

STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION

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

WQCC 12-01 (R)

New Mexico Environment Department,  
Petitioner.

**NEW MEXICO ENVIRONMENT DEPARTMENT'S REPLY BRIEF**

The New Mexico Environment Department (“NMED” or “Department”) provides this Reply to both the Attorney General’s Motion to Remand the Proposed Copper Mine Rule to NMED (“AG’s Motion”), as well as the Joint Motion to Dismiss Petition for Rulemaking (“Joint Motion”), filed on behalf of the Gila Resources Information Project, Amigos Bravos, and Turner Ranch Properties, Inc. (“Movants”). NMED opposes the Motions, and requests that they be denied.

**REPLY**

Both the AG and the Movants have apparently conceded that the Commission *can* hold a hearing on the proposed Copper Rule; therefore the only question remaining is whether or not it *should*. See, e.g., Attorney General’s Response to Department’s Brief on Commission’s Authority (“AG’s Response”), pp. 2-3 (“The issue before the Commission is whether the Commission should spend the time and effort [to consider this rulemaking Petition]”). Arguments concerning whether the Commission can promulgate the Rule exactly as proposed are a separate matter, but there appears to no longer be a debate that the Commission has the legal authority to hold a hearing to consider the Petition.

**I. THE ADVISORY COMMITTEE PROCESS HAS BEEN COMPLETED, AND THE WORK OF DEVELOPING AND DRAFTING THE PROPOSED RULE HAS BEEN DONE.**

A tremendous amount of time and effort have gone into the drafting and development of the proposed Rule. Beginning in January of last year, the Department announced the creation of the Copper Rule Advisory Committee and the Copper Rule Technical Committee. These two committees or their subcommittees met on more than 20 occasions during the next nine months, sometimes for days at a time. In between these meetings, staff from the Department's Groundwater Quality Bureau were busy drafting and revising rule language, and integrating comments from committee members.

The proposed Rule is comprehensive, including sections on engineering design criteria for leach stockpiles and their operation, tailings impoundment design and operation, mine water management, requirements for waste rock stockpiles, rules for material characterization and material handling, design criteria for tank, pipeline, truck wash and smelter facilities, and very detailed closure and post-closure requirements, among many others. While obviously not all parties are satisfied with the result, the fact remains that the work of drafting a complex and comprehensive rule from scratch has been done, and the resulting Rule incorporates many of the provisions sought by the Movants during the Advisory Committee process. The Department has proposed a rule that it believes complies with both the Water Quality Act, as amended by the legislature in 2009 ("WQA"), and guidance from the Court of Appeals in *Phelps Dodge Tyrone v. N.M. Water Quality Control Commission*, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502 ("*Phelps Dodge*"). From the Department's view, repeating the Advisory Committee process would be the waste of time and resources warned of in the AG's Response.

**II. THE WATER QUALITY ACT GIVES THE COMMISSION AUTHORITY TO DETERMINE WHERE STANDARDS APPLY.**

The Commission has extremely broad powers to regulate within its area of authority. *Tri-State v. D'Antonio*, 2012-NMSC-039 ¶ 13-36, 289 P. 3d 1232. Not only does the Commission have the authority to decide where the numerical standards in Section 20.6.2.3103 NMAC (the "3103 Standards") apply, but making this determination is a fundamental function of the Commission. The proposed Rule seeks to codify some existing Department practices regarding the issuance of discharge permits, while imposing many new proscriptive requirements on the copper mining industry. It represents an acknowledgement by the Department that the lack of certainty in the existing permitting process has proved, if not unworkable, than at least very time consuming and inefficient. The Rule attempts to provide protection for groundwater around a mine site, using best available technologies and materials where appropriate, while also taking into account the reality that large scale mining is inherently disruptive to the local environment, and has historically had significant environmental impacts.

The Department's years of experience in implementing the existing groundwater rules has shown that compliance with 3103 standards has been virtually impossible under certain conditions, and in certain areas, such as underneath the bottom of an open pit mine. These situations have been dealt with in the past through the Commission's granting of variances. In each of these cases, the Department had to supply testimony and technical support to the Commission in response to a variance petition. In each case there was acknowledgement that groundwater contamination existed at the location identified in the petition, and in each case the Commission approved the variance. The proposed Rule seeks to establish requirements that are realistically attainable and thus reduce the need for variances or alternative abatement standards. By defining the location where the standards apply, the proposed Rule seeks both to promote

certainty, and to curtail future disputes over the meaning of terms such as “place of withdrawal” in the Water Quality Act. See NMSA 1978, §74-6-5(E).

**III. THE REASONING IN *SHOOBRIDGE* IS APPLICABLE TO THE COMMISSION’S DECISION TO HOLD A HEARING IN THIS MATTER.**

In the *Shoobridge* Supreme Court Case, as here, the groups opposing the rulemaking argued that the rulemaking body lacked the statutory authority to adopt the rule as proposed. The second of the three reasons the Court gave for striking down the injunction in that case is just as applicable here as it was there: “Only upon completion of administrative rulemaking proceedings will a party be certain that it is aggrieved . . . .” *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049 at ¶ 1, 149 N.M. 42, 243 P.3d 746. *Shoobridge* is one of the seminal cases on rulemaking in our state, and it stands for the proposition that legal challenges to the authority of a board or commission to promulgate a particular rule don’t make sense until after a hearing has been held, because *no one* can know what the final rule will look like (or if there will even be a final rule) until one is promulgated. If nothing else, the opinion in *Shoobridge* should assure the Commission that it has the final say as to whether to hold a hearing, and that no court will second-guess that decision, or otherwise interfere with the rulemaking process, until it is complete.

The Attorney General and the Movants paint the rule with a broad brush, as if it were one long sentence: “[The] Rule, as proposed, violates the WQA...” AG’s Response at 3. Their claim that “the Rule” violates the WQA is really a complaint about certain parts of the Rule. The proposed Rule contains dozens of separate requirements, all of which are intended to be protective of groundwater, and each of which should be considered on its own merits. The Attorney General and the Movants are opposed to certain sections or paragraphs of the proposed

Rule, but would have the Commission refuse to consider any part of it. They even claim that the Petition itself violates the WQA. See AG's Response at 4.

After conceding that any perceived defects could be remedied, The AG's Response repeats the allegation from its Motion that "[T]he defects in the proposed rule are so pervasive, and the defective provisions are so numerous..." (AG's Response at 6), but again a closer reading shows that there are only a few sections to which they are opposed. After admitting that the Commission can indeed "fix" any perceived problem with the rule, the Attorney General and the Movants are reduced to arguing that it is just not worth the Commission's time.

The last remaining argument is that "The Commission's limited time and resources are better spent" considering a different rule, one that no one has proposed, and presumably one that ignores the balancing of interests required by the WQA. AG's Response at 6. As stated previously, the WQA requires the Commission to employ a "balanced and practical approach" to regulating discharges to groundwater. ("[T]he legislature meant for impacts to be measured in a practical and sensible fashion"). *Phelps Dodge*, 2006-NMCA-115 at ¶ 29.

#### **IV. CONCLUSION**

The AG appears to have abandoned its argument that the Commission is prohibited from hearing the proposed Rule, and is now more concerned that the Commission would be "wasting its time." The legislature explicitly instructed the Commission to promulgate copper mining rules. The Commission must therefore consider and adopt some form of rules. The Department, through a long and arduous process, has developed a proposed Rule that it believes complies with the law, and one that can be implemented in a practical fashion that allows mining to take place while protecting groundwater. The Department is confident that each provision of the

proposed Rule will be closely examined during the public hearing process, and that during that process each provision can be evaluated on its technical and legal merits.

WHEREFORE, the Department requests that the Motions be denied.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

A handwritten signature in black ink, appearing to read "Andrew P. Knight", is written over a horizontal line.

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CERTIFICATE OF SERVICE

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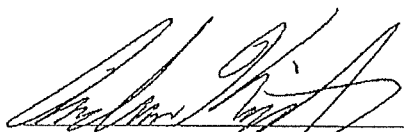
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