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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 RULE

WQCC 12-01 (R)

New Mexico Environment Department,
Petitioner.

NEW MEXICO ENVIRONMENT DEPARTMENT'S RESPONSE TO MOTIONS TO REMAND OR DISMISS

The New Mexico Environment ("NMED" or "Department") provides this Response 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, filed on behalf of the Gila Resources Information Project, Amigos Bravos, and Turner Ranch Properties, Inc. ("GAT Motion"). NMED opposes the Motions, and requests that they be denied.

INTRODUCTION

Both the Attorney General and Gila Resources Information Project, Amigos Bravos, and Turner Ranch Properties, Inc. (hereafter, "Movants") seek to advance a flawed interpretation of the Water Quality Act (WQA), arguing the WQA's mandate that the Water Quality Control Commission ("Commission") adopt regulations to "prevent or abate" water pollution, *see* NMSA 1978, § 74-6-5(E), means that all groundwater underneath a discharge site must meet ground water quality standards. This impractical interpretation of the WQA was soundly rejected by the New Mexico Court of Appeals in its 2006 decision in *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n*, 140 N.M. 464, 143 P.3d 502, 2006-NMCA-115 ("*Phelps Dodge*"). There, the Court of Appeals stated: "Although the [Tyrone] mine is a place where water is withdrawn for present use, it would be incorrect to conclude that, as a consequence, the

entire mine is a measuring point and must meet water quality standards everywhere ... it is also unrealistic to require all water at the Tyrone mine site to meet drinkable water standards." *Phelps Dodge*, 2006-NMCA-115, ¶ 33.

The unrealistic interpretation of the WQA being advanced by the Attorney General and Movants not only fails to strike the appropriate balance between the environmental and economic impacts of mining, but it also disregards the 2009 amendments to the WQA requiring the Commission to adopt regulations for the copper industry that "may include variations in requirements based on site-specific factors, such as ... geological and hydrological conditions." NMSA 1978, § 74-6-4(K). The Attorney General and Movants also gloss over the fact that the Department has a long-standing history of issuing discharge permits allowing groundwater standards to be exceeded at certain, discrete locations within a mine site.

If accepted by the Commission, the legal theory being advanced by the Attorney General and Movants would effectively end copper mining in the State of New Mexico. As the Court of Appeals stated in *Phelps Dodge,* "even though it is a conclusion that is arguably within the plain language of the statute, we reject such a broad and impractical interpretation of the Act; so interpreted, it would not reflect a balance between the competing policies of protecting water and yet imposing reasonable requirements on industry." 2006-NMCA-115 , ¶ 33.

ARGUMENT

I. THE PROPOSED RULE IS DESIGNED TO PREVENT OR ABATE WATER POLLUTION AND IS CONSISTENT WITH THE WATER QUALITY ACT AS AMENED IN 2009.

Both the AG's Motion and the GAT Motion (collectively, "Motions") assert that the proposed amendments to 20.6.2 NMAC ("Rule") violates the WQA because the Rule is not intended to "prevent or abate water pollution." NMSA 1978, § 74-6-4.E. However, as detailed

below, the Rule is contains many proscriptive requirements designed specifically to prevent pollution from mining activities, and is therefore consistent with the WQA.

In arguing that the proposed Rule violates the WQA, the Motions carefully avoid any analysis of the legislature's 2009 amendments to the WQA ("Amendments"), as well as the Court of Appeals opinion in *Phelps-Dodge*. Taken together, the Amendments and the Court of Appeals opinion represent a fundamental change in the interpretation of the WQA that Movants fail to acknowledge, and seem unwilling to accept. In the *Phelps Dodge* opinion, which is binding on the Commission, the Court explicitly rejected Movants interpretation of the WQA. The Court also described the Commission's conclusion that the entire mine site was a place of withdraw as "overly broad and impractical." 2006-NMCA-115, at ¶ 34. While acknowledging the potential impacts of a mine the size of Tyrone, the Court of Appeals specifically rejected "such a broad and impractical interpretation of the Act", Id., at ¶ 33, instead reasoning that "the legislature meant for impacts to be measured in a practical and sensible fashion." Id., at ¶ 29.

As amended by the Legislature in 2009, Section 4.K of the WQA specifically gives the Commission the necessary authority to promulgate rules for the copper industry. NMSA 1978, § 74-6-4.K. New Section 4.K states that these regulations "may include variations in requirements based on site-specific factors . . ." Id. The Department supports this change to the WQA because industry-specific rules offer an opportunity to make the permitting process for copper mines more clear, effective and efficient. By providing certainty and specificity to permittees regarding the requirements for obtaining a discharge permit, the proposed Rule is intended to be an improvement over the existing case-by-case approach.

Under the current Groundwater Regulations, found at 20.6.2.3000 NMAC *et seq.*, the permitting process for a discharge permit is applicant-driven: an applicant or permittee proposes

discharge permit requirements, and the Department must evaluate each application, accepting or rejecting each requirement. The applicant may then challenge the Department's rejection of any of the proposed requirements, or the addition of new requirements. This process takes place in negotiations between the Department and the applicant, without input from either the public or the WQCC.

The proposed Rule replaces this applicant-driven permitting process with proscriptive requirements, and allows the Commission to decide what measures are to be taken to protect and monitor ground water quality in copper industry-specific rules. Rule-based discharge permit requirements provide greater certainty not only for the industry, but for the Department and the public as well. An applicant would need to go before the Commission in a public rulemaking proceeding in order to change the proscriptive requirements set out in the Rule.

Among the many proscriptive requirements in the proposed Rule are 20.6.7.20.A(1) *(requiring synthetic liners for all new leach stockpiles)*, 20.6.7.17.D(3)(a) (*requiring synthetic liners for process water and impacted storm water impoundments*), 20.6.7.17.D(3)(d) (*requiring a leak collection system between primary and secondary liners*), 20.6.7.21.B(1)(a) (*requiring diversion of storm water from new waste rock stockpiles*), 20.6.7.21.B(1)(b) (*requiring collection of drainage from the base of new waste rock stockpiles, and containment of such drainage in lined impoundments*), 20.6.7.24(A)(2) (*requiring diversion of storm water "outward and away" from the perimeter of an open pit*), 20.6.7.25.B (*prohibiting the deposition of "any waste rock or tailings in an underground mine" that may cause an exceedance of groundwater standards*), 20.6.7.28(B) (*requiring monitoring wells "around and down gradient of the perimeter of each open pit, leach stockpile, waste rock stockpile, tailings impoundment, process water impoundment, and impacted storm water impoundment"*), and finally, 20.6.7.10(I) (*authorizing*

the Department to impose additional conditions in order to prevent any violation of the Water Quality Act).

Each of these requirements is specifically designed and intended to "prevent or abate" pollution of groundwater. NMSA 1978, § 74-6-4(E). To the extent that the AG and Movants disagree with certain requirements, or feel that additional requirements are necessary, they are free to propose their own language (with supporting technical testimony). However, to suggest that the Rule as a whole is not intended to prevent or abate water pollution is clearly wrong, and thus the Motions must fail.

II. THE MOTIONS INACCURATELY DESCRIBE THE PROPOSED RULE AND ITS EFFECTS.

Both the GAT Motion and the AG's motion grossly mischaracterize the proposed Rule. The GAT Motion, on page 6, describes §20.6.7.21.B.1.c of the Rule (incorrectly cited in the Motion as 20.2.6.21.b.1.c) as "allowing leachate from waste rock stockpiles to pollute groundwater." GAT Motion at 6. A look at the actual language in the proposed Rule shows that this is completely inaccurate: subparagraph 'c' requires that engineering plans for new waste rock stockpiles must consider the use of interceptor wells "or other measures to reduce, attenuate, or contain" any contaminants "that may cause groundwater to exceed applicable standards." Petition, Attachment 1, page 20.

Likewise, the next sentence on page 6 of the GAT Motion describes Section 20.6.7.22.A.4.vi (incorrectly cited as 20.2.6.22.A.4.vi in the Motion) as "allowing leachate from tailings stockpiles to pollute groundwater." GAT Motion at 6. Reading the actual language of the proposed Rule reveals that Section 22.A.4.a.vi requires that a design report for new tailings impoundments "demonstrate that interceptor wells will be able to efficiently capture seepage such that applicable standards will not be exceeded." Petition, Attachment 1, page 21. There are

numerous other example in the GAT Motion where the proposed Rule is mis-cited or mischaracterized. Similarly, statements in the GAT Motion to the effect that the "proposed Rule would not require . . . even basic pollution prevention measures" in certain areas are simply false GAT Motion at 2. Inaccuracies such as these show why pre-hearing motion practice is an inadequate vehicle for evaluating a complex rule, and why a full hearing with testimony by experts is necessary.

III. FACTUAL ALLEGATIONS CONCERNING THE APPLICATION OF THE PROPOSED RULE CAN ONLY BE PROPERLY EVALUATED THROUGH A PUBLIC HEARING.

In addition to mis-characterizing the actual language of the Rule, the Motions make a number of claims concerning how the Rule will be applied. These arguments are precisely the sort of information that should be developed through the presentation of testimony and other evidence at a public hearing. Until an administrative record is developed, statements in either the AG's Motion or the GAT Motion concerning the anticipated effects of the Rule are allegations unsupported by any evidence. The back and forth of testimony, cross examination, and questions from the Commissioners that a hearing will allow the Commission to better understand the interaction between the different sections of the proposed Rule and how they operate together. Rulemakings require a public hearing "[T]o secure the views of all interested persons, receive all pertinent data, and hear all offered testimony and arguments, in order that the board might be better informed and better able to intelligently formulate and adopt regulations consistent with, and more likely to achieve, the objectives of prevention and abatement of ... pollution." *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Board*, 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969).

Both the AG's Motion and the GAT Motion seem to argue that because certain sections of the proposed Rule violate the WQA, the Commission does not have the authority to consider any part of the Rule, and is prohibited from holding a public hearing on the Petition. *See e.g.*, AG's Motion at 2. If this were true, any party that opposed a rule could prevent it from being considered using this tactic. This is inconsistent with *Shoobridge* and other New Mexico cases which stand for the principle that even purely legal challenges to a proposed rule must wait until the administrative body has had the chance to consider it and correct any perceived errors, legal or otherwise. *See New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 18; 149 N.M. 42, 243 P.3d 746.

Section 74-6-4 of the WQA provides and outlines the Commission's rulemaking authority, and this section and others contain factors the Commission must consider when *adopting* rules. However, nowhere does the WQA limit the circumstances under which the Commission may *consider* a rule. This is an important and basic distinction, that both the AG's Motion and the GAT Motion fail to make when arguing against a public hearing.

IV. WHEN ENGAGED IN RULEMAKING THE COMMISSION IS A POLICY-MAKING BODY, AND IS FREE TO RECONSIDER PRIOR DECISIONS.

The AG's Motion proposes that, absent any legal prohibition against holding a hearing, the Commission should nevertheless reverse its decision to grant a hearing on the Petition because the proposed rule would conflict with decisions of a prior Commission. *See* AG's Motion at 2. What the AG's Motion fails to state is that the Commission, as a policy-making body, is not bound in any way by these prior decisions, and is free to reconsider them in light of changing circumstances, or new evidence. *See generally, Village of Angel Fire v. Wheeler*, 133 N.M. 421 (describing judicial deference to administrative decisions of a policy-making body).

Furthermore, The Tyrone permit appeal before the WQCC was an adjudication, not a rulemaking, involving a much narrower set of facts and circumstances. *See e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17, 102 L.Ed. 493, 109 S.Ct. 468 (1988) (distinguishing rulemaking from adjudication). To the extent that prior WQCC decisions conflict with the Court of Appeals opinion in Phelps Dodge, they should not be relied upon by the Commission in this rulemaking.

V. THERE IS NO RECOGNIZED MECHANISM BY WHICH THE PETITION CAN BE REMANDED TO EITHER THE ADVISORY COMMITTEE OR NMED.

The AG's Motion asks the Commission to remand the proposed copper rule ("Rule") back to NMED. The GAT Motion asks that the Commission dismiss the Petition for Rulemaking and remand the proposed rule back to the Advisory Committee for further development. Neither the WQCC Rulemaking Guidelines ("Guidelines") nor the WQA provide any mechanism or contain any procedures or standards for remanding a rulemaking petition.

"Remand" is a legal term defined as: "The sending by the appellate court of the cause back to the same court out of which it came, for purpose of having some further action taken on it there." Black's Law Dictionary, Abridged 5th Edition. Remand is a procedural device used in adjudicatory proceedings and has no application in the context of rulemaking. By statute, when a petition for rulemaking is filed, the WQCC has only two options: it may either hold a hearing on the petition or decline to hold a hearing. *See* NMSA 1978, § 74-1-9(A) (Environmental Improvement Act); and § 74-6-6(B) (WQA). Nowhere in the Environmental Improvement Act or the WQA is the word "remand" found, and neither Act provides for a procedure analogous to a remand.

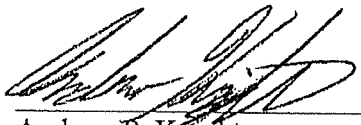
VI. CONCLUSION

The Rule contains many separate provisions that are specifically designed to "prevent or abate water pollution" and is therefore in conformity with the WQA. Allegations concerning the proposed Rule's application are best addressed in the context of a public hearing, in which testimony, exhibits, and cross-examination, in other words, evidence, will allow the Commission to best evaluate how the Rule will be applied and how it complies with the WQA. While the Commission may grant or deny a hearing on any petition, standards or procedures for "remanding" a rulemaking petition do not exist.

WHEREFORE, the Department requests that the Motions be denied.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT



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