



October 12, 2012

Transmitted Via Email

Mr. F. David Martin
Secretary of the New Mexico Environment Department
Harold L. Runnels Building
1190 St. Francis Drive
Suite N4050
Santa Fe, New Mexico 87505

Re: Comments on the September 13, 2012, Draft of the Copper Mine Regulations; Part 20.6.7
NMAC

Dear Secretary Martin:

On behalf of Amigos Bravos, Turner Ranch Properties, L.P., and the Gila Resources Information Project ("GRIP"), the New Mexico Environmental Law Center ("NMELC") provides the following comments on the September 13th draft of the copper regulations. As you know, we provided extensive comments to the New Mexico Environment Department ("NMED") in response to its preceding draft, dated August 17th, which we are re-transmitting along with this letter. NMED's most recent draft, dated September 13th, reflects the wholesale acceptance by NMED's upper management of virtually all comments submitted by Freeport-McMoRan, Inc. ("FMI") on the previous August 17th draft.

Because of FMI's apparent undue influence on NMED management, as discussed below, NMED's September 13th draft now allows "pollution by rule." This draft, which purports to be a statewide regulation to *prevent* water pollution, is now specifically designed to accommodate FMI's desire to pollute groundwater above the water quality standards set by the Water Quality Control Commission ("WQCC"). As a result, the September 13th draft is inconsistent with the letter and spirit of the Water Quality Act, WQCC's February 4, 2009, Decision and Order on Remand in WQCC Cases 03-2(A) and 03-3(A) (consolidated) ("WQCC Decision"), and existing WQCC regulations. The draft is even inconsistent with the December 20, 2010, Settlement Agreement and Final Stipulated Order ("Tyrone Settlement") that FMI and NMED spent over a year negotiating. The Tyrone Settlement would allow groundwater pollution above standards at FMI's Tyrone Mine in limited circumstances, but it also would at least require FMI to obtain a variance from the WQCC.¹ Tyrone Settlement at 12-14, ¶¶ 36-43.

¹ Variances can only be issued following an adjudicatory, duly noticed public hearing.

1. At FMI's Request, NMED's Draft Regulation Would Authorize FMI and Other Copper Mine Operators to Pollute Groundwater.

Most egregiously, NMED's latest draft would at FMI's request simply exempt large portions of all open pit copper mines from the WQCC's water quality standards, which have for 35 years protected groundwater for present and future beneficial use. See, e.g., September 13th Draft at §20(B)(2)² (allowing existing leach stockpiles to pollute above WQCC standards); §21(A)(f) (exempting materials from acid characterization requirements within the so-called "open pit drainage area"); §21(B) (exempting all leach stockpiles from liner requirements); §22 (allowing pollution of groundwater beneath tailings stockpiles); §23 (allowing pipeline leaks); §24 (exempting major portions of all open pit copper mines from water quality standards); §28(B)(2) (exempting substantial portions of all open pit copper mines from monitoring requirements); §33(D)(1) (exempting substantial portions of all open pit copper mines from both groundwater and surface water quality standards). These provisions clearly violate the Water Quality Act, which requires WQCC to adopt regulations that *prevent* pollution, not allow it. NMSA 1978, § 74-6-4(K).

2. At FMI's Request, NMED's Draft Regulation Would Establish Discrete "Points of Compliance" Rather than Protecting All Groundwater from Pollution.

Also at FMI's request the draft regulations would incorporate for the first time the "point of compliance" concept that FMI has long advocated—unsuccessfully until now. This concept is useful to FMI, because it exempts large portions of all copper mines from WQCC standards so long as designated "points of compliance" do not exceed the standards.³ Because these "points of compliance" are located some distance from the polluting sources, such as leach, waste rock, and tailings stockpiles that generate acid rock drainage and other contaminants, NMED's draft effectively allows FMI and now all copper mine operators to use *in situ* public water in their waste disposal and processing operations. See, e.g., § 21(C)(3) (polluting waste rock piles); §22(A)(4)(a) (polluting tailings); §28(B) (monitoring requirements at designated wells); §33(D)(2) (open pits); §33(F) (cover requirements). These provisions and others again violate the Water Quality Act, which requires NMED and WQCC to protect groundwater at *all* places of withdrawal for present or reasonably foreseeable future use ("places of withdrawal"). NMSA 1978, § 74-6-5(E)(3).

As the WQCC held after extensive litigation between FMI, GRIP and NMED regarding FMI's DP-1341⁴ at the Tyrone Mine:

Section 74-5-6(E)(3) does not establish any specific "point(s) of compliance" for compliance with water quality standards. ... Nothing in the [Water Quality] Act or the Commission Regulations provides for a "point of compliance," hydraulically up-gradient of which ground water need not be protected.

² The cited sections are all within Part 20.6.7.

³ The regulation does not use this term but instead uses, for example, terms such as "designated monitoring wells" that are located outside the areas of "hydrologic containment" or outside the "open pit surface drainage area."

⁴ "DP-1341" refers to FMI's closure permit at its Tyrone Mine.

WQCC Decision at 80 ¶¶ 27, 28. NMED now asks the WQCC to ignore its own holding and NMED's long-held former position, as well as the requirement—imposed by the Court of Appeals and WQCC—that all groundwater meeting certain site-specific criteria be protected.⁵ WQCC Decision at 33-34 (¶¶ 127-134), 78-79 (¶¶ 15-24), 81-84 (¶¶ 31-51).

3. In Adopting FMI's Regulatory Language, NMED Ignored Its Own Technical Experts and Acted in Derogation of the Legislatively-Mandated Public Process.

We also object to NMED's wholesale adoption of FMI's regulatory language outside the public process established by the Legislature. In regards to this process the Water Quality Act provides:

The [WQCC] shall adopt regulations for ... the copper industry. ... [NMED] shall establish an advisory committee composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders to advise [NMED] on appropriate regulations to be proposed for adoption by the [WQCC]. The regulations shall be developed and adopted in accordance with a schedule approved by the [WQCC]. The schedule shall incorporate an opportunity for public input and stakeholder negotiations.

NMSA 1978, § 74-6-4(K). The advisory committee meetings were always attended by multiple FMI representatives, including several company employees, legal counsel, and current and past consultants. FMI's lobbyists attended some of the meetings. However, despite FMI's overwhelming presence, NMED's technical experts and consultant on the committee did not incorporate most of FMI's unprecedented "pollution by rule" language into the August 17th committee draft. Instead, with two limited exceptions,⁶ the August 17th draft would have required FMI and all others to obtain a variance if they intended to pollute groundwater above standards. This same requirement has been, until now, common to all companies and industries throughout New Mexico.

However, NMED management decided to overrule its expert technical advisors, opting instead for wholesale adoption of all of FMI's "pollution by rule" regulatory language. We understand that Mr. Ryan Flynn, NMED's general counsel, was instrumental in incorporating FMI's suggested changes into the September 13th draft. Mr. Flynn came to NMED directly from the Modrall Sperling Law Firm, which has represented FMI for years in numerous proceedings before the WQCC, NMED, and the Courts. For years Modrall advocated unsuccessfully for essentially the same provisions that Mr. Flynn has now helped to incorporate into NMED's draft regulation. Although we do not know whether Mr. Flynn was in fact influenced by his former

⁵ Unless a variance is obtained, dischargers who desire to pollute groundwater above WQCC standards have the burden of proving that the groundwater at issue does *not* meet these criteria. WQCC Order at 15-17 (¶¶ 55-62), 78 ¶ 13, 83 ¶ 45.

⁶ These exceptions in the August 17th draft, Sections 20(A)(1) and 21(B)(1), were overlooked in our prior comments. We intend to object at hearing to any provision of NMED's petition that would allow pollution above WQCC water quality standards.

law firm and its longtime association with FMI, or whether he ever personally represented FMI, we do know that the appearance of unprecedented influence and conflict of interest is present, and that the interests of protecting public health and safety and our state's natural resources appear to have been overridden by the one company with the most to gain from revising these regulations. Cf. Rule 16-107(A)(2) (restricting a lawyer's representation where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a former client"). Therefore, we request that Mr. Flynn recuse himself from this process and that his influence on NMED's draft regulation be fully disclosed and removed.

Furthermore, NMED did not conduct meaningful stakeholder negotiations as required by the Water Quality Act. At the purported stakeholder meeting on September 27, no one from NMED who was responsible for the wholesale adoption of FMI's regulatory language was present. The NMED staff members who did attend could not explain the basis for the changes that NMED management made to the August 17th committee draft, nor were they authorized to negotiate any further changes. Although several FMI representatives were present, they refused to negotiate and remained largely silent throughout the meeting. Furthermore, in our private meeting with you and Mr. Flynn on October 3, Mr. Flynn made it very clear that no further substantive changes would be made to NMED's September 13rd draft, and that NMED would defend the draft "all the way to the Supreme Court." Thus, there was no genuine stakeholder process. This, and the sweeping last-minute changes made by NMED management at FMI's request, violated both the letter and spirit of Section 74-6-4(K), undermined the other parties' and the public's trust, and put at risk the public's health, safety and welfare as well as the public's water resources.

NMED has a duty to uphold the Water Quality Act and to carry on its admirable 35-year history of protecting groundwater for beneficial use by current and future generations. It should not make special exceptions for one industry, much less *one company*, which would allow it to pollute public groundwater as a matter of right. Such an exception is not only unlawful and unprecedented, it is not even necessary. Where justified by appropriate site-specific circumstances, WQCC can and has granted variances from its existing regulations on a case-by-case basis. Accordingly, NMED should recall its September 13th draft and go back to the August 17th draft and reconsider our recommended changes to that draft along with our current comments. This will not prejudice FMI whatsoever. In the hearing before WQCC, FMI (just like all interested New Mexicans) has the right to advocate for whatever additional changes they may desire in NMED's petition. NMED should not place FMI in a special position or act as FMI's advocate, but that is exactly what its September 13th draft appears to do.

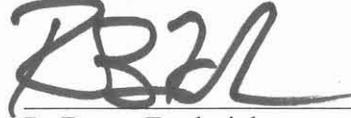
Finally, the draft copper regulations are voluminous, highly technical, and complicated. They raise serious scientific, legal, and procedural issues. Because the regulatory development process was rushed to accommodate the schedule of FMI and NMED under the Tyrone Settlement,⁷ we have not had sufficient time to perform a comprehensive line-by-line evaluation

⁷ The regulatory development process was improperly rushed because the Tyrone Settlement, which is exclusively between FMI and NMED, required WQCC to adopt regulations on or before December 17, 2012. Settlement

Secretary F. David Martin
October 12, 2012
Page 5

of the regulations or raise every possible legal objection.⁸ Accordingly, our present comments are limited to the most serious issues. At the hearing before WQCC, we expressly reserve the right to make any and all legal and technical objections to NMED's petition and to advocate for whatever changes to NMED's petition that we deem appropriate, regardless of whether we raised the same issues as part of the advisory committee process.

Sincerely,



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Agreement at 17 ¶ 50(d) (requiring termination unless WQCC adopts the copper regulations within 24 months after execution of the Settlement).

⁸ We also suspect that a line-by-line analysis would be futile given NMED's current position.