STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

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

No. WQCC 12-01(R)

New Mexico Environment Department,
Petitioner.

ATTORNEY GENERAL'S REPLY TO FREEPORT-McMoRAN'S CONSOLIDATED RESPONSE IN SUPPORT OF ATTORNEY GENERAL'S MOTION TO REMAND

Preliminary Statement

The Freeport-McMoRan, Inc. mining companies ("FMI") attempt to discredit the position of the Attorney General by misrepresenting it. FMI (and the New Mexico Mining Association and the New Mexico Environment Department ("NMED")) characterize the Attorney General's position as requiring all ground water under all discharge sites to meet water quality standards. This is not the position of the Attorney General. The position of the Attorney General – consistent with the plain language of the Water Quality Act ("WQA") – is that ground water underneath a "place of withdrawal of water for present and reasonably foreseeable future use" must meet ground water quality standards, as prescribed by Section 74-6-5(E)(3) of the WQA.

Argument

I. THE ATTORNEY GENERAL'S POSITION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE WQA, THE HISTORICAL INTERPRETATION OF THE WQA, THE COURT'S DECISION IN *TYRONE*, THE COMMISSION'S 2009 DECISION, AND THE TYRONE SETTLEMENT

A. FMI Misrepresents the Position of the Attorney General

FMI misrepresents the Attorney General, arguing that the Attorney General's position is that "*all* groundwater is required to meet groundwater standards at *all* times and in *all* places" at mine sites. ." FMI Resp., p. 6. The Attorney General's position, as articulated throughout his pleadings, is that ground water quality standards must be met at any "place of withdrawal of

water for present and reasonably foreseeable future use," as required by Section 74-6-5(E)(3) of the WQA. "Place of withdrawal" is to be determined in accordance with "general factors or policies" established by the Water Quality Control Commission ("Commission"), as directed by the Court of Appeals in *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. The Commission has determined the factors to be considered,[1] and has determined that numerous places at the Tyrone mine site, for example, are "places of withdrawal" under which ground water must meet standards.[2] Under Section 74-6-4(H) of the WQA a variance may be granted if Commission regulations impose an "unreasonable burden." The Attorney General's position is consistent with the plain language of the WQA and the balance struck by the Legislature in the WQA between protection of ground water and accommodating the needs of dischargers. This position, as outlined in the Attorney General's pleadings, is consistent with the State of New Mexico's interpretation of the WQA for the last 35 years, the Court of Appeals' opinion in *Tyrone,* the Commission's 2009 Decision in the *Tyrone Appeal*, and the Tyrone Settlement agreed to by FMI.

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[1] The Commission held that the following factors must be considered in determining "place with withdrawal": site hydrology and geology, quality of water prior to discharge, past and current land use in the vicinity, future land use in the vicinity, past and current water use in the vicinity, and population trends in the vicinity. *See In the Matter of Appeal of Supplemental Discharge Permit for Closure (DP 1341) for Phelps Dodge Tyrone, Inc.*, Nos. 03-12(A) and 03-13(A) ("*Tyrone Appeal*"), Comm'n Decision, COL ¶¶ 15-21.

[2] The Commission found that "places of withdrawal" at the Tyrone mine site included two drinking water wells, the Fortuna Wells; six parcels within the mine site not owned by Tyrone or affiliates; the north side of the mine around the Mangas Valley Tailing Impoundment; the area west and to the east of the 1A Tailing Impoundment; an area immediately south of the 1A Tailing Impoundment; an area to the southeast of the 3A Stockpile and to the east of the 3B Waste Rock Pile; open areas around the pits; the area on the east side of the mine south of the 5A Waste Rock Pile; an area south of the Gettysburg Pit; areas on the southwest corner of the mine; an area to the west of the Gettysburg Pit, along the 1C Stockpile; areas on the southeast side of the mine along and within Oak Grove Draw; an area on the east side of the mine to the southeast of the No. 1 Stockpile; areas in the southeast corner of the mine, around the reclaimed Burro Mountain Tailings; and areas on the west side of the mine in Deadman Canyon. Comm'n Decision, COL ¶¶ 46-49, FOF ¶ 125.

B. The Attorney General's Position Reflects the Balance Drawn by the Legislature under the WQA

FMI argues that the "balance" struck in the proposed Copper Mine Rule between ground water protection and mining development is somehow the precise balance contemplated by the Court of Appeals in the *Tyrone* case. FMI Resp., pp. 3, 7-10. This argument has no basis in the plain language of the WQA or in the Court of Appeals' opinion.

Provisions of the WQA will be interpreted by courts to "give effect to the intent of the legislature." *Summers v. N.M. Water Quality Control Comm'n*, 2011-NMCA-097, ¶ 16, 150 N.M. 694, 700, 265 P.3d 745, 751 (reversing Commission's interpretation of WQA). Courts "begin by considering the plain language of the statute and "assume that the ordinary meaning of the words expresses the legislative purpose." *Id.*

Under the plain language of the WQA, ground water may not exceed standards at "places of withdrawal." NMSA 1978, § 74-6-5(E)(3); *see also* 20.6.2.3103.A NMAC (requiring standards to be met at "any place of withdrawal of water for present and reasonably foreseeable future use"). That is the judgment of the legislature, as the clear language of the statute articulates. Mine sites or portions thereof may represent "places of withdrawal" under the WQA; there is no blanket exemption for mine sites under the WQA.

FMI argues mightily that meeting standards at mines sites is not technically feasible. The legislature contemplated precisely that possibility and provided for variances in the event Commission regulations imposed an "unreasonable burden" on dischargers. NMSA 1978, § 74-6-4(H). More specifically, Commission regulations allow variances in the form of alternative abatement standards if meeting standards is not technically feasible. 20.6.2.4103.F NMAC.

The plain language of the WQA requires meeting standards at "places of withdrawal," and allows for variances if Commission requirements impose an "unreasonable burden." This is the balance struck by the Legislature, and recognized by the Commission.[3] FMI may not believe this balance represents "good public policy," but this is the policy announced by the Legislature. If FMI does not believe it represents good public policy, its remedy is with the Legislature.[4]

C. The Tyrone Settlement, Agreed to by FMI, Reflects the Same Balance as Advocated by the Attorney General

The balance struck between meeting standards at "places of withdrawal" and obtaining variances or alternative abatement standards if standards represent an "unreasonable burden" is the same balance agreed to by FMI in its December 20, 2010 Settlement Agreement and Stipulated Final Order ("Tyrone Settlement") [attached as Ex. F to AGO's Mot. to Remand]. Tyrone Settlement, ¶¶ 47, 49. The Tyrone Settlement requires FMI to meet water quality standards at its mine site, *id.* at ¶¶ 26, 27, 35, and allows FMI to request variances from water quality standards during operations for existing and new facilities and to petition the Commission for alternative abatement standards upon closure, *id.* at ¶¶ 33, 38, 42. It is disingenuous for FMI to complain that this balance is impracticable, unreasonable, infeasible, and the like, when the balance reflects the precise agreement entered into by FMI.

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[3] The Commission held that "[i]f it is not technically feasible for water quality standards to be met underneath the Tyrone Mine, the appropriate remedy for Tyrone is to seek alternative abatement standards under the Commission Regulations at section 20.6.2.4103.F NMAC." Comm'n Decision, COL ¶ 52.

[4] As pointed out by the Attorney General in his Motion to Remand, in 2003, FMI's predecessor, Phelps Dodge Corporation, did attempt to amend the WQA to exempt mines from meeting standards. Senate Bill 473 ("SB 473") proposed to amend the WQA and the state Mining Act to establish "mining districts" that would be exempt from water quality standards under the WQA. SB 473, p. 37, ll. 1-4; p. 42, l. 20 to p. 43, l. 2 [attached as Ex. C to AGO Mot. to Remand]. "Mining districts" would have encompassed all land owned or leased by mining owners or operators. *Id.* at p. 4, ll. 3-7. SB 473 did not make it out of committee.

D. The 2009 Amendments Do Not Affect Protection of "Places of Withdrawal" under the WQA

FMI makes the novel argument that the 2009 amendments to the WQA – allowing the Commission to promulgate industry-specific permitting rules and requiring industry-specific rules for dairies and copper mines – allow mine discharge permits to be issued without consideration of whether a site is a "place of withdrawal" under the WQA. FMI Resp., p. 15. There is nothing in the 2009 amendments that indicates the Legislature intended in any way to change the protection given to ground water under "places of withdrawal." Section 74-6-5(E)(3) was not amended expressly or by implication. In the 2009 amendments, the Legislature expanded the Commission's authority to promulgate regulations specifying "the measures to be taken to prevent water pollution and to monitor water quality." NMSA 1978, § 74-6-4(K). But this expansion of authority -- to require specific pollution prevention measures in rule -- has no effect on the ground water that is protected under the WQA by Section 74-6-5(E)(3).

FMI further argues that the 2009 amendments represent a recognition by the Legislature that the existing permitting system was "broke." *Id.* at p. 5. FMI's revisionist interpretation of the Legislature's action is not justified by a fair reading of the plain language of the amendments. While FMI alleges the Attorney General ignores the 2009 amendments, in fact, the Attorney General detailed the history leading up to the amendments in the Attorney General's Response to FMI's Brief on the Commission's and analyzed the meaning of the amendments. *See* AGO Resp. to FMI Brief, pp. 7-11. The Attorney General hereby incorporates that analysis. In sum, the Legislature authorized the Commission to promulgate more specific measures for permitting, but did not impair or change NMED's authority to set specific conditions in permits. The

Legislature did not do away with protection of "places of withdrawal" under the WQA and was not attempting to fix a "broken system." FMI's interpretation is fanciful.

II. THE PROPOSED COPPER RULE EXEMPTS ACTIVE MINING AREAS FROM MEETING STANDARDS, CONTRARY TO THE REQUIREMENTS OF THE WQA

A. The Proposed Rule Establishes Compliance Around the Active Mining Area

FMI argues that the Commission has authority under the WQA to determine that "hydrologically isolated open pit areas" may be exempt from meeting water quality standards, and that compliance with standards may be met at designated points outside the pit areas. FMI Resp., p. 4. First, it is not only "hydrologically isolated open pit areas" that are exempted from meeting standards under the proposed Copper Mine Rule. Because the proposed rule establishes compliance with standards through monitoring wells located outside the interceptor and capture systems, also exempt from standards are:

- Open pits that are pumped;
- New and existing leach stockpiles;
- New and existing waste rock piles;
- New and existing tailing impoundments;
- And the interceptor and capture systems surrounding leach stockpiles, waste rock piles and tailing impoundments.

That is, ground water under the *active mining areas* would be exempt from standards. At Tyrone, for example, this area covers 2,000 acres of open pits; 2,800 acres of leach piles and waste rock piles; and 2,300 acres of tailing impoundments, for a total of at least *7,100 acres* of the 9,000 acre site. *See Tyrone Appeal,* Supplemental Discharge Permit for Closure DP-1341, pp. 1-2 [NMED Ex. 3]. The WQA does not exempt copper mine facilities from meeting

standards if portions of the mine site are "places of withdrawal." NMSA 1978, § 74-6-5(E)(3); *Tyrone,* 2006-NMCA-115, ¶ 28, 140 N.M. at 471, 143 P.3d at 509 (compliance with standards measured at "place of withdrawal"). And, as for the Tyrone mine site, the Commission has already found that substantial portions of the mine – areas around the open pits, leach piles, waste rock piles and tailing impoundments – are "places of withdrawal." *See* footnote 2 *infra.*

B. The Exemption under 20.6.2.3105 NMAC Is an Exemption from Obtaining a Discharge Permit, Not an Exemption from Complying with Ground Water Quality Standards

FMI argues that the Commission's current "exemptions" under Section 20.6.2.3105 NMAC demonstrate that the Commission may exempt out "places of withdrawal" from meeting ground water quality standards. FMI Resp., pp. 18-19. FMI misreads the plain language of Section 3105 of the Commission's regulations.[5] Section 3105 (which appears in full in footnote

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[5] **20.6.2.3105** ***EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT:*** *Sections 20.6.2.3104 and 20.6.2.3106 NMAC do not apply to the following:*

A. *Effluent or leachate which conforms to all the listed numerical standards of Section 20.6.2.3103 NMAC and has a total nitrogen concentration of 10 mg/l or less, and does not contain any toxic pollutant.* To determine conformance, samples may be taken by the agency before the effluent or leachate is discharged so that it may move directly or indirectly into ground water; provided that if the discharge is by seepage through non-natural or altered natural materials, the agency may take samples of the solution before or after seepage. If for any reason the agency does not have access to obtain the appropriate samples, this exemption shall not apply;

B. Effluent which is discharged from a sewerage system used only for disposal of household and other domestic waste which is designed to receive and which receives 2,000 gallons or less of liquid waste per day;

C. Water used for irrigated agriculture, for watering of lawns, trees, gardens or shrubs, or for irrigation for a period not to exceed five years for the revegetation of any disturbed land area, unless that water is received directly from any sewerage system;

D. Discharges resulting from the transport or storage of water diverted, provided that the water diverted has not had added to it after the point of diversion any effluent received from a sewerage system, that the source of the water diverted was not mine workings, and that the secretary has not determined that a hazard to public health may result;

E. Effluent which is discharged to a watercourse which is naturally perennial; discharges to dry arroyos and ephemeral streams are not exempt from the discharge permit requirement, except as otherwise provided in this section;

F. Those constituents which are subject to effective and enforceable effluent limitations in a National Pollutant Discharge Elimination System (NPDES) permit, where discharge onto or below the surface of the ground so that water contaminants may move directly or indirectly into ground water occurs downstream from the outfall where NPDES effluent limitations are imposed, unless the secretary determines that a hazard to public health may result. For purposes of this subsection, monitoring requirements alone do not constitute effluent limitations;

G. Discharges resulting from flood control systems;

5 *infra*) does *not* exempt the discharges identified from meeting water quality standards under Section 20.6.2.3103 NMAC; the exemptions apply only to "Sections 20.6.2.3104 and 20.6.23106 NMAC", which are the requirements to obtain a discharge permit. This is an important distinction. Thus, the "conventional mine workings" exemption is not an exemption from meeting water quality standards, only from obtaining a discharge permit. (And, the copper mines in New Mexico are not exempt from obtaining discharge permits.) Indeed, a review of the exemptions reveals that they represent circumstances in which the discharge is regulated by another governmental entity or the discharge does not pose a threat to ground water, obviating the need for a discharge permit, but not exempting the discharges from meeting ground water quality standards.

For example, FMI cites to the exemption for effluent from a domestic sewage system which receives 2,000 gallons or less of waste per day (20.6.2.3105.B NMAC) as demonstrating that these facilities are exempt "regardless of whether these discharges might cause ground water standards to be exceeded." FMI Resp., p. 18. This assertion is flatly incorrect. Domestic waste

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H. Leachate which results from the direct natural infiltration of precipitation through disturbed materials, unless the secretary determines that a hazard to public health may result;

I. Leachate which results entirely from the direct natural infiltration of precipitation through undisturbed materials;

J. Leachate from materials disposed of in accordance with the Solid Waste Management Regulations (20 NMAC 9.1) adopted by the New Mexico Environmental Improvement Board;

K. Natural ground water seeping or flowing into conventional mine workings which re-enters the ground by natural gravity flow prior to pumping or transporting out of the mine and without being used in any mining process; this exemption does not apply to solution mining;

L. Effluent or leachate discharges resulting from activities regulated by a mining plan approved and permit issued by the New Mexico Coal Surface Mining Commission, provided that this exemption shall not be construed as limiting the application of appropriate ground water protection requirements by the New Mexico Coal Surface Mining Commission;

M. Effluent or leachate discharges which are regulated by the Oil Conservation Commission and the regulation of which by the Water Quality Control Commission would interfere with the exclusive authority granted under Section 70-2-12 NMSA 1978, or under other laws, to the Oil Conservation Commission.

(Emphasis added.)

discharges 2,000 gallons or less per day *must be permitted* under NMED's Liquid Waste Program pursuant to 20.7.3 NMAC[6], and *must meet ground water quality standards* under 20.6.2 NMAC. *See* 20.7.3.7.D(1), -7.F(1), -201.D, -306, -402.A(5), -404.A, -405.E(1), & -605.D(3) NMAC.

The "exemption" under Section 3105 of the Commission's regulations does not exempt dischargers from meeting ground water quality standards. FMI cannot rely on this section of the regulations to argue that the Commission has authority to exempt out facilities from meeting standards.

III. THE COURT OF APPEALS DID NOT ENDORSE A "POINT OF COMPLIANCE" STANDARD

FMI argues that the Court of Appeals is some manner endorsed a "point of compliance" regulatory structure as consistent with the WQA. FMI Resp., p. 20. The Court of Appeals did not. Tyrone had requested the Court of Appeals to adopt a "point of compliance" standard. In response, the court stated,

> *Additionally, at this point we decline to adopt the standard as "point of compliance,"* or to engage in the wholesale adoption of cases and federal regulations dealing with "point of compliance." It is possible that "point of compliance" is a reasonable proxy for "any place of withdrawal . . . for present or reasonably foreseeable future use," Section 74-6-5(E)(3), and that authorities dealing with "point of compliance" can and should be used in a case like this one. *However, there may be reasons, such as differences in statutory language, that may make federal law or law from other jurisdictions inapplicable or inappropriate in New Mexico. These arguments were not well developed below or on appeal.*

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[6] Section 20.7.3.2.A NMAC provides:

> This part, 20.7.3 NMAC, applies to on-site liquid waste systems, and effluent from such systems, that are designed to receive and do receive two thousand (2,000) gallons or less of liquid waste per day, and that do not generate discharges that require a discharge plan pursuant to 20.6.2 NMAC or a national pollutant discharge elimination system (NPDES) permit.

Tyrone, 2006-NMCA-115, ¶ 37, 140 N.M. at 473, 143 P.3d at 51 (emphasis added). The court recognized that, based on differences in statutory language, a "point of compliance" standard may not apply to New Mexico. As the Attorney General pointed out in his Reply to the Mining Association's Response, pp.8-10, those states that have adopted a "point of compliance" standard have done so expressly and unequivocally by requiring standards to be met at a "point or points of compliance." *Compare* Ariz. Rev. Stat. § 49-244 [attached as Ex. A to AGO Reply to NMMA Resp.]; Colo. Rev. Stat. § 25-8-202(7)(a) [cited in AGO Reply to NMMA Resp., p. 9]; and 5 Colo. Code Regs. 1002-41:41.6 [attached as Ex. B to AGO Reply to NMMA Resp.] with NMSA 1978, § 74-6-5(E)(3). The New Mexico Legislature has not adopted this standard.

Conclusion

For the reasons set forth herein and in the Attorney General's Motion to Remand, the Commission should remand NMED's Copper Mine Rule Petition to NMED to develop a rule, in conjunction with the Copper Rule Advisory Committee, that complies with the WQA.

Respectfully submitted,

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