STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENT TO	)	**No. WQCC 12-01(R)**
PART 20.6.2 NMAC - COPPER RULE	)	
	)	

CITIZENS' JOINT RESPONSE TO
FMI'S BRIEF ON THE COMMISSION'S AUTHORITY TO CONDUCT RULEMAKING
AND
NMED'S BRIEF ON COMMISSION'S AUTHORITY TO CONSIDER PETITION

On October 30, 2012, the New Mexico Environment Department ("NMED") filed a Petition to adopt rules applicable to the copper industry. On November 13, 2012, the Water Quality Control Commission ("the Commission") scheduled this matter for hearing on April 9, 2013 and designated a Hearing Officer to rule on preliminary matters and to conduct the hearing. The Procedural Order issued by the Hearing Officer allows the parties to file pre-hearing motions and briefs. Pursuant to the Procedural Order, the Gila Resources Information Project and Turner Ranch Properties, Inc., and Amigos Bravos, referred to collectively as "Citizens," respectfully file this Joint Response to FMI's Brief on the Commission's Authority to Conduct a Copper Industry-Specific Rulemaking and the New Mexico Environment Department's Brief on the Commission's Authority to Consider Petition.

I. FMI'S BRIEF - THE PETITION IS CONTRARY TO LAW

Freeport-McMoRan Tyrone, Inc., Freeport-McMoRan Chino Mines Company and Freeport-McMoRan Cobre Mining Company's ("FMI") brief lays out the authority of the Commission to adopt a copper industry specific regulation. We agree the statute clearly requires the Commission to adopt specific regulations for the dairy industry and the copper industry. NMSA 1978, §74-6-4.K. The Citizens' concern is not the Commission's authority to adopt a copper specific rule, which is required by law, but rather that this proposed Copper Rule is contrary to law. NMED's proposed rule provides no protection for groundwater located within

the areas of hydrologic containment and open pit surface water drainage, commonly called "sacrifice zones." The proposed Copper Rule instead permits FMI and other copper mining companies to pollute groundwater above water quality standards, without obtaining a variance from the Commission.

FMI represents that the 2009 amendments to the Water Quality Act ("Act") "substantially limit [NMED's] ability to impose permit conditions that specify the methods to prevent or abate water pollution." FMI Brief, p. 4. To support this contention, FMI points to another 2009 amendment in the Act at NMSA 1978, §74-6-5.D. Subsection D states that the "constituent agency has the burden of showing that each condition is reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions." NMSA 1978, §74-6-5.D. This statement is true and was true even before this amendment to the statute. The constituent agency always has the burden of showing that a permit condition is reasonable and necessary. In fact, the 2009 amendments allow NMED more authority on adding conditions because the statutory language was struck that precluded the agency from *specifying* "the method to be used to prevent or abate water pollution." *See* NMSA 1978, §74-6-4.D. Now, NMED can direct a facility specifically on how it must prevent or abate water pollution through reasonable and necessary conditions.

FMI cites a New Mexico Supreme Court case for the proposition that rule amendments can reflect the specific policies of the current executive administration. *City of Albuquerque v NM Public Regulation Commission,* 2003-NMSC-028, ¶16, FMI Brief, p. 10-11. However, the Court requires the rule to be *within the limits* of delegated policymaking responsibilities. *City of Albuquerque,* 2003-NMSC-028, ¶16. Here, NMED's proposed Copper Rule exceeds the authority granted in the Act, which requires the Commission to adopt regulations "to prevent or abate water pollution." NMED's proposed Rule would do just the opposite—it would license

mining companies to pollute groundwater. This proposed rule is outside of the limits of delegated policymaking responsibilities. *Id.*

FMI concludes by stating that it is difficult to imagine an "issue where the WQCC would be able to decide the matter as an issue of law" without the facts presented at a public hearing. FMI Brief, p. 15. The facts presented here are the draft Copper Rules filed by NMED. The proposed rule speaks for itself and does not need argument by the parties to interpret its meaning. The Commission can apply the Water Quality Act to NMED's proposed Copper Rule to determine whether it violates the Act. Courts are often faced with motions for summary judgment or declaratory judgment prior to going to hearing. *See* Rule 01-056 and Rule 01-057 NMRA. In this case, there are no facts that can be presented in a hearing to support a determination that the proposed rule is lawful under the Act. As such, it is ripe for summary judgment. Alternatively, similar to a declaratory judgment action, the Commission can provide legal certainty to the parties in this matter whether the Commission has authority to adopt a regulation that allows pollution of an aquifer without a variance or other showing of extraordinary circumstances. A public hearing is not necessary to resolve the legal issue of whether the petition is contrary to law on its face.

II. NMED'S BRIEF – THE COMMISSION HAS AUTHORITY TO DISMISS THE PETITION

In its brief on the Commission's authority to consider its Petition, NMED argues that boards and commissions are given broad rulemaking authority to fulfill legislative purposes. We agree. However, NMED's draft Copper Rule is contrary to the Water Quality Act and does not fulfill the legislative purpose in the Act. Furthermore, the Commission has authority under the Act to dismiss a petition that is contrary to law. NMSA 1978, §74-6-6.B ("[t]he commission shall determine whether to hold a hearing within ninety days of submission of the petition. The denial of such a petition shall not be subject to judicial review").

NMED cites *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, for the proposition a district court cannot stop a rulemaking proceeding by a declaratory judgment action on purely legal grounds. NMED Brief, p. 2. However, *Shoobridge* is not applicable to this matter, even by analogy. In *Shoobridge*, a nonprofit organization filed for declaratory judgment in district court seeking to enjoin an executive agency from conducting further administrative proceedings and argued that the agency lacked statutory authority to adopt the regulations. In ruling, the New Mexico Supreme Court based its decision partly on the separation of powers between the judicial and executive branches of government, prohibiting a district court from interfering with an ongoing administrative rulemaking proceeding. *Shoobridge*, 2010-NMSC-049, ¶¶10-14. That is not the case here. We are asking the Commission, not a district court, to determine whether it has authority to promulgate the proposed regulation, which we contend is contrary to law. This is not one branch of government interfering in the process of another branch of government.

The second holding of the Court in *Shoobridge* is whether the issue is ripe for decision. *Shoobridge*, 2010-NMSC-049, ¶¶15-16. In this case, the Commission has everything it needs to make a decision on whether it has authority of promulgate NMED's proposed Copper Rule – it has the proposed rule to compare to the requirement in the Water Quality Act and. The issue is ripe for decision. The administrative agency in *Shoobridge* invited briefing and ruled on whether it had authority to promulgate the regulations at issue prior to district court interference. *See In the Matter of Petition to Adopt New Regulations in 20.2.1 NMAC*, EIB 08-19(R), EIB minutes April 6, 2009, Item 10.

In its brief, NMED then cites a Federal Trade Commission case to support the concept that an agency has authority to promulgate rules, "even where such rules were not specifically authorized by the enabling statute." *National Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672

(D.C. Cir 1973). The issue here is not that the concepts of "point of compliance" and "sacrifice zone," which are in the regulations, are not in the statute. The issue is that these concepts are contrary to law. NMED's draft Copper Rule is in violation of the plain meaning of the Water Quality Act.

NMED points out that the Water Quality Act gives the Commission broad authority to "adopt, promulgate and publish regulations to prevent or abate water pollution in the state." NMSA 1978, §74-6-4.E. In making these regulations, the Commission must give the weight it deems appropriate seven factors. NMSA 1978, §74-6-4.E. NMED specifically points to two of the seven factors: "(2) the public interest, including the social and economic value of the sources of water contaminants; (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved." NMSA 1978, §74-6-4.E(2)&(3) and NMED Brief, p. 4. In applying the criteria in Section 74-6-4.E, NMED overlooks the basic premise in that statutory provision - that the regulations must "prevent or abate water pollution in the state." Before applying the criteria outlined in Section 74-6-4.E(2) and (3), the regulations must first prevent or abate water pollution.

NMED acknowledges that the Commission has discretion on whether or not to hold a hearing of NMED's proposal. NMED Brief, p. 5. That is what is being decided here. NMED argues that the Commission needs the parties to explain what the rules are intended to do, what they mean and how they will be implemented. NMED Brief, p. 5. They claim that without this testimony, the Commission would have no basis to determine whether the proposed rules comply with the Act. The proposed rules are all that is needed for the Commission to analyze whether they are within the statutory authority of the Commission. Contrary to NMED's argument, most of the Commissioners are agency experts who do not need the parties to tell them what the

proposed Copper Rule means. The Commission can look at the plain meaning of the regulation to determine whether it has authority to adopt this version of the draft rule.

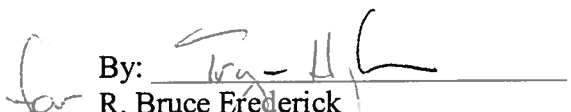
Though NMSA 1978, §74-6-4.K requires the Commission to adopt industry specific regulations for the copper industry, the statute does not specify a timeframe in which this must be done. The regulations adopted must be in conformance with the Act, not with a set period of time. NMED's draft Copper Rule is outside of the legal authority of the Act. It should be remanded to NMED to conform to the Act.

CONCLUSION

The Commission may dismiss any petition, regardless of whether NMED or another person submits it. NMSA 1978, §74-6-6.B (the Commission's "denial of ... a petition shall not be subject to judicial review"); NMSA 1978, §74-6-9.F (providing that constituent agencies, such as NMED, may "on the same basis as any other person, recommend and propose regulations and standards for promulgation by the commission"). Because NMED's proposed Copper Rule would permit mining companies to pollute groundwater, it is irreconcilably at odds with the Water Quality Act's most fundamental purpose—prevention and abatement of water pollution. Therefore, the Commission should reject NMED's petition and remand the Copper Rule back to the advisory committee for further development.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW CENTER



By: _____
R. Bruce Frederick
Douglas Meiklejohn
Jon Block
Eric Jantz
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022
bfrederick@nmelc.org

Attorneys for the Gila Resources Information Project and Turner Ranch Properties, Inc.

HIGH DESERT ENERGY + ENVIRONMENT LAW PARTNERS, LLC

By:_____
Tracy Hughes
P.O. Box 8201
Santa Fe, New Mexico 87504
505-819-1710
hughes@energyenvironmentlaw.com
Attorney for Amigos Bravos

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2013 I sent the Citizens' Joint Response to NMED'S Brief on Commission's Authority to Consider Petition and FMI'S Brief on the Commission's Authority by first-class mail or hand delivery to the following:

Andrew Knight
Assistant General Counsel
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87502-6110

Dalva Mollenberg
Gallagher and Kennedy, PA
1233 Paseo de Peralta
Santa Fe, New Mexico 87501-2758

Jon Indall
Comeau, Maldegen, Templeman, et al.
P.O. Box 669
Santa Fe, NM 87504-0669

Tannis Fox
Assistant Attorney General
Water, Environment and Utilities Division
Office of the NM Attorney General
P.O. Box 1508
Santa Fe, NM 87504

Louis Rose
Montgomery & Andrews, PA
P.O. Box 2307
Santa Fe, NM 87504-2307

_____
Tracy Hughes