IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NOS. S-1-SC-35279, 35289, & 35290

GILA RESOURCES INFORMATION PROJECT, AMIGOS BRAVOS, TURNER RANCH PROPERTIES, L.P., STATE OF NEW MEXICO ex rel. HECTOR BALDERAS, Attorney General, and WILLIAM C. OLSON,

Appellants-Petitioners,

v.

NEW MEXICO WATER QUALITY CONTROL COMMISSION,

Appellee-Respondent,

and

FREEPORT-MCMORAN CHINO MINES COMPANY, FREEPORT-MCMORAN TYRONE, INC., FREEPORT-MCMORAN COBRE MINING COMPANY, and NEW MEXICO ENVIRONMENT DEPARTMENT,

Intervenors-Respondents.

CONSOLIDATED REPLY BRIEF OF APPELLANTS-PETITIONERS AMIGOS BRAVOS, GILA RESOURCES INFORMATION PROJECT, AND TURNER PROPERTIES, L.P.

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Request for Oral Argument

In accordance with NMRA 12-214.B, the Appellants-Petitioners have requested that the Supreme Court set this matter for oral argument. The Appellants-Petitioners made this request because this matter involves both complex issues of law and complicated issues of hydrology, and oral argument would assist the Supreme Court by providing the members of the Court with an opportunity to question counsel for the parties.

Statement of Compliance

Counsel for the Appellants hereby certifies that the text and footnotes of this Consolidated Reply Brief are typed in Times New Roman 14 point font. Counsel for the Appellants further certifies that the Word count for the number of words in the body of this Consolidated Reply Brief, including text and footnotes, indicates that this Consolidated Reply Brief consists of 9,871 words. This Consolidated Reply Brief therefore complies with the requirements of NMRA 12-213.F(3) of the Rules of Appellate Procedure and with this Court's Order dated January 20, 2016, which provided that this Brief should not exceed 12,000 words.

Petitioners Gila Resources Information Project ("GRIP"), Amigos Bravos and Turner Ranch Properties, L.P. ("TRP") file this Consolidated Reply Brief to the three separate Consolidated Answer Briefs ("Answer Brief" or "AB") filed by Respondents Freeport-McMoRan, Inc. ("Freeport" or "FMI"), the New Mexico Water Quality Control Commission ("Commission" or "WQCC"), and the New Mexico Environment Department ("Department" or "NMED").

INTRODUCTION

Undisputed Facts and Law

Respondents agreed with or did not dispute the basic law and facts set out in Petitioners' and the Attorney General's briefs-in-chief. The following, therefore, is undisputed on appeal:

1. The New Mexico Water Quality Act ("Act"), NMSA 1978, Sections 74-6-1 through -17 (1967, as amended through 2009), imposes a duty on the Commission and NMED to enforce water quality standards at "any place of withdrawal of water for present or reasonably foreseeable future use," Section 74-6-5(E)(3)(1993), referred to herein as the "Place of Withdrawal." The purpose of the Act is to prevent and abate water pollution and protect ground water that may be withdrawn for present or reasonably foreseeable future beneficial use. [Petitioners' Brief-in-Chief ("BIC"), 10-13]

2. The numeric water quality standards codified at 20.6.2.3103 NMAC ("3103 Standards") must be met at Places of Withdrawal. Places of Withdrawal are underground water supplies, i.e., aquifers, from which ground water may be withdrawn for present or reasonably foreseeable future use.

3. The Copper Mine Rule ("Rule"), 20.6.7 NMAC, exempts ground water beneath existing and future copper mines from compliance with 3103 Standards. [BIC 21-26; WQCC AB 7; FMI AB 68-69]

4. The Rule expressly allows the open pits, waste rock piles, leach piles, tailings, and other mine units at copper mines to release hazardous contaminants directly into the environment and to pollute ground water above 3103 Standards at every existing and future copper mine in New Mexico. The Rule permits this pollution within vast areas circumscribed by perimeter ground water monitoring wells ("perimeter monitoring wells"). The ground water within these areas may be polluted to any degree, by any contaminant, for any duration so long as "applicable standards" are met at perimeter monitoring wells. [BIC 9] By definition, "applicable standards" under the Rule may exceed 3103 Standards. 20.6.7.7(B) NMAC.

5. Hundreds of millions of tons of broken, crushed and finely ground mineralized rock are present within the massive leach ore, waste rock, and tailings

piles found at open pit copper mines in New Mexico. These piles are capable of generating and releasing acid rock drainage ("ARD") into the environment for hundreds of years. ARD along with the acidic solution used to leach copper from ore has already caused approximately 20,000 acres of ground water pollution at Freeport's three existing mines in Grant County, New Mexico. [BIC 28-30] The Rule permits most of this pollution. [*Id.*]

6. Section 74-6-4(K) NMSA 1978 (2009) of the Act required the Commission to "specify in [the Rule] the measures to be taken to *prevent* water pollution [at copper mines] and to monitor water quality." (Emphasis added.) The Rule, in contrast, permits ground water pollution. Perimeter monitoring wells are used to stake out vast areas in which ground water pollution is permitted, which the Rule implicitly defines as *not* a Place of Withdrawal. [WQCC AB 30] Because ground water moves constantly through porous aquifers in response to pressure gradients, the Rule necessarily requires "pump and treat" remedial systems to be deployed in order to contain the polluted ground water.

7. After active mining ceases, the ore, waste rock, and tailings piles continue to generate ARD and pollute ground water, which continues to move and spread in response to pressure gradients. Accordingly, the pump-and-treat remedial

systems at a given copper mine must be operated continuously under the Rule, in perpetuity, in order to prevent the permitted pollution from spreading offsite.

8. Freeport wrote the provisions of the Rule that permit ground water pollution at its mines and all other existing and future copper mines in New Mexico. **[Attorney General Exhibit 8, 21 RP 03484-03487; *see also* 4-25-13 9 Tr. 2103:17-2106:23]** Freeport provided the language for these provisions to NMED after the Advisory Committee process had effectively ended. **[4-25-13 9 Tr. 2107:1-2108:19; 23 RP 04146-04308; Response to Petition for Rulemaking, 13 RP 00008282-000095]**

9. Freeport's attorneys were the "primary drafters" of the Commission's Order and Statement of Reasons ("Statement of Reasons" or "SOR") that NMED proposed as its own and that the Commission adopted without substantive change. [FMI AB 40; *see also* **Notice of Proposed Testimony and other Evidence Offered in Support of Motion to Stay the Copper Mine Rule Pending Appeal, p. 1-3, 35 SRP 06973-06975]** Freeport's authorship of the Statement of Reasons would not have come to light but for a request to inspect public records submitted by GRIP under the Inspection of Public Records Act. [*See* FMI AB 42]

Respondents' Arguments

Respondents' main argument in defense of the Rule has four basic parts, summarized as follows:

(1) The Act only protects the ground water within Places of Withdrawal.

(2) The Commission has unfettered discretion to define Places of Withdrawal.

(3) The Commission implicitly "defined" the areas of permitted pollution, *i.e.*, the areas demarcated by perimeter monitoring wells, as *not* Places of Withdrawal.

(4) Therefore, the ground water pollution expressly permitted under the Rule does not violate the Act, because that pollution never occurs at any Place of Withdrawal, as "defined" by Rule.

[*See, e.g.*, WQCC AB 3-5] In other words, the areas in which pollution is permitted under the Rule are not Places of Withdrawal because the Rule permits ground water pollution in those areas.

The circular reasoning underlying the Rule benefits Freeport immeasurably. It enables Freeport to exclude vast areas from being protected Places of Withdrawal based solely on the location of its open pits, massive stockpiles and various other mine units and associated perimeter monitoring wells. Moreover, the areas of permitted pollution are not fixed in place. They can be expanded simply by changing monitoring well locations, which the Rule allows NMED to approve

administratively through "discharge permit amendments" that require no public notice, hearing, or right of appeal. *See* 20.6.7.7(B)(19) (defining "discharge permit amendment") and -.14 NMAC (providing for permit amendments without notice or hearing).

The Commission admits that the Rule implicitly excludes extensive areas within perimeter monitor wells from being Places of Withdraw, but touts this as a great leap forward in ground water protection, claiming that the Rule defines everything outside these areas as a Place of Withdrawal, "*a priori*". [WQCC AB 30] The more appropriate Latin phrase, however, is *post hoc* rationalization. As Freeport told the Court of Appeals: "The Copper Rule's purpose is not to say where places of withdrawal are located or provide guidance on how to determine whether a particular location is a place of withdrawal." [Freeport's Court of Appeals Answer Brief ("FMI COA AB") to GRIP, Amigos Bravos, TRP, and William C. Olson (filed June 30, 2014), p. 23][1] The Rule simply permits ground water to be polluted above 3103 Standards at any copper mine in New Mexico, period. No regard is given to whether the polluted ground water would otherwise be withdrawn for present or future use.

[1] Similar statements are made throughout Freeport's Answer Brief. [FMI COA AB 2, 13, and 15]

Respondents attempt to temper this effect of the Rule by arguing that, notwithstanding the express license to pollute, NMED somehow retains discretion to deny a discharge permit if it determines that the proposed discharge would impact a Place of Withdrawal. Respondents base this argument on Section 20.6.7.10(J)(3) NMAC of the Rule, which requires NMED to "approve a discharge permit" if, among other things, "denial ... is not required pursuant to Subsection E of Section 74-6-5 NMSA 1978." Respondents, especially Freeport, place great emphasis on Section 20.6.7.10(J)(3) NMAC. [*See* FMI AB 2, 15, 46, 66, 70, 71, 86, and 80; *see also* WQCC AB 36, 47-48]

Based on Section 20.6.7.10(J)(3), Freeport argues that the Rule only creates a rebuttable "presumption" that the areas of permitted pollution are *not* Places of Withdrawal. [FMI AB 46, 47, 71, 72] This argument is logically inconsistent with Respondents' *a priori* argument,[2] and neither the Rule nor the Statement of Reasons mentions any presumption. On the contrary, on its face the Rule grants the copper industry an unequivocal right to pollute ground water wherever its mines are located. Moreover, it provides no standard by which to determine whether the areas of permitted pollution are Places of Withdrawal and thus no means of rebutting Freeport's alleged "presumption." And finally, as the Commission states

[2] *A priori* definitions, such as the classic "all bachelors are unmarried," cannot be rebutted.

plainly in its Answer Brief, the Rule dispenses with the need to "demonstrate that Places of Withdrawal are protected" on a case-by-case basis. [WQCC AB 36]

Respondents also argue that the Act's twin goals of preventing and abating water pollution must be "balanced" against economic considerations, and that such considerations justify the Rule's *a priori* definition of Place of Withdrawal. [WQCC AB 2, 18, 25, 28, 32; FMI AB 45, 57, 70] This is not accurate. The Act wisely allows the Commission to consider economic and several other factors when promulgating regulations to prevent or abate water pollution. NMSA 1978, § 74-6-4(E)(2009) ("In making regulations, the commission shall give weight it deems appropriate to all relevant facts and circumstances, including" several listed factors for consideration). However, the factors set out in Section 74-6-4(E) have no bearing on whether ground water at a given location is within a protected Place of Withdrawal. Places of Withdrawal refer to physical ground water resources that may be withdrawn for present or future beneficial use. The existence and location of these valuable water resources are not determined by economic or other factors, any more than the existence and extent of a lake are determined by them.

Respondents' remaining arguments seek to rationalize, deflect, or otherwise minimize the unequivocal license to pollute granted by the Rule to Freeport and the copper industry. Respondents claim without analysis that the Rule is no different

than the Commission's Dairy Rule (20.6.6 NMAC), which Amigos Bravos supported, and that it is consistent with the hazardous waste regulations promulgated by the federal Environmental Protection Agency ("EPA") under the Resource Conservation and Recovery Act ("RCRA"). [WQCC AB 2, 19, 21, 22, 32-35, 37 and 52; FMI AB 24-25] Respondents seriously misread the Dairy Rule and the RCRA regulations. As described below, in contrast to the Rule, both sets of regulations unequivocally prohibit releases of contaminants into the environment and both prohibit water pollution above standards at the sites they cover. The Court should not be misled by Respondents' inaccurate representations concerning the Dairy Rule and RCRA.

Respondents claim further that the Rule comports with NMED's historic permitting practices at Freeport's mines. According to Respondents, NMED intentionally permitted the extensive ground water pollution that now exists at Freeport's mines, but this claim is conclusively rebutted by the Commission's unappealed final adjudication regarding Freeport's Tyrone Mine. After a lengthy evidentiary hearing, the Commission found that NMED never intentionally permitted ground water pollution at Freeport's mines and that the existing pollution resulted from discharge permit violations. This prior adjudicatory determination of fact should be binding on Freeport and NMED under the doctrines of collateral and

judicial estoppel, respectively. Moreover, the Commission's unexplained departure from its prior adjudication should be disregarded as arbitrary decision making.

In sum, the Commission and NMED have an undisputed duty under the Act to prevent water pollution and protect ground water that may be withdrawn for present or future use. It is undisputed that the Rule permits ground water pollution above 3103 Standards, in perpetuity, at all existing and future copper mines. It allows this pollution with no regard to whether the polluted ground water may be withdrawn for present or reasonably foreseeable future use. Therefore, the Rule violates the Act on its face. It does not prevent water pollution or protect Places of Withdrawal. Petitioners respectfully request the Court to reverse the Court of Appeals and set the Rule aside.

ARGUMENT

I. THE RULE DOES NOT PREVENT WATER POLLUTION OR PROTECT PLACES OF WITHDRAWAL.

A. The Commission Never Intended The Rule To Define Places Of Withdrawal.

Respondents' argument that the Rule defines Place of Withdrawal has no support in the text of the Rule or in the record. The Rule does not mention, much less define, Place of Withdrawal or provide any guidance for identifying Places of Withdrawal. [NMED AB 10 ("Copper Rule does not expressly define the concept

of 'place of withdrawal'")] The term does not occur in the Rule or in the notice of rulemaking. **[15 RP 000901-000903]** The Commission did find that the vast areas of ground water pollution permitted by the Rule "would not be available for domestic or agricultural use" **[S*ee, e.g.*, SOR, p. 116, ¶ 750, 29 RP 006755, ¶ 750]**, but this is very different from finding that these areas are not Places of Withdrawal. That would be true only if the ground water to be polluted could not be withdrawn "for present or reasonably foreseeable future use," NMSA 1978, § 74-6-5(E)(3), and there is no such finding in the Statement of Reasons. On its face, the Rule permits ground water pollution without regard to Places of Withdrawal.

The Respondents' claim is also absolutely contradicted by the arguments, testimony, and evidence that they presented below. NMED's witness testified under oath that the "proposed Copper Mine Rule does not alter or define the concept of 'place of withdrawal.'" **[Written Testimony of Tom Skibitski, 16 RP 001008-001020]**[3] NMED's counsel specifically emphasized the point on direct examination of Mr. Skibitski:

> Q. Does the proposed rule attempt to define the concept of place of withdrawal in any way?
>
> A. No, it does not.

[3] Attached to NMED's Notice of Intent to Present Technical Testimony. **[16 RP 001003-001476]**

[4-10-13 2 Tr. 243:8-10] NMED's counsel confirmed in closing that "The rule does not make a determination where place of withdrawal is …." **[9-10-13 12 Tr. 2747:20-21]** And Freeport, whose lawyers wrote the Statement of Reasons as well as the challenged provisions of the Rule, made the same point to the Court of Appeals, arguing that the Rule "does not say *how* to determine" or "otherwise define 'place of withdrawal.'" [FMI COA AB 2, 13 (emphasis in original)][4] Accordingly, the Commission never intended the Rule to define, much less protect, Places of Withdrawal. Respondents' contrary argument on appeal, therefore, is a *post hoc* rationalization that has no support in the Rule or the record below.

B. The Rule Permits Ground Water Pollution Without Regard To Places of Withdrawal.

The Rule arbitrarily permits ground water pollution wherever copper mines happen to be located, now or in the future. As Respondents admit, the Rule allows ground water pollution within areas circumscribed by perimeter monitoring wells, which areas the Rule implicitly precludes from being Places of Withdrawal, *a priori*. The Rule permits pollution to remain in these areas, unabated, forever. 3103 Standards within "area[s] of open pit hydrologic containment" are completely waived, both during and after active mining operations. 20.6.7.24(D) and -

[4] FMI filed two answer briefs in the Court of Appeals, one in response to Petitioners and one in response to the Attorney General. Citations in this Reply Brief refer to the former.

.33(D)(1) NMAC. In addition, the Rule permits massive waste rock piles and tailings impoundments located outside the area of open pit hydrologic containment to pollute ground water wherever they are located. 20.6.7.21(B)(1)(c) and -.22(A)(4)(c) NMAC. The Rule thus allows the copper industry to create sprawling ground water contamination sites, covering thousands of acres, at which various pump-and-treat remediation systems must be operated in perpetuity. **[Remand Order, p. 53, ¶ 238, 24 RP 004525, ¶ 238** (describing this situation at the Tyrone Mine)]

C. The Pump-And-Treat Ground Water Remediation Systems Required Under The Rule, Though Appropriate At Superfund And Other Contamination Sites, Have No Place In A Rule That Is Supposed To Prevent Water Pollution.

Respondents admit that the Rule relies on "containment strategies" rather than prevention. **[SOR, p. 204, ¶ 1332, 29 RP 006843, ¶ 1332]** The Rule permits Freeport or any other copper mining company to pollute ground water so long as it also implements pump-and-treat remediation, as necessary, to "contain" the pollution within permitted areas. As explained by Freeport, pump-and-treat remediation within the mine site creates a "cone of depression" in ground water. [FMI AB 4-5] This induces clean ground water from offsite to flow into and through the polluted areas onsite, where it is contaminated and eventually

produced at various pumping centers—either at an open pit or an interceptor well.[5] Unless the contaminated water so produced can be used in the mining process,[6] it must be treated and disposed of during active operations. *See* 20.6.7.17(C)(3) NMAC (governing "process water[7] or impacted stormwater treatment system plans and specifications"). Under the Rule, this process of pump, treat and dispose is allowed to continue in perpetuity after active operations cease. 20.6.7.33(H) NMAC ("Closure water management and water treatment plan") and 20.6.7.35 NMAC ("Post-Closure Requirements").

The Rule's pollution "containment strategy" clearly is not a preventative tool; it is an after-the-fact remedy. This same remedy is typically used at Superfund Sites under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675 (2002).

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[5] Prior to the Rule, Freeport's predecessor had committed to prevent this by installing "new capture wells" to "collect [clean] ground water before it becomes contaminated." **[Remand Order, p. 55, ¶ 245, 24 RP 004527, ¶ 245]** The Rule does not require this.

[6] Aside from water quality concerns, the produced water could not legally be used unless the operator possessed appropriate water rights. NMSA 1978, § 72-12A-5(A)(1980) ("No water rights may be established solely by mine dewatering.")

[7] "Process water" includes "any water containing water contaminants in excess of [3103 Standards] that is generated, managed or used within a copper mine facility including ... pit dewatering water [and] intercepted ground water ...." 20.6.7.7(B)(50) NMAC.

See, e.g., City of Wichita, Kansas v. Trustees of APCO Oil Corp., 306 F.Supp.2d 1040, 1079 (D. Kan., 2003) (generally describing pump-and-treat system employed to remediate contaminated ground water at Superfund Site); *N.M. Mining Assn. v. N.M. Water Quality Control Comm.*, 2007-NMCA-010, ¶20, 141 N.M. 41 (describing use of long-term pump-and-treat systems to abate water pollution at uranium mines). Pump-and-treat systems are imposed at Superfund Sites as a remedy to contain ground water pollution caused by illegal and (typically) accidental releases of hazardous substances into the environment. Under the Rule, however, these systems must be routinely deployed because the Rule permits intentional releases of hazardous substances into the environment at copper mines.

Pump-and-treat is an appropriate remedy at Superfund Sites, but it has no place in a Rule that is supposed to prevent water pollution from occurring in the first place. NMSA 1978, § 74-6-4(K) (requiring the Commission to specify methods to *prevent* water pollution at copper mines). The fact that the Rule must rely on pump-and-treat remedial systems to contain ground water pollution demonstrates conclusively that the Rule does not prevent, and was not intended to prevent, water pollution.

D. The Rule Allows The Areas Of Permitted Ground Water Pollution To Be Expanded Administratively Without Public Notice, Hearing, Or Right Of Appeal.

Respondents claim that the Rule defines Place of Withdrawal, *a priori*, as being located outside the areas circumscribed by perimeter monitoring wells. According to Respondents, these outside areas are forever protected, "without exception." [WQCC AB 3] Respondents, however, neglect to disclose that the areas inside the perimeter monitoring well networks, *i.e.*, the areas implicitly defined as *not* Places of Withdrawal, may be expanded under the Rule, without public notice, hearing, or right of appeal.

The Act requires the Commission "by regulation [to] develop procedures that ensure that the public ... shall receive notice of each application for issuance, renewal or modification of a permit." NMSA 1978, § 74-6-5(F)(2005). Furthermore:

> No ruling shall be made on any application for a permit without opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. The hearing shall be recorded. Any person submitting evidence, data, views or arguments shall be subject to examination at the hearing.

NMSA 1978, § 74-6-5(G)(2005). The Act requires notice and an initial evidentiary public hearing before the NMED, which must provide notice of its decision to all

persons who participated in the permitting action. NMSA 1978, § 74-6-5(N)(2005). These persons, if adversely affected by the action, may appeal NMED's decision to the Commission, NMSA 1978, § 74-6-5(O)(2005), and ultimately to the Court of Appeals. NMSA 1978, § 74-6-7(A)(1993).

The Rule largely circumvents the Act's public notice, hearing, and appeal requirements by creating an unprecedented definition, called a "discharge permit amendment":

> "Discharge permit amendment" means a minor modification of a discharge permit that does not result in a significant change in the location of a discharge, an increase in daily discharge volume of greater than 10% of the original daily discharge volume approved in an existing discharge permit for an individual discharge location, a significant increase in the concentration of water contaminants discharged, or introduction of a new water contaminant discharged.

20.6.7.7(B)(19) NMAC. An application for a discharge permit amendment may be submitted at "any time" under the Rule, 20.6.7.14(A) NMAC, and is "administratively reviewed and evaluated by the [NMED] *and is not subject to public notice or a public hearing*." 20.6.7.14(C) NMAC (emphasis added). The Rule thus effectively strips the public of its statutory right to notice, hearing, and right of appeal regarding any agency action characterized as a "discharge permit amendment."

The term, "discharge permit amendment," is not in the Act or any other Commission regulation; it only occurs in the Rule. This unprecedented definition allows Freeport to change the location of its perimeter monitoring wells without public notice, because such changes fall easily within the definition of a "discharge permit amendment." Merely changing monitoring well locations does not "change … the location of a discharge," "increase [the] daily discharge volume," "increase … the concentration of water contaminants [being] discharged," or introduce "a new water contaminant." Therefore, because the Rule implicitly precludes the areas circumscribed by perimeter monitoring wells from being Places of Withdrawal, the extent of permitted ground water pollution under the Rule may be expanded "any time" through one or more discharge permit amendments.

Accordingly, the Rule does not protect Places of Withdrawal. On the contrary, it arbitrarily permits ground water pollution within areas circumscribed by perimeter monitoring wells, and these areas of permitted pollution may be expanded administratively without public notice, hearing, or right of appeal.

E. Section 20.6.7.10(J)(3) Of The Rule Provides No Standard For Identifying, And Thus No Means Of Protecting, Places of Withdrawal.

Respondents place much stock in Section 20.6.7.10(J)(3) of the Rule. This Section appears in context as follows:

> J. The secretary [of the NMED] shall approve a discharge permit provided that it poses neither a hazard to public health nor undue risk to property, and:
>
> (1) the requirements of the copper mine rule are met;
>
> (2) the provisions of 20.6.2.3109 NMAC are met, with the exception of Subsection C of 20.6.2.3109 NMAC; and
>
> (3) *the denial of an application for a discharge permit is not required pursuant to Subsection E of Section 74-6-5 NMSA 1978.*

20.6.7.10(J) NMAC (emphasis added). Section 74-6-5(E)(3), cited in the third numbered paragraph, establishes the Act's Place of Withdrawal standard. Respondents argue that the Rule's reference to this statutory standard saves the Rule from invalidation, because the statute forbids the exceedance of 3103 Standards at Places of Withdrawal. This argument is not sound.

First, it is logically inconsistent to argue that the Rule defines Places of Withdrawal, *a priori*, based on monitoring well locations, and, at the same time, argue that NMED may disregard the definition.[8] Second, Respondents' argument is again the product of circular reasoning. They argue that the Rule complies with the Act because the Rule requires compliance with the Act. If this reasoning were sound, then any regulation could evade invalidation, no matter how inconsistent with its underlying statute, simply by including a provision that required

[8] *See* footnote 2, *supra*.

compliance with the statute. But such provisions merely express an axiom of administrative law—agencies must comply with their statutory authority. Whether compliance actually exists, however, is for the Court to decide.

Respondents' argument begs the question in this appeal: Does the Rule protect Places of Withdrawal from water pollution? *Cf. Cadena v. Bernalillo Co. Bd. of County Commissioners*, 2006-NMCA-036, ¶ 14, 139 N.M. 300 (merely locating a landfill on a generalized map "begs the question" of whether it is actually located within a "crucial area," as expressly defined by county ordinance). The Court of Appeals correctly held in *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Commission*, 2006-NMCA-115, 140 N.M. 464 ("*Tyrone*") that this question cannot be answered unless the Commission first adopts some rational basis for identifying Places of Withdrawal. *Id.*, ¶¶35-36.

On remand from *Tyrone*, after providing additional public notice, the Commission did just that in the "Tyrone Remand Adjudication." After 24 days of hearing, the Commission adopted the following seven factors for identifying Place of Withdrawal:

(1) Site hydrology and geology,

(2) The quality of ground water prior to any discharge,

(3) Past and current land use,

(4) Future land use,

(5) Past and current water use,

(6) Potential future water use and potential future water demand, and

(7) Population trends.

[Remand Order, p. 78-79, ¶¶ 15-21, 24 RP 004550-004551, ¶¶ 15-21] Whereas the present Commission allowed Freeport to craft a special Rule for itself, one that expressly allows ground water pollution at existing and future copper mines, the prior Commission intended the foregoing factors to be applied universally to protect any Place of Withdrawal. The prior Commission recognized that Place of Withdrawal is not merely an intellectual construct devoid of intrinsic meaning; it refers to physical water supplies (*i.e.*, aquifers) that exist in the world. The universal factors developed by the prior Commission, therefore, can be used to identify and protect Places of Withdrawal at any type of site.

However, under the Statement of Reasons that Freeport wrote, the current Commission purported to "supersede" the universal factors developed by the prior Commission, but only as to copper mines. **[SOR, p. 203-204 ¶¶ 1327-1330, 29 RP 006842-006843, ¶¶ 1327-1330]** As a result, neither NMED nor the public has any basis other than the Rule to identify Places of Withdrawal. On its face, the Rule permits the copper industry to pollute ground water by precluding vast areas

circumscribed by perimeter monitoring from being Places of Withdrawal, *a priori*. The Rule gives NMED no discretion to prevent ground water pollution in those areas.

Therefore, notwithstanding the "wink" to statutory compliance provided in Section 20.6.7.10(J)(3), the Rule is contrary to the Act. It does not prevent water pollution or protect Places of Withdrawal. On the contrary, it arbitrarily permits water pollution at all copper mines. This gives Freeport a windfall, the right to pollute the public's ground water wherever its mines happen to be located, but it clearly does not prevent water pollution or protect Places of Withdrawal.

II. THE GROUND WATER POLLUTION PERMITTED BY RULE IS UNPRECEDENTED.

A. NMED Did Not Intentionally Permit Ground Water Pollution At Freeport's Mines Prior To The Rule.

According to Respondents, the Rule merely codifies NMED's past practice of routinely allowing the copper industry to cause widespread ground water pollution. [WQCC AB 2, 16; NMED AB 10] Respondents ignore both the law and uncontroverted facts.

In their brief-in-chief, Petitioners explained that the Act expressly requires the Commission to adopt regulations that prevent water pollution and protect Places of Withdrawal through enforcement of 3103 Standards. [BIC 4-13] The

original regulations that the Commission promulgated in 1977 ("Original Regulations"), and that remain in effect today, met this mandate. They require the NMED to deny a proposed discharge plan unless, among other things, the discharger "demonstrates that approval of the [proposed plan] will not result in either concentrations in excess of [3103 Standards] or the presence of any toxic pollutant at any" Place of Withdrawal. 20.6.2.3109(C)(2) NMAC. Under this provision, unless the discharger demonstrates that no Place of Withdrawal will be impaired, NMED required 3103 Standards to be met everywhere in ground water.

None of the permits cited by Respondents indicates that Freeport (including its predecessor, Phelps Dodge) ever made this demonstration, and therefore, "the [NMED took] the position that ground water standards must be met at all points underneath a discharge site." [NMED AB 3] The *Tyrone* adjudication establishes this fact conclusively.

In *Tyrone*, after years of litigation, Phelps Dodge-Tyrone, Inc. ("Tyrone") appealed the finding by both NMED and the Commission that the *entire* Tyrone Mine was within a Place of Withdrawal where 3103 Standards must be met. **[*See also* Remand Order, p. 4, ¶ 9, 24 RP 004476, ¶ 9** ("As a general matter, NMED took the position that the entire Tyrone Mine site is a place or places of withdrawal of water for present or reasonably foreseeable future use, and therefore, the ground

water underneath the mine site should be protected.")] If Respondents' revisionist view of NMED's permitting history were correct, there would have been no decade-long litigation over the meaning of Place of Withdrawal and no *Tyrone* appeal.

Nevertheless, on remand from *Tyrone*, Tyrone and another party claimed that NMED had historically permitted ground water pollution on private property, up to the property line. **[Remand Order, p. 18-21, ¶¶ 63 – 81, 24 RP 004490-004493, ¶¶ 63 - 81]** Based on this alleged history, Tyrone claimed the right under the Act and Original Regulations to pollute ground water up to its mine permit boundary.[9] **[Remand Order, p. 5, ¶ 10, 24 RP 004477, ¶ 10]** Tyrone offered to implement pump-and-treat remediation to contain the pollution onsite for the next one hundred years. **[*Id.*, ¶ 11]** Although rejected by NMED and the Commission at the time, Tyrone's "pollute and contain" strategy is now incorporated into the Rule.

After a lengthy evidentiary hearing, the prior Commission unanimously rejected Tyrone's containment strategy as well at its characterization of NMED's

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[9] The mine permit boundary encompasses the "permit area" identified in a mining permit issued by the Mining and Minerals Division under the New Mexico Mining Act, NMSA 1978, §§ 69-36-1 through -20 (1993) and its implementing regulations, 19.10.1 NMAC. The "permit area" is the area "on which mining operations are conducted or cause disturbance." 19.10.1.7(P)(3) NMAC.

past conduct. It found that NMED had issued "nine ground water discharge permits" for the Tyrone Mine between 1978 and 2007. **[Remand Order, p. 6, ¶ 15, 24 RP 004478, ¶ 15]** The "fundamental purpose" of these permits, the Commission found, "is to *prevent* ground water contamination underneath and around the areas of the mine that are permitted and to require abatement of ground water contamination that has occurred." **[*Id.*, ¶ 16** (emphasis added)**]** Moreover:

> None of the operational permits authorizes Tyrone to contaminate ground water in excess of ground water standards ....

[Remand Order, p. 7, ¶ 18, 24 RP 004479, ¶ 18] The Commission found that the ground water pollution at the Tyrone Mine occurred, not because NMED authorized it, but "as a result of [Tyrone's] failure under its operational permits to prevent ground water contamination at the site". **[*Id.*, ¶ 19]** It is to address Tyrone's failure that the operational discharge permits and closure permit at issue in *Tyrone* (DP-341) all include abatement requirements, including pump-and-treat remediation.[10] **[Remand Order, p. 7-8, ¶¶ 19-24, 24 RP 004479-004480, ¶¶ 19-24]**

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[10] The Commission promulgated separate abatement regulations in 1995, requiring remediation of polluted ground water to 3103 Standards within Places of Withdrawal. 20.6.2.4101 to -.4115 NMAC. NMED may enforce abatement requirements under these separate regulations under a stand-alone "abatement plan" *or* under a discharge permit. 20.6.2.4105(A)(6) NMAC. It is because NMED took the latter approach at Freeport's mines that Freeport's discharge permits include abatement requirements.

The Commission's unappealed finding that NMED did not intentionally permit ground water pollution at Freeport's mines is not a quasi-legislative policy statement; it is a final "adjudicative determination," one that the Commission made on the record after a noticed evidentiary hearing at which witnesses were sworn and subject to cross examination. Restatement (Second) of Judgments § 83, Adjudicative Determination (1982) ("*Restatement*"); *Shovelin v. Central New Mexico Elec. Co-op., Inc.*, 1993-NMSC-015, ¶ 12, 115 N.M. 293 (citing the Restatement with approval); 20.1.3 NMAC (setting out Commission's adjudicatory procedures). The Commission necessarily decided the issue to resolve the legal claim made by Phelps Dodge-Tyrone, Freeport's predecessor, that it had the right to pollute ground water beneath its mines.

> Where an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication. Decisional processes using procedures whose formality approximates those of courts may properly be accorded the conclusiveness that attaches to judicial judgments.

Restatement, cmt. b. Respondents should not be permitted to brush aside the Commission's prior adjudicative determination.

"[A]gencies act arbitrarily and capriciously when they 'ignore [their] own relevant precedent.'" *Nat'l Fed'n of Fed. Employees, FD-1 v. Fed. Labor Relations Auth.*, 412 F.3d 119, 121 (D.C. Cir. 2005)(quoting *B B & L, Inc. v. NLRB,* 52 F.3d

366, 369 (D.C. Cir. 1970). Although the Statement of Reasons written by Freeport alludes to "past *de facto* NMED practices (albeit not policies) in permitting copper mining units" **[SOR, p. 202, ¶ 1325, 29 RP 00681, ¶ 1325]**, it contains no finding that NMED ever intended to authorize ground water pollution at Freeport's mines, nor is there anything in the Statement of Reasons that qualifies, refutes, or even mentions the Commission's prior adjudicative determination that NMED did not authorize it. This prior determination is uncontroverted.

Moreover, both NMED and Freeport should be collaterally estopped from relitigating the issue of whether NMED intentionally allowed ground water at Freeport's mines. *Shovelin*, 1993-NMSC-015 (holding that administrative determinations may have preclusive effect). The elements of collateral estoppel are:

> (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.

1993-NMSC-015, ¶ 10.

The issue of whether NMED permitted pollution at Freeport's mines was actually, necessarily, and extensively litigated in the Tyrone Remand Adjudication. Freeport's predecessor (Phelps Dodge-Tyrone) and NMED were both parties to

that Proceeding, and the subsequent proceeding below involved a different cause of action.

In addition, NMED should be judicially estopped from reversing the position it successfully maintained in the Tyrone Remand Adjudication and throughout the decade of litigation leading up to that proceeding. "The purpose of the doctrine of judicial estoppel is to stop 'a party from playing fast and loose with the court' during litigation." *Santa Fe Pac. Trust, Inc. v. City of Albuquerque*, 2012-NMSC-028, ¶ 33, 285 P.3d 595 (quoting *Keith v. ManorCare, Inc.*, 2009-NMCA-119, ¶ 36, 147 N.M. 209.) NMED should not be allowed to reverse itself now, especially since it presented no witnesses below who had any discharge permit experience, much less any experience actually issuing permits for Freeport's mines. Moreover, GRIP supported NMED's position in the Tyrone Remand Adjudication, which NMED established through extensive sworn testimony, and GRIP would be prejudiced if NMED were allowed to reverse itself now on appeal. *Id.*, ¶ 32 ("[W]hile not an absolute requirement, judicial estoppel will be especially applicable when the party's change of position prejudices a party who had acquiesced in the former position.") *Id.*, ¶ 32 (quoting *Keith v. ManorCare, Inc.*, 2009-NMCA-119, ¶ 37, 147 N.M. 209.)

Respondents seek to evade the Commission's prior adjudicative determination by pointing out that the proceeding below was a rulemaking, quasi-legislative in nature and aimed at governing future conduct. Although that is true, the procedure under which the Commission conducts rulemaking is highly adjudicative in nature—it is on the record, notice is provided, witnesses are sworn and subject to cross examination, and parties are represented by counsel who file pleadings, make objections, and provide legal argument. NMSA 1978, § 74-6-6(C) & (D); **[*See also*, Various Procedural Orders: 13 RP 000101-000108; 15 RP 00898, 00904; 26 RP 05374-05378]** Such formality would be pointless if the Commission is free to disregard its precedents and prior adjudicative determinations. Accordingly, neither Freeport nor NMED should be permitted to relitigate a purely factual issue regarding NMED's past conduct in any subsequent proceeding, whether administrative or judicial. *See Shovelin; Restatement, cmt. b.*

B. The Dairy Rule Prohibits Ground Water Pollution Above 3103 Standards.

Respondents claim that the Rule is no different than that adopted by the prior Commission to control contaminant discharges at dairies pursuant to Section 74-6-4(K), referred to as the "Dairy Rule." 20.6.6 NMAC. Respondents misread the Dairy Rule.

Unlike the Copper Mine Rule, the Dairy Rule does not permit ground water pollution or rely on pump-and-treat remediation or any other form of pollution "containment" after-the-fact. Whereas the Copper Mine Rule relies on "containment strategies," the Dairy Rule relies on prevention. Accordingly, none of the definitions or concepts used in the Copper Mine Rule to permit water pollution occurs in the Dairy Rule. The Dairy Rule does not depend on "applicable standards," "discharge permit amendments," "areas of open pit hydrologic containment," "open pit surface drainage areas," "interceptor systems," or "perimeter monitoring wells." No comparable definitions or concepts occur in the Dairy Rule, because the Dairy Rule is designed to prevent ground water pollution, not permit it.

Unlike the Copper Mine Rule, no provision of the Dairy Rule renders 3103 Standards inapplicable to ground water beneath dairies. On the contrary, the Dairy Rule expressly requires compliance with 3103 Standards, not just at discrete perimeter monitoring wells, but everywhere in ground water. 20.6.6.10(H)(2), -.18(E), -.20(B)(1) and (2), -.27(A) and (B), and -.30(B) NMAC. The Dairy Rule is designed to actually prevent dairies from polluting ground water by requiring impoundments and other pollution sources to be constructed on impermeable synthetic liners or their equivalent. 20.6.6.17(D)(5), -.20(B), and -.27(B)(2)(b)

NMAC. The Copper Mine Rule, by contrast, allows NMED to require liners only if an "interceptor system" would fail to prevent the permitted ground water pollution from spreading beyond perimeter monitoring wells.

As Respondents point out, the Dairy Rule includes a provision equivalent to Section 20.6.7.10(J) of the Copper Mine Rule. *See* 20.6.6.10(J) NMAC. Similar to the Copper Mine Rule, this section exempts dairy operators from the case-by-case burden of demonstrating that their proposed discharge will not impact Places of Withdrawal. 20.6.6.10(J)(2) NMAC (exempting dairies from compliance with 20.6.2.3109(C)). Also similar to the Copper Mine Rule, this section requires NMED to approve a discharge permit if "denial ... is not required pursuant to" Section 74-6-5(E) of the Act. 20.6.6.10(J)(3) NMAC. However, in stark contrast to the Copper Mine Rule, the Dairy Rule does not allow any ground water to be polluted above 3103 Standards.

As already discussed, the Dairy Rule requires 3103 Standards to be met everywhere in ground water. Therefore, it makes sense to exempt dairies from the case-by-case burden of demonstrating that Places of Withdrawal will be protected. Dairy owners are appropriately relieved of this burden because, under the Dairy Rule, it is assumed that all ground water underlying a given dairy is within a Place of Withdrawal where 3103 Standard must be met. The Copper Mine Rule takes the

opposite approach. It permits vast areas of ground water pollution by precluding these areas from being Places of Withdrawal.

C. EPA's RCRA Regulations Prohibit The Release of Contaminants Into The Environment And Prohibit Ground Water Pollution Above Water Quality Standards.

Respondents claim that the Rule is equivalent to EPA's regulations under RCRA. Respondents are mistaken.

Congress expressly required hazardous waste landfills and other RCRA regulated facilities to be constructed atop impermeable double liners with leachate collection systems, unless the owner/operator proves that an "alternative design and operating practices, together with location characteristics, *will prevent the migration of any hazardous constituents into the ground water or surface water at least as effectively as such liners and leachate collection systems*." 42 U.S.C. § 6924(o)(2)(1996) (emphasis added). EPA's regulations faithfully carry out this mandate. *See, e.g.*, 40 C.F.R. 264.251(a)(1)(2006) (requiring waste piles to have a "liner ... installed to prevent any migration of wastes out of the pile into the adjacent subsurface soil or ground water"); 40 CFR 264.251(a)(2)(2006) (requiring waste piles to have leachate collection and leak detection systems). Thus, in stark contrast to the Rule, EPA's RCRA regulations are designed to actually prevent releases of hazardous substances into the environment.

In an attempt to support the Rule's "point of compliance" system, Respondents point out that EPA's RCRA Regulations incorporate a point-of-compliance system even though RCRA itself does not expressly authorize it. 40 C.F.R. § 264.95 (1982). However, unlike the Act, RCRA does not require compliance at Places of Withdrawal. As described above, RCRA simply prohibits the release and migration of hazardous substances into any ground water, and this prohibition is implemented through EPA's regulations. EPA's purpose in adopting a point-of-compliance system, moreover, was not to permit water pollution. The purpose was "to avoid the implication that monitoring and corrective action wells should be drilled through the structures which are designed to control the waste ...." *Ground-Water Monitoring at Hazardous Waste Facilities*, 53 Fed. Reg. 28160, 28162. No similar structures, such as liners, are required under the Rule.[11] Unlike RCRA and EPA's implementing regulations, the Rule permits the intentional release of hazardous substances at copper mines to pollute ground water, and it allows this pollution to migrate up to and even beyond perimeter monitoring wells.

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[11] The only exception is leach ore stockpiles located outside the surface drainage area, 20.6.7.20(A) NMAC, but most operators would deploy liners in any case to collect the pregnant leachate solution. However, the Rule allows even leach ore stockpiles to be constructed atop bare ground within the surface drainage area. 20.6.7.20(A)(1)(f) NMAC.

III. THE ACT DOES NOT AUTHORIZE THE COMMISSION TO PERMIT GROUND WATER POLLUTION AT ALL EXISTING AND NEW COPPER MINES IN THE NAME OF "BALANCE."

Respondents argue that the Act's express purposes of preventing and abating water pollution must be balanced against economic considerations, and that the Rule strikes the appropriate balance. This is not the case.

The purpose of the Act is expressed in simple and direct language: The Commission shall prevent and abate water pollution. NMSA 1978, § 74-6-4(D), (E) and (K); NMSA 1978, § 74-6-9(D)(1993); *Bokum Res. Corp. v. New Mexico Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 59, 93 N.M. 546 ("The objective of the Water Quality Act … is to abate and prevent water pollution"); *cf. Pub. Serv. Co. of New Mexico v. New Mexico Envtl. Imp. Bd.*, 1976-NMCA-039, ¶ 7, 89 N.M. 223 ("The legislative mandate in this instance is expressed in simple and direct language: The board shall prevent or abate air pollution."). No provision of the Act authorizes the Commission to permit water pollution in the interest of copper mining or other purposes unrelated to the prevention and abatement of water pollution. Similarly, nothing in the Act authorizes the Commission to manipulate the meaning of Place of Withdrawal in order to accommodate copper mining. Respondents are reading into the Act language which is not there. *Westgate Families v. County Clerk of Inc. Los Alamos County*, 1983-NMSC-061, ¶

7, 100 N.M. 146 ("*we will not read into the Act language which is not there, particularly if it makes sense as written*") (emphasis in original).

The Legislature intended the appropriate economic balance to be achieved through individual variances. Under the Act, the Commission may grant variances on a case-by-case basis when it finds "that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity." NMSA 1978, § 74-6-4(H)(1993). The Rule, in contrast to the Act, effectively grants the entire copper mining industry a blanket variance from 3103 Standards. As the Commission states, the Rule obviates the need for any case-by-case determination. It allows ground water to be polluted in *all* cases. This aspect of the Rule is not the product of an agency's careful balancing of competing interests; it is that of Freeport's hand on the scale.

The notion that the Place of Withdrawal standard can be manipulated in the interest of achieving "balance" comes from *Tyrone*, where the Court of Appeals held:

> The critical [Place of Withdrawal] phrase [set out at Section 74-6-5(E)(3)] suggests that the legislature meant for impacts to be measured in a practical and sensible fashion, but the issue is complicated by the fact that groundwater and surface water systems are interconnected. Contaminated waters migrate into areas that were previously pristine. We have no doubt that the legislature intended to limit that kind of migration. On the other hand, mining is a necessary and important component of our economy and our modern way of life.

> *We believe that the legislature intended that our laws, regulations, and any interpretation of them, strike a wise balance between these competing interests. Cf.* NMSA 1978, § 69–36–2 (1993) (recognizing that mining is vital to the welfare of New Mexico); § 74–6–4(D) (stating that, in adopting regulations, the Water Quality Commission should consider, among other things, the economic impact of the regulations); *Sierra Club*, 2003–NMSC–005, ¶ 28, 133 N.M. 97, 61 P.3d 806 (stating that "the overall purpose of the Mining Act [is] to strike a balance between the economic and environmental impacts of mining").

Tyrone, ¶ 29 (emphasis added). To the extent the Court of Appeals held that "balance between ... competing interests" should be achieved by manipulating the meaning of Place of Withdrawal, it erred. First, as already discussed, the Legislature intended balance to be achieved on a case-by-case basis through individual variances.

Second, the Court of Appeals admitted that deeming the entire Tyrone Mine a Place of Withdrawal, as both the NMED and the Commission had done, "is arguably within the plain language of the statute," but nevertheless held it to be an overly broad interpretation of the Act. *Id.* ¶ 33. In reaching this conclusion, the Court relied primarily on an entirely different statute, the New Mexico Mining Act, rather than the Act itself. *Id.* ¶ 30, 33. In contrast to the Mining Act, nothing in the Water Quality Act suggests that the special interests of the copper industry should be balanced against the Act's fundamental purposes of preventing and abating

water pollution.[12] Moreover, allowing such an interpretation is a slippery slope, one that inevitably leads to routine water pollution by rule, not just at copper mines, but at all facilities operated by industries having sufficient power and influence.

Third, the only section of the Act cited by the Court of Appeals in support of manipulating the meaning of Place of Withdrawal to achieve balance is 74-6-4(D) (1973, as amended through 2003). This section, now codified at NMSA, § 74-6-4(E), provides in pertinent part:

> In making regulations [to prevent or abate water pollution], the commission shall give weight it deems appropriate to all relevant facts and circumstances, including:
>
> (1) character and degree of injury to or interference with health, welfare, environment and property;
>
> (2) the public interest, including the social and economic value of the sources of water contaminants;
>
> (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;

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[12] But even the Mining Act would not allow remedies that require perpetual care. It requires mining operations to be "designed to meet *without perpetual care* all applicable environmental requirements imposed by the New Mexico Mining Act and regulations adopted pursuant to that act and other laws following closure." NMSA 1978, § 69-36-12(B)(4)(1993) (emphasis added).

(4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;

(5) feasibility of a user or a subsequent user treating the water before a subsequent use;

(6) property rights and accustomed uses; and

(7) federal water quality requirements.

NMSA 1978, § 74-6-4(E). The Court of Appeals cited Section 74-6-4(E) for the proposition that the Commission must consider "the economic impacts of the regulations," *Tyrone* ¶ 29, but this consideration is not relevant to identifying Places of Withdrawal.

Sections 74-6-4(E) requires the Commission to "adopt, promulgate and publish regulations to prevent or abate water pollution in the state ...." Under the Act, "water pollution" and Place of Withdrawal are separate and distinct concepts. *See* NMSA 1978, § 74-6-2(C)(2003) (defining "water pollution"). Indeed, the Place of Withdrawal standard and the Commission's authority to promulgate regulations to prevent and abate water pollution occur in different sections of the Act. *Compare* NMSA 1978, § 74-6-5(E)(3) (Place of Withdrawal) *with* NMSA 1978, § 74-6-4(E) (authority to promulgate regulations). Therefore, the economic and other factors that the Commission may consider in promulgating regulations to

prevent or abate water pollution have no relevance to how Places of Withdrawal are identified.

As already explained, Places of Withdrawal are physical water supplies, *i.e.*, aquifers, from which ground water may be withdrawn for present or future beneficial use. These water supplies exist independently of copper mining; and, under the Act, the Commission and NMED have an undisputed duty to identify and protect them from water pollution. NMSA 1978, § 74-6-5(E)(3) (prohibiting exceedances of water quality standards at Places of Withdrawal). The Commission breached this duty in promulgating the Rule, because the Rule arbitrarily permits ground water pollution at copper mines without regard to whether the impacted ground water may be withdrawn for present or future use.

IV. RESPONDENTS' MISREPRESENTATIONS OF PETITIONERS' POSITIONS DO NOT JUSTIFY PERMITTING GROUND WATER POLLUTION BY RULE.

A. Petitioners Do Not Seek To Apply 3103 Standards At The Point Of Discharge.

Respondents claim that Petitioners want 3103 Standards enforced at the "point of discharge." [WQCC AB 23] This is not true. The point of discharge is the point at which contaminants are released into the environment, such as the end of an open pipe at the top of a leach ore stockpile. Petitioners have never argued that 3103 Standards should be enforced at the point of discharge. By definition,

3103 Standards apply to ground water. 20.6.2.3103 NMAC ("The following standards are the allowable pH range and the maximum allowable concentration *in ground water*") (emphasis added). Petitioners want the Rule set aside because it does not prevent ground water pollution or protect Places of Withdrawal. On the contrary, it permits 3103 Standards to be exceeded everywhere copper mines happen to be located.

B. Petitioners Do Not Seek To Outlaw The Use Of Monitoring Wells To Monitor Ground Water Quality.

In yet another misrepresentation, Respondents claim that Petitioners are somehow against the use of monitoring wells to measure ground water quality. [WQCC AB 21, 32; FMI AB 72-73] Such an argument would clearly be absurd and Petitioners have never made it. Ground water quality cannot be measured directly except by collecting samples from monitoring wells. However, Petitioners strongly object to the improper use of monitoring wells, not merely to collect ground water samples, but to stake out vast areas of permitted pollution.

C. When It Originally Adopted The Place of Withdrawal Standard In 1977, the Commission Intended It To Be Interpreted In Conjunction With Established Water Law Principles.

Respondents claim that Petitioners raised the clear relationship between water law and Place of Withdrawal for the first time in this Court. This not correct or relevant. [Petitioners' COA BIC 3, 47-48; Petitioners' COA RB 4-5] Moreover,

the Commission itself established the relationship between water law and the Place of Withdrawal standard when it first incorporated the standard into its Original Regulations. [BIC 10-13]

Contrary to yet another misrepresentation by Respondents [WQCC AB 55-57], the incorporation of water law principles into Place of Withdrawal does not mean 3103 Standards can only be enforced at the faucets of homes with domestic wells. As described in this reply and Petitioners' brief-in-chief, the intent of the Act is to protect New Mexico's water resources from pollution, and Places of Withdrawal are included among the State's physical water resources, along with lakes, streams, and reservoirs. Just as the Commission's regulations must prevent pollution of these surface water resources, not just at the point of use but throughout the resource, so too must the regulations prevent pollution of ground water that may be withdrawn for present or future use.

V. THE WQCC'S STATEMENT OF REASONS IS NOT ENTITLED TO DEFERENCE.

Respondents argue that the Commission's Statement of Reasons is entitled to deference. [FMI AB 44; WQCC AB 25] Although it is not characterized as such, the Statement of Reasons contains intermixed findings of fact, conclusions of law, and summaries of the testimony and evidence below. Under normal circumstances, the Court may give "some deference to the agency's interpretation"

of a particular statute, but "the court may always substitute its interpretation of the law for that of the agency's ...." *Regents v. Fed'n of Teachers*, 1998-NMSC-020, ¶17, 125 N.M. 401 (quoting *Fitzhugh v. New Mexico Dep't of Labor,* 1996-NMSC-44, PP21-25, 122 N.M. 173); *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 18, 147 N.M. 523 ("Our analysis is one of statutory construction, which is an issue of law; accordingly, we review the district court's findings and order de novo.") Courts normally accord "greater deference to the agency's [factual] determination[s], especially if the factual issues concern matters in which the agency has specialized expertise." *Id*. But the Commission in this instance is not entitled to the deference courts normally accord administrative agencies.

First, "[c]ourts generally show little deference to an agency's interpretation of its own statute when the interpretation is an unexplained reversal of a previous interpretation or consistent practice." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1994-NMCA-139, ¶ 45, 119 N.M. 29. In this case, the Commission below reversed several long-held positions evidenced in the Remand Order, which was the culmination of ten years of litigation and a 24-day evidentiary hearing on remand from *Tyrone*. The Commission's (and NMED's) former positions are summarized as follows:

(1) Places of Withdrawal may exist under mine units and are entitled to protection under the Act.

(2) Places of Withdrawal are physical water supplies, *i.e.*, aquifers or portions of aquifers from which ground water may be withdrawn for present or reasonably foreseeable use. Places of Withdrawal should be identified and protected on the basis of several universal factors.

(3) A point of compliance system, which allows ground water up-gradient from a monitoring well to be polluted, is inconsistent with the Act's requirement to protect Places of Withdrawal.

(4) Prior to the Rule, NMED did not intentionally permit ground water to be polluted above 3103 Standards at Freeport's mines.

(5) Given appropriate circumstances in a specific case, the Commission may allow ground water pollution above 3103 Standards, even a Places of Withdrawal, by granting a variance following a public adjudicatory hearing.

(6) Ground water that has been polluted above 3103 Standards must be remediated back to Standards unless the Commission allows alternative abatement standards, which are a specific type of variance.

The Commission has reversed each of the forgoing positions. The Rule permits pollution of ground water beneath and around all copper mine units, as a matter of right. No variance is required. The Rule wholly dispenses with the need to identify Places of Withdrawal, except in the negative sense—all areas circumscribed by perimeter monitoring wells are implicitly defined as *not* Places of Withdrawal, *a priori*. These areas may be expanded administratively without public notice, hearing, or right of appeal.

Finally, the Rule incorporates a form of point of compliance, such that ground water pollution is allowed everywhere except at perimeter monitoring wells. And even there ground water may meet "applicable standards" and still exceed 3103 Standards. Given these drastic changes in position, the Court should afford the Commission no deference.

Second, the Commission adopted verbatim the Statement of Reasons that Freeport wrote and that NMED proposed as its own. The record shows that Petitioners obtained three drafts of the Statement of Reasons through the Inspection of Public Records Act. **[*See* Notice of Proposed Testimony and other Evidence Offered in Support of Motion to Stay the Copper Mine Rule Pending Appeal ("Notice of Testimony"), p. 1-3, 35 SRP 06973-07315]** NMED prepared the first draft, which is only 26 pages long and bears no resemblance to the final 214-page Statement of Reasons adopted by the Commission. **[Notice of Testimony, Exhibit I, 35 SRP 07334-07258]** Freeport's attorneys prepared the next two drafts. **[Notice of Testimony, Exhibit F, 35 SRP 06991-074117; Notice of Testimony, Exhibit H, 35 SRP 07193-07233]** These drafts are virtually identical to the final Statement of Reasons except that the drafts bear the client/matter identification numbers, edits, and comments of Freeport's attorneys. **[*Id.*]**

Freeport discounts its admitted authorship of the Commission's Statement of Reasons, arguing that the Commission was aware, at least after the fact, that Freeport was working with NMED. Freeport, however, did more than work on NMED's proposed Statement of Reasons; Freeport wrote it for NMED, but neither party disclosed this fact. In its written closing, Freeport said only that it had "reviewed the [NMED's] positions for the proposed Statement of Reasons to the Commission, and asked the Department to consider [including] Freeport's positions ...." **[Freeport's Written Closing, p. 1-2, 28 RP 06063-06064]** NMED was less forthcoming:

> In consideration of all of the above arguments and for the reasons expressed in the Department's Proposed Statement of Reasons, we ask that the Commission adopt the Department's proposed Copper Rule in its entirety.

[NMED's Written Closing, p. 12, 27 RP 05760] NMED's closing contains no mention of Freeport's hand in writing virtually the entire Statement of Reasons that the NMED proposed and represented as its own work.

Accordingly, when Respondents demand that the Court pay deference to the Commission, they are actually demanding that the Court pay deference to Freeport. Freeport is entitled to no deference. Freeport is not a public agency; it is a private company that answers solely to its stockholders. Freeport wrote the Commission's Statement of Reasons and the parts of the Rule that allow water pollution above

3103 Standards. It is no coincidence that these provisions legitimize the extensive water pollution that now exists at Freeport's mines and authorize more of the same in the future. The Statement of Reasons is a rationalization of this pollution from Freeport's self-interested perspective. For that reason, the Court should accord the Commission no deference. *Cf. Sierra Club v. Sigler*, 695 F.2d 957, 962-963, note 3 (5th Cir. Tex. 1983) (forbidding federal agency from "abdicat[ing] its statutory duties by reflexively rubber stamping a statement prepared by others" (quoting *Sierra Club v. Lynn*, 502 F.2d 43, 58-59 (5th Cir., 1974), *cert. denied,* 421 U.S. 994 (1975)).

CONCLUSION

For the forgoing reasons, Petitioners respectfully request the Court to reverse the Court of Appeals, set aside the Copper Mine Rule as contrary to the Water Quality Act, and remand the Rule to the Commission for further proceedings consistent with the Water Quality Act and the Court's opinion.

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