

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO COURT OF APPEALS

New Mexico Environment Department, New Mexico
Water Quality Control Commission,

Appellees/Respondents,

v.

No. 35279

Gila Resources Information Project, Amigos Bravos,
and Turner Ranch Properties,

Appellants/Petitioners.

v.

Freeport-McMoRan Chino Mines Company, Freeport-
McMoRan Tyrone, Inc., and Freeport-McMoRan Cobre
Mining Company,

Intervenor-Appellees/Respondents

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STATEMENT OF COMPLIANCE

Counsel for Petitioners certifies that this Petition for a Writ of Certiorari complies with the word limitation of New Mexico Rule of Appellate Procedure 12-502.D(3). The body of this Petition contains 3,076 words, Times New Roman typeface. The word count for this Petition was obtained using Microsoft Word 2007.

LIST OF ATTACHMENTS

Counsel for Petitioners certifies that the following documents are attached to this Petition for a Writ of Certiorari:

- The Opinion of the Court Appeals (Exhibit A),
- The Copper Mine Rule (Exhibit B), and
- The New Mexico Water Quality Control Commission's Statement of Reasons for adoption of the Copper Mine Rule (Exhibit C).

INTRODUCTION

Petitioners seek reversal of the attached Court of Appeals' Opinion ("Opinion") in *Gila Resources Information Protect et al. v. Water Quality Control Commission et al.* (Nos. 33,237, 33,238 and 33,245, consolidated). **The Opinion, issued on April 8, 2015,** upholds the validity of the Copper Mine Rule ("Rule"), 20.6.7 NMAC, which the Water Quality Control Commission ("Commission") adopted under the Water Quality Act ("WQA"), NMSA 1978, Sections 74-6-1 through -17(2013). Section 74-6-5(E)(3)(1993) of the WQA prohibits pollution of groundwater above water quality standards¹ "at any place of withdrawal of water for present or reasonably foreseeable future use." NMSA 1978, § 74-6-5(E)(3); *Phelps Dodge Tyrone, Inc. v. Commission*, 2006-NMCA-115, ¶¶ 26-38, 140 N.M. 464 (discussing at length the requirement under Section 74-6-5(E)(3) to meet water quality standards at places of withdrawal). The Rule circumvents this fundamental requirement of the WQA by arbitrarily excluding large areas at copper mines from being "places of withdrawal," thus permitting these mines to pollute groundwater for hundreds of years.

According to the Court of Appeals ("COA"), "determining the locations of places of withdrawal under [the WQA] was, as it always had been, left to the

¹ "Water quality standards" here refers to the concentration limits established by the Commission for various "water contaminants" (as defined at Section 74-6-2) and codified at 20.2.6.3103 NMAC. The Opinion refers to these as "3103 Standards."

Commission's discretion." Opinion ¶32. Thus, although the Commission in 2009 had adopted seven objective factors for identifying places of withdrawal at all types of facilities, by adopting the Rule the Commission repealed these factors without prior notice or valid explanation.

As correctly recognized by the COA, the Rule expressly permits areas of groundwater pollution above 3103 Standards and thus implicitly excludes these areas from being places of withdrawal. As explained by the COA:

Pursuant to the [Rule] all areas within a mine facility except areas that fall within the perimeter of the monitor wells must meet the 3103 standards. ... Accordingly, every place within a mine facility at and beyond the monitor-well perimeters is protected from ground water pollution, and therefore, may be used as a "place of withdrawal."

Opinion ¶34. The Rule thus establishes a "point of compliance" system in which groundwater pollution underlying extensive areas is permitted so long as the concentration of contaminants detected at the "perimeter" of the area are within "applicable standards."²

Under the Rule, monitoring wells are located around the outside perimeter of massive open pits, waste rock and ore stockpiles, leach dumps, and other mine units that (combined) can occupy 10,000 acres or more at a typical open pit copper mine. Thus, by defining places of withdrawal as being "beyond the monitoring

² The Rule defines "applicable standards" as *either* 3103 Standards *or* "Alternative Abatement Standards." 20.6.7.7(B)(2) NMAC. Alternative Abatement Standards exceed 3103 Standards and apply to polluted groundwater that cannot be reclaimed to 3103 Standards. 20.6.2.4103(F) NMAC.

well perimeters” at copper mines, the Rule permits thousands of acres of public groundwater within those perimeters to be polluted above 3103 Standards. The Rule thus allows pollution of pristine groundwater and places no limit on the extent, depth, or duration of the pollution.

The issue presented here is not whether open pit copper mines should be allowed to operate in New Mexico. They should be and they can be allowed under Petitioners’ view of the law. The basic issue is whether the Commission has discretion under the WQA to adopt a Rule that allows every existing and future copper mine in New Mexico, wherever located, to pollute good quality groundwater above 3103 Standards without any prior determination of whether the polluted area is a protected place of withdrawal.³ If the Commission has this discretion with respect to copper mines, then it has the same discretion regarding other types of mines and facilities. The Legislature could not have intended this result, because it could ultimately defeat the basic purpose of the WQA, which is to “prevent or abate water pollution” and protect places of withdrawal.

QUESTIONS PRESENTED

1. Does the Rule violate the WQA because it permits groundwater pollution at all copper mines without requiring any prior determination as to whether the areas of pollution are places of withdrawal?

³ “Pollute” or “pollution” here means groundwater pollution above 3103 Standards.

2. Does the Rule violate the WQA and *Phelps Dodge* because it fails to provide or reference any factors or other rationale for identifying places of withdrawal?

3. Does the Rule violate the WQA by establishing a “point of compliance” system as a proxy for “place of withdrawal?”

4. Did the COA err in holding that the determination of place of withdrawal is committed to the Commission’s discretion?

5. Does the Rule violate the WQA because it permits water pollution rather than preventing or abating it?

6. Does the Commission’s repeal of the factors it formerly adopted to identify places of withdrawal constitute arbitrary agency action?

7. In establishing areas that cannot be places of withdrawal under the Act, is the Rule inconsistent with Article XVI, Section 2 of the New Mexico Constitution, which declares that “unappropriated water” belongs to the public and that it is “subject to appropriation for beneficial use?”

MATERIAL FACTS AND DEFINITIONS

The following material facts are based primarily on the express provisions of the Rule, the Final Groundwater Restoration Plan for the Chino, Cobre and Tyrone Mine Facilities [16 RP 1316], the New Mexico Environment Department’s closure discharge permits for Freeport McMoRan, Inc.’s (“Freeport”) Tyrone,

Chino, and Cobre Mines [20 RP 2927, 2971, and 3040], the Commission's Decision and Order ("Remand Order") on remand from *Phelps Dodge*, [21 RP 4473], and expert testimony. Petitioners' briefs below cite extensively to the record.

1. Open pit copper mines typically are comprised of one or more deep open pits that extend hundreds of feet below the water table and into groundwater. The ore and overburden excavated from the pit is divided among numerous and massive ore and waste rock stockpiles, tailings dumps and other impoundments. These structures, referred to as "mine units" or "units", in combination can cover ten thousand or more acres at a single open pit copper mine.

2. The walls of an open pit must be stepped back as the pit is deepened, creating a benched "pit area" typically having a diameter of a mile or more.⁴ Waste rock and ore stock piles can be located within, along the edge, and outside of the pit area. Tailings dumps are typically located outside the pit area.

3. Groundwater occurs in the aquifers underlying the pit area and extending offsite. The depth of groundwater from the land surface, i.e., the water table, is at the same level as the pit bottom at the center of the pit and becomes progressively shallower with distance away from the center.

⁴"Pit area" here means "open pit surface drainage area" or "area of open pit hydrologic containment," as defined in the Rule. 20.6.7.7(B) NMAC.

4. Unless reasonable preventative measures are taken, the mine units at copper sulfide mines will contaminate groundwater. Approximately 20,000 acres of groundwater contamination from unlined mine units has been documented at Freeport's three existing open pit sulfide copper mines in southern New Mexico.

5. The groundwater contamination at copper mines, including Freeport's mines, results primarily from two processes:

a. First, when sulfide copper ore is exposed to air and water in stockpiles, open pits, and leach dumps it inevitably creates acid rock drainage ("ARD"). ARD is characterized by low pH and the presence of high concentrations of metals and metalloids, many of which are toxic to humans, animals and plants. As ARD is generated, a process that continues for hundreds of years, it discharges into groundwater and contaminates it unless an impermeable liner prevents it from doing so. "Discharge" means "spilling, leaking, pumping, pouring, emitting, emptying, or dumping into water or in a location and manner where there is a reasonable probability that the discharged substance will reach surface or subsurface water." 20.6.2.1203(C)(1) NMAC.

b. Second, copper is leached from crushed ore by applying an acidic solution over the top of massive stockpiles. As the solution percolates through the stockpile it dissolves copper and other metals, becoming "pregnant

leach solution,” which discharges into and contaminates groundwater unless the stockpile was constructed on an impermeable liner.

6. The Commission adopted human health and other water quality standards for groundwater beginning in the 1970s, including standards for many water contaminants found in ARD and pregnant leach solution. 20.6.2.3103 NMAC.

7. Stockpiles, tailings dumps, and impoundments can be and often are constructed on synthetic liners at copper and other hard rock mines outside New Mexico to prevent discharges from these mine units from polluting groundwater.

8. The Commission acknowledges the effectiveness of liners in preventing discharges from waste rock stockpiles and tailings dumps, as evidenced by the provisions in the Rule allowing (though not requiring) these units to be lined. 20.6.7.21 and -.22 NMAC.

9. A liner cannot prevent the exposed pit walls of a dewatered open pit from generating ARD as groundwater and surface water flow into the pit.

10. The Rule allows all mine units to pollute groundwater within and outside the pit area by exempting groundwater from 3103 Standards during and after active mining operations. 20.6.7.24(D) and -.33(D). The pit area can cover several square miles and includes both the exposed water at the bottom of the pit and surrounding groundwater.

11. The Rule thus permits contaminant discharges from mine units covering several square miles to create “areas of pollution” in groundwater, both inside and outside the pit area.

12. The groundwater pollution caused by copper mines persists for hundreds of years.

13. The Rule allows large areas of pollution subject to two requirements. First, groundwater monitoring wells located along the “perimeter” of the areas of pollution must meet “applicable standards.” 20.6.7.28(B) NMAC; 20.6.7.7(B) NMAC (defining “applicable standards”). Second, the areas of groundwater pollution must be “contained.” Within the pit area, this means that the polluted groundwater must be induced to flow towards an open pit, either through evaporation or pumping out the pit lake; outside the pit area, the groundwater must be induced to flow towards an interceptor system such as a pumping well. 20.6.7.20, -.21, -.22, -.24, and -.33(D) NMAC.

14. Under the Rule, the permitted areas of pollution at existing and future copper mines cannot be places of withdrawal. The Rule implicitly defines “places of withdrawal” to mean areas that are “beyond the monitor-well perimeters.” Opinion ¶34.

15. In the late 1970s, the Commission adopted regulations under the WQA that require 3103 Standards to be met everywhere in groundwater unless the

discharger demonstrates that the proposed area of pollution is not a place of withdrawal, obtains a variance, or the groundwater is highly saline. 20.6.2.3109(C) NMAC.⁵ No similar demonstration is required under the Rule, which exempts copper mines from Section -.3109(C). 20.6.7.10(J)(2) NMAC.

16. In compliance with *Phelps Dodge*, the Commission entered its Remand Order in 2009, adopting seven objective factors for identifying places of withdrawal based on groundwater quality, aquifer characteristics, and population. The Commission considered and expressly rejected landownership as a factor and concluded that point of compliance is inconsistent with the WQA.

17. In adopting the Rule, the Commission reversed itself, repealing the factors for identifying places of withdrawal and embracing point of compliance. The Commission gave no notice of its intent to repeal the factors and provided only a cursory explanation.

18. The Rule expressly permits areas of groundwater pollution at all existing and future copper mines, wherever located; it does not impose any limit on the extent, depth, or duration of that pollution.

19. There are present and reasonably foreseeable uses of groundwater underlying open pit copper mines both within and outside the pit area.

⁵ These regulations still apply to all facilities except copper mines and dairies.
20.6.2 NMAC

BASIS FOR GRANTING WRIT

The COA' Opinion below is inconsistent with the WQA and conflicts with the precedents of this Court and those of the COA.

1. The Rule does not prevent or abate water pollution: Pursuant to the plain language of the WQA and the precedents of this Court and the COA, the Commission's regulations must "prevent or abate water pollution." *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶16, 149 N.M. 207; *Bokum Res. Corp. v. Commission*, 1979-NMSC-090, ¶41, 93 N.M. 546; *New Energy Econ., Inc. v. Vanzi*, 2012-NMSC-005, ¶22, 274 P.3d 53; *N.M. Mining Assn. v. Commission*, 2007-NMCA-010, ¶7, 141 N.M. 41; *Gila Res. Info. Project v. Commission*, 2005-NMCA-139, 138 N.M. 625. The Rule and Opinion below conflict with these precedents, because the Rule and the Opinion conflate "prevention of water pollution" with "containment of polluted groundwater." As the COA explained:

Under the [Rule], the primary method for protecting groundwater during the mine's operation is ... by containing ground water that exceeds applicable standards.

Opinion ¶¶ 24, 38. In holding that the Rule does not "permit" pollution despite its express provisions doing just that, the COA draws an invalid distinction between "allowing" pollution and "permitting" it.

While the Commission acknowledged that the containment strategy required by the [Rule] may allow ground water underlying certain units to exceed the 3103 standards during mining operations, to say

that the [Rule] therefore permits ground water contamination goes too far.

Id. ¶ 38. Regardless of whether the Rule is characterized as permitting or allowing pollution, it does not prevent or abate it; therefore, it conflicts with the WQA and foregoing precedent.

2. The Commission does not have unlimited discretion to determine places of withdrawal: According to the COA:

After the 2009 amendments to the WQA, determining the locations of places of withdrawal under Section 74-6-5(E)(3) was, as it always had been, left to the Commission's discretion. *See Phelps Dodge*, 2006–NMCA–115, ¶ 35 ... (recognizing that pursuant to Section 74–6–5(E)(3) the Commission must determine places of withdrawal).

Opinion ¶32. This holding conflicts with *Phelps Dodge*. In that case, the COA set aside the Commission's finding that the entire Tyrone open pit copper mine, now owned by Freeport, is a place of withdrawal. The COA remanded the case back to the Commission, holding that the Commission "in the first instance, must create some general factors or policies to guide its determination" as to the location of places of withdrawal. *Phelps Dodge*, 2006-NMCA-115, ¶35. Had the issue truly been "left to the Commission's discretion," the COA in *Phelps Dodge* would have upheld the Commission's finding rather than striking it.

3. Containment of groundwater pollution after the fact does not constitute prevention of water pollution under the WQA. The COA also erred in holding that:

In promulgating the [Rule], the Commission was [complying with] the Legislature's mandate [to] formulate regulations to 'prevent or abate water pollution' while simultaneously weighing, among other things, the 'social and economic value of the sources of water contaminants' and the 'technical practicability and economic reasonableness of reducing or eliminating' them. Section 74-6-4(E)(2), (3).

Opinion ¶37. This holding misconstrues and effectively changes the express purpose of the WQA, which is to "prevent or abate water pollution." It also conflicts with *Public Serv. Co. v. N.M. Env'tl. Improvement Bd.*, 1976-NMCA-039, ¶ 7, 89 N.M. 223. In construing the virtually identical language in the Air Quality Control Act, now codified at NMSA 1978 Section 74-2-5(E), the COA held in *Public Service Co.* that the statutory requirements to consider "economic value" and "economic reasonableness" in promulgating regulations do not change the basic purpose of the Air Quality Control Act, which is to "prevent or abate air pollution." *Id.* ¶ 7. The Court held that administrative agencies "are creatures of statute," *id.* ¶ 7, and therefore, they cannot "amend or enlarge [their] authority under the guise of making rules" *Id.* ¶ 10.

4. The Commission's change in position was arbitrary and capricious: The COA did not address Petitioners' argument that the Commission's unexplained change in position regarding place of withdrawal, namely its repeal of the seven factors and adoption of a point of compliance system, constituted arbitrary action. See *Southwest Research & Info. Ctr. v. N.M. Env't Dep't*, 2014-NMCA-098, ¶61 (*citing Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State*

Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46-47 (1983) “for the proposition that it is arbitrary and capricious for an agency to change course without explanation ...”). The Opinion thus conflicts with NMSA 1978, Section 74-6-7(B) (1993) of the WQA and numerous precedents holding that Courts must set aside arbitrary and capricious agency decisions. *See, e.g., Bernalillo County Health Care Corp. v. N.M. Pub. Regulation Comm'n*, 4-NMSC-008, ¶9, 319 P.3d 1284.

5. This Petition presents issues of constitutional significance and great public importance: As held by this Court and the COA:

Water has constitutional significance in New Mexico. *See* N.M. Const. art. XVI. Its scarcity and overall importance in our semiarid state precludes our taking such a casual view of water. *State ex rel. Erickson v. McLean*, 62 N.M. 264, 270, 308 P.2d 983, 987 (1957).

Bybee, 1995-NMCA-061, ¶10. Whether the Commission has discretion to allow the pollution of public groundwater underlying thousands of acres, as the Opinion holds, is a matter of great public importance. Moreover, whether the Commission has the power to declare such areas of pollution “not available as ‘places of withdrawal’ during mining operations” conflicts with Article XVI, Section 2 of the New Mexico Constitution, which declares public ownership of water and requires that unappropriated water be open to appropriation by the public. Finally, if the Commission has authority to allow such pollution by copper mines, it also has the authority to allow similar pollution by all other types of mines and facilities.

ARGUMENTS BEFORE THE COURT OF APPEALS

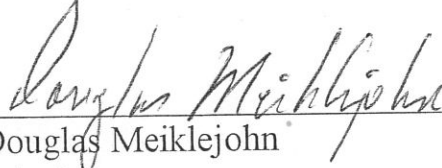
Each of the questions presented in this Petition relate to the primary issue under the WQA: Does the Rule prevent or abate water pollution or protect places of withdrawal as required by the WQA? In arguing that the Rule does not comply with the WQA, Petitioners raised each of the questions presented to the COA below. *See* Petitioners' April 4, 2014, Brief-in-Chief at 23-32; August 19, 2014 Reply Brief to Freeport at 2-15 and Reply Brief to the Commission at 2-10; and February 19, 2014, Brief in Support of Motion to Stay at 24-35.

PRAYER FOR RELIEF

Petitioners request this Court to reverse the COA's April 8, 2015, Opinion and set aside the Rule. The Rule violates the WQA because it does not prevent or abate water pollution or protect places of withdrawal.

Dated: May 8, 2015.

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CERTIFICATE OF SERVICE

I certify that on May 8, 2015 copies of this Petition for a Writ of Certiorari

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