of open pit hydrologic containment," because the Court concluded that such areas do not meet the groundwater jurisdictional prerequisite of being a "place of withdrawal of water for present or reasonably foreseeable future use" under NMSA 1978, §74-6-5(E)(3) of the Water Quality Act. *Id.* Accordingly, although the Ranches' discussion of statutory and regulatory principles generally are correct, on the central concerns GRIP previously lost, it is not.

IV. STANDARD OF REVIEW

NMCC does not have any significant differences of opinion with the Ranches or EBID as to the appropriate standard of review to be applied by the Commission in this permit review.

V. ARGUMENT

A. NMED Correctly Concluded that Water in the Future Open Pit is Eligible for the Private Waters Exemption Under the Water Quality Act

On the basis of testimony from Mr. Steven Finch of John Shomaker & Associates and Mr. Jeff Smith of NMCC, together with more detailed analyses presented in the Probable Hydrologic Consequences submitted by NMCC, which addressed the final elevation of the water body that will be in the open pit after mining, taking into account seasonal variability of water levels over time due to various climate regimes based on the last hundred years of data from the Hillsboro, New Mexico weather station, the Hearing Officer did not recommend the adoption of findings proposed by the Ranches that the future pit water will encroach on public land. *See* H.O. Rpt. at 18-22. The Hearing Officer further relied on testimony from NMED witness Kurt Volbrecht and other record evidence that the future pit lake will be a "hydrologic sink," as well as the *GRIP* and *Phelps Dodge* opinions referred to above from the New Mexico Supreme Court and Court of Appeals, to recommend the future pit lake's eligibility for the "private waters exemption" from the

Water Quality Act's definition of "surface water of the State." H.R Rpt. at 18-22. As a result, the NMED Secretary concluded that the future pit water will fall within the "private waters" exemption under NMSA 1978, § 74-6-2(H). Final Order at 4, ¶ 11.

Despite modeling which indicates that the future pit water body will have better water quality than the existing pit water body, and testimony from NMCC witness Dr. Ruth Griffiths that the future pit water body will be mildly alkaline with no acid wall seep events, Tr. pp. 272-273, the Ranches essentially argue that because certain surface water quality standards—if they were to apply—may over time be exceeded, as a matter of policy the Commission should narrowly construe the private water exemption so that surface water standards will be applicable to the future pit water body such that DP-1840 should be denied. This prime example of a "bootstrap" argument should be rejected. Essentially, the position is that the future water body should not be exempted from the application of surface water standards because, as exempted, the inapplicable surface water standards could not be applied and enforced against NMCC by NMED.²

The Ranches also argue that NMCC's pit is not eligible for the "private water exemption" from the application of NMED's surface water quality standards because water in the pit will combine with other surface waters or groundwater of the state. Cast as a "plain language" argument, the position of the Ranches is that, because groundwater will flow to the pit and at that point will "combine" with water in the pit, a water body that is projected to remain on private lands

² It is important for the Commission to understand that the eligibility of NMCC's future pit water body for the private waters exemption does not mean that no standards will apply to the pit or to the post-closure pit water body. Separate and apart from NMED's regulatory program under the Water Quality Act, because the Copper Flat Mine qualifies as a new mine under the New Mexico Mining Act, NMSA 1978, §69-36-1, et seq., NMCC will have to establish that it can meet the performance standards and protection for wildlife, habitat and water under Part 6 of the Mining Act Reclamation Program regulations adopted by the New Mexico Mining Commission under that Act.

nonetheless is not “private waters” within the plain meaning of the exemption. However, if there is a plain purpose and rationale of the private water exemption, it is that where, as in the case of NMCC’s pit water body, there is no potential for outward migration from the pit such that the water will contaminate other surface or groundwater, there is no need to apply surface water standards to the water body given that it will be confined to private land.

Moreover, as pointed out adeptly by NMED’s witness Kurt Vollbrecht, NMED’s determination that the surface water standards administered by NMED will not apply to NMCC’s post-closure pit is entirely consistent with the Copper Rule’s permitting regime, under which water captured within an open pit that is a hydrologic sink need not comply with NMED’s surface water standards during operations so long as post-closure monitoring around the perimeter of the unit will assure no outward migration of any contamination. 20.6.7.33(D) NMAC (“If an open pit is determined to be a hydrologic evaporative sink, the standards of 20.6.2.3103 NMAC do not apply within the area of open pit hydrologic containment.”); 20.6.7.24.D NMAC; *also cf. Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm’n*, 2006-NMCA-115, ¶ 29, 140 N.M. 464, 471, 143 P.3d 502, 509.

B. NMED Correctly Concluded that the Andesite Bedrock Underlying a Large Portion of the Mine Site has been Adequately Evaluated

The Administrative Record evidences the fact that NMCC’s aquifer evaluation meets the requirements of 20.6.7.21.B(1)(d)(iv) NMAC. NMCC thoroughly researched and evaluated the andesite bedrock underlying the mine site, and there is no reason for the WQCC to require further investigation of the andesite bedrock underlying a large portion of the mine site.

NMCC’s conclusion regarding the andesite bedrock’s hydraulic conductivity is based on a number of studies and data sources, contrary to the Ranches’ assertion that there is “remarkably little data to support this estimate and many reasons to question it.” Ranches’ Brief at 25. In fact,

NMCC provided a detailed analysis of the conductivity of the andesite bedrock through reports and testimony of its expert, Steven Finch. As Mr. Finch explained, the low permeability of the andesite bedrock in the mine area has been well known for some time, is based on over forty years of data, and is based on more data than what was discovered in two borings. Tr. p. 1606:6-7. As early as 1993, another consultant, Shomaker, reached the same conclusion regarding the permeability of the andesite below the mine site based on local geology, mine workings, hand-dug wells and mine shafts, and dewatering efforts within the andesite. Tr. p. 1606-1607, Finch Rebuttal slide, marked as NMCC 108, H.O. Rpt. at 7. In 1996, another consultant, Adrian Brown, performed slug tests that confirmed the low hydraulic conductivity of the andesite below the mine site. *Id.* Additionally, other consultants reached the same conclusion through separate independent analyses in 1997 (SRK, reviewing Brown's well data), and 2011 and 2012 (INTERA), among others. *Id.* Clearly, numerous studies and data sources support NMCC's conclusion regarding the andesite bedrock's hydraulic conductivity beneath the mine site.

NMCC has provided information and data concerning the fractures in the andesite, and, contrary to the Ranches' argument offered evidence as to why they do not represent 'preferential pathways'. *See* Tr. p. 99. Specifically, Mr. Finch presented evidence that the permeability of the andesite that surrounds the ore body has been significantly reduced because there are fractures in the andesite that are filled in with fluids, which formed silicate and calcite minerals. *Id.* He went on to note that these filled fractures actually reduced the permeability. *Id.* Mr. Finch's findings regarding the hydrogeologic setting of the mine site, including the minerals in the rock, the type of fractures, and what is in those fractures are from an extremely detailed data set from over forty years' worth of data collection. Tr. pp. 103-104. Therefore, the Ranches' suggestion that NMCC did not properly evaluate the fractures in andesite is meritless.

In contrast to the numerous studies and data points that informed NMCC's conclusion regarding the hydraulic conductivity of the andesite at the mine site, the Ranches' expert, Dr. Tom Myers, offered illogical arguments regarding hydraulic conductivity values for andesite. Importantly, Dr. Meyers did not independently attempt to test any of the hydraulic conductivity values for andesite at the mine site, and his testimony was solely based on wildly disparate and inconsistent hydraulic conductivity values for andesite (including one value that fell within the range he himself ascribed to the Santa Fe Group) that he acknowledged were chosen assumptions based on what point he was arguing. Tr. pp. 1266, lines 5-8, 1277-1278. Accordingly, the Ranches' argument is not based on credible evidence and is merely conjecture based on its expert's scientifically unsupported preferential values.

The Ranches' attempt to undermine the overwhelming evidence of the low permeability of andesite by introducing ill-informed arguments regarding wells referred to as "supply wells," which the Ranches maintain are completed in the andesite bedrock, is similarly misguided. What the Ranches fail to acknowledge, which Mr. Finch explained, is that "[w]hat you'll find, if you knew about these wells and if you've been to them, most of them are hand-dug, they don't yield water as you would think of as a supply well, and are not even operable as a supply well." Finch, Tr. p. 1608, Finch Rebuttal slides NMCC 109, 110. The field data in the Stage I Abatement Report reflects that, when sampled, the wells completed in the andesite rarely got any more than a single well volume, and that these wells have a water chemistry that resembles surface water. *Id.*, Tr. p. 1611, Finch Rebuttal slides NMCC 111 and 112.

Based on the credible and scientifically sound evidence in the record, the Hearing Officer and the Secretary properly concluded that no further evaluation of the andesite is warranted. H.R. Rpt. at 9; Final Order at 3, ¶ 7. The Ranches' effort to recast those conclusions is misleading.

Specifically, the Ranches mischaracterize NMED's expert witness, Kurt Vollbrecht's, testimony regarding further evaluation of the andesite bedrock. When asked by the Ranches' counsel whether it would "be desirable to have further characterization of the andesite bedrock," Mr. Vollbrecht responded:

I—it's beyond my expertise to weigh in on the technical merits of that. I think Dr. Marcoline could probably provide a better analysis of that. I think the department's position and the reason we've drafted the permit as we have is that we think the evaluation that was done is adequate. Doing more work will certainly provide more data and make it more defensible, and so I can't say I would object to that necessarily, but we don't necessarily think it's necessary."

Tr. p. 556, lines 1-13. Similarly, the Hearing Officer did not invite NMED's Secretary to add a permit condition requiring further evaluation of the andesite bedrock; rather the Hearing Officer expressly provided that "requiring further evaluation of andesite is not among the recommendations...If the Secretary chooses to include an additional permit condition requiring additional evaluation of the andesite in the discharge permit, it can be included in the final order." H.O. Rpt. at 9. The Secretary clearly found that "the andesite bedrock has been adequately evaluated." Final Order at 3, ¶ 7.

Given the number of studies and data points informing NMCC's evaluation of the andesite bedrock underlying the mine site, there is no need for the Commission to require further investigation of the andesite bedrock underlying the mine site. The administrative record demonstrates that the hydraulic conductivity of the andesite has been well studied and fully complies with the requirements of the Copper Rule.

C. DP-1840's Robust Groundwater Monitoring Network Exceeds the Requirements of the Copper Rule; No More Monitoring Wells are Needed

The Ranches' concerns regarding the spacing and adequacy of the groundwater monitoring well network are displaced, unwarranted and do not consider the existing conditions and

requirements of the permit, all of which comply with the requirements of the Copper Rule, including 20.6.7.28.B NMAC. DP-1840's monitoring wells are adequately spaced and are designed to detect an exceedance or trend toward exceedance at the earliest possible occurrence. The Hearing Officer and the Secretary properly concluded from the evidence in the administrative record and testimony from NMCC's expert witness, Steven Finch, and NMED's witness, Dr. Marcoline, that DP-1840's monitoring well requirements exceed the requirements of the Copper Rule. H.R Rpt. at 14, Final Order at 3, ¶ 9.

The Administrative Record demonstrates that NMCC carefully evaluated the underlying geology of the waste rock stock piles and tailings storage facility in proposing groundwater monitoring well locations. Tr. p. 177, lines 2-15. As NMCC's expert, Mr. Finch, explained, NMCC prepared and used a credible and thorough hydrologic analysis to determine where to locate the groundwater monitoring wells incorporated in the permit. Tr. pp. 177-179. This analysis used groundwater contours as they currently exist and various sequences of model-simulated groundwater contours throughout the mining period, out to hundred years after reclamation. *Id.* The analysis of groundwater flow allowed NMCC to choose the best location for monitoring wells. *Id.* Ultimately, the hydrologic analysis informed the robust groundwater monitoring planned for the mine site, which NMED's experts confirmed in their own analyses. Tr. pp. 535-536.

The monitoring wells for the waste rock stock piles and the tailings storage facility are adequately spaced and are designed to be able to detect any contamination from those mine units. As Mr. Finch explained, the groundwater monitoring well locations around the waste rock stock piles and the tailings storage facility were carefully planned using advanced modeling and thorough calculations of possible contaminant migrations. Tr. pp. 177-179. Mr. Finch further explained that when going over the numerous existing and proposed monitoring well locations,

the monitoring wells planned will detect contaminants even if they are not in the direct line of a plume, specifically the plumes Dr. Myers's theorizes *could* develop. Finch, Tr. p. 1616, lines 7-15. Therefore, the current groundwater monitoring network will allow NMCC to detect dispersion from the waste rock stock piles and the tailings storage facility.

As evidenced by the permit itself, and as the Ranches' concede, the permit "includes detailed requirements on groundwater monitoring." Ranches' Brief at 15. This robust groundwater monitoring plan includes a requirement for monitoring at certain existing monitoring wells at the mine site in combination with proposed new monitoring wells, as well as surface water and process water sampling points. AR 17051-17067, 18770-18772, 18755-18760. The Ranches fail to acknowledge that the permit requires NMCC monitor and report water quality information from *fifty-six* compliance sampling locations at the Copper Flat Mine. AR 18755-18760, 18770-18772, 18774; NMED Ex. 3, p. 16. Additionally, there is at least one monitoring well located within 75 feet, or as close as practicable, of each process water or impacted stormwater impoundment at the Copper Flat Mine. AR 18770-18772, 18774; NMED Ex. 3, p. 17. It is therefore unnecessary to require additional monitoring wells as a condition of DP-1840.

As set forth herein, the comprehensive groundwater monitoring network is adequately designed to detect any contamination from the mine site. The Ranches' arguments regarding the adequacy of the groundwater monitoring network are therefore misplaced and at best premature. Assuming any new groundwater monitoring wells are needed, it is unnecessary to require them at this juncture- as NMED's expert witness, Dr. Marcoline, clarified, until the initial monitoring wells are in, and everything's being monitored, "we may not know if we need more [monitoring wells] or not." Tr. p. 704, lines 19-21. As with seepage or leaks from the tailings facility, in the event contaminants are detected, the Copper Rule requires additional monitoring, and therefore adding

any permit conditions requiring additional groundwater monitoring wells at these locations is unnecessary at this point in time. The Secretary properly concluded that “the groundwater monitoring well network required in DP-1840 is appropriate, and in the event future data suggests additional monitoring wells would be advisable, the Bureau is already authorized to require them.” Final Order at 3, ¶ 9.

The monitoring well network provided in DP-1840 is robust and exceeds the requirements of the Copper Rule. It is therefore unnecessary to require additional monitoring well locations in DP-1840. *See GRIP*, 2018-NMSC-025, ¶ 49 (“According to the Commission, [the] requirements pertaining to NMED’s oversight of the monitoring well system are the most intensive required by any state.”).

D. NMED Correctly Concluded that Issuance of DP-1840 Poses no Hazard to Public Health nor Undue Risk to Property Pursuant to the Copper Rule

The New Mexico Supreme Court effusively lauded the Copper Rule because its “plain terms contain an abundance of provisions that afford significant groundwater protections at copper mine facilities designed to prevent pollution.” *See GRIP*, 2018-NMSC-025, ¶ 61. As the Court noted:

The Copper Rule is comprised of thirty-nine different sections and a myriad of sub-sections which address all manner of discharge control for the copper mining industry. It is a “supplement [to] the general permitting requirements . . . to control discharges of water contaminants specific to copper mine facilities . . .” 20.6.7.6 NMAC. The “purpose” of the Copper Rule, as stated by the Commission, “is to control and contain discharges of water contaminants specific to copper mine facilities and their operations to prevent water pollution so that ground water meets the quality standards of 20.6.2.3103 NMAC at locations of present and potential future use.”

* * *

The NMED was the constituent agency tasked with creating the Copper Rule. Section 74-6-2(K)(1). The Copper Rule is a complicated and lengthy regulatory overflowing with technical requirements. The order and statement of reasons the Commission issued to explain its adoption of the Copper Rule is 214 pages long

and explains, in detail, why the Commission embraced the varying technical standards in the Copper Rule and why certain proposed amendments to the Copper Rule were rejected.

Id., 2018-NMSC-025, ¶¶ 16 and 38. In this case, the Ranches have acknowledged the Hearing Officer's general recommendation to issue DP-1840 "as fully compliant with the Copper Rule." Ranches' Brief at 13.

Most likely because the Ranches and EBID recognized their uphill battle to establish that NMCC did not fully meet the technical requirements of the Copper Rule, they both place a heavy emphasis in their petitions and briefs-in-chief on one broadly stated provision on which the Hearing Officer deferred to NMED's Secretary. The provision states, without elaboration, that NMED shall approve a discharge permit if "it poses neither hazard to public health nor an undue risk to property" and otherwise meets the minimum of requirements of the Copper Rule. *See* 20.6.7.10.J NMAC. Although their arguments differ in scope as well as particulars, both the Ranches and EBID seek to shoehorn into this provision a broad range of arguments ranging from concerns relating to the potential for contamination of groundwater, which of course are within the purpose and technical requirements of the Copper Rule, to concerns about groundwater depletions and tailings dam safety, which of course are within the separate jurisdiction of New Mexico's Office of the State Engineer.

On the issue of potential environmental impacts, the Hearing Officer accepted the interests at stake that were presented by the Ranches and EBID, but also found NMCC's technical experts' reports and testimony to be valid and reassuring:

NMCC's witnesses presented a more reassuring picture of the mine and its potential environmental impacts, specifically as to groundwater contamination: Mr. Smith noted that the ore processing would be by flotation only, NMCC would not employ ore leaching or solvent extraction processes. Only a small amount of materials mined will be acid-generating, and they will be segregated and stored. Smith, Tr. p. 49, Griffiths, Tr. p. 255. There is an abundance of site data and detailed

evaluations that informed their understanding of the hydrogeologic setting and the necessary groundwater protection measures. Finch, Tr. pp. 134-135. The faults at the site will not serve as a conduit for the migration of contaminants; the red clay there is very low permeability and is smeared all along the fault zone. It acts as a barrier. Finch, Tr. p. 168. Predicted groundwater chemistry is similar if not almost identical to current groundwater chemistry. Furthermore, all parameters are below New Mexico groundwater standards, with the exception of fluoride, which is naturally elevated in the existing groundwater. Griffiths, Tr. pp. 262-264.

H.O. Rpt. at 26-27. As explained by the Hearing Officer, the Ranches' and EBID's unfounded arguments and unsupported assertions regarding the likelihood of migration of groundwater contaminants to the Ladder Ranch and Caballo Reservoir, Ranches' Brief at 32, EBID's Brief at 9, are contradicted by substantial evidence in the Administrative Record presented by NMCC's expert witnesses, including Steven Finch:

The Ladder Ranch should not be concerned about water moving from the mine through the East Animas Fault to the Ladder Ranch. "For one thing, a small amount of TDS and sulfate contamination that occurred from the existing tailings impoundment did not travel east. It mounded up right underneath the pile, with no eastward movement at all. That's one line of evidence. We have a groundwater model that's been calibrated to all the data that shows that that's not the direction in which water would travel either. It basically mimics what we've already observed from the existing plume. It stays mounded up underneath the facility behind the fault zone. Water moving northward along the East Animas Fault to the Ladder Ranch is physically impossible based on the data we have, the observations we've made and the modeling calculations we have performed."

No one "should be concerned that the sulfate plume that exists from the Quintana days will find its way to the Caballo Reservoir; it hasn't moved anywhere in 30 years, and Caballo is still 12 miles away."

Nor "should there be any concern that any contamination will travel from the future mining operation at Copper Flat to either the Caballo or the Elephant Butte Reservoir or the Rio Grande. With the requirements of the Copper Rules protecting water sources from pollution, all the stormwater controls, the design features, and the monitoring network, it's as bulletproof as you can make it." Finch, Tr. pp. 216-218.

H.O. Rpt. at 26-27.³ On these bases, as well as additional substantial evidence in the Administrative Record, the NMED Secretary was fully supported and justified in concluding that he should issue DP-1840, and this Commission likewise should affirm.

In essence, it was the fear of “hazards to public health,” and the fear of “undue risks to property”—very general language employed by the Copper Rule—that the opposing parties and their witnesses sought to advance and capitalize on in this proceeding. In doing so, however, they neglected to offer sound science or technical engineering of their own to counter NMCC’s witnesses in substance, and otherwise essentially ignored the Copper Rule altogether. Being thus ungrounded, the witnesses offered by the parties opposing issuance of DP-1840 were unsuccessful in refuting or casting any doubt whatsoever on NMCC’s central showing, based upon sound science and technical engineering and design, that permit issuance under the Copper Rule’s permit-by-rule regime is appropriate given NMCC’s compliance with the requirements of the Copper Rule and associated discharge program regulations. The Ranches’ erroneous and unsupported statement that “the Copper Flat Mine is the rare case in which the evidence of undue risk to property is overwhelming,” Ranches’ Brief at 37, is unsupported by the overwhelming evidence in the Administrative Record that demonstrates that the mine meets or exceeds the many robust technical requirements of the Copper Rule to ensure that groundwater is protected. Nothing in the testimony of the opposing parties’ witnesses, which all five of NMCC’s experts stayed to the end to hear,

³ Similarly, disregarding the extensive evidence presented at the hearing and in the Administrative Record, the Ranches’ Brief includes a misleading assertion that “it is likely that leaks and spills from the Copper Flat Mine—particularly the waste rock stock piles and the Tailings Storage Facility— will occur.” Ranches’ Brief at 33. Rather, as the Ranches’ own expert, Mr. Kuipers, agreed, the liner under the tailings storage facility meets the requirements of the Copper Rule. Tr. p. 1148. Additionally, NMED characterized the liner as exceeding the requirements of the Copper Rule. Tr. p. 521. Similarly, the design, location and operation of the waste rock stock piles authorized in DP-1840 meet the requirements of the Copper Rule and will not impact groundwater above the standards set forth in 20.6.2.3103 NMAC. Hr. O. Rpt. at 64-65, Findings 407-413.

gave NMCC's witnesses any less confidence in their testimony and opinions. NMCC's witnesses so testified on rebuttal, wherein each of NMCC's five experts also went on to offer their well-grounded opinion testimony that issuance of DP-1840 would not pose a hazard to public health or an undue risk to property. Tr. pp. 1602, 1616-1618, 1636-1640.

E. Assertions that Financial Assurance is not Adequate are Premature and Unpersuasive, and Financial Assurance Discussions are Ongoing

The Ranches complain extensively, over five pages of their brief-in-chief, about a "preliminary financial assurance cost estimate" which had been submitted by NMCC at the time of the permit hearing on DP-1840 before NMED's Hearing Officer. The Ranches assert that the financial assurance proposal by NMCC is substantively inadequate and procedurally defective.

The Hearing Officer correctly found that NMCC has met the financial assurance requirements in the Copper Rule. H.O. Rpt. at 17-18, 74-75; Findings 468-479. The Copper Rule and DP-1840 require that financial assurance be held among three agencies, and does not require the Secretary issue a decision on the amount of financial assurance as part of his final order. *Id.*

Moreover, the Commission may take administrative notice of what was obvious at the time of the hearing on DP-1840, which is that the preliminary cost estimate was just that: preliminary; discussions among the three agencies remain ongoing. The Ranches have cited to no authority whatsoever which suggests that the amount of financial assurance must have been settled at the time of issuance of DP-1840, nor that NMED could not condition DP-1840 upon ultimately providing and maintaining satisfactory joint financial assurance, as DP-1840 did in this case. AR 18763. The reason is simple: no such authority exists.

CONCLUSION

For all the reasons stated herein, and other reasons appearing in the Administrative Record, the Hearing Officer's Report, the Final Order and DP-1840 itself, as well as the arguments to be made by undersigned counsel at the hearing on August 13, 2019, NMCC respectfully requests that the Commission affirm NMED's issuance of DP-1840.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of **Answer Brief of New Mexico Copper Corporation with Responses to the Briefs-in-Chief of the Ranches and EBID** was sent via the stated methods below on July 16, 2019:

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