



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

**In the matter of:** )  
)  
**PROPOSED AMENDMENT TO** )  
**PART 20.6.2 NMAC (Copper Rule)** )  
\_\_\_\_\_ )

**No. WQCC 12-01(R)**

**RESPONSE TO PETITION FOR RULEMAKING**

The Gila Resources Information Project, Amigos Bravos, and Turner Ranch Properties, Inc., referred to collectively as “Respondents,” respectfully request the Water Quality Control Commission (“the Commission”) to reject the New Mexico Environment Department’s (“NMED”) petition and to remand the Copper Rule back to the Advisory Committee for further development. The Commission should reject NMED’s petition because its proposed Copper Rule would license mining companies to pollute groundwater, and therefore, it violates the Water Quality Act.

At the urging of Freeport-McMoRan, Inc. (“FMI”), NMED’s proposed Copper Rule would provide no protection for groundwater located within the so-called areas “of hydrologic containment” and “open pit surface water drainage,” referred to herein as the “Sacrifice Zone.”<sup>1</sup> NMED’s proposed Copper Rule would instead license FMI and other copper mining companies to pollute groundwater within the Sacrifice Zone above water quality standards, without a variance. The Rule would also limit groundwater protection outside the Sacrifice Zone to so-called “points of compliance,” which are designated monitoring wells located some distance down gradient from major (and often permanent) sources of pollution, such as acid and metal generating pits and stockpiles. NMED’s proposed Copper Rule would license FMI and other mining companies to pollute groundwater located up gradient from the designated points of

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<sup>1</sup> This Sacrifice Zone may cover hundreds of acres and include tens of thousands of acre-feet of water.



compliance. Indeed, as long as the pollution goes undetected in these discrete points of compliance, regardless of where it occurs, mining companies would have no obligation to prevent or abate it under NMED's Rule.

As set out in detail below, NMED's proposed Rule is irreconcilable with the Water Quality Act ("the Act"). First, the Act expressly requires this Commission to adopt regulations "to prevent or abate water pollution," whereas NMED's proposed Rule would do just the opposite—it would license mining companies to pollute groundwater. Second, NMED's proposed Rule conflicts with this Commission's 85-page *Decision and Order on Remand* ("WQCC Order") *In the Matter of: Appeal of Supplemental Discharge Permit for Closure (DP-1341) for Phelps Dodge Tyrone, Inc.*<sup>2</sup> ("Tyrone Appeal"). In the WQCC Order, attached hereto as Exhibit A, this Commission rejected the "point of compliance" model as inconsistent with the Water Quality Act and confirmed that groundwater must be protected at every "place of withdrawal for present or reasonably foreseeable future use" ("Place of Withdrawal").

Third, contrary to the mandate of the Water Quality Act, NMED's proposed Rule fails to specify "the measures to be taken to prevent water pollution." Instead, for virtually every substantive requirement specified in the Rule, NMED would allow the discharger to implement an unspecified "alternate" measure. This defeats the legislative intent behind Senate Bill 206 ("SB 206"), which was to promote certainty and efficiency in the permitting process.

Fourth, contrary to NMED's representation, the "content of [NMED's] proposed [Copper Rule] ... is" *not* "the product" of the public advisory committee and stakeholder process mandated by the Legislature. *NMED Petition at 2*. Instead, the parts of the Rule that would license mining companies to pollute groundwater and that incorporate the "point of compliance" model are the product of FMI's undue influence, the company which stands to gain the most

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<sup>2</sup> Phelps Dodge is now FMI.

from these provisions. This influence was not exerted in public, as least not successfully. FMI did not succeed in imbedding its “pollution provisions” into the Rule until after the advisory committee stopped meeting and committee’s draft Rule underwent review by NMED’s general counsel. Allowing one company to so influence NMED’s work product undermines public confidence and renders the advisory committee process meaningless. It also further undermines the legislative intent behind SB206, which required NMED to develop the Copper Rule through the public advisory committee process and stakeholder negotiations.

Because NMED’s proposed Rule violates the Water Quality Act and would in fact undermine the Act’s fundamental purpose—prevention and abatement of water pollution—the Commission should reject NMED’s petition outright and remand the Rule back to the advisory committee so that a genuine committee draft can be developed, one that complies with law.

## DISCUSSION

1. The Commission should reject NMED’s petition, because its proposed Copper Rule conflicts with the Water Quality Act. The Water Quality Act requires the Commission to only adopt regulations that will prevent or abate water pollution, whereas NMED’s Rule would expressly license mining companies to pollute groundwater above water quality standards.

A. The Water Quality Act and the Commission’s regulations protect groundwater for beneficial use by prohibiting exceedances of water quality standards at all Places of Withdrawal.

“The objective of the Water Quality Act ... is to abate and prevent water pollution.”

*Bokum Resources Corp. v. New Mexico Water Quality Control Comm’n*, 93 N.M. 546, 555

(1979); *WQCC Order at 75 ¶ 1* (“The purpose of the Water Quality Act ... is to abate and

prevent water pollution in accordance with its provisions and the regulations of the

[Commission].”). To accomplish this fundamental purpose, the Act requires the Commission

(among other things) to “adopt water quality standards for surface and ground waters of the state

based on credible scientific data and other evidence appropriate under the Water Quality Act.” *NMSA 1978*, ¶ 74-6-4(D). Pursuant to this mandate, the Commission long ago adopted numeric water quality standards to protect groundwater for present and reasonably foreseeable future use for domestic and agricultural purposes. *NMAC § 20.2.3103*; *N.M. Mining Association v. N.M. Water Quality Control Comm’n*, 2007 NMCA 10, ¶¶ 7 & 9; *Bokum, supra* (upholding Commission’s adoption of water quality standards).

The reason we protect groundwater in New Mexico is clear:

Approximately ninety percent of the people in New Mexico rely on groundwater for drinking water, and approximately ten percent of the population obtain their drinking water from private supply systems that are not subject to the federal drinking water standards.

*N.M. Mining Association*, 2007 NMCA 10, ¶ 23. Furthermore, although the Legislature allowed for “reasonable degradation of water quality resulting from beneficial use,” it also expressly provided that such “degradation shall not result in impairment of water quality *to the extent that water quality standards are exceeded.*” *NMSA 1978*, § 74-6-12(F) (emphasis added).

Under the Water Quality Act and the Commission’s regulations, protection of groundwater as a vital public water supply is fundamentally linked to enforcement of water quality standards. Thus, in upholding the Commission’s new standard for uranium, the Court of Appeals cited the many Commission regulations that enforce water quality standards:

Thus, regulations regarding discharge permits incorporate by reference the numeric standard for uranium [and all other water quality standards], and a regulated entity could be subject to consequences for failure to meet the standard. *See, e.g.*, 20.6.2.3101(A)(1)-(2) NMAC (using the standards to determine whether degradation of the groundwater will be allowed); 20.6.2.3107(A)(11) NMAC (requiring a closure plan that will “prevent the exceedance [\*45] of [water quality] standards . . . in ground water . . . or abate such contamination”); 20.6.2.3109(C)(2) NMAC (providing that a proposed discharge plan, modification, or renewal cannot result in concentrations in excess of the standards at any place of withdrawal of water for present or reasonably foreseeable future use, unless an exception applies); 20.6.2.3109(E) NMAC (providing that

noncompliance with the standards, "in ground water at any place of withdrawal for present or reasonably foreseeable future use," may result in a discharge permit modification that requires abatement or prevention); 20.6.2.3109(F) NMAC (providing that if a discharge permit is terminated or expires, an abatement plan may be required if contamination levels exceed or will exceed standards). Regulations regarding abatement plans also incorporate the numeric standard for uranium. See 20.6.2.4103(B) NMAC (requiring abatement of groundwater pollution, at any place of withdrawal for present or reasonably foreseeable future use, to conform to the groundwater standards); see also 20.6.2.4101(B) NMAC (requiring abatement by the person responsible for a background concentration of a water contaminant that exceeds the groundwater standards). The purpose of the abatement regulations is to remediate or protect all groundwater for use as domestic and agricultural water supply. 20.6.2.4101(A)(1) NMAC.

*N.M. Mining Association at ¶¶ 8 & 9.* The regulations excuse compliance with standards only if certain statutory and regulatory criteria are met:

If a person responsible for contamination cannot meet the abatement standards through the use of appropriate technology and procedure, the secretary may approve a technical infeasibility proposal involving the use of experimental abatement technology, provided the resulting concentration of contaminants is no greater than 200 percent of the standard for that contaminant. 20.6.2.4103(E) NMAC. If the 200 percent limit on concentration is technically infeasible, the responsible person may file a petition with the commission for alternative abatement standards or for a variance. 20.6.2.4103(E)(3) NMAC; see also 20.6.2.4103(F) NMAC. The petitioner must show either that compliance is technically infeasible when the responsible party makes "the maximum use of technology within the economic capability of the responsible person," or that "there is no reasonable relationship between the economic and social costs and benefits." 20.6.2.4103(F)(1)(a) NMAC. In addition, the responsible person must show that the proposed alternative standards are achievable, justifiable, and will not cause undue damage to property or create a present or future hazard to public health. 20.6.2.4103(F)(1)(b)-(c) NMAC.

*Id.* ¶ 9. Thus, the Water Quality Act and this Commission's regulations, as a matter of law, require dischargers to meet water quality standards except in limited, site-specific circumstances.

B. NMED's proposed Copper Rule conflicts with the Water Quality Act and the Commission's regulations, because it would license water pollution rather than prevent and abate it.

NMED's proposed Copper Rule runs afoul of the Water Quality Act and this Commission's (and the NMED's) decades-long history of requiring all groundwater to meet

standards. *See, e.g., WQCC Order at 22 ¶ 83*(NMED's expert "testified that NMED's practice for at least the last 21 years has been to ensure that all ground water underneath a discharge site meets ground water quality standards"); *WQCC Order at 77 ¶ 9* ("Except to the extent that existing conditions exceed standards, all ground water having a TDS of 10,000 mg/L or less 'shall meet the standards of subsection A [human health standard], B [domestic water supply standards] and C [standards for irrigation use], unless otherwise provided.' 20.6.2.3103 NMAC.") In a 180-degree change in position, NMED would now expressly license FMI and other mining companies to pollute groundwater above standards, without limit, within the Sacrifice Zone.

NMED's new pro-pollution policy is most glaringly obvious in § 24.A.4<sup>3</sup> of its proposed Rule, which provides:

During operation of an open pit, the standards of 20.6.2.3103 NMAC do not apply within the [Sacrifice Zone] ...;

and in § 33.D.1, which provides:

The standards of 20.6.2.3103 NMAC do not apply within the [Sacrifice Zone].

Moreover, NMED would authorize FMI and other mining companies to pollute *any* groundwater above standards—both inside and outside the Sacrifice Zone—by authorizing them to discharge toxic acid rock drainage ("ARD") from their various stockpiles directly into groundwater. NMED would allow this so long as "interceptor wells" were positioned some place down gradient, not to assure that water quality standards will be met, but only "to reduce, attenuate or contain the discharge." *See, e.g.,* § 21.B.1.c (allowing leachate from waste rock stockpiles to pollute groundwater); § 22.A.4.vi (allowing leachate from tailings stockpiles to pollute groundwater).

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<sup>3</sup> Citations herein to NMED's proposed Copper Rule refer to sections (§) and omit the preceding chapter, title, and part designations, *i.e.*, "20.2.6" prefix is omitted.

NMED would also substantially excuse copper mining companies from taking basic pollution prevention, detection, mitigation and reporting measures within the Sacrifice Zone. Within this zone, basic requirements such as lining, covering and re-grading ARD-generating stockpiles, installing monitoring wells, reporting leaks and spills, and providing for secondary containment would be non-existent or substantially reduced. *See, e.g.*, § 17.D.3 (allowing contaminated process water and stormwater to be impounded without liners); § 18.F.2 (allowing existing impoundments to continue to pollute groundwater within the Sacrifice Zone); § 21.A.2.f (the potential of waste rock stockpiles to pollute groundwater need only be evaluated in the stockpiles located outside the Sacrifice Zone), §21.B.2 (imposing no pollution prevention requirements, other than diversion of storm water, on stockpiles located within the Sacrifice Zone); §21.D.4 (no requirement to record or report leaks and spills inside the Sacrifice Zone); §23.A (imposing no pollution prevention requirements on pipelines and tanks within the Sacrifice Zone); § 33.C.3.b & -.F (no closure requirement to re-grade outslopes of stockpiles within Sacrifice Zone); § 33.I.4 & -.6 (no closure requirement to cover, re-vegetate, recover seepage or take other measures to stop pollution from impoundments and reservoirs within the Sacrifice Zone).

Finally, at the request of FMI, NMED would allow existing pollution sources, such as the numerous ARD-generating stockpiles and leaking impoundments present at FMI's existing mines, to continue polluting groundwater above standards. *See, e.g.*, § 18.F.2 (allowing existing impoundments to continue to operate regardless of the pollution they may be causing); § 20.B.2 (allowing existing leach stockpiles to continue to operate regardless of the pollution they may be causing); §21.C.2 (allowing existing waste rock stockpiles to continue to operate regardless of the pollution they may be causing); § 22.B.2 (allowing existing crushing, milling, concentrating,

smelting and tailings impoundments to continue to operate regardless of the pollution they may be causing); § 23.B.2 (allowing existing pipelines and tanks to continue to operate regardless of the pollution they may be causing). These requirements would apparently trump the settlement agreement between NMED and FMI, attached hereto as Exhibit B, which would have at least required FMI to obtain a variance for its existing polluting stockpiles and other contaminant sources. *Tyrone Settlement Agreement and Stipulated Final Order at 12-15, ¶¶ 36-45.*

- C. This Commission has no authority to adopt NMED's proposed Copper Rule, because the Rule conflicts with the Water Quality Act. Therefore, the Commission should reject NMED's petition and remand the Copper Rule back to the advisory committee for further development.

"Statutes create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute." *In re PNM Elec. Servs., 1998 NMSC 17, ¶ 10.* Accordingly, the Commission cannot adopt NMED's proposed Copper Rule, because it conflicts with the Water Quality Act's fundamental purpose, which is to prevent and abate water pollution. Indeed, NMED's proposed Rule would expressly license mining companies to pollute groundwater, and therefore, the Commission should reject NMED's petition without further consideration.

2. The Commission should reject NMED's petition, because its proposed Copper Rule would only protect groundwater at "points of compliance" located some distance outside the Sacrifice Zone. In contrast, the Water Quality Act requires protection at all Places of Withdrawal.

The Water Quality Act compels NMED to deny an application for a discharge permit if the discharge would cause an exceedance of standards at any Place of Withdrawal. NMSA 1978, § 74-6-5(E)(3). In *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, involving FMI's predecessor in interest, the Court of Appeals ordered the Commission to develop "some general factors or policies to guide its determination" as to what constitutes a "Place of



Withdrawal.” 2006 NMCA 115, ¶ 35. In response, the Commission conducted an extensive public hearing:

[The] Commission held 24 days of hearing between July 23 and December 13, 2007. It received testimony from approximately 25 witnesses and afforded all parties the opportunity to cross-examine witnesses.

The parties filed written testimony with the Commission on July 9, 2007. The parties submitted proposed findings of fact, conclusions of law, and closing briefs on March 28 and May 12, 2008. The Commission heard oral argument on July 7, 2008 and deliberated on this matter on July 8, August 11 and 12, September 8 and 9, October 14, December 15 and 16, 2008, and January 12, 2009.

The ... hearing record ... consists of 24 volumes of certified hearing transcripts totaling approximately 5956 pages, [including] the pleadings submitted by the parties, and the exhibits duly admitted into the record ....

WQCC Order at 2. After carefully considering all of this testimony and argument, the Commission adopted seven objective criteria to determine whether an aquifer in a given location should be considered a Place of Withdrawal. The criteria are:

- [1] Site hydrology and geology ....
- [2] The quality of ground water prior to any discharge from a facility ....
- [3] Past and current land use in the vicinity of facility ....
- [4] Future land use in the vicinity of a facility ....
- [5] Past and current water use in the vicinity of the facility ....
- [6] Potential future water use and potential future water demand in the vicinity of the facility ....
- [7] Population trends in the vicinity of the facility ....

WQCC Order at 78-79, ¶¶ 15-21. NMED’s proposed Copper Rule would allow copper mining companies to pollute groundwater without regard to the forgoing criteria.

Based on the provisions of the Water Quality Act, the Commission expressly rejected FMI’s invitation to only protect groundwater at officially designated “points of compliance”:

Section 74-6-5(E)(3) of the Act provides that determination of the discharges' effect on ground water shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use. See NMSA 1978, § 74-6-5(E)(3) (emphasis added).

Section 74-5-6(E)(3) does not establish any specific "point(s) of compliance" for compliance with water quality standards. NMSA 1978, § 74-6-5(E)(3).

Nothing in the Act or the Commission Regulations provides for a "point of compliance," hydraulically up-gradient of which ground water need not be protected. See NMSA 1978, §§ 74-6-1 to 74-6-17; 20.6.2 NMAC.

A place of withdrawal of water is not limited to a place on the ground, but extends into the aquifer underlying an area on the ground surface; it need not be a well.

WQCC Order at 80-81, ¶¶ 26-32. Thus, this Commission has already definitively rejected the "point of compliance" concept as inconsistent with the Water Quality Act.

Yet, at FMI's urging and in complete derogation of NMED's former long-held position, NMED's general counsel changed the advisory committee draft to imbed FMI's "points of compliance" into the Copper Rule. Exhibit D. Under NMED's proposed Rule, for example, an ARD-generating waste rock pile need not be lined, even if it pollutes groundwater, so long as no exceedance of standards is detected in "a monitoring well located pursuant to 20.6.728." § 21.B.1.d. Similarly, NMED would allow leachate and other contaminants generated by tailings piles, open pits and other sources to pollute groundwater above standards, so long as the contaminant plume goes undetected in designated down gradient monitoring wells. §22.A.4.b, §33.D.2 and §33.F. Because these provisions are nothing more than an attempt to imbed FMI's point of compliance concept, which the Commission has already rejected, the Commission should reject NMED's petition.

3. NMED's Proposed Copper Rule fails to specify "the measures to be taken to prevent water pollution," because the Rule would allow applicants to propose and implement "alternate" measures that allegedly meet the Rule's standard of performance.

Prior to 2009, the Water Quality Act expressly prohibited the Commission from specifying the measures to be used to prevent pollution by providing:

*Regulations shall not specify the method to be used to prevent or abate water pollution but may specify a standard of performance for new sources that reflects the greatest reduction in the concentration of water contaminants that the commission determines to be achievable through application of the best available demonstrated control technology, processes, operating methods or other alternatives, including where practicable a standard permitting no discharge of pollutants.*

*Phelps Dodge* at 12 (emphasis in original); *see also* Exhibit C—January 7, 2011, *Memorandum from William C. Olson, Bureau Chief, Ground Water Quality Bureau, to Raj Soloman, Acting Secretary, NMED* ("Olson Memo") at 3 (describing pre-2009 discharge permitting process).

In 2009, through Senate Bill 206 ("SB 206"), the Legislature amended the Water Quality Act to require the Commission to do just the opposite—to specify by rule the measures required to prevent pollution<sup>4</sup>:

The commission ... *shall specify* in regulations the measures to be taken to prevent water pollution and to monitor water quality.

*NMSA 1978, § 74-6-4(K)*. According to Mr. Olson:

SB206 initiated a paradigm shift in the rulemaking and permitting process affecting the dairy [and copper] industry. Most significantly, SB206 inserted a new Subsection K of Section 74-6-4 of the WQA which allows the WQCC to adopt regulations specific to particular industries, and directs the WQCC to promulgate industry specific rules for the dairy industry and the copper industry.

...  
*With these amendments, the legislature eliminated the applicant and/or permittee driven permitting process for meeting a standard of performance by demonstrating that a proposed discharge will not cause an exceedance of WQCC ground water standards. Instead, under the amended WQA the WQCC must set forth the specific measures to be taken to protect and monitor ground water quality in dairy [and copper] industry specific rules.*

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<sup>4</sup> The Act does not require the Commission to specify methods to "abate" pollution.

*Olson Memo at 4* (emphasis added).

Contrary to the legislative intent expressed in SB206, NMED's proposed Copper Rule has not "eliminated the applicant and/or permittee driven permitting process for meeting standards of performance ...." On the contrary, NMED's proposed Rule expressly retains the standard of performance paradigm by allowing applicants to propose "alternate" measures for virtually every substantive requirement in the Rule. *See, e.g.*, § 17.D.4.e (allowing alternate measures to impoundments of impacted stormwater); § 20.A.1.f (allowing alternate measures for leach stockpile designs); § 23.A (allowing alternate measures for pipelines and tanks); § 26.A (allowing alternate measures relating to truck and equipment washing); 28.D (allowing alternate measures for monitoring well construction); 33.C.3 & .4 (allowing alternate measures for surface re-grading); 33.F (allowing alternate measures for cover design); 33.I.7 (allowing alternate measures for closing impoundments); § 33.M (allowing NMED to approve modification of any "closure design criteria").

Allowing applicants to disregard the pollution prevention measures imposed by Rule and to instead implement "alternate" measures, without first obtaining a variance, defeats the legislative intent behind SB206, which was to create certainty and streamline the permitting process. Therefore, as a matter of law, the Commission cannot adopt NMED's proposed Copper Rule, because it fails to "specify in regulations the measures to be taken to prevent water pollution and to monitor water quality."

4. In Adopting FMI's Regulatory Language, NMED Ignored Its Own Technical Experts and Acted in Derogation of the Legislatively-Mandated Public Process.

The Respondents provided written comments to NMED, dated October 12, 2012 and attached hereto as Exhibit D, regarding NMED's September 13<sup>th</sup> draft of the Copper Rule.

Among other things, Respondents objected to the undue influence FMI had over NMED, in private, outside the advisory committee process. It was in direct response to FMI's influence that NMED adopted the provisions in the Rule that license water pollution rather than prevent and abate it. The proposed Copper Rule attached to NMED's petition is substantially unchanged from its September 13<sup>th</sup> draft. Therefore, Respondents incorporate their comments into this Response. The Commission should reject NMED's petition because, as described in Exhibit D, NMED's proposed Copper Rule is not the product of the public advisory committee process mandated by the Legislature. It is the product of FMI's undue influence on NMED.

### CONCLUSION

The Commission may reject 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 license 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:

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