

COPY



STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

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In the Matter of:
PROPOSED AMENDMENT
TO 20.6.2 NMAC (Copper Rule)
)
)

No. WQCC 12- 01(R)

**NEW MEXICO ENVIRONMENT DEPARTMENT’S REPOSE TO
ATTORNEY GENERAL’S MOTION TO ADMIT RECORD FROM
TYRONE PERMIT APPEAL INTO RECORD PROPER**

The New Mexico Environment Department (“Department”) submits this Response to the Attorney General’s Motion to Admit the Record from the *Tyrone Permit Appeal* into the Record Proper for this proceeding. The Department requests the Water Quality Control Commission (“WQCC”) deny the Motion for the reasons below:

I. INTRODUCTION.

This administrative rulemaking proceeding is before the WQCC on a Petition filed by the Department on October 30, 2012 pursuant to Section 301 of the *Guidelines for Water Quality Control Commission Regulation Hearings*. In its Petition, the Department seeks the adoption of new rules for ground water discharge permits and financial assurance at copper mines, 20.6.7 NMAC and 20.6.8 NMAC (“Copper Mine Rules”).

The Attorney General seeks to admit certain portions of the record from a prior proceeding before the WQCC, the *Tyrone Permit Appeal* (“*Tyrone*”). In its Motion, the Attorney General argues that the record in that previous proceeding should be admitted because it is relevant to the Petition. The Department disagrees that the *Tyrone* record is relevant to the

Petition. Additionally, its admission in this rulemaking proceeding would result in a confusion of the issues and constitute a waste of time. For these reasons, the Motion should be denied.

II. ARGUMENT.

In its Motion seeking to admit the *Tyrone* record, the Attorney General is confusing two entirely different matters. The *Tyrone* proceeding concerned an appeal brought by one permittee of specific conditions in an individual discharge permit for one facility. In contrast, the Department's Petition concerns a rulemaking of state-wide application that will regulate all copper mine facilities in New Mexico. The WQCC should make its decision in this matter based on the record in the rulemaking, and not some prior proceeding involving a single discharge permit.

The standard for admissibility in rulemaking proceedings before the WQCC is relevance. See *Guidelines for Water Quality Control Commission Regulation Hearings*, § 402.A. Whether evidence is relevant should be determined within the overall context of the case when the evidence is offered during the course of the proceeding. *Kilgore v. Fuji Heavy Industries Ltd.*, 2009-NMCA-078, ¶ 64, 146 N.M. 698, 716, 213 P.3d 1127, 1145, citing *Romero v. State*, 112 N.M. 332, 334, 815 P.2d 628, 630 (1991)). The Hearing Officer is vested with the discretion to make the determination whether to exclude proffered evidence on relevancy grounds. *Colonias Development Council v. Rhino Environmental Services, Inc.*, 2003-NMCA-141, ¶19, 134 N.M. 637, 643, 81 P.3d 580, 586 (“The hearing officer had discretion to exclude irrelevant evidence”), *rev'd on other grounds, In re Application of Rhino Environmental Services*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

That discretion is best exercised by making the determination of admissibility in the context of the hearing. Exclusion on the grounds that evidence is not relevant obviously requires

that the Hearing Officer make the determination of admissibility of proffered evidence within the hearing context and during the course of the proceeding. Thus, the Attorney General's Motion must be denied since it requests that the Hearing Officer make determinations, before the hearing begins, on the admissibility of evidence that are best made in the context of the hearing.

Furthermore, even relevant evidence may be excluded if it will result in a confusion of the issues. The New Mexico Rules of Evidence, upon which the WQCC may rely for guidance, provide that

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

NMRE 11-403.

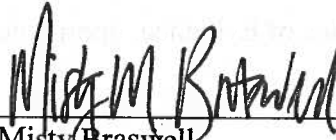
Here, the Attorney General seeks admission of, among other documents, the entire transcript of the *Tyrone* proceeding, consisting of 24 volumes. By the Attorney General's own assertion, the *Tyrone* proceeding was an extremely complex and lengthy proceeding. Attorney General's Motion at p. 2. The admission of the entire transcript of the *Tyrone* proceedings as well as all of the dozens of admitted exhibits, which are very likely to include a great deal of evidence that is entirely unrelated to the narrow issues relating to place of withdrawal and point of compliance raised in the Attorney General's Motion, can only serve to confuse the issues and constitute a waste of time by requiring the WQCC to review the transcripts and exhibits in their entirety. However, if the *Tyrone* record is admitted as evidence, the Hearing Officer should issue an order requiring that each document be introduced by a competent witness and be subjected to cross-examination by the parties.

Finally, the Department disagrees with the Attorney General's characterization and interpretation of the proposed copper mine rules and expressly reserves the right to dispute any

claims or arguments raised by the Attorney General regarding the substance of the proposed rules and to present argument and evidence in the rulemaking proceeding or at any other appropriate time rebutting these claims.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Response for Motion to Admit Record was served on the following parties on November 19, 2012:

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