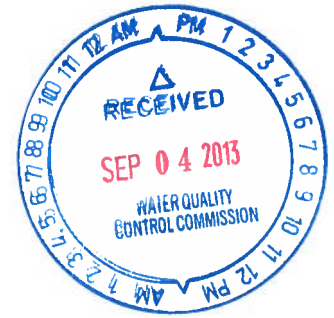


STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



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 MOTION TO STRIKE NMED'S REQUEST FOR
COMMISSION TO RE-DETERMINE PLACE OF WITHDRAWAL AS OUTSIDE THE
SCOPE OF THE PROCEEDING**

Preliminary Statement

In its Closing Arguments and Proposed Statement of Reasons, the New Mexico Environment Department (“NMED”) requests the Water Quality Control Commission (“Commission”) to reconsider and re-determine its 2009 decision in the *Tyrone* matter determining the criteria to establish “place of withdrawal” under the Water Quality Act (“WQA”) and its determinations of specific locations at the Tyrone Mine site that are places of withdrawal. NMED’s request, however, is outside the scope of the rulemaking hearing before the Commission.

However, the scope of this rulemaking hearing before the Commission does not include re-determining the criteria or factors to determine “place of withdrawal.”¹ The Commission held that proceeding previously, in 2007, and decided in 2009 the criteria for determining place of withdrawal and decided specific locations within the Tyrone Mine site there are places of withdrawal. Decision and Order on Remand, Conclusions of Law (“COL”) ¶¶ 15-21, 32, 40, 49 (Feb. 9, 2007) (“Comm’n Decision”), *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*”).

¹ See WQCC Notice of Public Hearing to Consider Proposed Amendments to 20.6.2 NMAC – Proposed Copper Rule (“WQCC Notice of Public Hearing”) at http://www.nmenv.state.nm.us/wqcc/documents/12-01WQCCEnglishpublicnotice_001.pdf.

The Commission held that proceeding pursuant to an order from the Court of Appeals specifically directing the Commission to create factors to determine place of withdrawal. *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. Nor does the scope of this rulemaking include determining the specific locations that are places of withdrawal at the Tyrone Mine. *See* WQCC Notice of Public Hearing. Again, the Commission already held that hearing, in 2007.

The scope of this rulemaking proceeding before the Commission did not include a redetermination or reconsideration of those factors or the Commission's specific place-of-withdrawal determinations for the Tyrone Mine site. Neither the parties in this proceeding or the public in general had any notice that this rulemaking hearing would involve such issues. As such, NMED's request that the Commission re-determine the general factors and specific places of withdrawal at the Tyrone Mine falls far outside the scope of this rulemaking hearing and should be struck.

Background

As the Commission is aware, it initially held a 10 day hearing in 2003 on an appeal brought by Phelps Dodge Tyrone, Inc. ("Tyrone") challenging NMED's closure permit for the Tyrone Mine. The Commission issued a decision in 2004 holding *inter alia* that the Tyrone Mine was a "place of withdrawal" under the WQA.²

Tyrone appealed the Commission's decision to the New Mexico Court of Appeals. The appellate court found, in 2006, that the Commission's determination was overly broad, and remanded the matter to the Commission to "create some general factors or policies to guide its

² Commission's Partial Final Decision and Order Affirming Supplemental Discharge Permit and Requesting a Modification to Condition 22, Conclusion of Law ¶ 29 (June 10, 2004).

determination” as to what constitutes a “place of withdrawal” under the WQA. *Phelps Dodge Tyrone, Inc.*, 2006-NMCA-115, ¶ 35, 140 N.M. at 473, 143 P.3d at 511. The court stated that the Commission could create the factors through the *Tyrone* adjudication or a rulemaking. *Id.*

Pursuant to the court’s mandate, the Commission decided to create the general factors to determine place of withdrawal through the *Tyrone* adjudication. Comm’n Decision, p. 1. After 24 days of hearing, the Commission decided the general factors to determine place of withdrawal in its 2009 Decision. The factors are 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. Comm’n Decision COL ¶¶ 15-21. The Commission also determined that many locations at the Tyrone Mine site are in fact places of withdrawal. These non-exclusive locations include the Tyrone open pits, areas near the open pits, and areas around leach stockpiles, waste rock stockpiles and tailings impoundments.³

In 2009, the Legislature amended the WQA to require the Commission to promulgate regulations for the copper industry for “the measures to be taken to prevent water pollution and

³ Applying the factors decided by the Commission, the Commission determined that “the regional and alluvial aquifers underlying portions of the Tyrone mine site are places of withdrawal of water for present and reasonable foreseeable future use pursuant to Section 74-6-5(E)(3).” Comm’n Decision, COL ¶ 33.

The Commission determined that areas around the open pits are present and future places of withdrawal. *Id.* COL ¶¶ 40-41.

The Commission specifically identified the following areas as places of withdrawal: 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 Tailings Impoundment; the area west and to the east of the 1A Tailings Impoundment; an area immediately south of the 1A Tailings 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. *Id.* COL ¶¶ 46-49, FOF ¶ 125.

to monitor water quality.” NMSA 1978, § 74-6-4(K). Prior to the 2009 amendments, the Commission was not authorized under the WQA to promulgate regulations that specified specific methods to prevent or abate water pollution, but was only authorized to specify a standard of performance for sources of pollution. The 2009 amendments deleted that prohibition, and authorized the Commission to promulgate rules for the copper industry (and other industries) that specified such methods. *Compare* NMSA 1978, § 74-6-4(D) (1993) with NMSA 1978, § 74-6-4(D) (2009). The 2009 amendments directed NMED to form a stakeholder committee to develop proposed regulations, and to proposed regulations to the Commission. NMSA 1978, § 76-6-4(K).

NMED formed the stakeholder committee, developed proposed regulations, and petitioned the Commission for this rulemaking, all in response to the 2009 amendments to the Legislature directing this rulemaking. *See* Petition to Adopt 20.6.7 and 20.6.8 NMAC and Request Hearing (Oct. 30, 2012) (petitioning Commission for this rulemaking pursuant to NMSA 1978, § 76-6-4(K) (2009)). The Commission granted the NMED’s Petition, and is holding this rulemaking to “establish new rules for the copper mine industry to specify measures to be taken to prevent water pollution and to monitor water quality,” just as it is directed to do so by statute. WQCC Notice of Public Hearing. There was no notice in NMED’s Petition or in the Commission’s public hearing notice that indicated that the scope of the rulemaking before the Commission included reconsideration of the factors to determine place of withdrawal or reconsideration of specific locations at the Tyrone Mine that are places of withdrawal.

During the rulemaking hearing, NMED’s policy witness, Tom Skibitski, testified that NMED did not disagree with any of the general factors determined by the Commission in the

Tyrone proceeding to determine place of withdrawal. Skibitski Test. Tr. vol. 2, p. 412, ll. 4-10.⁴

Mr. Skibitski testified further that NMED did not disagree with the Commission's determination of the specific places of withdrawal at the Tyrone Mine. *Id.* p. 334, ll. 16-24.⁵

In its closing brief and Proposed Statement of Reasons, NMED requests the Commission for the first time in this proceeding for a redetermination of the *Tyrone* decision. NMED Closing Argument, p. 10; NMED Statement of Reasons, ¶¶ 1308-31 [attached as Ex. A]. Specifically, NMED seeks a re-determination of the Commission's general factors to be used to determine place of withdrawal. NMED Closing Argument, p. 10; NMED Statement of Reasons, ¶ 1325 (NMED proposes factors adopted by Commission to determine place of withdrawal should be changed from *Tyrone* Remand Order).⁶ NMED proposes that the Commission adopt new factors that include "copper mining activity, water usage supported by water rights and land ownership." NMED Closing Argument, p. 10. NMED also requests for the first time that the Commission re-determine the specific locations determined to be places of withdrawal so that ground water

⁴ Q. Those are the criteria that the Court directed the Commission to adopt, are they not?

A. Okay. Yes. Yes.

Q. Okay. And does the Environment Department have any disagreement with those factors?

A. I am unaware of any disagreement with these factors. I believe we supported these factors.

Skibitski Test. Tr. vol. 2, p. 412, ll. 4-10.

⁵ Q. So they -- they identified, you know, in their decision a number of places of withdrawal at the Tyrone Mine site.

So my question is, as a policy matter, does the Department have any disagreement with the findings of the Commission that -- about these specific places of withdrawal at the Tyrone Mine site?

A. No. To my knowledge, there is no disagreement.

Skibitski Test. Tr. vol. 2, p. 334, ll. 16-14.

⁶ NMED proposes that, "The Commission finds that, at least with respect to the copper mining industry, the criteria adopted in the Tyrone Remand Order for identifying 'places of withdrawal' where compliance is determined under the WQA requires adjustments to allow for consistency with industry practice, with past NMED permitting practices for copper mining units in New Mexico, and with the continued ability of existing and future copper mining to conduct their operations in a manner which is protective of ground water resources" NMED Statement of Reasons, ¶ 1325.

underneath mine units and open pits would not be places of withdrawal. *Id.* pp. 2, 7;⁷ *see also* NMED Statement of Reasons, ¶¶ 1326-28 (NMED proposes that the specific locations the Commission determined to be places of withdrawal at the Tyrone Mine should be changed).

Argument

I. THE SCOPE OF THIS RULEMAKING DOES NOT INCLUDE REDETERMINATION OF THE CRITERIA TO DETERMINE PLACE OF WITHDRAWAL OR SPECIFIC LOCATIONS FOR PLACE OF WITHDRAWAL

A. The Public Notice for a Rulemaking Must Fairly Apprise the Public of the Subject Matter of the Rulemaking

Under the WQA, public notice of a rulemaking must set forth the “subject” of the hearing. NMSA 1978, § 74-6-6(C).

Notice is one of the dominant elements of adequate rulemaking procedures. Adequate notice resolves many of the fairness arguments surrounding rulemaking. If interested persons have notice, they can confront the agency’s factual suppositions and policy preconceptions through the comment process. *Thus, the very legitimacy of a rulemaking demands that all interested persons receive notice of the rulemaking in a way which will permit them to participate in an effective way.*

West’s Fed. Adm. Prac. § 7532 (3rd ed. 2001) (emphasis added).

The adequacy of notice is a critical starting point which affects the integrity of an administrative proceeding. Notice is said not only to improve the quality of rulemaking through exposure of a proposed rule to comment, but also to provide fairness to interested parties and to enhance judicial review by the development of a record through the commentary process. . . .

The test that has been set forth is whether the agency's notice would "fairly apprise interested persons of the subjects and issues' [of the rulemaking]."

National Black Media Coalition v. FCC, 791 F.2d 1016, 1022 (2nd Cir. 1986) (citations omitted) (emphasis added). Thus, for any rulemaking to have legitimacy, the public must have fair notice

⁷ *See also id.* p. 1 (“[t]he rulemaking before the Commission concerns the applicability of groundwater standards at copper mines”); p. 12 (“[i]t is reasonable for the Commission to conclude that Section 3103 standards do not apply to ground water beneath an active mine unit”); p. 2 (same).

of the subject matter of the proceeding. Further, any final rule must be a “logical outgrowth” of the proposed rule. West’s Fed. Adm. Prac. § 7536.

B. The Public Notice for This Rulemaking Did Not Include a Redetermination of the General Factors to Determine Place of Withdrawal or Specific Locations of Places of Withdrawal

The public notice for this rulemaking was clear: the scope of the rulemaking was to “establish new rules for the copper mine industry to specify measures to be taken to prevent water pollution and to monitor water quality.” WQCC Notice of Public Hearing. The purpose of the hearing was to comply with the statutory mandate under the WQA to promulgate copper mine rules. *Id.*; *see also* NMED Petition. There was *no hint* in the public notice that the Commission would reconsider the general factors it adopted in the *Tyrone* matter to determine place of withdrawal. There was *no hint* in the public notice that it would reconsider the specific locations the Commission determined to be actual places of withdrawal at the Tyrone Mine. As such, the public was not apprised by the Commission’s notice that these issues were within the scope of the Commission’s rulemaking proceeding and would subject to re-determination.

And, indeed, those issues were *not* re-litigated in the rulemaking. There was *no evidence* put on by any of the parties that the general factors to determine place of withdrawal should be changed. There was *no evidence* put on by any of the parties that the specific locations at the Tyrone Mine site determined by the Commission determined by the Commission.

Not only were these issues not litigated in the rulemaking hearing, but NMED’s policy witness *confirmed under oath* that NMED had no disagreement with the general factors developed by the Commission in the *Tyrone* case to determine place of withdrawal and had no disagreement with the Commission’s determinations of specific locations that were places of

withdrawal at the Tyrone Mine site. Skibitski Test. Tr. vol. 2, p. 412, ll. 4-10; p. 334, ll. 16-14. These issues were not re-litigated, and could not be considered a “logical outgrowth” of this rulemaking proceeding since NMED’s own witness confirmed under oath NMED had no disagreement with the Commission’s prior determinations.

That re-litigating the place of withdrawal criteria and places of withdrawal at the Tyrone Mine is not within the scope of this rulemaking is underscored by the fact that the Commission – pursuant to an order of remand from the Court of Appeal – already held that hearing. That hearing lasted 24 days, and testimony from an array of experts from all parties on the factors for consideration was heard. None of that type of testimony occurred during this rulemaking hearing. That type of testimony was not heard because this rulemaking hearing was not held pursuant to the appellate court’s remand order in *Tyrone* to make those determinations, but was held for an entirely different and limited purpose, that is, pursuant to the 2009 amendments to the WQA.

That re-litigating the place of withdrawal criteria and places of withdrawal at the Tyrone Mine is not within the scope of this rulemaking is also underscored by the fact that those determinations by the Commission are binding and must be followed in this proceeding based on the doctrine of collateral estoppel, as set forth in the Attorney General’s Closing Argument, pp. 6-10. Collateral estoppel or issue preclusion is a bar to re-litigation of the same issues, even in connection with a different claim or cause of action. Adm. Law Treatise, vol. 2, § 13.4, p. 1145 (2010). According to a leading administrative law treatise, “[c]ourts routinely apply collateral estoppel to issues resolved by [administrative] agencies” with some complexities added because of the agency context. *Id.*; see also West’s Fed. Adm. Practice, § 7867, p. 370 (3rd ed. 2001) (the

doctrines of collateral estoppel and res judicata are applicable to administrative proceedings when an agency is acting in an adjudicatory capacity).

Collateral estoppel applies to an administrative agency's own prior decisions, as well as to courts reviewing the administrative agency's decisions. *Id.* § 7868, p. 371. Therefore, the Commission must follow its own prior decisions. Furthermore, collateral estoppel applies to factual and legal determinations made by administrative agencies. *Id.* (factual determinations); Adm. Law Treatise, § 13.4 (factual determinations) & 13.5 (legal determinations).

As explained in the Attorney General's Closing Argument, collateral estoppel applies to the Commission's determination as to the general factors to apply to determine place of withdrawal under the WQA and to the specific locations at the Tyrone Mine that the Commission determined to be places of withdrawal. AGO Closing Argument, pp. 6-10. As such, the Commission may not re-determine those determinations in this rulemaking proceeding where no notice of any re-litigation was given to the public.

Conclusion

For the reasons set forth above, the Commission should strike NMED's request in its Closing Arguments and Proposed Statement of Reasons, ¶¶ 1308-31, to reconsider the criteria to determine place of withdrawal of water for present and reasonably foreseeable future use under the WQA and to reconsider the specific locations at the Tyrone Mine that have been determined by the Commission as places of withdrawal.

Respectfully submitted,

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



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

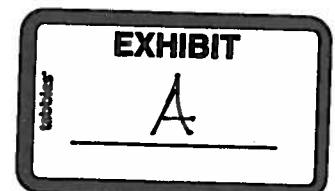
WQCC 12-01 (R)

**New Mexico Environment Department,
Petitioner.**

**NEW MEXICO ENVIRONMENT DEPARTMENT'S
PROPOSED STATEMENT OF REASONS**

THIS MATTER comes before the Water Quality Control Commission (hereinafter, “Commission”) pursuant to the Petition to Adopt 20.6.7 and 20.6.8 NMAC and Request for Hearing (hereinafter, “Petition”) filed by the New Mexico Environment Department (hereinafter, “NMED” or “Department”) on October 30, 2012. On February 18, 2013, NMED filed a Notice of Amended Petition (hereinafter, “Amended Petition”) which: (1) withdrew proposed 20.6.8 NMAC in its entirety, and (2) revised certain portions of proposed 20.6.7 NMAC. As a result of NMED’s withdrawal of proposed 20.6.8 NMAC, the Commission took no evidence on that portion of the Petition and does not adopt it.

NMED attached proposed rule provisions to both the Petition and Amended Petition. The Commission held a hearing on this matter over the course of ten days between April 9, 2013, and April 30, 2013. The Commission allowed all interested persons a reasonable opportunity to submit data, views, and arguments and to examine witnesses. Thus, the record containing pleadings, written testimony, exhibits, the hearing transcript, public comments, and hearing officer orders has been submitted to the Commission for review in compiling this Statement of Reasons.



“places of withdrawal of water for present or reasonably foreseeable future use” than it did in 2009, the Commission will have to confront that decision and articulate a basis for any significant change in course.” Order on Attorney General’s Motion to Admit Tyrone Record, filed February 6, 2013, (Pleading 40).

1308. The “Tyrone Permit Appeal” referenced in the above-referenced Order was an appeal of a discharge permit, DP-1341, in which NMED prescribed permit conditions for closure of the Tyrone Mine. The appeal was made pursuant to the NMSA 1978, sections 74-6-1 to 74-6-17 and 20.6.2 NMAC and the Commission’s rule for adjudication of permit disputes.

1309. Tyrone initially challenged NMED’s draft closure permit during a 10-day evidentiary hearing in May of 2002 before NMED, and NMED issued the closure permit for Tyrone. *See* Attorney General’s Motion to Remand the Proposed Copper Mine Rule to NMED (hereinafter, “AG Motion to Remand”) at 9, filed December 14, 2012 (Pleading 16).

1310. Tyrone then challenged NMED’s closure permit by filing an appeal petition with the Commission on July 3, 2003, and the Commission held a 10-day hearing on the matter in October and November of 2003 with the Commission eventually issuing a decision. *See id.*

1311. Tyrone then appealed the Commission’s decision to the New Mexico Court of Appeals, and in 2006, the Court issued a decision and remanded the matter to the Commission for further consideration on particular issues. *See id.*; *see also Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n*, 2006-NMCA-115, ¶ 35, 140 N.M. 464, 143 P.3d 502 (hereinafter, “Tyrone Decision”).

1312. The 2006 decision of the Court of Appeals expressly recognized the difficulties of applying the phrase “places of withdrawal of water for present or reasonably future use” in the context of a large copper mining operation such as the Tyrone Mine, and its remand granted the

Commission substantial latitude in determining how that phrase should be interpreted for purposes of identifying the locations at which ground water quality compliance is to be determined.

1313. In 2007, the Commission held a 24-day hearing dealing with the Tyrone Decision on remand, and the Commission issued its decision on February 9, 2007 (hereinafter the “Tyrone Remand Order”). *See* AG Motion to Remand at 9-10.

1314. The Tyrone Remand Order made certain findings and conclusions relating, among other things, to factors to be considered by NMED in identifying “places of withdrawal,” and ordered the parties to the adjudication to perform certain actions by certain dates in applying the factors to the Tyrone Mine site as a means of identifying the locations where compliance with groundwater standards would be measured under Tyrone’s discharge permit for closure, DP-1341.

1315. Following the Tyrone Remand Order, Tyrone initiated a further appeal to the Court of Appeals on March 9, 2009, and during the pendency of that appeal, three of the four parties to the adjudication, including NMED and Tyrone, sought the Commission’s permission to depart from the Tyrone Remand Order so that certain regulatory solutions could be pursued to avoid further protracted litigation over “places of withdrawal.”

1316. The Commission granted the parties relief from the directives of the Tyrone Remand Order to allow for implementation of a settlement through various regulatory actions and processes. One of the regulatory processes agreed to in the settlement was this Copper Mine Rule proceeding, which is a proceeding that was also contemplated by directives of the New Mexico Legislature under its 2009 amendments to the WQA.

1317. The administrative and judicial proceedings starting with challenge of the draft closure permit in 2002 through the Commission's decision dealing with the Tyrone Decision on remand shall be collectively referred to as the "Tyrone Permit Adjudications."

1318. In June of 2009, the WQA was amended to require, among other things, that the Commission adopt these Copper Mine Rules. The statutory amendments occurred subsequent to the Tyrone Permit Adjudications. *See* Freeport Consolidated Response at 11-12.

1319. The Commission finds that the Tyrone Permit Adjudications occurred prior to the amendments to the WQA in 2009 and decisions were made based on the Commission's existing regulations and the WQA as it existed before 2009.

1320. The 2009 amendments to the WQA, which were enacted after the Tyrone Remand Order, implemented a new regulatory paradigm by requiring this Commission to enact by rule previously unauthorized specifications of the appropriate discharge control technologies for the copper mining industry as a whole. *Freeport Consolidated Response at 15.*

1321. The Commission finds that the new regulatory paradigm implemented through the 2009 Amendments to the WQA and these Copper Mine Rules render the Tyrone Permit Adjudications and any precedents, policies, and decisions interpreting such adjudications either obsolete or distinguishable. *See* Freeport Consolidated Response at 15.

1322. The Commission finds that prior to the 2009 amendments to the WQA, NMED had to determine and resolve the "place of withdrawal" concept before it could decide on appropriate discharge control technologies through permit conditions for the closure permit for the Tyrone Mine. *See* Freeport Consolidated Response at 15.

1323. The Commission finds that subsequent to the 2009 amendments to the WQA, the Commission (as opposed to the Department) is now required to specify appropriate discharge

control technologies for the industry as a whole in the first instance by rule (as opposed to the previous system of NMED identifying appropriate discharge controls through permit conditions), although the rules may include variable requirements reflecting differences in site conditions. *See* Freeport Consolidated Response at 15.

1324. The Commission finds that the circumstances which have transpired since the Tyrone Remand Order, including but not limited to the Commission's prior grant of relief from the directives of that Order, the Legislature's 2009 amendments to the WQA, the opportunities for public input and stakeholder negotiations that ensued, the development of draft regulations forming the basis of this rulemaking proceeding, and the extensive testimony presented in these Copper Mine Rule proceedings, justify the Commission's departure from certain aspects of the Tyrone Remand Order.

1325. The Commission finds that, at least within the copper mining industry, the criteria adopted in the Tyrone Remand Order for identifying "places of withdrawal" where compliance is determined under the WQA requires certain adjustments to allow for consistency with industry practices, with past NMED permitting practices for copper mining units in New Mexico, and with the continued ability of existing and future copper mining to conduct their operations in a manner which is protective of ground water resources, as addressed in the evidence presented in this proceeding.

1326. The Commission finds that the necessary adjustments to the Tyrone Remand Order represented by the Copper Mine Rules that the Commission adopts in this proceeding fully comport with letter and spirit of the 2006 decision of the New Mexico Court of Appeals, and are well within the substantial latitude afforded by that Court in determining how the "place of

withdrawal” phrase should be interpreted and applied, particularly recognizing the 2009 amendments subsequently enacted by the New Mexico Legislature.

1327. One area of the Tyrone Remand Order the Commission finds it appropriate to supersede is to allow for the various containment and treatment methodologies specified in these Copper Mine Rules as reasonable and prudent means of ensuring a copper mine’s protection of groundwater resources. To the extent that application of the Tyrone Remand Order and its factors would not accommodate employment of these specified methods of discharge control technologies, this Commission expressly intends to supersede effectiveness of the Order.

1328. Another area of the Tyrone Remand Order the Commission finds it appropriate to supersede is to allow for the determination of the locations where compliance with ground water standards is required in relation to particular mine-related units. To the extent that application of the Tyrone Remand Order and its criteria would not allow for determining compliance at the specified locations, this Commission expressly intends to supersede the effectiveness of the Order.

1329. Another area of the Tyrone Remand Order the Commission finds it appropriate to supersede is to allow for the employment of containment, pump-back, pump and treat or dewatering wells associated with mining or mine closure without having those wells and the associated water withdrawals be deemed present or future uses water for purposes of the phrase “place of withdrawal of water for present or reasonably foreseeable future use” as that language or language like it is used in the WQA and this Commission’s regulations. To the extent that the Tyrone Remand Order and its factors would result in such wells being deemed as “places of withdrawal” where compliance with groundwater standards must be met, this Commission expressly intends to supersede the effectiveness of the Order.

1330. The Commission's bases for superseding the Tyrone Remand Order in these respects, and in any other respects that are incompatible with the Copper Mine Rules adopted herein, are as explained above, and are further supported by the Commission's belief that these Copper Mine Rules strike an appropriate policy balance of protecting the State's groundwater resources and allowing for the continued ability of the copper mining industry to positively support state and local economies.

1331. The Commission concludes as a matter of law that the Tyrone Permit Adjudications arose in the context of administrative adjudications under the existing regulations, while this matter before the Commission arises in the context of a rulemaking, thereby making the proceedings distinguishable. A rulemaking is a quasi-legislative function, not an adjudicatory function, and results in new law that need not follow prior adjudicatory precedents, particularly if the reasons for any departure are explained, as they are in this document.

1332. In adopting these Copper Mine Rules, the Commission is mindful that the measures specified herein to prevent water pollution rely upon containment strategies, as described in the testimony of Mr. Brown, that may allow ground water underlying certain units to exceed the standards of 20.6.2.3103 during mine operations.

1333. Mr. Brown's testimony supported a conclusion that, during mine operations, these areas are not available as "places of withdrawal" within the meaning of the WQA.

Public Comments

1334. The Commission received many public comments during the hearing and in the hearing session held in Silver City. There were approximately the same number of public commenters who spoke in favor of the Copper Mine Rule as those who spoke in opposition.