

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED

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Wendy F. Jones

GILA RESOURCES INFORMATION PROJECT,
AMIGOS BRAVOS, and TURNER RANCH
PROPERTIES, L.P.,

Appellants,

vs.

Ct. App. No. 33,237

STATE OF NEW MEXICO WATER QUALITY
CONTROL COMMISSION,

Appellee.

APPELLANTS' JOINT DOCKETING STATEMENT

Appeal from the New Mexico Water Quality Control Commission
WQCC 12-01(R)

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Appellants Gila Resources Information Project, Amigos Bravos, and Turner Ranch Properties, L.P. (collectively "Appellants") submit this Docketing Statement pursuant to Rule 12-601 NMRA and Rule 12-208 NMRA.

INTRODUCTION AND NATURE OF THE PROCEEDING

The proceeding below was a formal rulemaking conducted by the New Mexico Water Quality Control Commission ("the WQCC") pursuant to NMSA 1978, Section 74-6-4 (2009). Parties were represented by counsel, witnesses testified under oath, subject to cross-examination, and the proceeding was transcribed verbatim by a court reporter. A hearing officer presided over the proceeding. At the conclusion of the proceeding the WQCC entered the Order and Statement of Reasons ("SOR"), which gave rise to this appeal and is attached to Appellants' Notice of Appeal. The SOR is a complex 214-page document containing 1,388 numbered paragraphs that allegedly set out the WQCC's reasons for adopting the "Copper Mine Rule," which will be codified at 20.6.7 NMAC and become effective on December 1, 2013, unless stayed. The actual Order adopting the Copper Mine Rule occurs on the final page of the SOR. SOR at 214.

Both the public and formal parties participated in the proceeding below. The formal parties included the following:

- 1) The New Mexico Environment Department ("NMED"). NMED initiated the proceeding below by petitioning the WQCC to adopt the Copper Mine

Rule pursuant to NMSA 1978, Section 74-6-6(A) (1993). Two witnesses testified for NMED in support of NMED's proposed Copper Mine Rule, one employee of the Department and one independent contractor.

2) The Freeport-McMoRan Corporation ("Freeport"). Freeport is an international copper mining company that, through its wholly-owned affiliates, owns and operates three large open pit copper mines in Grant County near Silver City, New Mexico—the Chino Mine, the Tyrone Mine, and the Cobre Mine. As used herein, "Freeport" refers to the Freeport-McMoRan Corporation and its New Mexico affiliates involved in copper mining. Ten expert witnesses testified for Freeport in support of NMED's proposed Copper Mine Rule.

3) The New Mexico Mining Association ("NMMA"). Except for preliminary legal argument in support of NMED's proposed Copper Mine Rule, the NMMA did not participate in the hearing below. It did not present evidence or testimony.

4) Appellant Gila Resources Information Project ("GRIP"). GRIP is a nonprofit organization headquartered in Silver City, New Mexico. GRIP works toward meaningful public participation in mining and other environmental permitting matters. GRIP has several members who live, recreate, and depend on ground water in the vicinity of Freeport's copper mines in Grant County, New Mexico. Over the course of more than a decade, GRIP has been a party in several

legal proceedings involving Freeport's mines. Two expert witnesses testified for GRIP in opposition to NMED's proposed Copper Mine Rule.

5) Appellant Turner Ranch Properties, L.P. ("TRP"). TRP has owned the Ladder Ranch in Sierra County, New Mexico, since 1992. The Ladder Ranch depends on clean water for its livestock operations, irrigation activities, and conservation of wildlife resources, including the Rio Grande cutthroat trout and the Chiricahua leopard frog. The Ladder Ranch is adjacent to the Copper Flat Mine, which has applied for a discharge permit and will be regulated under the Copper Mine Rule unless the Rule is invalidated by this Court. The Rule on its face would allow ground water pollution without regard to TRP's use of water from the same source at Ladder Ranch. Moreover, the Copper Mine Rule relies on perpetual ground water pumping from deep open pits and from various interceptor systems to allegedly "contain" the pollution it permits. Such pumping will impair TRP's water rights (and the many uses they support) by rapidly lowering the water table and depleting spring flows. TRP joined with GRIP in opposing NMED's proposed Copper Mine Rule and jointly presented expert witnesses with GRIP.

6) Appellant Amigos Bravos is a nonprofit organization that has long worked to protect New Mexico's water resources from pollution by mines and other sources. One witness testified on behalf of Amigos Bravos in opposition to NMED's proposed Copper Mine Rule.

7) The New Mexico Office of the Attorney General (“NMAG”). The NMAG presented two expert witnesses in opposition to NMED’s proposed Copper Mine Rule.

8) William C. Olson. Mr. Olson appeared *pro se* below and testified in opposition to NMED’s proposed Copper Mine Rule. He is an expert in hydrogeology and copper mine regulation in New Mexico.

Appellants, NMAG and Mr. Olson appealed the WQCC’s SOR and adoption of the Copper Mine Rule pursuant to NMSA 1978, Section 74-6-7(B) (1993). See October 21, 2013, Attorney’s General’s Unopposed Motion to Consolidate Appeals (requesting the Court to consolidate appeal Nos. 33,237, 33,238 and 33,245). Appellants contend that this Court should set aside WQCC’s decision to adopt the Copper Mine Rule because the Rule allows Freeport and all copper mining companies to cause widespread and permanent pollution of public ground water. Appellants will show that this aspect of the Rule violates the Water Quality Act, the New Mexico Constitution, and the Public Trust Doctrine. Key findings of the SOR are not supported by substantial evidence, and in adopting the Copper Mine Rule the WQCC failed to consider the whole record and instead arbitrarily and capriciously relied almost exclusively on Freeport, the major beneficiary of the Copper Mine Rule. The Copper Mine Rule codifies the antiquated mining practices of Freeport into law and allows it and all copper mining companies in New Mexico

to pollute public ground water above water quality standards without regard to whether such pollution will impair present or future beneficial use of the polluted water.

DATE OF JUDGMENT AND TIMELY APPEAL

The WQCC verbally announced its decision to adopt NMED's proposed Copper Mine Rule along with NMED's proposed SOR on September 10, 2013, and it entered the signed SOR on September 25, 2013. Appellants filed their Notice of Appeal on October 9, 2013. Accordingly, this appeal is timely. Rule 12-601(B) NMRA ("Direct appeals from orders ... of boards ... shall be taken by filing a notice of appeal ... within thirty (30) days from the date of the order ...").

STATEMENT OF THE CASE

As of the filing of this Docketing Statement, discharges of water contaminants from copper mines and all other facilities except dairies are regulated under the WQCC's general ground water protection regulations, codified at 20.6.2 NMAC. These regulations have since 1977 prohibited NMED from permitting a discharge of water contaminants unless:

- (1) ground water that has a TDS¹ concentration of 10,000 mg/l or less will not be affected by the discharge; or
- (2) the person proposing to discharge demonstrates that approval of the proposed discharge plan, modification or renewal will not result in either concentrations in excess of the standards of 20.6.2.3103 NMAC or the presence of any toxic pollutant at any place of withdrawal of

¹ "TDS" means total dissolved solids in the ground water.

water for present or reasonably foreseeable future use, except for contaminants in the water diverted as provided in Subsection D of 20.6.2.3109 NMAC [.]

20.6.2.3109(C) (“Section 3109(C)”). Section 3109(C) assures that NMED fulfills its primary statutory duty under the Water Quality Act, which is to protect the public’s right to unpolluted ground water:

The constituent agency² shall deny any application for a [discharge] permit ... if:

... (3) the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard ... [in] ground water ... at any place of withdrawal of water for present or reasonably foreseeable future use.

NMSA 1978, § 74-6-5(E) (2009). This provision of the Act imposes a non-discretionary duty on NMED to protect existing and future uses of ground water against discharges of harmful water contaminants. By focusing on “places of withdrawal of [ground] water for present or reasonably foreseeable future use” (“Place of Withdrawal”), the Act effectively safeguards present and future beneficial uses of water against impairment by pollution.

The Copper Mine Rule reverses over thirty years of ground water protection by WQCC and NMED by, among other things, exempting copper mines from the requirements of Section 3109(C). 20.6.7.10 (J)(2) NMAC. Contrary to Section 74-6-5(E) of the Water Quality Act, the Rule arbitrarily allows widespread ground

² “Constituent agency” means NMED and seven other state agencies that may issue discharge permits under the Water Quality Act. NMSA 1978, § 74-6-2(K) (2003).

water pollution above standards without ever mentioning Places of Withdrawal. The substantive provisions of the Rule that allow this pollution were crafted by Freeport, and these provisions (if valid) serve to legitimize the extensive ground water pollution existing at Freeport's existing mines and allow more pollution at all copper mines, existing and future. Although NMED was the ostensible proponent and author of the SOR that the WQCC ultimately adopted, *in toto*, Freeport was the SOR's primary author.³

Copper mines such as those owned and operated by Freeport involve the excavation of massive open pits that can be thousands of feet deep. These pits extend below the water table and may intersect multiple aquifers. The pits and vast stockpiles of removed rock permanently disfigure dozens of square miles of land. Open pit copper mines such as Freeport's expose and stockpile millions of tons of rocks that contain sulfite minerals such as pyrite. When exposed to air and water, such minerals produce a toxic and highly acidic leachate known as "acid mine drainage" or "AMD." Substantial quantities of AMD can be generated when precipitation or ground water contact and percolate through (1) the exposed walls of an open pit, (2) the vast stockpiles of ore and waste rock that commonly

³ Appellants learned this through documents obtained from NMED under the New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-1 (2011), after WQCC adopted the Copper Mine Rule. Because we believe it is material to this appeal, Appellants may seek to supplement the record in order to provide the Court with documents showing Freeport's authorship of WQCC's SOR.

surround and consequently increase the depth and diameter of the open pit, and (3) the extensive piles of finely-ground “tailings” generated when copper ore is milled onsite.

In addition to AMD, massive “heap leach” stockpiles of finely ground ore at copper mines can pollute ground water if the toxic and highly acidic copper leaching solution is allowed to percolate below the pile and into ground water. The leaching solution may be referred to as “raffinate” or “pregnant leach solution” (“PLS”), depending where it is in the process. See Phelps Dodge Tyrone, Inc. v. WQCC, 2006-NMCA-115, 5, 140 N.M. 464. 143 P.3d 502 (“Tyrone leaches the stockpiles by placing acidic leach solution on the tops and sides of the piles. The solution percolates through the piles and dissolves the copper, and the resulting pregnant leach solution is then collected at the stockpile toes.”)

The Copper Mine Rule defines the toxic fluids generated, used, stored and transported at copper mines as “process water”:

"Process water" means any water containing water contaminants in excess of the [water quality] standards of 20.6.2.3103 NMAC that is generated, managed or used within a copper mine facility including raffinate; PLS; leachate collected from waste rock stockpiles, leach stockpiles, and tailings impoundments; tailings decant water; pit dewatering water; intercepted ground water, laboratory or other waste discharges containing water contaminants; and domestic wastes mixed with process water.

20.6.7.7(B)(50) NMAC. Because of their massive scale and numerous sources of toxic “process water,” open pit copper mines can be major sources of water

pollution. If this pollution is not prevented in the first place, the vast sources of pollution at open pit copper mines will continue polluting ground water in perpetuity, generation after generation.

The process of mining copper produces acid drainage that significantly and adversely affects groundwater. Piles continue to create acid drainage for hundreds of years after mining has ceased, as the piles are exposed to water and oxygen.

Phelps Dodge Tyrone, 2006-NMCA-115, 6; see also id. at ¶33 (“The potential environmental impacts from a mine the size of Tyrone are enormous, both in scope and duration”); GRIP v. WQCC, 2005-NMCA-139, 7, 138 N.M. 625, 124 P.3d 1164 (The Chino “open pit copper mine in southwestern New Mexico ... discharges contaminants that move into ground water.”)

Freeport’s mines are a case in point. The widespread and permanent ground water pollution at all three of its open pit mines near Silver City caused the New Mexico Office of the Natural Resources Trustee (“ONRT”) to sue Freeport for damages to natural resources under 42 USCS § 9607(f) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) and the Natural Resources Trustee Act, NMSA 1978, Sections 75-7-1 through 75-7-5 (1993, as amended through 2007). The Copper Mine Rule was designed by

Freeport to expressly allow it and other mining companies to cause the same kind of pollution that was the subject of ONRT's suit against Freeport.⁴

A. Numerous Provisions of the Copper Mine Rule Permit Ground Water Pollution.

The provisions of the Copper Mine Rule that permit widespread and permanent ground water pollution are not hidden or subtle. On the contrary, as summarized below, the Rule is expressly designed to give Freeport and others the right to pollute the public's ground water above public health standards.

1. The Copper Mine Rule is built around two key definitions:

"Open pit surface drainage area" means the area in which storm water drains into an open pit and cannot feasibly be diverted by gravity outside the pit perimeter, and the underlying ground water is hydrologically contained by pumping or evaporation of water from the open pit. 20.6.7.7(B)(42) NMAC.

"Area of open pit hydrologic containment" means, for an open pit that intercepts the water table, the area where ground water drains to the open pit and is removed by evaporation or pumping, and is interior to the department approved monitoring well network installed around the perimeter of an open pit pursuant to Paragraph (4) of Subsection B of 20.6.7.28 NMAC *and also limited to the area of disturbance authorized by a discharge permit.*⁵ 20.6.7.7(B)(5) NMAC.

Both of these areas are dependent on ground water pumping, and both may continue to expand over time as pumping continues. The Rule relies on these definitions because it permits mining companies to pollute ground water and then

⁴ Freeport settled the suit by paying thirteen million dollars to the State.

⁵ The italicized phrase was added by NMED after the close of the evidentiary hearing and is not supported by any testimony in the record.

requires them to attempt to contain that pollution, in perpetuity, by continuous ground water pumping.

2. The Copper Mine Rule permanently waives the WQCC's ground water quality standards within the "area of open pit hydrologic containment" at all copper mines. Since 1977 the WQCC has established numeric water quality standards for numerous contaminants, referred to herein as "3103 Water Quality Standards." 20.6.2.3103 NMAC. Up to now, 3103 Water Quality Standards applied to all discharges and facilities across-the-board, including copper mines. The Copper Mine Rule expressly exempts copper mines from compliance with 3103 Water Quality Standards. 20.6.2.3103 NMAC. 20.6.7.24 (D) NMAC (waiving 3103 standards during operations); 20.6.7.33 (D) NMAC (waiving 3103 standards in perpetuity). Having relieved Freeport and other copper mining companies from complying with 3103 standards, the Rule effectively allows them to dispose their AMD, leachate and other mining wastes directly in the public's ground water.

3. Numerous provisions of the Copper Mine Rule allow AMD-generating stockpiles, impoundments, and other sources of water contaminants to be placed within the "open pit surface drainage area" without any controls, such as impermeable liners, leak detection and monitoring wells, which would prevent these sources from polluting the public's ground water. See, e.g., 20.6.7.17(D)(3)

& 20.6.7.18(F) NMAC (allowing unlined impoundments of toxic “process water,” etc., to continue polluting ground water at “existing” copper mines, such as Freeport’s); 20.6.7.20(A)(1) NMAC (allowing leach stock piles to be placed directly on the ground without a liner); 20.6.7.21(A)(1)(e) & (B)(2) NMAC (allowing AMD from waste rock piles to pollute ground water); 20.6.7.22(A)(1) NMAC (allowing contaminant discharges from ore crushing and milling operations to pollute ground water); 20.6.7.23(A)(1) & (B)(2) NMAC (allowing leaks and spills from pipelines and tanks to pollute ground water); 20.6.7.26(B)(2) NMAC (allowing water contaminant discharges from truck and equipment units to pollute ground water); 20.6.7.28(B)(2) & (3) NMAC (allowing leachate from mine units to pollute ground water with no monitoring requirement); 20.6.7.33(C)(3)(b) & (F) NMAC (exempting AMD-generating waste rock and leach stockpiles from full cover and grading requirements); and 20.6.7.33(I)(4) & (6) NMAC (allowing process water impoundments to pollute ground water).

4. The Copper Mine Rule imposes no limit on the aerial extent or depth of the “open pit surface drainage area” or “area of open pit hydrologic containment,” herein referred to as the “permitted area of pollution.” The size of the permitted area of pollution may expand indefinitely under the Rule and is controlled primarily by the amount of ground water that is pumped from the open

pits.⁶ At Freeport's mines the permitted areas of pollution under the Rule would currently encompass over a dozen square miles. Nothing in the Copper Mine Rule prevents these permitted areas of pollution from extending offsite onto other private, state and federal lands. Indeed, a mine may be located entirely on leased land. 20.6.7.11(C)(2) NMAC. The Rule also places no limit on the depth of pollution, which may extend down hundreds or thousands of feet into any aquifers that happen to underlie the permitted areas of pollution. The only requirement is that mining companies report the "extent" of the open pit surface drainage area on a semi-annual basis. 20.6.7.28(L) NMAC.

5. The Copper Mine Rule also allows AMD-generating waste rock piles and tailings to pollute ground water *outside* the open pit surface drainage areas, thus creating another permitted area of pollution. If ground water outside the open pit surface drainage area is "impacted by waste rock stockpiles in excess of applicable standards," then the Rule merely requires the mining company to install an "interceptor system." 20.6.7.21(B)(1)(c) NMAC. The purpose of the "interceptor system" is *not* to prevent ground water from being polluted. Instead,

⁶ Because open pits may extend hundreds or thousands of feet below the water table, they must be pumped continuously in order to keep them dewatered. This pumping induces an expanding "cone of depression" in ground water, similar to a pumping well, which causes ground water from ever-increasing distances to flow towards and converge on the pit. The size and shape of the cone of depression changes not only in response to pumping from the pit, but also in response to off-site and on-site pumping from other wells.

the Rule allows waste rock piles to pollute ground water, regardless of location, so long as the company attempts to control the migration of the pollution by pumping ground water in perpetuity. 20.6.7.21(B)(1)(d) NMAC. Such systems are regarded as “effective” if they are designed to prevent an exceedance of “applicable standards” in ground water “at monitoring well locations” some distance away from the combined waste rock pile/interceptor unit. *Id.* The Rule allows tailings piles to pollute ground water in the same way. 20.6.7.22(A)(4) NMAC. Similar to the open pit surface drainage area, the Rule imposes no limit on the location, aerial extent, or depth of the permitted areas of pollution that may surround the massive waste rock and tailings piles at open pit copper mines.

6. The Copper Mine Rule allows copper mines to discharge water contaminants directly into ground water such that the ground water is polluted above 3103 Water Quality Standards. The only potential limit imposed by the Rule is that the interceptor systems should be designed such that pollution is not expected to be above “applicable standards” in monitoring wells located some distance away from waste rock and tailings piles outside the open pit surface drainage area.⁷ 20.6.7.21(B)(1)(e) NMAC; 20.6.7.22(A)(4)(d) NMAC. In other words, the Copper Mine Rule allows ground water pollution above some “applicable standard” everywhere except designated monitoring wells or “points of

⁷ This is only a “potential limit” because it is by no means clear whether exceeding applicable standards has any consequence under the Copper Mine Rule.

compliance.” As discussed below, the WQCC had previously rejected the “point of compliance” model as inconsistent with the Water Quality Act.

7. The Copper Mine Rule does not require 3103 Water Quality Standards to be met *anywhere* in ground water. As discussed above, the Rule refers repeatedly to “applicable standards”:

"Applicable standards" means the standards set forth in 20.6.2.3103 NMAC; the background concentration approved by the department; or, any alternative abatement standard approved by the commission pursuant to Subsection F of 20.6.2.4103 NMAC.

20.6.7.7(B)(3) NMAC. The term “applicable standards” was derived from a settlement agreement between Freeport and NMED relating to the Tyrone Mine, where it was necessary to take into consideration the fact that Freeport could not feasibly abate the existing pollution at the mine to meet 3103 Water Quality Standards. Therefore, Freeport would have to petition the WQCC to establish alternative abatement standards. However, because they apply only to the abatement of *existing* ground water pollution, alternative abatement standards make no sense in a regulation that is purportedly intended to *prevent* pollution.

Ground water that meets “applicable standards” will not necessarily be safe for public use or consumption. If polluted ground water cannot feasibly be reclaimed to meet 3103 Water Quality Standards, then the “applicable standard” under the Rule will be “any alternative abatement standard.” Such “standards” are not based on public health but on whatever reasonable reduction in contaminant

concentrations that can be achieved using existing technology. 20.6.2.4103

NMAC.

8. The Copper Mine Rule permits mining companies to pollute the public's ground water without imposing any commensurate duty to abate or otherwise limit the duration that the pollution may persist. The Rule allows permanent ground water pollution. It only requires mining companies to attempt to limit the migration of this pollution through continuous ground water pumping, in perpetuity. 20.6.7.33(D) NMAC.

B. The Copper Mine Rule Represents an Unexplained Reversal by WQCC on Substantive Issues of Policy, Law and Fact.

The Water Quality Act expressly compels NMED to deny any application for a discharge permit that would cause an exceedance of standards at any Place of Withdrawal. NMSA 1978, § 74-6-5(E)(3). In Phelps Dodge Tyrone, Inc. v. WQCC, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502, involving Freeport's predecessor in interest, the Court of Appeals ordered the WQCC to develop "some general factors or policies to guide its determination" as to what constitutes a "Place of Withdrawal." 2006-NMCA-115, ¶35.

On remand from the Court of Appeals, the WQCC conducted an extensive public hearing:

[The] Commission held 24 days of hearing between July 23 and December 13, 2007. It received testimony from approximately 25

witnesses and afforded all parties the opportunity to cross-examine witnesses.

The parties filed written testimony with the Commission on July 9, 2007. The parties submitted proposed findings of fact, conclusions of law, and closing briefs on March 28 and May 12, 2008. The Commission heard oral argument on July 7, 2008 and deliberated on this matter on July 8, August 11 and 12, September 8 and 9, October 14, December 15 and 16, 2008, and January 12, 2009.

The ... hearing record ... consists of 24 volumes of certified hearing transcripts totaling approximately 5956 pages, [including] the pleadings submitted by the parties, and the exhibits duly admitted into the record

February 4, 2009, Decision and Order on Remand, In the Matter of the Appeal of Supplemental Discharge Plan for Closure (DP-1341) for Phelps Dodge Tyrone, Inc., WQCC No. 03-2A and 03-3A (Consolidated) (“WQCC Remand Decision”).

After carefully considering all of this testimony and argument, the WQCC adopted seven objective criteria to determine whether an aquifer in a given location should be considered a Place of Withdrawal. The criteria are:

- [1] Site hydrology and geology
- [2] The quality of ground water prior to any discharge from a facility
- [3] Past and current land use in the vicinity of facility
- [4] Future land use in the vicinity of a facility

[5] Past and current water use in the vicinity of the facility

[6] Potential future water use and potential future water demand in the vicinity of the facility

[7] Population trends in the vicinity of the facility

WQCC Remand Decision at 78-79, ¶¶ 15-21. Based on these criteria, the WQCC found that Places of Withdrawal exist within the Tyrone Mine site:

A place of withdrawal of water is not limited to a place on the ground, but extends into the aquifer underlying an area on the ground surface; it need not be a well. ...

NMED has demonstrated by a preponderance of the evidence that the regional and alluvial aquifers underlying portions of the Tyrone Mine site are places of withdrawal of water for present or reasonably foreseeable future use pursuant to Section 74-6-5(E)(3).

WQCC Decision on Remand at 81, ¶¶ 32 & 33. Finally, the WQCC considered but rejected Freeport's invitation to substitute "points of compliance," *i.e.*, designated monitoring wells, for Places of Withdrawal:

Section 74-6-5(E)(3) of the Act provides that determination of the discharges' effect on ground water shall be measured at *any* place of withdrawal of water for present or reasonably foreseeable future use. See NMSA 1978, § 74-6-5(E)(3) (emphasis added).

Section 74-5-6(E)(3) does not establish any specific "point(s) of compliance" for compliance with water quality standards. NMSA 1978, § 74-6-5(E)(3).

Nothing in the Act or the Commission Regulations provides for a "point of compliance," hydraulically up-gradient of which ground water need not be protected. See NMSA 1978, §§ 74-6-1 to 74-6-17; 20.6.2 NMAC.

A place of withdrawal of water is not limited to a place on the ground, but extends into the aquifer underlying an area on the ground surface; it need not be a well.

WQCC Remand Decision at 80-81, ¶¶ 26-32.

Without any explanation, the WQCC completely reversed itself in adopting the Copper Mine Rule. Contrary to the WQCC Remand Decision, the Copper Mine Rule allows ground water pollution without regard to Places of Withdrawal. The Rule never refers to Places of Withdrawal, much less to the seven criteria that a prior WQCC carefully devised to comply with this Court's express mandate to protect the public's ground water supplies. To the extent that the Copper Mine Rule imposes any requirement to meet standards at all, it is a "point of compliance" requirement. This directly conflicts with the WQCC's legal conclusion in its Remand Decision. Moreover, the Rule's strategy of permitting pollution and then requiring "containment" through perpetual ground water pumping was emphatically rejected by WQCC and NMED in the Tyrone Mine litigation. Phelps Dodge Tyrone, 2006 NMCA 115, ¶¶ 8 & 9. Finally, the WQCC's SOR in this appeal, which Freeport wrote in substantial part, concludes without substantial evidence that NMED intentionally permitted ground water to be

polluted in the past. While this comports perfectly with Freeport's position in the Tyrone Mine litigation, it represents a 180-degree change from the WQCC's conclusion in its Remand Decision.

C. NMED Did Not Support the Copper Mine Rule with Competent Testimony.

In presenting its case to the WQCC below, NMED did not provide competent testimony. NMED offered only two witnesses—one was an employee of NMED who was only temporarily “acting” in his current position and who admitted to having no knowledge, experience or training relevant to copper mining. The other witness presented by NMED was a hired consultant who worked primarily for the mining industry. Although he had extensive experience working for the mining industry, he testified as an independent contractor and admitted to having no authority to bind NMED to his various interpretations of the Rule. Both NMED witnesses admitted that NMED has competent technical personnel on staff, but neither knew why none of them appeared at the hearing to provide testimony to the WQCC. In any event, the Copper Mine Rule was not supported by even one NMED staff member who had relevant technical or regulatory expertise.

In contrast, qualified NMED staff along with Appellant William C. Olson did prepare a very complete draft version of the Copper Mine Rule referred to below as the “August 17th Draft.” The August 17th Draft was prepared at the

culmination of the advisory committee process established pursuant to NMSA 1978, § 74-6-4(K) (1967, as amended through 2009). Appellants, Freeport and others participated in the advisory committee. Unlike the Copper Mine Rule adopted by the WQCC, the August 17th Draft did not allow copper mining companies to pollute groundwater. However, NMED's upper management inexplicably decided to adopt virtually all of Freeport's extensive edits of the August 17th Draft, including the edits that would grant Freeport and all copper mining companies the right to pollute public ground water.

ISSUES ON APPEAL

Issues Relating to the Water Quality Act

ISSUE 1: *Does the Copper Mine Rule violate the Water Quality Act by expressly permitting mining companies to permanently and extensively pollute ground water in excess of 3103 Water Quality Standards without regard to whether "Places of Withdrawal" may be impacted?*

ISSUE 2: *Does the Copper Mine Rule violate the Water Quality Act by shifting the statutory burden of identifying and protecting Places of Withdrawal from NMED and the discharger to the public?*

ISSUE 3: *Does the Copper Mine Rule violate the Water Quality Act by not regarding the mining company's use of public ground water as protected Places of Withdrawal?*

ISSUE 4: *Does the Copper Mine Rule violate the Water Quality Act by granting a blanket variance from compliance with 3103 Water Quality Standards without following the statutory procedures and standards imposed by the Act?*

ISSUE 5: *Does the Copper Mine Rule impermissibly conflict with this Court's opinion and mandate in Phelps Dodge Tyrone v. WQCC by permitting ground water pollution without regard to whether Places of Withdrawal may be impacted?*

ISSUE 6: *Does the Copper Mine Rule constitute an arbitrary and capricious decision by the WQCC because it allows ground water pollution without first establishing or following any rational criteria for identifying Places of Withdrawal?*

Authorities Relevant to Issues 1-6

1. N.M. Const. Art. XVI, § 2 (declaring that water in New Mexico “belong[s] to the public and [is] subject to appropriation for beneficial use ...”); N.M. Const. Art. XVI, § 3 (“Beneficial use shall be the basis, the measure and the limit of the right to the use of water.”)
2. NMSA 1978, § 72-12-1 (1931, as amended through 2003) (declaring ground water to “belong to the public and [to be] subject to appropriation for beneficial use.”)
3. NMSA 1978, §§ 72-12-1.1 through 72-12-1.3 (2003) (granting right to appropriate ground water for domestic, stock and other purposes).

4. The New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 through 74-6-17 (1967 as amended through 2009), including the following sections of the Act:

a. NMSA 1978, § 74-6-2(D) (defining “wastes” to mean “sewage, industrial wastes or any other liquid, gaseous or solid substance that may pollute any waters of the state”).

b. NMSA 1978, § 74-6-4(D) (requiring the WQCC to “adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the Water Quality Act.”)

c. NMSA 1978, § 74-6-4(E) (requiring the WQCC to “adopt, promulgate and publish regulations to prevent or abate water pollution”).

d. NMSA 1978, § 74-6-4(H) (authorizing the WQCC to “grant an individual variance from any regulation of the commission” and setting out standards and procedure applicable to variances).

e. NMSA 1978, § 74-6-4(K) (requiring the WQCC to “specify in regulations the measures to be taken to prevent water pollution” and requiring WQCC to “adopt [industry-specific] regulations for the dairy industry and the copper industry.”)

f. NMSA 1978, § 74-6-4(K) (requiring the WQCC to “specify in regulations the measures to be taken to prevent water pollution” and requiring

WQCC to “adopt [industry-specific] regulations for the dairy industry and the copper industry.”)

g. NMSA 1978, § 74-6-5(E) (requiring NMED to “deny any application for a permit ... if ... (3) the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard ... at any place of withdrawal of water for present or reasonably foreseeable future use.”)

h. NMSA 1978, § 74-6-10(A) (authorizing NMED to assess administrative penalties for violation of any “water quality standard adopted pursuant to the Water Quality Act”).

i. NMSA 1978, § 74-6-12 (A) (stating that “The Water Quality Act does not grant to the [WQCC] the power to take away or modify the property rights in water, nor is it the intention of the Water Quality Act to take away or modify such rights.”)

j. NMSA 1978, § 74-6-12(F) (providing that in “regulations adopted pursuant to that [Water Quality Act], reasonable degradation of water quality resulting from beneficial use shall be allowed [but that such] degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded.”)

k. NMSA 1978, § 74-6-13 (“The Water Quality Act provides additional and cumulative remedies to prevent, abate and control water pollution”).

5. 20.1.3.18 NMAC (codifying the Commission's adjudicatory procedures for deciding variance petitions under the Water Quality Act).
6. 20.6.2.3103 NMAC (setting forth numeric ground water quality standards to protect Places of Withdrawal).
7. 20.6.2.3106(C)(7) NMAC (requiring applicant for a discharge permit "to demonstrate that the discharge ... will not result in concentrations in excess of the standards [3103 Water Quality Standards] at any place of withdrawal").
8. 20.6.2.3109(C)(2) NMAC (requiring applicant for a discharge permit to demonstrate[] that approval of the proposed discharge plan, modification or renewal will not result in ... concentrations in excess of the standards of [3103 Water Quality Standards] ... at any place of withdrawal").
9. 20.6.2.3109(E) NMAC (providing that NMED may terminate or modify an existing discharge permit if "data ... or other information ... indicates that ... [3103 Water Quality Standards] ... are being or will be exceeded ... in ground water at any place of withdrawal").
10. 20.6.2.4103(B) NMAC (requiring abatement of "ground-water pollution at any place of withdrawal" to meet 3103 Water Quality Standards).
11. 20.6.2.5101(C)(2) NMAC (providing that "ground water at any place of withdrawal ... will not contain ... concentrations in excess of [3103 Water Quality Standards]."

12. Bokum Resources Corp. v. WQCC, 1979-NMSC-090, 93 N.M. 546, 603 P.2d 285 (“The objective of the Water Quality Act ... is to abate and prevent water pollution.”)
13. Clodfelter v. Reynolds, 1961-NMSC-003, 68 N.M. 61, 66, 358 P.2d 626, 629-630 (“a water right is a property right and inherent therein is the right to change the place of diversion, storage, or use of the water”).
14. N.M. Mining Association v. WQCC, 2007-NMCA-10, ¶ 7, 141 N.M. 41, 150 P.3d 991 (holding that the WQCC’s “regulations and standards” are designed to protect “groundwater for use as domestic and agricultural water supply” regardless of how the water is presently being used”); *id.* at ¶ 23 (“Approximately ninety percent of the people in New Mexico rely on groundwater for drinking water”); *Id.* at ¶ 25 (“The [Water Quality Act] applies to *all* water, surface or subsurface, that meets this geographical test, with the exception of “private waters that do not combine with other surface or subsurface water”).
15. Phelps Dodge Tyrone, 2006-NMCA-115, ¶ 27 (“Certainly, the legislature meant to capture the concept that clean water that is currently being withdrawn for use, or clean water that is likely to be used in the reasonably foreseeable future, must be protected”); *id.* at ¶ 35 (“The Commission, in the first instance, must create some general factors or policies to guide its determination” as to what constitutes a Place of Withdrawal”).

Constitutional Issues

ISSUE 7: *Does the Copper Mine Rule violate the New Mexico Constitution and Public Trust Doctrine by permitting mining companies to permanently pollute the public's ground water in excess of water quality standards?*

ISSUE 8: *Does the Copper Mine Rule violate the New Mexico Constitution by granting copper mining companies the right to possess and use the corpus of public ground water to dispose of their wastes?*

ISSUE 9: *Does the Copper Mine Rule violate the New Mexico Constitution by donating public ground water to private mining companies?*

ISSUE 10: *Did WQCC violate the separation of powers doctrine by exceeding its authority under the Water Quality Act?*

Authorities Relevant to Issues 7 through 10

1. N.M. Const. art. III § 1 (requiring separation of powers).
2. N.M. Const. art. IX, § 14 (forbidding the State from “directly or indirectly ... mak[ing] any donation to ... any person, association or public or private corporation”).
3. N.M. Const. art. XVI, § 2 (declaring that water in New Mexico “belong[s] to the public and [is] subject to appropriation for beneficial use ...”); N.M. Const. art. XVI, § 3 (“Beneficial use shall be the basis, the measure and the limit of the right to the use of water.”)

4. N.M. Const. art. XX, § 21 (declaring that “water and other natural resources of this state” are “of fundamental importance to the public interest, health, safety and the general welfare”).
5. NMSA 1978, § 30-8-2 (1963, as amended through 1993) (declaring pollution of public water to be a criminal public nuisance).
6. NMSA 1978, § 72-12-1 (1931, as amended through 2003) (declaring ground water to “belong to the public and [to be] subject to appropriation for beneficial use.”)
7. Illinois C. R. Co. v. Ill., 146 U.S. 387, 453 (1892) (enforcing the public trust doctrine to prevent state officials from giving away public resources).
8. State ex rel. Sandel v. New Mexico Pub. Util. Comm’n, 1999-NMSC-19, ¶ 12, 127 N.M. 272 (“an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own.”).
9. Kaiser Steel Corp. v. W. S. Ranch Co., 1970-NMSC-043, 81 N.M. 414, 417, 467 P.2d 986, 989 (“Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.”)

10. State ex rel. Erickson v. McLean, 1957-NMSC-012, 62 N.M. 264, 271, 308 P.2d 983, 987 (“All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use.”)
11. Deming v. Hosdreg Co., 1956-NMSC-111, 62 N.M. 18, 28 (holding that “the term "donation," as found in [the Anti-Donation Clause of] the Constitution, ... has been applied in its ordinary sense and meaning, ... a gift, an allocation or appropriation of something of value, without consideration to a person, association or public or private corporation.”)
12. State ex rel. Bliss v. Dority, 1950-NMSC-066, 55 N.M. 12, 17 (“The public waters of this state are owned by the state as trustee for the people, Murphy v. Kerr, D.C., 296 F. 536”).
13. Bybee v. City of Albuquerque, 1995-NMCA-061, ¶ 10, 120 N.M. 17, 896 P.2d 1164 (“Water has constitutional significance in New Mexico. Its scarcity and overall importance in our semiarid state precludes our taking ... a casual view of water.”)
14. New Mexico v. GE, 467 F.3d 1223, 1243 (10th Cir. 2006) (holding that New Mexico has codified “the public trust doctrine as to groundwaters”).

Issues Regarding Evidence

ISSUE 11: *Is there a lack of substantial evidence supporting the WQCC's decision not to require impermeable liners beneath waste rock and tailings piles or impose other pollution prevention mechanisms?*

ISSUE 12: *Is there a lack of substantial evidence supporting the WQCC's conclusion that mining companies can and will contain and control polluted ground water in perpetuity?*

ISSUE 13: *Did the NMED fail to provide substantial evidence in support of the Copper Mine Rule by failing to present competent witnesses?*

ISSUE 14: *Does the Copper Mine Rule and SOR constitute an arbitrary and capricious decision, and an abuse of discretion, because it reverses WQCC's decades-long policy of protecting Places of Withdrawal from water pollution, as articulated in the WQCC Remand Decision and WQCC regulations, without any rational explanation or substantial evidence?*

ISSUE 15: *Is WQCC estopped from re-litigating and re-determining factual and legal issues that it necessarily and finally decided in its WQCC Remand Decision?*

ISSUE 16: *Does substantial evidence support the provisions of the Copper Mine Rule that are based on changes that NMED made after the close of the evidentiary record?*

Authorities Relevant to Issues 11 through 16

1. INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (U.S. 1987) (“An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view”) (internal quote and citations omitted)
2. City of Santa Fe v. Woodard, 1996-NMSC-058, ¶11, 122 N.M. 449, 11, 926 P.2d 302, 306 (“[to] be substantial, the evidence must be both competent and relevant.”)
3. Shovelin v. Central N.M. Elec. Coop., 1993-NMSC-015, 115 N.M. 293, 850 P.2d 996 (collateral estoppel may be applied against administrative agencies).
4. Tenneco Oil Co. v. WQCC, 1987-NMCA-153, 107 N.M. 469, 471 (the burden is on the petitioner of a regulation).
5. Lampi Corp. v. Am. Power Prods., Inc., 228 F.3d 1365, 1377 (Fed. Cir. 2000) (“The [judicial estoppel] doctrine also applies to administrative proceedings in which a party obtains a favorable order by making an argument that it seeks to repudiate in a subsequent judicial proceeding”).
6. Reed v. Amax Coal Co., 971 F.2d 1295, 1300-1301 (7th Cir. Ill. 1992) (identifying factors for determining when agency acts in a judicial capacity).
7. Environmental Center v. Lujan, 961 F.2d 886, 891 (9th Cir. Alaska 1992) (applying judicial estoppel against the Government).

8. International Tel. & Tel. Corp. v. American Tel. & Tel. Co., 444 F. Supp. 1148, 1159 (S.D.N.Y. 1978) (recognizing that preclusion doctrines could, given requisite circumstances, could apply in administrative rulemaking).
9. See also “Standard of Review” below.

Issue Related to Natural Resources Trustee Act

ISSUE 17: *Does the Copper Mine Rule violate the Natural Resources Trustee Act by permitting mining companies to pollute ground water that would otherwise subject the companies to a claim of natural resources damage?*

Authorities Related to Issue 17

1. 42 U.S.C. 9607(f)(1) (“[T]he authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover ... damages.”)
2. New Mexico Natural Resources Trustee Act, NMSA 1978, §§ 75-7-1 through 75-7-5 (1993, as amended through 2007) (creating and imposing duties on the New Mexico Trustee).

STANDARD OF REVIEW

This Court may set aside an action of the Commission only if it is “(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law.” NMSA 1978, § 74-6-7(B); Regents of the Univ. of Cal. v. WQCC, 2004-NMCA-73, ¶ 8, 136 N.M. 45, 94 P.3d 788. “An action is arbitrary or capricious if it is unreasonable,

irrational, willful, and does not result from a sifting process” or “if there is no rational connection between the facts found and the choices made.” Regents, 2004-NMCA-73, ¶ 35 (internal quotation marks and citations omitted); see also Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-5, ¶ 17, 133 N.M. 97, 61 P.3d 806 (“A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record”); Rio Grande, 2003-NMSC-5, ¶ 17 (“agency action is arbitrary and capricious if it entirely omits consideration of important aspects or relevant factors of the issue at hand). “A misapprehension of the law constitutes an abuse of discretion.” New Energy Econ., Inc. v. Shoobridge, 2010-NMSC-49, ¶ 45, 149 N.M. 42, 243 P.3d 746. “Substantial evidence is evidence that a reasonable mind would recognize as adequate to support the conclusions reached by a fact-finder” and the Court “reviews the record as a whole, in the light most favorable to the decision of the Commission.” N.M. Mining Ass'n v. WQCC, 2007-NMCA-010, ¶¶ 10-11, 141 N.M. 41, 150 P.3d 991. The Court is not bound by an agency's interpretation of a statute, since it is a matter of law that is reviewed de novo. Rio Grande, 2003-NMSC-5, ¶ 17.

PRESERVATION OF ISSUES

Appellants raised all of the issues identified in this Docketing Statement, with two exceptions, throughout the proceeding below. Appellants raised the issues

through multiple written submissions, through testimony, and through the argument of counsel. Most of the issues were raised in Appellant's December 14, 2012, Motion to Dismiss filed and in Appellant's August 22, 2013, Closing Argument in Opposition to the Copper Rule. Appellants did not expressly raise Issue 9, but it is a constitutional issue that is beyond WQCC's authority to decide; therefore, Appellants were not required to raise this issue below in order to preserve it for appeal. Sandia Sav. & Loan Ass'n v. Kleinheim, 1964-NMSC-067, 74 N.M. 95, 100, 391 P.2d 324, 328 (no requirement to raise constitutional issues to an administrative agency). Appellants did not have an adequate opportunity to raise Issue 16 below, relating to lack of substantial evidence supporting NMED's eleventh-hour changes to the Rule that WQCC adopted.

Strict preservation requirements applicable to court proceedings should not apply to administrative rulemakings. Dick v. City of Portales, 1994-NMSC-092, 118 N.M. 541, 543, 883 P.2d 127,129 ("Our statutes do not require formal preservation of error before appeal may be taken from these [administrative] decisions and we do not judicially impose such a requirement.") Moreover, the requirement of preservation applicable to court cases makes little sense in appeals from WQCC's decisions, because the statute conferring the right of appeal imposes no requirement that the appellant participate in the rulemaking below. NMSA

1978, § 74-6-7(A) (conferring the right to appeal a WQCC decision on any “person who is adversely affected by a regulation adopted by the” WQCC.)

RECORDING OF PROCEEDINGS

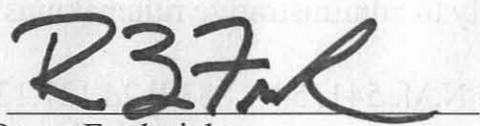
The entire proceeding below was transcribed by a court reporter.

RELATED OR PRIOR APPEALS

The Copper Rule is related to Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Commission, 2006-NMCA-115, which was remanded to the WQCC. The subsequent appeal of the remanded case, Phelps Dodge and Waterman v. WQCC, NMED and GRIP, No. 29,321, is currently stayed and pending in this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE: I hereby certify that on November 8, 2013, I caused a copy of the foregoing paper to be mailed (first class) to the parties' attorneys at the addresses shown below:

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