

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

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

No. WQCC 12-01(R)

New Mexico Environment Department,
Petitioner.

WRITTEN TESTIMONY OF TOM SKIBITSKI

My name is Tom Skibitski, and I am the Acting Director of the Resource Protection Division of the New Mexico Environment Department (“Department” or “NMED”), which includes the Department’s Groundwater Quality Bureau. I am presenting this written testimony in support of the Department’s amended petition to the New Mexico Water Quality Control Commission (“Commission”) to promulgate new permitting rules for the copper mine industry.

I. BACKGROUND AND EXPERIENCE

My education and work history has included data processing in the early days of automated accounting systems, construction cost estimation and project management for large public works, and managing regulatory compliance and oversight programs for the New Mexico Environment Department. I graduated from the School of Architecture and Planning from the University of New Mexico with a focus on construction management. I worked in construction project management beginning in approximately 1980 for a succession of firms in Albuquerque engaged in earthmoving, wet utilities (water, sewer, and storm drain), subdivision development, and paving.

I have been employed by the New Mexico Environment Department in a management capacity since 1998, beginning as a program manager for the Underground Storage Tank Bureau's compliance and inspection section. I later served as finance manager for the Corrective Action Fund for a 10 month period while the position was vacant. I was then appointed as acting District 1 Manager, where I was responsible for the field operations and consumer protection programs for seven counties in the northwest portion of the state. Regulatory programs within my jurisdiction included the Liquid Waste Program, Food Safety Program, Public Swimming Pool, Hot Tub and Spas Program, and the Vector Control Program. In 2001, I was officially hired as the District 1 Manager and stayed in that position for approximately 5 years. In 2006, I became Chief of the Department of Energy (DOE) Oversight Bureau, a non-regulatory program that conducts oversight activities at DOE facilities in New Mexico. These facilities include the Los Alamos National Laboratory (LANL), Sandia National Laboratories (SNL), and the Waste Isolation Pilot Plant (WIPP). The DOE Oversight Bureau has the authority to study and report on all aspects of DOE activities, including those that are otherwise not regulated by the state such as the emission of radioactive elements and isotopes.

In January of 2013 I was appointed as the Acting Director of the NMED Resource Protection Division. This assignment includes responsibility for the DOE Oversight Bureau, Ground Water Quality Bureau, Hazardous Waste Bureau, Petroleum Storage Tank Bureau, and the Surface Water Quality Bureau. In addition, I am tasked with responding on behalf of the Department in representing the Resource Protection Division before the legislature, committees, boards, and commissions. A copy of my resume is marked as **NMED Exhibit 1**. It is accurate and up to date.

II. INTRODUCTION

The Department's Notice of Intent to Present Technical Testimony, with exhibits, includes the Department's direct testimony in support of the proposed Copper Mine Rule submitted in the Petition filed with the Commission on October 30, 2012, and amended on February 18, 2013.

My testimony seeks to provide background information concerning the adoption of the Copper Mine Rule, and explains why, as a matter of policy, the Department supports the proposed rule. My testimony will provide a summary of the history that gave rise to the proposed Copper Mine Rule,¹ the policy goals and objectives of the proposed Copper Mine Rule, and a discussion of some of the statutory criteria the Commission must consider in adopting rules for copper mines. My testimony will also summarize the formation, composition, and function of the Advisory Committee, and the stakeholder and public participation process.

III. BACKGROUND

A. PRE-2009 WQA AMENDMENT DISCHARGE PERMITTING

The current permitting process for any discharge subject to the requirements of the Ground and Surface Water Protection Rules, 20.6.2 NMAC, requires an applicant to propose a plan to protect ground water and submit this plan for the Department's review. There is no guidance in the current rules for the measures to be taken to protect ground water except that the plan as proposed by the applicant must demonstrate that it would not cause an exceedance of the Commission's ground water quality standards. Prior to the 2009 amendments, the Water Quality

¹ Under the State Rules Act, at NMSA 1978, § 14-4-2, a "regulation" is a "rule." A rule is not valid or enforceable until it is filed with the State Records Center and published in the New Mexico Register. NMSA 1978, § 14-4-5. To be consistent with the requirements of the State Records Center, NMED uses the term "rule" instead of the term "regulation" throughout its testimony and its proposal.

Act stated that regulations of the Commission “...*shall not specify the method to be used to prevent or abate water pollution*” but may specify a “standard of performance” for new sources.

Under the rules adopted by the Commission in 1977, the Department could approve the plan as proposed, approve the plan by issuing a discharge permit with conditions or disapprove the plan. Often the Department is presented with administratively complete applications that are substantially lacking in technical details. This practice tends to lead to a repetitive cycle where the Department requests additional information, the applicant submits that information and the Department reviews the supplemental information in an effort to determine whether the permit can be approved. This back-and-forth cycle is often repeated several times during the application review process. This approach has proven to be very slow and resource intensive. In too many cases, the permitting process has dragged on for years.

The early discharge permits issued by the Department did not contain many conditions of approval. As a result, the Department discovered that some operational and disposal practices have failed to prevent ground water pollution and resulted in impacts to ground water quality. As ground water violations at copper mines were discovered over time, the Department would condition approval of subsequent permits to correct the practice or institute a new practice to address the issues that led to contamination. The number of permitting conditions grew over time to address the protection of ground water quality through monitoring and prevention measures.

Due to the limitations in the pre-2009 WQA, conditioning the approval of a permit was the only permitting mechanism where specific practices could be addressed. Under this process the permittee was allowed to challenge permit conditions through a hearing before the Secretary of the Department and ultimately through appeal to the Commission. By 2008, the Department’s

discharge permit template had grown to contain dozens of standardized permit conditions and individual site specific conditions intended to protect and monitor ground water quality. **NMED Exhibit 2**, Re-issue of the Supplemental Discharge Permit for Closure, Phelps Dodge Tyrone Inc., DP-1341 (containing 117 conditions).

B. TYRONE HEARINGS AND LITIGATION

In 2002, a dispute over conditions in a discharge permit for the Phelps Dodge Tyrone Mine led to an appeal hearing before the Commission. The Commission's decision was appealed by the permittee and reviewed by the New Mexico Court of Appeals in *Phelps Dodge Tyrone, Inc. v. NM Water Quality Control Comm'n*, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502 ("*Phelps-Dodge Opinion*"). In the *Phelps-Dodge Opinion*, the Court of Appeals expressly rejected the Commission's position that the entire mine site was a "place of withdrawal." **NMED Exhibit 3**, *Phelps-Dodge Opinion*. The Court of Appeals stated "it is ... unrealistic to require all water at the Tyrone mine site to meet drinkable water standards ... we reject such a broad and impractical interpretation of the [WQA]; so interpreted, it would not reflect a balance between the competing policies of protecting water and yet imposing reasonable requirements on industry." *Phelps Dodge Tyrone, Inc.*, 2006-NMCA-115, ¶ 33 (emphasis added). The Court of Appeals then directed the Commission to create some general factors or policies to guide its determination as to whether a given site is a "place of withdrawal," but expressly deferred to the Commission as to whether it should do so by way of a rulemaking or by simply deciding the factors as a part of this specific case.

Instead of promulgating a generally applicable rule to guide the Department and the public as to whether any particular site is a "place of withdrawal," the Commission adopted criteria as part of the specific Tyrone permit appeal hearing and directed the Department to apply

them to the Tyrone Mine in its Decision and Order on Remand. The Decision and Order on Remand was also appealed to the Court of Appeals, and that matter has been stayed pending implementation of a Settlement Agreement between Tyrone and the Department.

In developing the proposed Copper Mine Rule, the Department has been cognizant of the Court of Appeal's *Phelps-Dodge* Opinion, and has attempted to craft it consistent with the Court's findings in that Opinion.

C. 2009 WQA AMENDMENTS

In early 2009, the dairy and copper industries lobbied the legislature for a change to the Water Quality Act ("WQA") requiring the adoption of specific rules for dairies and copper mines to monitor ground water quality and to abate ground water pollution. The dairy and copper industries sought certainty and specificity in rules instead of the uncertainty inherent in the existing rule language and as evidenced by the Department's increasing number of permit conditions. The Department agreed with the change to the WQA because industry-specific rules offered an opportunity to make the permitting process more transparent, effective, and efficient. Industry-specific rules also provide more certainty to the applicant regarding the requirements for obtaining a discharge permit which the Department believes offers better protection for ground water.

The 2009 WQA amendment initiated a paradigm shift in the rulemaking and permitting process affecting the copper industry. Most significantly, the 2009 amendments inserted a new Subsection K of Section 74-6-4 of the WQA that allows the Commission to adopt regulations specific to particular industries, and directs the Commission to promulgate industry specific rules for the dairy industry and the copper industry. The 2009 amendments inserted in new Subsection K of Section 74-6-4 of the WQA language stating that the Commission "*shall specify in*

regulations the measures to be taken to prevent water pollution and to monitor water quality”.

NMED Exhibit 4, Final Senate Bill 206, Proposing Amendments to the Water Quality Act. The WQA now places the onus on the Commission to promulgate dairy and copper mine industry rules that specify the methods for protecting and monitoring ground water quality.

The 2009 amendments to the WQA placed new language in Subsection D of Section 74-6-5 stating that, *“after regulations have been adopted for a particular industry, permits for facilities in that industry shall be subject to conditions contained in the regulations.”* **NMED Exhibit 4**. Under this new approach, discharge permits for copper mines would contain standard provisions applicable to any facility. The Department may still impose conditions on a particular permit. The permittees will have the opportunity to review and comment on the conditions and the Department’s explanation for additional requirements. The rulemaking process is designed to systematically capture in rule what used to be included as conditions of approval in discharge permits. If an applicant, permittee, or public member wishes to challenge a permit provision contained in the Copper Mine Rule, they would have to go through the rulemaking process, including a public hearing. They would not be able to challenge the application of a provision contained in the regulations during the permitting process itself. The application of copper industry specific rules to a discharge permit for a copper mine facility is now required by the WQA and is analogous to permitting by rule.

With these amendments, the Legislature has sought to streamline the permitting process by specifying requirements that must be met by rule, reducing the need for multiple submittals by the applicant and numerous specific conditions for each discharge permit. Instead, under the amended WQA, the Commission must set forth the measures to be taken to protect and monitor ground water quality in copper industry specific rules. Although the WQA still authorizes the

Department to impose conditions in addition to those contained in the Copper Mine Rule,² the clear emphasis of the 2009 amendments is to place what were previously permit conditions into a comprehensive rule. In addition to streamlining the permit process, industry-specific rules may also serve to reduce costly, resource intensive lawsuits between the Department and permit applicants.

The Department's proposed Copper Mine Rule represents a change from the permitting approach previously employed by the Department. Previously, the Department had taken the position that ground water standards must be met at all points underneath a discharge site, rather than in designated monitoring wells designed to monitor ground water quality down gradient of a contamination source. The actual practice of the Department was to issue permits without requiring all ground water at all locations within a mine site meet ground water standards. Rather than requiring a permittee to meet water quality standards directly underneath a mine unit, the proposed Copper Mine Rule requires a permittee to demonstrate compliance with applicable standards at monitoring well locations specified by the rule. This approach is protective of ground water while allowing copper mine facilities to operate in a predictable and cost effective manner. This approach is also consistent with the past practice of the Department, except the Department will no longer require a permittee to obtain a variance.

The proposed Copper Mine Rule does not alter or define the concept of "place of withdrawal." Rather, the proposed Copper Mine Rule specifies that monitoring for compliance will occur around the perimeter of and as close as practicable to the copper mine units, both during operations and following closure. The Rule is designed to systematically capture what used to be included as conditions of approval in discharge permits. Site specific information is

² Subsection D of NMSA 1978, Section 74-6-5 (2009) later states, "[a]dditional conditions on a final permit may be imposed if the applicant is provided with an opportunity to review and provide comments in writing on the draft permit conditions and to receive a written explanation of the reasons for the conditions from the constituent agency."

required to be submitted in the application and is to be included in the discharge permit, as described in the Department's proposed rule.

The proposed Copper Mine Rule codifies existing practices and contains measures to prevent, minimize, or contain the pollution of ground water to the maximum extent practicable. Furthermore, in addition to requiring prevention, containment, and monitoring of ground water pollution, the proposed Copper Mine Rule requires copper mine operators to provide treatment if pollution of ground water should occur. The proposed Copper Mine Rule contains detailed requirements for closure of a mine intended to prevent or abate water pollution, including long-term maintenance, water treatment and monitoring of the mine site.

D. DEVELOPMENT OF THE DEPARTMENT'S PROPOSED COPPER MINE RULE

On January 10, 2012 the Department presented to the Commission a negotiated schedule for development and adoption of copper mine rules that incorporated an opportunity for public input and stakeholder negotiation pursuant to the new Subsection K of Section 74-6-4 the WQA. This schedule was approved by the Commission and was later extended to allow an additional 30 days.

An Advisory Committee comprised of representatives from the Department, academia, industry, citizen and environmental groups, and the Energy, Minerals, and Natural Resources Department was formed. A technical sub-committee was also formed. The purpose of the Advisory Committee was to gather information "to advise [the NMED] on appropriate regulations to be proposed for adoption by the [Water Quality Control] commission." NMSA 1978, § 74-6-4.K (emphasis added). **NMED Exhibit 5**, Advisory Committee Guidelines, dated January 15, 2012. As stated in the Guidelines, it was not the role or responsibility of the Committee to set agency policy, or draft proposed regulations that the Department was obligated

to submit to the Commission. Rather, it was the responsibility of the Advisory Committee to discuss and debate regulatory concepts, and water quality protection and monitoring measures for the copper mining industry for the Department to consider when drafting the proposed rule.

Following an initial meeting on January 25, 2012, the Advisory Committee and the technical sub-committee met over a seven month period, developing and debating concepts, language, and structure of the proposed Copper Mine Rule. These meetings resulted in the completion of a draft rule on August 17, 2012. The August 17, 2012, draft rule was developed by an independent contractor hired by the Department to facilitate the Advisory Committee meetings. At the end of this process, the Department carefully evaluated the comments and recommendations of all of the Advisory Committee members, including the August 17, 2012, rule drafted by the Department's independent contractor, and formulated a proposed rule that was released for public comment on September 13, 2012. **NMED Exhibit 6**, Public Notice Version of Copper Rule. On September 25 and 26, 2012, the Department held evening public meetings in Albuquerque and Silver City to inform the public about changes in the WQA, the legislative requirement for copper industry specific rules, and to encourage the submission of comments on the Department's September 13, 2012 draft rule. **NMED Exhibit 7**, Department's Presentation Used at Public Meetings. The Department invited industry and members of the public to participate in stakeholder negotiations from September 24 through October 12, 2012. Based on comments received on the September draft, the Department made changes to the draft and filed it with the Commission as part of the Department's rule-making petition on October 30, 2012. **Pleading Index Number 4**, Petition. Notice of this hearing has been published in the New Mexico Register, Albuquerque Journal, and the Silver City Daily Press and was mailed to all persons who have expressed an interest in being notified of the rulemaking.

Following the October 30, 2012 publication of the draft Copper Mine Rule, the Department continued to refine the rule. On February 18, 2013 the Department filed an Amended Petition containing edits to the proposed Copper Mine Rule including both a “clean” version as well as one containing redline strikeout to highlight changes to the Copper Mine Rule. These two versions showing all edits were sent to members of the Advisory Committee.

Pleading Index Number 45, Amended Petition.

IV. OBJECTIVES OF THE DEPARTMENTS PROPOSED COPPER MINE RULE

The overarching goal of the Department’s proposed Copper Mine Rule is to prevent water pollution and monitor ground water quality beneath copper mines in an effective, consistent, and comprehensive manner, and to assist the Commission in promulgating a rule that is consistent with both the *Phelps-Dodge* Opinion and the Water Quality Act as amended in 2009. The secondary goals are to improve the permitting process for both the applicant and the Department, to decrease permit conditions by incorporating provisions by rule and to reduce the number of variances sought. Thus, the Department’s proposed Copper Mine Rule sets forth specific, clear, and effective requirements for copper mines to protect and monitor ground water quality, and strikes a balance between the environmental and economic impacts of mining.

The basic regulatory tool for protecting and monitoring ground water quality at copper mine facilities is a valid and enforceable discharge permit. The Department’s proposal would create a straightforward permitting process with improved regulatory certainty that results in discharge permits that are consistent between facilities and more readily enforceable. The Rule proposes efficient measures and clear provisions to prevent and contain ground water contamination, as well as comprehensive monitoring and detection methods.

Copper mines pose a high potential risk of ground water contamination if leachate, process water, and impacted storm water are not contained and managed properly. Operational practices at copper mines have contaminated ground water in excess of standards, and the proposed rule contains requirements specifically designed to address these three potential sources of contamination. The Rule is intended to assure that ground water contamination is prevented, minimized, and contained to the extent practicable. The existing Commission rules already require abatement of contamination if it should occur. Clear requirements that result in the use of the best available control technology help assure that costs are borne by the permittee operating the facility, rather than creating the potential that the public or others will bear the cost of remediation. The Department's proposed Copper Mine Rule strikes a balance between the interests of the state and public in protecting ground and surface water, and the economic value of the copper mine industry.

The construction and operational requirements called for in the Rule are technically practical and prescribe each of the requirements that must be met, making the permitting process more predictable and economically feasible. Prevention or containment of ground water contamination at copper mines is achievable through currently available control technologies and proper operating methods. None of the prevention and monitoring practices called for in the Department's proposal are novel or technically unfeasible and most are reflective of conditions contained in the existing discharge permits. The WQA requires in §74-6-4(K) that the Commission must consider the “best available scientific information” in developing and proposing the Copper Mine Rule. In this proposed Copper Mine Rule, the Department has relied upon the best scientific information available to it as described in the testimony of the

Department's technical expert witness and has focused on codifying and implementing processes that have evolved through regulation of copper mine facilities.

VI. CONCLUSION

In conclusion, for the reasons contained in my testimony in this document and the testimony of our technical expert the Department recommends that the Commission adopt the Copper Mine Rule as proposed and amended by the Department.

Thank you. That concludes my direct testimony.