

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, TURNER RANCH  
PROPERTIES, L.P., STATE OF NEW MEXICO  
ex rel. GARY KING, ATTORNEY GENERAL,  
and WILLIAM C. OLSON

Appellants,

vs.

Nos. 33,237; 33,238; and  
33,245 (Consolidated)  
WQCC 12-01(R)

STATE OF NEW MEXICO WATER QUALITY  
CONTROL COMMISSION,

Appellee,

and,

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

Intervenor-Appellees.

BRIEF IN SUPPORT OF MOTION TO STAY  
THE COPPER MINE RULE PENDING APPEAL,  
SUBMITTED BY APPELLANTS GILA RESOURCE  
INFORMATION PROJECT, AMIGOS BRAVOS, AND  
TURNER RANCH PROPERTIES, L.P.

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## INTRODUCTION

Pursuant to Rule 12-207 NMRA and NMSA 1978, Section 74-6-7(C) (1993), Appellants Gila Resources Information Project ("GRIP"), Amigos Bravos, and Turner Ranch Properties, L.P. ("TRP") submit this brief in support of their Motion to Stay the Copper Mine Rule, 20.6.7 NMAC, during the pendency of this appeal. The Copper Mine Rule (also referred to herein as "the Rule") was adopted by the New Mexico Water Quality Control Commission ("the WQCC"). The Appellants appealed the Rule because it permits extensive and enduring water pollution at all open pit copper mines, contrary to the express purposes of the New Mexico Water Quality Act (also referred to herein as "the Act"). As set out below, the Court should stay the Rule pending appeal based on four factors of analysis: (1) the likelihood that Appellants will prevail on the merits; (2) the threat of irreparable harm to the public and to the Appellants if the Rule is not stayed; (3) the absence of harm to the other parties; and (4) the public interest in unpolluted water supplies. Tenneco Oil Co. v. N.M. Water Quality Control Comm'n, 1986-NMCA-033, ¶ 10, 105 N.M. 708, 736 P.2d 986.

## SUMMARY OF ARGUMENT

The WQCC denied Appellants' motion to stay the Copper Mine Rule, in part, because the WQCC incorrectly concluded that Appellants lacked standing to appeal the WQCC's adoption of the Rule. Therefore, in Part I of this brief,

Appellants demonstrate that they have standing to appeal because they are “adversely affected” by the Rule within the meaning of NMSA 1978, Section 74-6-7(C) (1967, amended 1993). Standing is conferred by allegations of present or future injury. See, e.g., De Vargas Sav. & Loan Ass'n of Santa Fe v. Campbell, 1975-NMSC-026, ¶8, 87 N.M. 469, 535 P.2d 1320. In this case Appellants allege that the Rule threatens them and the public with present and future irreparable harm in the form of pollution and depletion of their water supplies and deprivation of statutory rights. Uncontroverted substantial evidence in the record supports these allegations. Moreover, this Court should reach the merits of this appeal in any event, because protection of New Mexico’s scarce water supplies from pollution and depletion is a matter great public importance. See, e.g., New Energy Econ., Inc. v. Martinez, 2011-NMSC-006, ¶ 13, 149 N.M. 207, 247 P.3d 286.

In Part II of this brief, Appellants demonstrate that the Copper Mine Rule should be stayed for good cause and to preserve the *status quo*. The Court should stay the Rule pursuant to the four-factor test set out in Tenneco, as follows:

(1) The Appellants will prevail on the merits because the Rule, on its face, exceeds the statutory authority of the WQCC under the Water Quality Act. See, e.g., In re PNM Elec. Servs., 1998-NMSC-17, ¶ 10, 125 N.M. 302, 961 P.2d 147 (“Statutes create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute.”)

Whereas the Act mandates prevention and abatement of water pollution through enforcement of water quality standards, the Rule expressly permits water pollution in excess of water quality standards. The Rule thus directly conflicts with its authorizing statute. Moreover, the Rule represents a significant departure from WQCC's other regulations, which have up to now prohibited pollution above water quality standards. Staying the Rule pending appeal will, therefore, preserve the *status quo* while the Court determines whether permitting pollution by rule violates the Act and other authorities.

The Rule also violates this Court's mandate in Phelps Dodge Tyrone, Inc. v. WQCC, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502. Pursuant to NMSA 1978, Section 74-6-5(E) (2009) of the Act, water quality standards must be met "at any place of withdrawal of water for present or reasonably foreseeable future use," herein referred to as the "Place of Withdrawal." In Tyrone, the Court mandated the WQCC to develop criteria for identifying Places of Withdrawal. Id. ¶¶ 25, 35.

Pursuant to this Court's mandate, in 2009 the WQCC developed seven criteria for identifying aquifers that are Places of Withdrawal and thus entitled to protection from pollution above water quality standards. Decision and Order on Remand, In the Matter of Appeal of Supplemental Discharge Permit for Closure (DP 1341) for Phelps Dodge-Tyrone, Inc., Nos. 03-12(A) and 03-13(A) [AGO Exhibit 1, RP 04473-04557] ("Remand Order") at 78-79, ¶¶ 15-21. However, in

adopting the Rule, the WQCC arbitrarily jettisoned the criteria for identifying Places of Withdrawal. Order and Statement of Reasons (“Statement of Reasons”) [29 RP 06640-06853] at 203-204, ¶¶ 1327-1329. This violates the Court’s mandate in Tyrone, because the Rule permits water pollution above standards without regard to Places of Withdrawal. Staying the Rule pending appeal, therefore, will preserve the *status quo* by assuring that Places of Withdrawal are rationally identified and protected pursuant to the Act, the WQCC’s Remand Order, and this Court’s mandate.

(2) The water pollution permitted by the Rule poses an imminent threat of irreparable harm to the public and to Appellants. It is undisputed that certain types of open pit copper mines, those that target sulfide ore deposits, can and do cause widespread and essentially permanent water pollution if appropriate preventative measures are not taken. The three mines in Grant County, New Mexico, operated by Appellees Freeport-McMoRan Chino Mines Company, Freeport-McMoRan Tyrone, Inc., and Freeport-McMoRan Cobre Mining Company (collectively referred to herein as “Freeport”), are a case in point. The tens of millions of tons of sulfide ore stockpiles, waste rock stockpiles, mill tailing impoundments, and open pits at Freeport’s mines generate sulfuric acid when exposed to water and air, which releases metals from crushed rock and produces a toxic leachate known as acid mine drainage (“AMD”).

Appellants use and depend on water supplies that are proximate to Freeport's existing mines in Grant County and to a proposed new open pit copper mine, the Copper Flat Mine, located in Sierra County. The ore at Copper Flat contains sulfide, and therefore, has the same potential to generate acid mine drainage as that at Freeport's mines. The Rule threatens Appellants and the public with irreparable harm because it permits Freeport's mines and Copper Flat to permanently pollute the public water supplies on which they depend.

The also threatens to irreparably deplete Appellants' water supplies, because the Rule permits water pollution on the condition that the pollution is "hydrologically contained," in perpetuity, by the dewatering of open pits and other ground water pumping. This will permanently deplete Appellants' ground and surface water supplies, which are interconnected.

The threat posed by the Rule is imminent. Seventeen applications for discharge permit renewals or modifications are currently pending for Freeport's mines and one application for a new discharge permit for the Copper Flat Mine is also pending. The New Mexico Environment Department ("NMED") has begun processing these pending applications under the Rule. Therefore, unless the Rule is stayed, NMED will approve existing and new contaminant discharges at open pit copper mines that will permanently pollute and deplete public water supplies.

Staying the Rule will prevent this irreversible harm and preserve the *status quo* during the pendency of appeal.

(3) WQCC, NMED and Freeport will not be harmed if the Rule is stayed pending appeal. Prior to adoption of the Rule, NMED regulated discharges at open pit copper mines and all other facilities pursuant to Part 20.6.2 NMAC, which the WQCC adopted in 1977. NMED has issued over a thousand discharge permits for various facilities under Part 20.6.2, including nearly two dozen for open pit copper mines. If the Rule is stayed pending appeal, then NMED will simply continue processing applications for discharge permits at open pit copper mines under 20.6.2 NMAC, just as it has since 1977. Staying the Rule will preserve this *status quo* while the Rule's legal validity is determined on appeal.

(4) Staying the Rule is in the public's interest. According to this Court:

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, [1957-NMSC-012] 62 N.M. 264, 270, 308 P.2d 983, 987 (1957).

Bybee v. City of Albuquerque, 1995-NMCA-061, ¶10, 120 N.M. 17, 896 P.2d 1164. The Rule permits water pollution in excess of human health and other water quality standards, as codified at Section 20.6.2.3103 NMAC ("3103 Standards"), at all existing and future open pit copper mines. The Rule does not protect Places of Withdrawal, and therefore, it does not safeguard New Mexico's scarce water

supplies from pollution. Moreover, any claim that NMED and WQCC acted in the public's interest in adopting the Rule is undermined by the undisputed fact that Freeport wrote the Statement of Reasons that the NMED proposed and that the WQCC adopted as its own, *in toto*, as justification for the Rule. Staying the Rule while this Court determines the legality of permitting "pollution by rule" thus serves the public's interest in protecting New Mexico's scarce water supplies.

### **BACKGROUND**

On September 25, 2013, the WQCC entered its Statement of Reasons and adopted the Copper Mine Rule. [29 RP 06640-06853] The WQCC purported to adopt the Rule pursuant to NMSA 1978, Section 74-6-4(K) (2009) of the Act, which requires the WQCC to "specify in regulations the measures to be taken to prevent water pollution and to monitor water quality ... [for the] the copper industry" (emphasis added). On October 9, 2013, Appellants filed a Notice of Appeal in this Court pursuant to NMSA 1978, Section 74-6-7(A), challenging the Statement of Reasons and seeking to set aside the Rule. [29 RP 6854] Among other things, Appellants assert on appeal that the Rule is contrary to the Water Quality Act because it mandates water pollution above human health and other water quality standards rather than preventing or abating pollution. On November 8, 2013, Appellants filed their Docketing Statement in this Court identifying numerous issues on appeal.

On October 23, 2013, pursuant to Rule 12-207 NMRA and NMSA 1978, Section 74-6-7(C), Appellants exhausted their administrative remedies by requesting WQCC to stay the Rule pending appeal. Joint Request to Stay the Copper Mine Rule. [39 RP 6919] The WQCC conducted a hearing on Appellants' Joint Request on January 8, 2014. [RP Vol. 34] The WQCC orally denied the Joint Request on the same date. Id. On January 21, 2014, the WQCC entered an Order Denying Joint Request for Stay of 20.7.6 NMAC and Statement of Reasons ("Order Denying Stay"). [35 RP 7498]

The Order Denying Stay states the following reasons in support of the WQCC's decision not to stay the Copper Mine Rule pending appeal:

- a. The Rule is valid and the Appellants lack standing to appeal the Rule. Order Denying Stay, ¶¶ 17-21.
- b. The Appellants failed to prove that the water pollution expressly permitted by the Rule will actually occur. Id. ¶ 48.
- c. Water pollution above standards has always been lawful. Id. ¶ 22; but see id. ¶ 38 ("Currently, mine units that contaminate ground water above standards require a variance.")
- d. The Rule protects ground water for present and future use. Id. ¶ 44.
- e. Appellants failed to prove that the Rule threatens them or the public with irreparable harm. Id. ¶¶ 38-46.

f. The WQCC's decision represents a "balance" of competing interests and the public interest is served by denying Appellants' request to stay the Rule pending appeal. *Id.* ¶¶ 46-49.

As set out below, none of WQCC's alleged reasons for not staying the Copper Mine Rule pending appeal is valid.

### STANDARD OF REVIEW

In Part I of this brief, Appellants demonstrate that they have standing to appeal the Copper Mine Rule. The issue of standing "is a matter of law subject to *de novo* review." ACLU of N.M. v. City of Albuquerque, 2008-NMSC-045, ¶6, 144 N.M. 471, 188 P.3d 1222. If any one of the Appellants has standing, or if the Court determines that protecting public water from pollution is a matter of "great public importance," then there is no reason for the Court to "engage in the non-outcome-determinative exercise of identifying which of the numerous [Appellants] did and did not have standing to raise issues that [the Court] should address in any event." Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm., 2014 N.M. LEXIS 40, ¶ 14; see also Comcast Corp. v. FCC, 579 F.3d 1, 6 (D.C. Cir. 2009) ("if one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case.")

In Part II of this brief, Appellants demonstrate that the Rule should be stayed pending appeal. Pursuant to NMSA 1978, Section 74-6-7(C) of the Water Quality

Act, this Court has discretion to stay the Rule pending appeal after “a hearing and a showing of good cause by the appellant ....” See also Tenneco, 1986-NMCA-033, ¶ 10 (holding that the grant of a stay pending appeal “is dependent upon the circumstances of each individual case.”) A regulation should be stayed pending appeal to “preserve rather than alter the *status quo*.” Connecticut Life & Health Ins. Guaranty Assn. v. Daly, 391 A.2d 735, 737 (Conn. Super. Ct. 1977) (cited in Tenneco, 1986-NMCA-033, ¶ 9).

Tenneco set out four factors to help guide the Court’s discretion in determining good cause:

- (1) a likelihood that applicant will prevail on the merits of the appeal;
- (2) a showing of irreparable harm to applicant unless the stay is granted;
- (3) evidence that no substantial harm will result to other interested persons; and
- (4) a showing that no harm will ensue to the public interest.

Tenneco Oil Co. v. N.M. Water Quality Control Comm'n, 1986-NMCA-033, ¶8, 105 N.M. 708, 736 P.2d 986. Appellants’ motion to stay the Rule is based on undisputed facts and presents pure questions of law, which this Court reviews *de novo*. See, e.g., San Pedro Neighborhood Ass'n v. Bd. of County Comm'rs, 2009-NMCA-045, ¶20, 146 N.M. 106, 206 P.3d 1011 (“a question of law ... is subject to our *de novo* review”).

## ARGUMENT

### I. APPELLANTS HAVE STANDING TO APPEAL THE COPPER MINE RULE.

NMSA 1978, Section 74-6-7(C) grants any “person who is adversely affected by a regulation adopted by the” WQCC the right to “appeal to the court of appeals for further relief.” Relying on N.M. Cattle Growers' Ass'n v. N.M. Water Quality Control Comm'n, 2013-NMCA-046, 299 P.3d 436, NMED argued below and WQCC concluded without discussion that Appellants lack standing because they allegedly are not “adversely affected” by the Copper Mine Rule. Order Denying Stay at 4 ¶ 19; see also NMED Response to Stay [35 RP 07316-07337] at 2-6. This is not correct.

#### A. Allegations of present and future injury confer standing.

The purpose of requiring a plaintiff to show standing is to “insure that only those with a genuine and legitimate interest can participate in a proceeding.” De Vargas Sav. & Loan Ass'n of Santa Fe v. Campbell, 1975-NMSC-026, ¶8, 87 N.M. 469, 535 P.2d 1320. In order “to attain standing in a suit arguing the unlawfulness of governmental action, the complainant must allege that [the complainant] is injured in fact or is imminently threatened with injury, economically or otherwise.” Id. at ¶15.

[S]tanding is not confined to those who show economic harm, as “aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the

fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." ... Also, once the party seeking review alleges he himself is among the injured, the extent of injury can be very slight.

Id. at ¶12. "An identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Ramirez v. City of Santa Fe, 1993-NMCA-049, ¶ 9, 115 N.M. 417, 852 P.2d 690. Appellants "need not be experts in hydrology nor have a sophisticated legal understanding ... in order to demonstrate ... injuries for purposes of standing, because [Appellants] need not prove the merits of their case in order to establish standing." API v. Johnson, 541 F. Supp. 2d 165, 174-175 (D.D.C. 2008).

Appellants "can demonstrate standing merely by alleging that they are "faced with a real risk of future injury ... as a result of the challenged action or statute." ACLU of N.M. v. City of Albuquerque, 2008-NMSC-045, 11, 144 N.M. 471, 188 P.3d 1222; De Vargas, 1975-NMSC-026, ¶12 ("New Mexico has always required allegations of direct injury to the complainant to confer standing") (emphasis added); id. at ¶ 15 ("We hold that to attain standing in a suit arguing the unlawfulness of governmental action, the complainant must allege that he is injured in fact or is imminently threatened with injury, economically or otherwise") (emphasis added). For purposes of standing, each of the litigant's

allegations of injury must be accepted as true. See, e.g., Chatterjee v. King, 2012-NMSC-019, 52, 280 P.3d 283. That allegations of future injury are sufficient to confer standing to appeal a WQCC regulation was confirmed by this Court in N.M. Mining Ass'n v. Water Quality Control Comm'n, 2007-NMCA-084, 11, 142 N.M. 200, 164 P.3d 81. In that case, general allegations of future injury were sufficient to confer standing on the Phelps Dodge Corporation and others to appeal WQCC's regulation defining "surface waters of the state":

Appellants, New Mexico Mining Association, New Mexico Home Builders Association, New Mexico Oil & Gas Association, New Mexico Wool Growers, Inc., Chino Mines Company, and Phelps Dodge assert that they are 'entities that have been adversely affected or represent persons that have been adversely affected' by the WQCC's adoption of the 2005 definition of surface waters of the State because they and their members 'own and operate facilities and properties . . . where [there] exist various types of ponds, lagoons, ditches, channels, impoundments, and other areas where water sometimes accumulates or flows on the surface of the earth.'

N.M. Mining Ass'n v. Water Quality Control Comm'n, 2007-NMCA-084, 11, 142 N.M. 200, 164 P.3d 81. This Court accepted the appellants' general allegations of possible future injury and went on to decide the merits of their appeal. Id.

**B. Appellants allege present and future injury, and their allegations are supported by substantial evidence.**

Substantial uncontroverted evidence rather than mere allegations support Appellants standing to appeal the Copper Mine Rule. First, it is undisputed that open pit copper mines cause widespread and enduring water pollution unless

appropriate preventative measures are taken. Open pit copper mines cover thousands of acres of land with various mine units that cause water pollution. For example:

The Santa Rita Pit [at the Chino Mine] is an active Open Pit mine approximately 1.8 miles in diameter and 0.3 miles deep (from 6,600 to 5,050 feet elevation). It covers approximately 2,560 acres. Approximately 1,800 million tons of rock from the Open Pit have been placed in several Leach Ore Stockpiles and Waste Rock Piles, the South, Upper South, West, North, Northeast, Northwest, North Pit and Lampbright piles, located around and adjacent to the Open Pit. These piles cover over 2,048 acres.

Supplemental Discharge Permit for Closure, Chino Mine (“DP-1340”) [Freeport Exhibit (Shelly 3), RP 02971-03039] at 1. The ore stockpiles, waste rock stockpiles, tailings impoundments, open pits and other mine units at Freeport’s mines discharge acid mine drainage and other contaminants directly into the ground water. See, e.g., DP-1340 at 5-6; Supplemental Discharge Permit for Closure, Tyrone Mine (“DP-1341”) [Freeport Exhibit (Shelly 2), RP 02927-02970] at 6-7; Supplemental Discharge Permit for Closure, Cobre Mine (“DP-1403”) [Freeport Exhibit (Shelly 4), RP 03040-03091] at 6.

The numerous contaminant discharges at Freeport’s mines have polluted both the regional and alluvial aquifers underneath and around its mines, impacting over 20,000 acres. Final Groundwater Restoration Plan for the Chino, Cobre, and Tyrone Mine Facilities (“Final Restoration Plan”) [AGO Exhibit 11, RP 01316-01331] at S-1 & 3-18 (Table 3.4); see also Remand Order at 8-11 (¶¶ 25-27, 33,

35-38), 41 (¶174). The pollution is predicted to endure for hundreds of years. Remand Order at 9 (¶¶ 28 & 29), 79-80 (¶ 25); see also Final Restoration Plan at 3-19 (“These characteristics of the groundwater injury plumes support an assumption that injury will last for at least 100 years”).

The pollution at Freeport’s mines is so severe, extensive and enduring that it incited the New Mexico Office of the Natural Resources Trustee (“State Trustee”) to sue Freeport for permanent injury to New Mexico’s water resources. Consent Decree [Appellants’ Exhibit (Kuipers Rebuttal Testimony, Exhibit A), RP 05180-05202] at 3 ¶ A, State v. Freeport et al., U.S. Dist. Court, N.M., Case No. 10-1254. The polluted ground water at Freeport’s mines involves over a dozen toxic contaminants, including antimony, arsenic, beryllium, cadmium, chromium, cobalt, copper, sulfate, lead, manganese, nickel, selenium, sulfate, sulfuric acid, thallium, toluene, and zinc. Id.; see also DP-1340 at 3-4; DP-1341 at 4-5; and DP-1403 at 4. Several of the contaminants in ground water at Freeport’s mines exceed human health and domestic supply standards. Final Restoration Plan at 3-2 to 3-3, 3-8 to 3-9 (Table 3.3).

As set out in Part II below, the Rule changes *the status quo* by permitting the 20,000 acres of water pollution at Freeport’s mines and by allowing the same kind of extensive long-lasting pollution at all future open pit copper mines. Uncontroverted testimony shows that Appellants use and depend on the water

supplies that are proximate to Freeport's mines and to the Copper Flat Mine where applications for new, renewed and modified discharge permits are currently pending. The water pollution permitted by the Rule thus threatens Appellants with present and future injury.

Rachel Conn testified that Amigos Bravos and its members are adversely affected by the Rule, as follows: (a) the Rule permits water pollution above 3103 Standards and thus directly undermines Amigos Bravos' mission of protecting and restoring ground and surface water in New Mexico; (b) the "pollute and contain" system set up by the Copper Mine Rule harms the members of Amigos Bravos who depend on public water supplies in Grant and Sierra Counties, where discharge permit applications for open pit copper mines are currently pending; (c) Amigos Bravos has participated in numerous permitting and rulemaking proceedings to fulfill its mission and protect its members, including the proceeding below and the proceeding in which WQCC adopted the Dairy Rule, 20.6.6 NMAC; (d) the precedent set by the Rule undermines Amigos Bravos' substantial efforts and mission to prevent water pollution, not only in the proceeding below and the Dairy Rule proceeding, but in all permitting and rulemaking proceedings in which the Copper Mine Rule could serve as a precedent; and (e) in permitting pollution by rule at all new and future open pit mines, without a site-specific variance, the Rule deprives Amigos Bravos and its members of their right to oppose water

pollution by participating in statutory variance proceedings. [Testimony of Rachel Conn of Amigos Bravos, 34 RP 279-287]

Allyson Siwik testified that GRIP and its members are adversely affected by the e Rule, as follows: (a) the Rule permits water pollution above 3103 Standards and thus directly undermines GRIP's mission to protect the quality and supply of New Mexico's waters; (b) the pollute and contain system set up by the Copper Mine Rule harms the members of GRIP who depend on public water supplies in Grant County, New Mexico, proximate to Freeport's mines; (c) GRIP has participated in numerous other permitting proceedings involving Freeport's mines to fulfill its mission and protect its members; (d) the precedent set by the Rule undermines GRIP's substantial efforts in such proceedings; and (e) in permitting pollution by rule at all existing and future open pit copper mines, without a site-specific variance, the Rule deprives GRIP and its members of their right to participate in statutory variance proceedings. [Testimony of Allyson Siwik of GRIP, 34 RP 287-297]

William C. Olson, expert hydrologist and former Bureau Chief of the Water Quality Bureau of NMED, testified on behalf of GRIP, Amigos Bravos, and TRP in support of Appellants' motion to stay the Rule. Mr. Olson testified regarding the following adverse effects of the Rule: (a) the Rule permits widespread water pollution above standards that endures for hundreds of years; (b) the Rule will

effectively negate existing plans to abate pollution at Freeport's open pit copper mines; (c) new water pollution is likely under the Rule; (d) the Copper Mine Rule will set a precedent of "pollution by rule" for other polluting industries; (e) the pollution permitted by the Rule will cause loss of public water resources; (f) Freeport successfully obtained discharge permits under the regulations existing before the Rule, 20.6.2 NMAC; and (g) unless the Rule is stayed, administrative resources will be wasted if the Rule is invalidated on appeal. [Written testimony of William C. Olson, attached as Exhibit K to Appellants' Notice of Intent, 35 RP 6973-7315, and oral testimony of Mr. Olson at hearing, 34 RP 116-232]

Steve Dobrott, biologist and manager of the Ladder Ranch in Sierra County, New Mexico, testified that TRP is adversely affected by the Rule, as follows: (a) Ladder Ranch is directly adjacent to the proposed Copper Flat Mine; (b) there are numerous livestock, irrigation activities, fish, wildlife, habitat, and threatened and rare species conservation programs at Ladder Ranch, which all depend on ground water and surface water; (c) Ladder Ranch has water wells that are directly adjacent to Copper Flat Mine; (d) springs and surface streams at Ladder Ranch depend on ground water inflows; and (e) any negative change in either the quality or quantity of ground or surface water supplies at Ladder Ranch would irreparably harm numerous business and conservation activities at Ladder Ranch. [Written

testimony of Steve Dobrott, attached as Exhibit J to Appellants Notice of Intent, 35 RP 6973-7315, and oral testimony of Mr. Dobrott at hearing, 34 RP 88-116]

James R. Kuipers, P.E., expert mining and reclamation engineer, testified that TRP is adversely affected by the Rule, as follows: (a) the Copper Flat Mine is a proposed new open pit copper mine with a pending discharge permit application of NMED; (b) the ore deposit at Copper Flat has the potential to generate acid mine drainage that can pollute ground water for hundreds of years; (c) numerous provisions of the Rule permit pollution of ground water above standards; (d) the Copper Flat Mine is directly adjacent to Ladder Ranch and upgradient of the Caballo Reservoir and the Rio Grande; (e) the pollute and contain system set up by the Rule threatens Ladder Ranch with irreparable harm in the form of water pollution and depletion of ground and surface water supplies for hundreds of years; (f) by permitting pollution by rule without obtaining a statutory variance, the Rule deprives Appellants of their statutory right to participate in variance proceedings; and (g) Copper Flat Mine was issued a discharge permit under the regulations that applied before the Rule. [Testimony of James R. Kuipers, P.E., attached as Exhibit A to Appellants' Notice of Intent, 35 RP 6973-7315, and as provided hearing, 34 RP 233-278.]

Finally, the pollution and other injury threatened by the Rule are imminent. The Rule became effective on December 1, 2013, and NMED has commenced

processing discharge permit applications under the Rule. There are seventeen permit applications for discharge permits for Freeport's mines and another application for the new Copper Flat Mine currently pending. Freeport's Opposition to Request for Stay [35 RP 07338-07410] at 2; Appellants' Reply in Support of Motion for Stay [35 RP 07411-07453] at 12. Moreover, Freeport may at any time apply to modify its discharge permits to make them consistent with the Rule. 20.6.2.3109(G) NMAC. The Rule unlawfully authorizes NMED to approve currently pending and future discharge permit applications, even if the resulting discharges will cause water pollution above 3103 Standards.

**C. Appellants' injuries are within the "zone of interests" protected by the Water Quality Act.**

NMED argued below that Appellants' interest in protecting their water supplies and water rights from harm are not within the "zone of interests" protected under the Water Quality Act. This is not correct.

As described in Part I(B) of this brief, Appellants' are appealing the Copper Mine Rule to protect their interests in health, safety, welfare, property, water, water rights, wildlife, and the environment from water pollution and other harm. All of these interests are expressly protected by the Water Quality Act, and therefore, they are "within the zone of interests to be protected or regulated by the statute ... in question." De Vargas, 1975-NMSC-026, ¶ 10 (emphasis added).

In De Vargas, the “New Mexico Department of Banking (Supervisor) granted authority to the Los Alamos Building and Loan Association (LABL) to operate a branch office in ... Santa Fe, New Mexico.” Id. at ¶ 1. “Four savings and loan associations (appellants) located in Santa Fe” appealed the Supervisor’s decision under a statute that gave a right to appeal to “any association or person aggrieved and directly affected by a decision.” Id. Based on the statutory criteria applicable to the Supervisor’s decision, the Court held that the “competitive injury” alleged by the associations was clearly within the zone of interests protected by the applicable statute. Id. at ¶16.

The interests that Appellants seek to protect in this appeal are similarly within the zone of interests protected by the Water Quality Act. The Act defines “water pollution” as pollution that “may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property.” NMSA 1978, § 74-6-2(C)) (emphasis added). In “making standards” under the Act, the WQCC is required to consider “the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes.” NMSA 1978, § 74-6-4(D). In adopting regulations, the WQCC must consider, among other things, the “character and degree of injury to or interference with ... [the] environment and property,” “successive uses [of water], including but not limited to domestic,

commercial, industrial, pastoral, agricultural, wildlife and recreational uses,” and “property rights and accustomed uses.” § 74-6-4(E). Thus, Appellants interests in water, water rights, property, wildlife and livestock, etc., are protected under the Act.

Moreover, the Act specifically protects the interests of persons, such as TRP and the members of GRIP and Amigos Bravos, who own property or depend on water supplies near discharging facilities. NMSA 1978, § 74-6-5(F)(1)(a) (requiring “notice by mail to adjacent and nearby landowners”); see also 20.6.2.3108 NMAC (requiring notice to landowners). Accordingly, the interests of the Appellants that the Rule threatens are well within the zone of interests protected by the Act.

**D. Protecting water supplies from pollution is a matter of great public importance.**

Even if none of the Appellants in all three consolidated appeals, including the Attorney General, had standing to challenge the Copper Mine Rule, the Court should nevertheless decide this appeal under the “great public importance” doctrine. See, e.g., Piedra, Inc. v. State Transp. Comm'n, 2008-NMCA-089, ¶ 44, 2008-NMCA-089, 144 N.M. 382, 188 P.3d 106 (“Denial of standing ... may not prevent enforceability of a claim that involves a question of great public importance”). Matters of great public importance “involve clear threats to the essential nature of state government guaranteed to New Mexico citizens under their

Constitution—a government in which the three distinct departments . . . legislative, executive, and judicial, remain within the bounds of their constitutional powers.” New Energy Econ., Inc. v. Martinez, 2011-NMSC-006, ¶ 13, 149 N.M. 207, 247 P.3d 286.

In the instant appeal, WQCC exceeded its statutory authority, and thus violated separation of powers principles, by granting copper mining companies such as Freeport the right to pollute water that is “declared to belong to the public” under the New Mexico Constitution. N.M. Const. art. XVI, § 2. “Separation of powers principles are violated 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.” Tri-State Generation & Transmission Ass'n v. D'Antonio, 2012-NMSC-039, ¶13, 89 P.3d 1232. In adopting the Copper Mine Rule, WQCC is attempting to “create new law on its own.” Accordingly, this appeal raises issues of great public importance that the Court “should address in any event.” Rayellen ¶ 14.

**II. THE COURT SHOULD STAY THE COPPER MINE RULE PENDING APPEAL FOR GOOD CAUSE AND TO PRESERVE THE STATUS QUO.**

The Copper Mine Rule changes the *status quo* by mandating NMED to approve contaminant discharges at all open pit copper mines that will cause

widespread and enduring water pollution above 3103 Standards. No other regulation of the WQCC has given NMED this authority. Therefore, good cause exists to stay the Rule pending appeal. It will preserve the *status quo* and prevent irreversible water pollution pending appeal. Moreover, as set out below, Appellants' application for stay satisfies the four Tenneco factors: (A) the Rule is contrary to the Water Quality Control Act, and therefore, Appellants are likely to prevail on the merits; (B) Appellants and the public will be irreparably harmed if the Rule is not stayed; (C) no party to this appeal will be harmed if the Rule is stayed pending appeal; and (D) staying the Rule pending appeal is in the public's interest. Tenneco, 1986-NMCA-033, ¶ 10; See also Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9 (1942) ("an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong.")

**A. Appellants are likely to prevail on the merits.**

WQCC is a creature of statute. Gila Res. Info. Project v. N.M. Water Quality Control Comm'n, 2005-NMCA-139, ¶ 2, 138 N.M. 625, 124 P.3d 1164. Therefore, as a matter of law, its authority to adopt the Copper Mine Rule must be "expressly granted or necessarily implied by" the Water Quality Act. See Tri-State Generation & Transmission Ass'n v. D'Antonio, 2012-NMSC-039, ¶ 13, 289 P.3d 1232.

Because the WQCC has no statutory authority to mandate water pollution above 3103 Standards, the Rule will likely be set aside on appeal.

1. The Act mandates prevention and abatement of water pollution through enforcement of water quality standards at all Places of Withdrawal.

“The objective of the Water Quality Act ... is to abate and prevent water pollution”. Bokum Res. Corp. v. N.M. Water Quality Control Comm'n, 1979-NMSC-090, ¶ 59, 93 N.M. 546, 603 P.2d 285; see also Summers v. N.M. Water Quality Control Comm'n (In re Final Order in the Alta Vista Subdivision DP #1498 WQCC 07-11(A)), 2011-NMCA-097, ¶22, 150 N.M. 694, 265 P.3d 745 (“The Legislature's obvious concern [under the Act] is safeguarding our groundwater from pollution and contamination”). The Act imposes the “duties of ... preventing [and] abating water pollution” on the WQCC, Bybee v. City of Albuquerque, 1995-NMCA-061, ¶ 10, and does so in two ways. First, it requires WQCC to “adopt water quality standards for surface and ground waters ... [that] shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act.” NMSA 1978, § 74-6-4(D). Second, the Act requires the WQCC to “adopt ... regulations to prevent or abate water pollution ....” NMSA 1978, § 74-6-4(E); see also NMSA 1978, § 74-6-4(K) (requiring WQCC to “specify in regulations the measures to be taken to prevent water pollution ... for ... the copper industry.”)

The Act mandates prevention and abatement of water pollution through enforcement of water quality standards, including the human health and other standards codified as 3103 Standards. Several key provisions of the Act bear this out:

a) The Act requires compliance with 3103 Standards in ground water at "Places of Withdrawal": NMSA 1978, Section 74-6-4(E)(3) of the Act requires NMED to "deny any application for a [discharge] permit" if the proposed "discharge would cause or contribute to water contaminant levels [in ground water] in excess of any state ... standard ... at any place of withdrawal of water for present or reasonably foreseeable future use." Pursuant to this statutory mandate, all WQCC regulations -- *except the Copper Mine Rule* -- require compliance with 3103 Standards at Places of Withdrawal. See 20.6.2.3103, -3106(C)(7), -3109(C)(2) and -3109(E) NMAC (relating to applications for new, renewed and modified discharge permits); 20.6.2.4103(B) NMAC (relating to abatement of polluted ground); 20.6.2.5101(C)(2) NMAC (relating to waste disposal injection wells); cf. 19.8.20.2046(D)(2) NMAC (Coal Surface Mining Commission regulation requiring ground water at surface coal mines to meet 3103 Standards); 19.15.30.8 NMAC (Oil Conservation Commission regulation requiring abatement of polluted ground water).

The WQCC's Dairy Rule, 20.6.6 NMAC, was promulgated under the same statutory mandate as the Copper Mine Rule. NMSA 1978, § 74-6-4(K). The Dairy Rule, in contrast to the Copper Mine Rule, protects Places of Withdrawal by requiring all ground water at dairies to meet 3103 Standards and thus complies with the Water Quality Act. See 20.6.6.20(B), -27, and -30(B), (D), & (E) NMAC (requiring compliance with 3103 Standards in various contexts). There is no similar requirement to meet 3103 Standards in the Copper Mine Rule.

b) The Act calls for termination or modification of discharge permits if 3103 Standards are exceeded: NMSA 1978, Section 74-6-4(M) of the Act authorizes NMED to terminate or modify a discharge permit for "violation of ... any ... water quality standards ...." See also 20.6.2.3109(E) NMAC (providing for termination or modification of discharge permits for violation of 3103 Standards).

c) The Act imposes civil liability and administrative penalties on dischargers who cause exceedance of 3103 Standards: NMSA 1978, Section 74-6-10 (1993) and Section 74-6-10.1 (1993) of the Act impose civil liability on persons who cause an exceedance of water quality standards. Section 74-6-10(A) authorizes NMED to issue compliance orders, assess civil penalties, and seek injunctive relief in district court to enforce water quality standards. Section 74-6-10(B) imposes a civil penalty of up to \$10,000 per day for each violation of a water

quality standard. Section 74-6-10.1 states that “[a]ny person who violates any ... water quality standard ... shall be assessed civil penalties up to the amount of ten thousand dollars (\$10,000) per day for each violation.” (Emphasis added.)

d) The Act prohibits beneficial uses of water that cause exceedance of 3103 Standards: NMSA 1978, Section 74-6-12 (1999) of the Act allows “reasonable degradation of water quality resulting from beneficial use” of water, provided that “[s]uch degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded.”

2. Prior to the Copper Mine Rule, the WQCC determined that the “point of compliance” system is contrary to the Act.

In Tyrone, the Court mandated the WQCC to “create some general factors or policies to guide its determination” as to what constitutes a Place of Withdrawal within the meaning of Section 74-6-5(E)(3). Tyrone, 2006 NMCA 115, ¶ 35. The Court suggested that “the unique geology and hydrology of the area and the particular site (including the mining or other operations and its scale) may be appropriate factors.” Id. ¶ 36. Although the Court believed it was unreasonable to require “water at the bottom of a mine pit ... to be drinkable,” it did not necessarily agree “that water ‘underneath’ a mine site need not be protected.” Id. ¶ 36. The Court could “conceive of a situation in which an aquifer underneath a mine site may be negatively impacted, and consequently it might be appropriate to protect that water.” Id.

The WQCC's 2009 Remand Order complied with this Court's mandate. It sets forth seven objective criteria for identifying Places of Withdrawal in the vicinity of a discharge: (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 [RP 04473-04557] at 78-79, ¶¶ 15-21. The WQCC also clarified that a Place of Withdrawal is an aquifer, and specifically determined that "the regional and alluvial aquifers underlying portions of the Tyrone mine site are places of withdrawal of water for present and reasonable foreseeable future use pursuant to Section 74-6-5(E)(3)." *Id.* at 83 (¶33); see also *id.* at 23, ¶ 89 ("The aquifer and the ground water underlying the surface is the place of withdrawal of water.")

At this Court's suggestion, Tyrone, 2006 NMCA 115, ¶ 37, the WQCC specifically considered and expressly rejected "point of compliance" as a proxy for Place of Withdrawal. It found that "Section 74-5-6(E)(3) does not establish any specific 'point(s) of compliance' for compliance with water quality standards" and that "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." *Id.* at 80, ¶¶ 27 and 28.

3. The Copper Mine Rule violates the Act because it does not prevent or abate water pollution or require compliance with 3103 Standards at Places of Withdrawal.

The Copper Mine Rule changes the regulatory *status quo* and violates the Water Quality Act, on its face, by expressly permitting extensive water pollution at Places of Withdrawal, in perpetuity, at all existing and future open pit copper mines. In fact, the Rule is directly contrary to the Act. Whereas the Act requires prevention and abatement of water pollution through enforcement water quality standards, the Rule expressly permits water pollution above standards.

The Rule is long and technically complex, but two main attributes of the Rule stand out as permitting water pollution in violation of the Act. First, the Rule carves out large exempt areas in which 3103 Standards unequivocally do not apply to the aquifers underneath a mine site regardless of whether the aquifers are Places of Withdrawal. Second, the Rule establishes a “point of compliance” system that allows unlimited water pollution between compliance points, and even these compliance points may never meet 3103 Standards. These attributes of the Rule would, if valid, legitimize the 20,000+ acres of water pollution at Freeport’s mines—the same pollution that caused the State Trustee to bring suit against Freeport for permanent injuries to the State’s natural resources.

- a) The Copper Mine Rule violates the Act by permitting water pollution, in perpetuity, within extensive exempt areas where 3103 Standards do not apply and few if any measures are imposed to prevent pollution.

The Copper Mine Rule violates the Water Quality Act by carving out exempt areas in which 3103 Standards do not apply and reduced or no pollution prevention measures are required. One extensive exempt area created by the Rule is based on two complex definitions—the “area of open pit hydrologic containment” and the “open pit surface drainage area.” 20.6.7.7(B)(5) and -(42) NMAC. These areas substantially overlap to form one large exempt area, herein called the “Central Exempt Area” Id. The extent and shape of the Central Exempt Area depend on several variables, which can change over time. However, the most important features of the Central Exempt Area are that its maximum size is not limited by the Rule, and all of the ground water in the area can be polluted above 3103 Standards, in perpetuity.

Here is how it works: Section 20.6.7.24(D) NMAC of the Rule makes 3103 Standards inapplicable to all aquifers, shallow or deep, within the Central Exempt Area “during operation of an open pit” and Section 20.6.7.33(D) NMAC makes the Standards inapplicable within this area after operations cease, in perpetuity. The Rule then imposes substantially relaxed or no prevention, monitoring, and closure requirements on all polluting units located within the Central Exempt Area. This permits massive unlined waste rock stockpiles, leach ore stockpiles,

impoundments, pipelines, and other facilities within the area to discharge acid mine drainage and other contaminants into ground water. See, e.g., 20.6.7.21 (A)(1), -21(B)(1) & (2), -22(a)(1), -23(A)(1)(b) & (c), -23(B)(2), -26(B)(2), -28(B)(2) & (3), -33(C)(3), -33(F), and -33(I) NMAC. Nothing in the Rule limits the maximum extent, degree or duration of the resulting water pollution.

The second type of exempt area, herein called the “Exterior Exempt Area,” is created under the Rule *whenever and wherever* waste rock stockpiles and tailings impoundments will pollute ground water above 3103 Standards outside the Central Exempt Area. Sections 20.6.7.21(B)(1)(c) and 20.6.7.22(A)(4)(c) NMAC permit acid mine drainage and other contaminant discharges from waste rock piles and tailings impoundments, respectively, to pollute ground water “in excess of applicable standards” so long as the polluted “ground water ... [is] captured and contained [by] interceptor systems ....” Aside from certain setback requirements, the Rule does not restrict the siting or size of waste rock stockpiles or tailings impoundments.

- b) The Copper Mine Rule violates the Act by incorporating a “point of compliance” system that permits widespread water pollution above 3103 Standards, in perpetuity.

The Copper Mine Rule also violates the Water Quality Act by incorporating a “point of compliance” system. This system permits mine units to be intentionally designed and constructed to pollute the aquifers underneath all open pit copper

mines, in perpetuity, so long as “applicable standards” are not exceeded in down-gradient monitoring wells. See 20.6.7.21(B)(1)(d)(vii) NMAC (permitting unlined waste rock stockpiles to be intentionally constructed to pollute ground water if “applicable standards” will not be exceeded in down-gradient monitoring wells); 20.6.7.22(A)(4)(d)(vii) NMAC (permitting same with respect to all unlined tailings impoundments); 20.6.7.33 (D)(2) NMAC (allowing flow-through open pits to pollute ground water so long as “applicable standards” are not exceeded in monitoring wells); 20.6.7.33 (F) NMAC (allowing unlined “waste rock piles, leach stockpiles, tailing impoundments and other units” to be closed without cover, thus allowing precipitation to infiltrate and form acid mine drainage, so long as “applicable standards” are not exceeded in down-gradient monitoring wells). Nothing in the Rule limits the extent, degree or duration of water pollution that may exist between compliance points, and nothing in the Rule prohibits these points from being originally located or moved offsite.

Moreover, an aquifer that meets “applicable standards” at the compliance points established under the Rule need not necessarily meet 3013 Standards at those points. Pursuant to the Rule:

“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 (emphasis added). Alternative abatement standards, by definition, exceed 3103 Standards. See 20.6.2.4103 NMAC. Therefore, pursuant to the express language of the Rule, ground water can exceed human health and other 3103 Standards at compliance points and still meet “applicable standards.”

4. The “point of compliance” system of the Copper Mine Rule violates the Act.

The WQCC further changed the *status quo* by incorporating a “point of compliance” system into the Copper Mine Rule. Order at 203 ¶ 1328 (finding it necessary to specify “places where compliance with ground water standards is to be determined in relation to particular mine-related units”). As the WQCC previously held in 2009, a “point of compliance” system is contrary to the Water Quality Act. Remand Order at 80, ¶¶ 27 and 28.

State Engineer Steve Reynolds originally came up with the Place of Withdrawal language to protect “fresh water supplies” from being impaired by pollution from oil and gas operations.<sup>1</sup> Remand Order at 11-12, ¶ 43; see also *id.* 11-23, ¶¶ 44-86 (setting out the historical development and interpretation of Place of Withdrawal language). The language is intended to be “parallel to water rights law where a permit cannot be granted except with a finding that other water rights will not be impaired.” *Id.* at 14, ¶ 52; see also NMSA 1978, 74-6-4(E) (requiring WQCC to consider, among other things, “successive uses [of water]” and

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<sup>1</sup> The State Engineer has a duty to designate fresh water supplies pursuant to NMSA 1978, Section 70-2-12(B)(15) (2004).

“accustomed uses.” Therefore, protecting Places of Withdrawal under the Act is tantamount to protecting existing and reasonably foreseeable future water rights from impairment by pollution.

The “point of compliance” system incorporated into the Rule does not protect Places of Withdrawal because it bears no relationship to existing and reasonably foreseeable future uses of ground water. This is readily apparent under the Rule, because compliance points are located strictly in relation to the mine units they monitor. See, e.g., 20.6.7.28(B) NMAC (“A permittee shall monitor ground water quality as close as practicable around the perimeter and downgradient of each open pit, leach stockpile, waste rock stockpile, tailings impoundment, process water impoundment, and impacted stormwater impoundment.”) On its face, the Rule requires no consideration of present or reasonably foreseeable uses of water. It instead permits the discharger to pollute *any* aquifer based on the arbitrary location, extent and duration of the discharge and resulting water pollution. This is contrary to the Act and violates this Court’s mandate to develop criteria for identifying Places of Withdrawal.

**B. Appellants and the public will suffer irreparable harm if the Copper Mine Rule is not stayed pending appeal.**

The pollution and depletion of Appellants’ water supplies permitted by the Copper Mine Rule, as described in Part I above, threatens the public and Appellants with irreparable harm. An “irreparable injury” is one “for which there

is no adequate and complete remedy at law.” Amkco, Ltd., Co. v. Welborn, 2001-NMSC-012, ¶9, 130 N.M. 155, 21 P.3d 24. The “showing necessary to establish irreparable injury” is an issue of law, which this Court reviews *de novo*. Romero v. Bank of the Southwest, 2003-NMCA-124, ¶ 28, 135 N.M. 1, 83 P.3d 288 (citing Amkco, 2001-NMSC-012, ¶¶ 8-9). Injuries to property interests are generally considered irreparable. Amkco, 2001-NMSC-012, ¶ 11. To be entitled to a stay, Appellants need only show the *threat* of irreparable harm:

Where injury is threatened, there need be no showing of the precise measured amount of actual harm. A showing of a serious threat of imminent harm is sufficient where such harm will result in irreparable injury.

Winrock Enters. v. House of Fabrics of N.M., Inc., 1978-NMSC-038, 16, 91 N.M. 661, 579 P.2d 787 (1978).

The pollution and depletion of the Appellants’ and the public’s water supplies constitutes irreparable harm in the form of environmental injury:

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987). “When the express purpose of a statute is the protection of the public health, safety and welfare, irreparable harm is presumed.” Department of Environmental Regulation v. Montco Research Products, Inc., 489 So. 2d 771, 774 (Fla. Dist. Ct. App. 5th

Dist. 1986); see also California ex rel. State Air Resources Bd. v. Department of Navy, 431 F. Supp. 1271, 1294 (N.D. Cal. 1977) (“Clearly, however, pollution which violates standards approved by the EPA pursuant to its authority under the Act is, by definition, presumptively significant and irreparably harmful to health and welfare”); Friends of Sakonnet v. Dutra, 738 F. Supp. 623, 637 (D.R.I. 1990) (“If the pollution is allowed to resume flowing until a permanent solution is found and constructed, irreparable harm will result to the plaintiffs and the public”); Nat’l Post Office Collaborative v. Donahoe, 2013 U.S. Dist. LEXIS 154679 (D. Conn. Oct. 28, 2013) (“courts have found irreparable harm and granted preliminary injunctions to prevent a wide array of environmental injuries, including those resulting from construction and development”) (citing Amoco and other cases); San Luis & Delta-Mendota Water Auth. v. Locke, 713 F. Supp. 2d 1116, 1179 (E.D. Cal. 2010) (recognizing irreparable harm from loss of water supply).

Appellants and the public are also irreparably harmed by the Rule because it deprives them of their statutory right to participate in variance proceedings under the Water Quality Act. Wyland v. West Shore Sch. Dist., 52 A.3d 572, 583 (Pa. Commw. Ct. 2012) (“deprivation of a statutory right constitutes irreparable harm”). Under the *status quo* existing before the Copper Mine Rule, dischargers could not legally pollute ground water above 3103 Standards unless they obtained a variance from the WQCC pursuant to NMSA 1978, Section 74-6-4(H). Order Denying Stay

Decision [35 RP 07498-07506] at 7 ¶ 38 (“Currently, mine units that contaminate groundwater above standards require a variance”); see also NMED Exhibits 22-25 (regarding prior variances obtained by Freeport) [RP 04698-04745]. Pursuant to Section 74-6-4(H), the WQCC cannot grant a variance from its regulations unless the discharger demonstrates at a public hearing that compliance imposes an unreasonable burden and the resulting pollution will be abated within a reasonable time.

The Rule changes the *status quo* by permitting widespread and enduring water pollution at all existing and future open pit copper mines, without a variance. This irreparably harms Appellants and the public by depriving them of their statutory right to oppose the pollution of their water supplies at adjudicatory variance hearings. At these hearings, unlike those provided under the Rule, Appellants and the public would have the opportunity to oppose water pollution by showing that compliance with 3103 Standards did not “impose an unreasonable burden” on the discharger or that “abatement of water pollution” would not occur “within a reasonable period of time.” § 74-6-4(H) (imposing statutory standards for variances). In contrast, the Rule permits water pollution as a matter of right, even if the pollution is reasonably preventable or cannot be abated within a reasonable time.

Appellants and the public will also be irreparably harmed by being forced to challenge the Rule and defend against water pollution in a multiplicity of lawsuits. As described above, there are seventeen permit applications for discharge permits at Freeport's open pit copper mines currently pending before NMED. Another application for the new Copper Flat Mine in Sierra County, New Mexico, is also pending. The Rule unlawfully permits NMED to approve these pending applications even if the discharge will cause water pollution above 3103 Standards.

NMED cannot approve a discharge permit until it provides notice and an opportunity for public hearing, and its decision is appealable to the WQCC and ultimately to this Court. NMSA 1978, §§ 74-6-5(G) & (O); NMSA 1978, § 74-7-7(C). If Appellants and the public are forced to challenge the aspects of the Rule that allow water pollution in multiple separate permitting actions, then they will suffer further irreparable harm:

Where the imminent harm or conduct is or will be of a continuous nature, the constant recurrence of which renders a remedy at law inadequate, except by a multiplicity of suits, then the injury is irreparable at law and relief by injunction is therefore appropriate.

Winrock Enters. v. House of Fabrics of N.M., Inc., 1978-NMSC-038, ¶ 16, 91 N.M. 661, 579 P.2d 787. In each separate permit proceeding, Appellants or any member of the public may challenge the Rule based on the same issues that are now before this Court. NMED's initial decision in each such case is preordained, as is the WQCC's decision on appeal, which means the expenditure of the public's

resources would be futile and the issues would again come to this Court. The Rule should be stayed pending appeal to avoid such waste of resources and irreparable harm.

**C. Staying the Copper Mine Rule pending appeal will not harm WQCC, NMED or Freeport.**

WQCC, NMED and Freeport will not be harmed if the Court preserves the *status quo* by staying the Copper Mine Rule pending appeal. Freeport is already operating under the general permitting rules, 20.6.2 NMAC, and has been since its first permit was issued in 1978. NMED's Response to Joint Request for Stay [35 RP 07316-07337] at 10. Indeed, NMED has allowed Freeport to operate under "expired permits" and there is no reason why Freeport could not continue doing so during the appeal. *Id.* at 10. Alternatively, as it conceded below, NMED "could proceed with issuing permits under the general permitting rules" (*i.e.*, Part 20.6.2 NMAC).

NMED objected to staying the Rule pending appeal because it "anticipate[d] challenges to the draft permit language [under pre-Rule regulations] will result in hearings, appeals and further litigation." *Id.* at 10-11. Freeport similarly objected that "uncertainty" and "litigation" would result if the Copper Mine Rule were stayed pending appeal. Freeport Opposition to Stay [35 RP 07338-07410] at 24-25. However, such "anticipation" of future litigation initiated by others is speculative and, as such, does not constitute cognizable harm. Cattlegrowers, 2013-NMCA-

046, ¶13, 299 P.3d 436 (“The fear of future lawsuits ... is hypothetical harm and does not establish that the Cattle Growers' Association will be adversely affected.”)

**D. The public interest in unpolluted public water overwhelmingly favors staying the Copper Mine Rule pending appeal.**

“There is substantial authority that when a case is brought pursuant to an environmental or public health statute ..., the primary focus shifts from irreparable harm to concern for the general public interest.” Wilson v. Amoco Corp., 989 F. Supp. 1159, 1171 (D. Wyo. 1998).

Thus, although it is not appropriate to dispense with the required showing of irreparable harm, it is permissible as part of the traditional balancing process to lessen the weight attributable to that usually dispositive factor.

Id.; see also id. at 1179 (“citizens have a right to expect contamination-free groundwater”). Conserving and protecting water is of great public importance in New Mexico. The New Mexico Constitution declares that all water in the State “belong[s] to the public and [is] subject to appropriation for beneficial use ....” N.M. Const. art. XVI, § 2; NMSA 1978, §72-12-1 (2003) (declaring groundwater “to belong to the public and is subject to appropriation for beneficial use”); NMSA 1978, § 72-12-18 (1983) (same).

The Constitution also declares that “water and other natural resources of this state” are “of fundamental importance to the public interest, health, safety and the general welfare.” N.M. Const. art. XX, § 21. Public water in New Mexico is held

in trust by the State for the benefit of the public. See, e.g., 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”). The pollution of public water in New Mexico is a criminal public nuisance, NMSA 1978, §30-8-2 (1993), and the Legislature has enacted numerous statutes to protect New Mexico’s water from pollution. See, e.g., NMSA 1978, §§ 74-1-1 through 74-1-17 (1971, as amended through 2009) (Environmental Improvement Act); NMSA 1978, §§ 74-4-1 through 74-4-14 (1977, as amended through 2006) (Hazardous Waste Act); NMSA 1978, §§ 74-6-1 through 74-6-17 (1967, as amended through 2009) (Water Quality Act); NMSA 1978, §§ 74-9-1 through 74-9-43 (1990, as amended through 2011) (Solid Waste Act).

The great public importance of water, as evidenced at all levels of New Mexico law, led this Court to hold:

Water has constitutional significance in New Mexico. ... Its scarcity and overall importance in our semiarid state precludes our taking ... a casual view of water.

Bybee v. City of Albuquerque, 1995-NMCA-061, 120 N.M. 17, 20. In Kaiser Steel Corp. v. W. S. Ranch Co., the New Mexico Supreme Court declared:

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.

1970-NMSC-043, 81 N.M. 414, 417, 467 P.2d 986, 989; see also, e.g., NMSA 1978, §74-1-12(A) (1999) (describing water as “the state’s most precious resource.”)

The public’s profound interest in protecting and conserving water substantially outweighs whatever interest the WQCC, NMED and Freeport have in polluting it. Neither NMED nor FMI claims that any jobs will be lost or other concrete harm will ensue if the Rule is stayed pending appeal. Furthermore, any presumption that WQCC and NMED speak for the public is undermined by the fact that Freeport wrote almost all of the Statement of Reasons that NMED proposed and WQCC adopted, *in toto*. Appellants Notice of Intent [35 RP 06973-07315] at 1-3. The Statement of Reasons presents Freeport’s biased view of the facts and law. It does not include even one citation to the closing arguments, proposed findings and conclusions of law, or alternative rule submitted by the Attorney General and other Appellants.

### CONCLUSION

Staying the Copper Mine Rule pending appeal will preserve the *status quo*, prevent irreparable harm in the form of essentially permanent water pollution and other injuries, and not harm any other party to this appeal. Most important, a stay will protect the public’s interest in unpolluted water supplies while this Court determines whether WQCC has the authority under the Water Quality Act to

permit water pollution by rule at all existing and future open pit copper mines.  
Therefore, Appellants respectfully request the Court to stay the Rule pending  
appeal.

Respectfully submitted,

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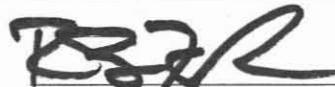
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**CERTIFICATE OF SERVICE:** I hereby certify that on February 19, 2014, I caused a copy of the foregoing paper to be mailed (first class) to the parties' attorneys at the addresses shown below:

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