

**STATE OF NEW MEXICO
BEFORE THE 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)



**APPEAL TO THE WATER QUALITY CONTROL COMMISSION
OF THE DECISION OF THE SECRETARY OF THE ENVIRONMENT
GRANTING DP-1840 TO THE NEW MEXICO COPPER CORPORATION**

**ELEPHANT BUTTE IRRIGATION DISTRICT'S REPLY BRIEF
REGARDING ISSUES FOR REVIEW
BY THE WATER QUALITY CONTROL COMMISSION**

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ELEPHANT BUTTE IRRIGATION DISTRICT'S REPLY BRIEF
REGARDING ISSUES FOR REVIEW
BY THE WATER QUALITY CONTROL COMMISSION

Pursuant to NMRA Section 20.1.3.16(A)(4), the Elephant Butte Irrigation District (“EBID”), through its counsel Samantha R. Barncastle of the Barncastle Law Firm, hereby submits its Reply Brief Regarding Issues for Review by the Water Quality Control Commission (“the Commission”) on the decision to issue DP-1840, which decision was rendered by the Secretary of Environment on December 19, 2018 and, as grounds therefor, would state as follows:

I. RESPONSE TO NMED BRIEF

NMED asserts a definition of “undue risk to property” that is not supported by the Copper Rule itself. In fact, NMED’s proposed definition is not consistent with the law in general in that NMED asserts the term means there can be no contamination of ground or surface water above numerical standards found at 20.6.2.3103 NMAC, even though the 3103 standards only apply to groundwater by definition (not surface water). Further, if NMED’s definition was actually the way the Copper Rule worked, that would go a long way toward alleviating some of EBID’s concerns. However, the Copper Rule specifically excludes certain types of waters from compliance with 3103 standards. Additionally, NMED’s proposed definition is the exact same as the definition of “hazard to public health”. If that is actually the case, why use both terms to describe the same standard that must be met?

Nowhere in the Copper Rule or any other provision of the Water Quality Act is the term “undue risk to property” defined, let alone as NMED has defined it. The proposed definition advanced by NMED essentially makes the term meaningless and useless as it is exactly what NMED is supposed to ensure anyway. In effect, if the definition were what NMED proposes, the “undue

risk to property” language would add no additional requirements to the Copper Rule beyond what NMED already must achieve before a permit is issued. That would make the language superfluous and ascribe it no meaning whatsoever, and to do so would be contrary to rules of construction for regulations. Why include such language in the rule if it has no meaning?

In any case, the proposed definition put forth by NMED is not the only way there could be an undue risk to property. An exceedance of 3103 standards is but one way other property interests might be unduly impacted by the issuance of the discharge permit. Looking only at exceedance issues fails to protect other property owners given that NMED must also impose permit conditions to prevent, not just abate, exceedances. In this instance, NMED has only done the bare minimum under the Copper Rule to address prevention, though, as EBID has discussed, much more should be done to ensure other property interests are not unduly impacted.

The definition of “undue risk to property” proposed by NMED is far too narrow to have any real meaning under the Copper Rule. NMED’s conclusion regarding its task is also too narrow. If the only task at hand is to ensure “DP 1840 is protective of groundwater quality at places of withdrawal”, then the language regarding undue risk to property has no meaning in the Rule.

II. RESPONSE TO NMCC BRIEF

NMCC does far less to respond to the issues raised by EBID than even NMED did. Unsurprisingly, NMCC focuses on their showing of compliance with the bare minimum standards of the Copper Rule to suggest that all is well, and no further analysis requirements or permit conditions need to be imposed. It is not the technical requirements of the Rule at play here, but whether there should be any meaning ascribed to a term of art included in the Rule, but thus far completely ignored by NMED and NMCC. If the term “undue risk to property” is to have a

meaning, it cannot simply be the bare minimum requirements of the Copper Rule. Similar to what was proposed by NMED, the idea that an applicant could meet the bare minimum requirements of the Copper Rule then simply ignore the “undue risk to property” language is exactly what EBID takes issue with in this appeal. Some meaning should be given to that language, and if ever there were a case of undue risk to property, it is this case, especially in light of the lack of planning for multiple scenarios that could cause extreme water quality issues for the second largest city in New Mexico, the largest agricultural area in New Mexico, the downstream state of Texas, including the City of El Paso, and the downstream country of Mexico, including Ciudad Juarez. To ignore the interests at stake in favor of the most basic amount of planning possible under the Copper Rule is to ignore the requirements of the Rule itself and is therefore arbitrary and capricious.

III. RELIEF REQUESTED

EBID is not opposed to issuance of the proposed discharge permit – EBID is opposed to the irresponsible permitting that has failed to completely analyze the impacts to downstream water users in the Lower Rio Grande. Permitting based upon an incomplete analysis of possible impacts to downstream users cannot be supported by law given the Copper Rule’s requirement to consider “undue impacts” to other property rights. NMED has broad authority to include appropriate permit conditions in the subject permit, as, for example, it has done with the requirement that the current site contamination be abated on a schedule that is independent of the mine’s operations. All EBID wants are permit conditions that appropriately address the property concerns downstream. Appropriate conditions might include:

1. Compliance with NM OSE Dam Safety Bureau permitting requirements must be completed prior to issuance of DP-1840 to allow the dam breach analysis and

emergency action plans to be prepared to inform the Department and the Hearing Officer regarding the possible hazard to public health and/or undue risk to property, and to ensure compliance with Section 20.6.7.10(J).

2. Water within the pit lake should be treated to meet Water Quality Act (and Section 3103) standards when it is pumped out of the pit lake to begin mining so as to avoid the possibility of a spill and contamination event.
3. A groundwater interceptor system should be required such that contaminated groundwater may be properly monitored, reclaimed and treated.
4. An emergency action plan should be required to be created, in conjunction with other affected entities downstream and relying on Caballo Reservoir as a measure to ensure there is no undue risk to property or hazard to public health.
5. Compliance with NM OSE water rights requirements must be achieved prior to NMCC being allowed to begin mining activity under DP-1840.

IV. CONCLUSION

With what is at stake for New Mexico in the ongoing Supreme Court Original Action, *Texas v. New Mexico*, further agency coordination on the issue of water rights, undue risk to property, and potential hazard to public health is necessary. Preparing the appropriate dam breach analysis, emergency action plans, and requiring proactive approaches to dealing with affects to downstream users is essential. The lack of cooperation among agencies in New Mexico on a project such as this necessarily creates an avenue for incomplete planning for the protection of others' property rights. The Copper Rule specifically seeks to prevent against an undue risk to property and gives agencies the path forward for proper coordination, thus rectifying what could be the situation if agencies failed

to cooperate with each other to protect the general public. The definition of undue risk to property should not be read as narrowly as the Department and the Copper Mine have urged and, instead, it should be read as an additional requirement that must be complied with prior to issuance of a discharge permit under the Copper Rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 25th day of July, 2019, a true and correct copy of the foregoing Reply Brief was sent via first class mail to the following:

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