

**COMMENTS ON THE COPPER FLAT COPPER MINE DRAFT DISCHARGE  
PERMIT, DP-1840**

**PREPARED BY THE NEW MEXICO ENVIRONMENTAL LAW CENTER (“NMELC”)  
ON BEHALF OF TURNER RANCH PROPERTIES, L.P. (“TRP”) AND HILLSBORO  
PITCHFORK RANCH (“PITCHFORK RANCH”)**

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Exhibit D, TRP's Second Request for Supplemental Draft EIS to BLM, dated January 5, 2018

Exhibit E, TRP Request for Supplemental Draft EIS to BLM, dated April 7, 2017

Exhibit F, Tom Myers, PhD, Hydrologic Consultant's Technical Memorandum: Review of the Draft Discharge Permit and Application, Copper Flat Copper Mine

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Exhibit H, MMD's Comments on the Draft EIS to BLM, dated March 4, 2016

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Exhibit J, TRP's Comments on the Draft EIS to BLM, dated April 4, 2016

Exhibit K, New Mexico Interstate Stream Commission's Comments on the Draft EIS to BLM, dated February 26, 2016

Exhibit L, BLM Briefing Memorandum Regarding Copper Flat Copper Mine Draft EIS, dated November 30, 2017

Exhibit M, THEMAC Letter to NMED Regarding Copper Flat Copper Mine's Pit Lake, dated August 5, 2016

Exhibit N, TRP's and Pitchfork Ranch's Request to MMD Regarding Copper Flat Copper Mine's New Application Permit and the Copper Flat Extradited Inter Se Decision, dated February 27, 2018

Exhibit O, NMED emails with NMELC, dated November 9, 2017

Exhibit P, NMED Comments on Copper Flat Copper Mine's Two Hydrologic Reports Submitted to MMD, dated March 16, 2018

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Exhibit S, NMED Comments on the Copper Flat Administrative Final EIS, dated April 17, 2018

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## **Comments and Request for Public Hearing on Draft Discharge Permit for Proposed Copper Flat Copper Mine, DP-1840**

### **Introduction**

The New Mexico Environmental Law Center (“Environmental Law Center”), on behalf of Turner Ranch Properties, L.P. (“TRP”) and Hillsboro Pitchfork Ranch, LLC (“Pitchfork Ranch”), submits the following comments on the draft discharge permit for the proposed Copper Flat Copper Mine (“Mine”), DP-1840 (“Draft Discharge Permit”), pursuant to 20.6.7.10.H NMAC and 20.6.2.3108.K NMAC. The Environment Department must stay all action on the Draft Discharge Permit for the reasons discussed below. In the alternative, the Environment Department must grant TRP’s and Pitchfork Ranch’s request that a public hearing be held on the Draft Discharge Permit<sup>1</sup>, and must ultimately deny the Draft Discharge Permit.

TRP is the owner of the Ladder Ranch (“Ladder Ranch,” “Ladder” or “Ranch”) located adjacent to the Mine in Sierra County, New Mexico. The Ladder Ranch covers 156,439 acres or 245 square miles and contains an extraordinarily diverse range of wildlife and mix of ecosystems, from desert grasslands to pine forests in the foothills of the Black Range. Four tributaries of the Rio Grande – the Las Animas, Seco, Palomas and Cuchillo streams – are located on the Ladder Ranch. These streams support abundant flora, including sycamores and cottonwoods, and fauna such as Chiricahua leopard frogs and sensitive Rio Grande cutthroat trout, which are in the process of being restored to these areas.

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<sup>1</sup> TRP’s and Pitchfork Ranch’s comments set forth the reasons why a public hearing should be held on the Draft Discharge Permit and demonstrate that there is substantial public interest in DP-1840. Section 20.6.2.3108.K NMAC; Communities for Clean Water v. New Mexico Water Quality Control Commission, 2017 N.M. App. LEXIS 115; In re Rhino Env’tl. Servs., 2005-NMSC-024, P 23, 138 N.M. 133, 139, 117 P.3d 939, 945.

The Ranch's riparian areas contribute significantly to biological diversity within New Mexico. The most pronounced and unusual communities on the Ranch are those dominated by Arizona sycamore, along the broadest flood plains of Las Animas Creek. Arizona sycamore are not known to occur anywhere else in the Rio Grande watershed, or further east of the Continental Divide. These riparian communities have high priority for conservation since throughout most of the Southwest they are in decline, due to drastic changes in hydrological conditions (such as large flood-control dams and climate change). The continued diversity of the riparian vegetation communities on Ladder is dependent on management practices that favor natural flooding, reliable stream flows on or near the surface, and protection of the uplands from erosion. Many wildlife species are totally dependent upon these riparian communities, which serve as wildlife sanctuaries within an arid landscape.

The Pitchfork Ranch is a fourth-generation family-owned cattle ranch located adjacent to the Mine. The ranch was established in 1906 and continues to operate as a family-owned cattle ranch. In addition, the ranch has partnered with the New Mexico Department of Game and Fish ("NM Game & Fish") to improve mule deer habitat on the ranch property and has been recognized by NM Game & Fish as one of the few ranches in New Mexico to make meaningful improvement to mule deer habitat.

TRP and Pitchfork Ranch are both extremely concerned about the Mine's impacts on ground and surface water. Hydrologic effects include the lowering of the water table associated with dewatering, post-closure evaporation of the open pit, and the Mine production wells. The Mine's hydrologic effects may negatively impact the Ladder Ranch's water resources and conservation programs that rely on perennial surface water flow, as well as its ranching and ecotourism activities, resulting in an undue risk to property. The Mine's hydrologic effects may



also harm the Pitchfork Ranch's water resources, as well as the ranch's cattle operations and mule deer habitat restoration efforts that rely on perennial surface water flow, resulting in undue risk to property.<sup>2</sup>

TRP and Pitchfork Ranch are also concerned about the migration of contaminants from mining operations into ground and surface water, and the associated impacts such contamination would have on their ranches, resulting in a hazard to public health and undue risk to property.

### **Executive Summary**

The following comments demonstrate that the New Mexico Environment Department's ("Environment Department" or "NMED") consideration of the Draft Discharge Permit is premature at this time and therefore the Environment Department must stay all action on the Draft Discharge Permit.

In the alternative, the Environment Department must deny the Draft Discharge Permit because it poses a hazard to public health and undue risk to property for the following reasons:

- The andesite bedrock beneath the proposed waste rock stockpiles is not an impermeable liner and therefore will not completely prevent all leaks to groundwater, thereby posing a hazard to public health and undue risk to property;
- The applicant's water balance calculations reveal a huge error regarding initial startup water and free tails water. Because of this error, the DP Application grossly underestimates the amount of fresh water the applicant will pump at the beginning of the project. This, therefore, violates the Copper Rule's requirement that the applicant submit an accurate water management plan. This factor is also key to the Secretary's

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<sup>2</sup> The Pitchfork Ranch is not alone in its concern regarding the Mine's impacts to mule deer in the Mine impact area. NM Game & Fish advised the Bureau of Land Management that, "Mule deer populations have been on the decline over the past several decades, and this area is considered to be vital habitat for mule deer in New Mexico. Department biologists have been working with landowners for approximately six years to improve habitat. Mule deer rely upon multiple springs in the area and could be in jeopardy..." NM Game & Fish comments on the Copper Flat Copper Mine Draft Environmental Impact Statement, page 2 (April 4, 2016).

determination whether the Draft Discharge Permit poses a hazard to public health or undue risk to property;

- Contaminants discharged from the Mine's waste rock stockpiles and tailings storage facility ("TSF") pursuant to the Draft Discharge Permit could reach surface water near the Mine, including the Rio Grande, thereby posing a hazard to public health and undue risk to property;
- Tailings run-off collected in unlined ditches could seep into groundwater, thereby posing a hazard to public health and undue risk to property;
- The proposed groundwater monitoring well network is grossly insufficient to detect contamination moving from the Mine's pit lake, waste rock stockpiles or TSF. Even with contaminant dispersion, entire contaminant plumes could escape the Mine site undetected, thereby posing a hazard to public health and undue risk to property.

Specific to Ladder Ranch, the Draft Discharge Permit poses a hazard to public health and undue risk to property for the following reasons:

- The Greyback Arroyo lies just south of the Ranch property line, so any Mine-impacted surface water/stormwater flow that could jump the banks or cause changes in the arroyo plan could negatively impact the Ranch through contamination of springs. Potential contamination resulting from the Mine's discharges thereby poses a hazard to public health and undue risk to property;
- Contaminants discharged from the Mine's waste rock stock piles and TSF pursuant to the Draft Discharge Permit could reach springs on the Ranch. Wells and springs on the Ranch could become contaminated by the Mine's discharges that exceed water quality standards set forth in Section 20.6.2.3103 NMAC, thereby posing a hazard to public health and undue risk to property; and
- The proposed groundwater monitoring well network is grossly insufficient to detect contamination moving from the Mine site onto the Ranch. The monitoring wells are spaced too widely and contaminant plumes could slip through undetected, thereby posing a hazard to public health and undue risk to property on the Ranch.

The Environment Department must also deny the Draft Discharge Permit because it is technically incomplete and fails to demonstrate compliance with the New Mexico Office of the State Engineer-Dam Safety Bureau ("OSE-DSB") rules and regulations for the proposed tailings dam. The Draft Discharge Permit's conditions also violate the New Mexico Water Quality Act

and its implementing regulations, as well as the New Mexico Mining Act and its implementing regulations.

Section I of these comments demonstrates why action on the Draft Discharge Permit is premature at this time, and therefore all permit action must be stayed. In the alternative, Section II demonstrates how the Draft Discharge Permit poses a hazard to public health and undue risk to property, and therefore the permit must be denied. Section III demonstrates how the Draft Discharge Permit is technically complete, and therefore the permit must be denied. Section IV demonstrates how the Draft Discharge Permit is arbitrarily based on new information not provided by the applicant and that the applicant may have made false material statements, representations, certifications or omissions of material fact, and therefore the permit must be denied. Section V demonstrates how the Draft Discharge Permit's use of "amendments" violates the Water Quality Act, and therefore the permit must be denied.

### **Detailed Comments**

#### **I. The Environment Department's Consideration of the Draft Discharge Permit is Premature.**

##### **A. The Environment Department Has Previously Suspended Action on Discharge Permits for the Copper Flat Copper Mine Pending Development and Evaluation of Environmental Impact Statements Demanded by the United States Bureau of Land Management.**

The New Mexico Copper Corporation ("NMCC") is not the first operator of the proposed Mine, and the Draft Discharge Permit is not the first discharge permit for this Mine. In fact, the Mine produced minerals for three months in 1982 under the operation of Quintana Minerals and pursuant to the first ever discharge permit issued in New Mexico, DP-01. *Copper Flat Expedited Inter Se Decision*, page 13 (December 28, 2017). See attached Exhibit A. However, operations ceased in July 1982. *Id.* at page 18.

Eight years later, after the Mine infrastructure was stripped and sold off and the Mine's water rights were sold, Gold Express acquired the Mine (*Id.* at page 39) and submitted a proposed plan of operations to the United States Bureau of Land Management ("BLM") on January 31, 1991. *Id.* at page 40. Gold Express also submitted a discharge permit renewal application for the Mine to the Environment Department on July 7, 1992. *See* attached Exhibit B. In 1992, the Environment Department suspended action on the discharge permit application "pending development and evaluation of an environmental impact statement demanded by BLM." Environment Department Letter to Alta Gold Co., (September 30, 1994). *See* attached Exhibit C.

Environment Department Secretary Judith Espinosa stated the following, in pertinent part, regarding the Department's decision to stay action on the discharge permit application: "I view it as reasonable for the Ground Water Bureau not to have acted on this discharge plan application in what **would have amounted to an advisory capacity, or in advance of necessity.**" *Id.* (emphasis added).

Alta Gold acquired the Mine in 1994 (*Copper Flat Expedited Inter Se Decision*, page 40) and became the new applicant for the discharge permit renewal initially submitted by Gold Express. Alta Gold requested that its application be processed and approved. *See* attached Exhibit B. The Environment Department continued to suspend action on the discharge permit application until completion of the environmental impact statement ("EIS") process.<sup>3</sup> *See* attached Exhibit C. Therefore, it has been longstanding Environment Department policy to stay action on discharge permit applications while the EIS process is pending.

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<sup>3</sup> Before the BLM's final EIS could be released to the public, Alta Gold Co. went bankrupt, terminating all pending permit activities. *Copper Flat Expedited Inter Se Decision*, Exhibit A, page 42.

**B. The Environment Department Should Apply Longstanding Policy Regarding Mine Discharge Permits and Suspend Action on the Draft Discharge Permit.**

When NMCC submitted its discharge permit application in 2011 it did so as a discharge permit renewal and modification application for DP-01. *See* NMCC's March 31, 2011 discharge permit renewal and modification application *and* NMCC's December 9, 2015 revision of its discharge permit renewal and modification application. It took the Environment Department over five years to determine that NMCC had incorrectly submitted a discharge permit renewal and modification application and that NMCC was required to submit a new discharge permit application because the Mine is a "new mine" under the New Mexico Mining Act ("Mining Act"). Environment Department Request for Additional Information Letter to NMCC (September 19, 2016). The Environment Department is now handling NMCC's application as a new discharge permit application for a new mine pursuant to the Copper Rule, 20.6.7 NMAC.

BLM has demanded an EIS for the Mine since the decades-dormant mine is technically a "new mine." BLM released the Draft EIS in November 2015 and has yet to issue a Final EIS and Record of Decision. Therefore, the EIS process is still pending for the Mine. In fact, there are multiple requests for BLM to conduct a Supplemental Draft EIS, for a multitude of reasons<sup>4</sup>, which are currently pending and may result in the issuance of a Supplemental Draft EIS.

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<sup>4</sup> TRP has requested BLM issue a Supplemental Draft EIS in light of the recent *Copper Flat Extradited Inter Se Decision*. *See* attached Exhibit D. The Draft EIS clearly fails to analyze the environmental impacts of any water leases NMCC may enter into for securing water necessary for ore processing and proposed reclamation measures and makes clear that the Mine's water accounting for start-up water is incorrect and that the Mine's proposed reclamation measure of rapid-fill of the pit post-closure is technically infeasible. TRP has also submitted additional requests for a Supplemental Draft EIS based upon substantial information coming to light after the close of the Draft EIS comment period pertaining to BLM's Biological Assessment and the Mine's impacts on two Endangered Species Act candidate species of fish, the Rio Grande Chub and Rio Grande Sucker; to NMCC's water lease with the Jicarilla Apache Nation; and to the Environment Department's potential classification of the Mine's current and future expanded pit

NMCC's discharge permit application relies extensively upon the Draft EIS and is supported by documents submitted in the EIS process. For example, NMCC's Mining Operations Reclamation Plan ("MORP"), submitted to BLM as part of the EIS process, is the foundation for all of the Mine's pending permits with BLM, the Environment Department, the New Mexico Mining and Minerals Division ("MMD"), and the New Mexico Office of the State Engineer ("OSE"). Furthermore, the Environment Department has stated to MMD that the MORP and its associated operational, monitoring and closure plans "are **critical to development of the draft Ground Water Discharge Permit.**" Environment Department Comments on NMCC's October 14, 2016 Revised MORP, page 2 (January 6, 2017) (emphasis added).

Additionally, NMED recently submitted comments on BLM's Administrative Final EIS.

NMED has requested BLM to:

- Address environmental and ecological impacts to nearby watersheds associated with draw down during mine operation and post-closure rapid fill of the pit; specifically, those within the Percha and Animas creeks;
- Provide more detail regarding the existing waste rock pile "west of the pit" which is to be "reclaimed such that the western portion of the pit perimeter would be graded to drain away from the pit into a proposed toe channel that drains to Greyback Arroyo diversion";
- Provide more detail on potential barriers to avians for the Mine's pit;
- Address how the Mine's reclamation plans will address protections of the water quality of Greyback Arroyo; and
- Address actions proposed to eliminate or severely reduce exposure to wildlife from stormwater leachates collected from low-grade reactive ore.

Exhibit S, pages 2-3.

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lake as a "private water" of the State, not subject to either ground or surface water regulations, thereby allowing NMCC to leave behind a toxic body of water in perpetuity. See attached Exhibit E.

As was the case with Gold Express's discharge permit application for the Mine in the 1990s, the current EIS process is still pending and the Environment Department itself has requested a number of additional analyses and revisions to the Administrative Final EIS. Accordingly, any action taken by the Environment Department on the Draft Discharge Permit before conclusion of the EIS process is premature and clearly amounts to actions taken in "an advisory capacity or in advance of necessity." The Environment Department must therefore suspend its consideration of the Draft Discharge Permit pursuant to its longstanding policy.

In the alternative, if the Environment Department does not following longstanding department policy and stay all action on the Draft Discharge Permit, the Environment Department must deny the Draft Discharge Permit for the following reasons.

**II. The Draft Discharge Permit Poses a Hazard to Public Health and Undue Risk to Property.**

The Environment Department must deny a discharge permit application when it poses either a hazard to public health or undue risk to property. Section 20.6.7.10.J NMAC. The Water Quality Act's implementing regulations provide the following, in pertinent part:

'hazard to public health' exists when water which is used or is reasonably expected to be used in the future as a human drinking water supply exceeds at the time and place of such use, one or more of the numerical standards of Subsection A of 20.6.2.3103 NMAC, or the naturally occurring concentrations, whichever is higher, or if any toxic pollutant affecting human health is present in the water...

Section 20.6.2.7.AA NMAC.

It would appear that the hazard to public health analysis is limited to whether water which is used or is reasonably expected to be used in the future as a human drinking water supply exceeds 3103 standards. However, the New Mexico Supreme Court has made clear that the Environment Department "cannot ignore concerns that relate to environmental protection simply because they are not mentioned in a technical regulation. The Department has a duty to

interpret its regulations liberally in order to realize the purposes of the Acts.” In re Rhino Env'tl. Servs., 2005-NMSC-024, P 34, 138 N.M. at 41 (citing to Atlixco Coalition v. Maggiore, 1998-NMCA-134, P 15, 125 N.M. 786).

The purpose of the New Mexico Water Quality Act (“Act” or “WQA”) is to prevent and abate water pollution. Bokum Res. Corp. v. N.M. Water Quality Control Comm’n, 1979-NMSC-090, ¶ 59, 93 N.M. 546. Furthermore, the New Mexico Constitution 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 (emphasis added). Public water in New Mexico is held in trust by the State for the benefit of the public, not mining companies. New Mexico v. G.E., 467 F.3d 1223, 1243 (10th Cir. 2006). The pollution of public water in New Mexico is also a criminal public nuisance. NMSA 1978, §30-8-2 (1993).

The great public importance of water, as evidenced at all levels of New Mexico law, led the New Mexico Supreme Court, in Kaiser Steel Corp. v. W. S. Ranch Co., to declare:

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, ¶ 15, 81 N.M. 414, 417 (emphasis added); *see also, e.g.*, NMSA 1978, § 74-1-12(A) (1999) (describing water as “the state's most precious resource”).

The Environment Department must therefore consider whether contaminant migration from the Mine’s discharges will pose a hazard to public health and undue risk to property, as well as whether groundwater pumping that would occur pursuant to the Draft Discharge Permit will pose a hazard to public health and undue risk to property. Rhino makes clear that the



Environment Department must consider all issues relating to environmental protection when making the required public hazard/undue risk to property analysis.

Additionally, the undue risk to property analysis includes not only the risk of groundwater and surface water contamination from the Mine's discharges, but also includes unreasonable and unnecessary risks related to *all* mining operations resulting from issuance of DP-1840. The Environment Department must therefore consider undue risks of groundwater and surface water reduction resulting from the Mine's operations pursuant to DP-1840 to property, and all associated undue risks to Ladder Ranch's wildlife, endangered species restoration efforts, and ecotourism enterprise. Rhino, 2005-NMSC-024.

**A. The Draft Discharge Permit, On its Face, Poses a Hazard to Public Health and Undue Risk to Property.**

According to hydrogeologist, Tom Myers, and mining engineer, Jim Kuipers, the Draft Discharge Permit poses a hazard to public health and undue risk to property for the following reasons.<sup>5</sup>

*1. The Use of Andesite Bedrock as a Waste Rock Stockpile Liner Poses a Hazard to Public Health and Undue Risk to Property.*

The Copper Rule requires that Section 20.6.2.3103's groundwater standards ("3103 standards") be met outside the area of open hydrologic containment. GRIP v. New Mexico Water Quality Control Commission, 2018 N.M. LEXIS 22. Therefore, a copper mine must take measures to prevent discharges from mining units located outside the area of open hydrologic containment from contaminating groundwater in exceedance of 3103 standards. *Id.* This is typically done through the use of engineered systems, primarily synthetic liners. NMCC claims

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<sup>5</sup> For a detailed discussion of how the Draft Discharge Permit poses a hazard to public health and undue risk to property, see attached Exhibits F and G.

that the andesite bedrock underneath proposed waste rock stockpiles outside the area of open hydrologic containment is an impermeable liner that can substitute for an engineered geomembrane liner. However, according to hydrogeologist Tom Myers, andesite bedrock is not similar to a synthetic liner because the conductivity is too high, it is fractured, and the waste rock would actually cause water to reach soil much more uniformly. *See Exhibit F, pages 5-8.* The Draft Discharge Permit's assumption of andesite impermeability is therefore incorrect, posing a hazard to public health and undue risk to property.

TRP's Ladder Ranch lies east and north of the proposed Mine. Groundwater flows west to east through the Mine site and onto the Ranch. Contaminant plumes would disperse laterally, so most contaminants discharged from the Mine would flow through or under the Ranch. Specifically, contaminants discharged from the Mine's waste rock stockpiles pursuant to the Draft Discharge Permit could reach springs on Ladder Ranch. Wells and springs on the Ranch could become contaminated by discharges that exceed 3103 standards, negatively impacting the Ranch's water resources and conservation programs, as well as its ranching and ecotourism activities, which rely on clean perennial surface water. *Id.* at page 2.

The Draft Discharge Permit therefore poses a hazard to public health and undue risk to property and must be denied. Section 20.6.7.10.J NMAC.

2. *Contaminants Discharged From the Mine's Waste Rock Stockpiles and TSF Could Reach Surface Water Near the Mine, Including the Rio Grande, Posing a Hazard to Public Health and Undue Risk to Property.*

The Copper Rule requires applicants to analyze potential pathways for contaminant migration to surface water and the identification of surface waters that are gaining because of inflow of groundwater that may be affected by contaminants. Sections 20.6.7.11.P(4) and (5) NMAC. NMCC has acknowledged that the Mine's production pumping of its four groundwater

wells and subsequent consumptive use would affect flows in the Rio Grande (DEIS 4-8), therefore it follows that groundwater pathways from the Mine site to the river could contain contaminants. Exhibit F, page 13.

Specifically, contaminants escaping from the Mine's waste rock stockpiles and TSF could reach surface water near the Mine site, including the Rio Grande. *Id.* The potential for surface water contamination from the Mine's contaminant discharges would be even greater during closure because pumping of the four groundwater production wells that might capture contaminants during operations would not occur. *Id.* According to hydrogeologist Tom Myers, the risk of contaminant migration to surface waters such as the Rio Grande would remain over the long-term, thus posing a hazard to public health and undue risk to property. *Id.*

As previously discussed, groundwater flows from west to east through the Mine site and underneath TRP's Ladder Ranch. Pathways emanating from any point on the Mine site could cross the Ranch property as they flow eastward to the Rio Grande or its tributaries. Contaminants follow those pathways, and a plume would develop around the flow paths, meaning that dispersion to the north from the flow path would penetrate far into groundwater within the Ranch's property. Wells and springs on the Ranch could become contaminated by the Mine's waste rock stockpiles and TSF discharges, negatively impacting the Ranch's water resources and conservation programs, as well as its ranching and ecotourism activities, which rely on clean perennial surface water. *Id.* The Draft Discharge Permit therefore poses a hazard to public health and undue risk to property and must be denied. Section 20.6.7.10.J NMAC.

Additionally, NMCC's Discharge Permit Application fails to analyze pathways for contaminant migration, as required by the Copper Rule. The Discharge Permit Application specifically fails to consider the pathway contaminants would follow from the Mine's waste rock

stockpiles, the TSF, or escaped contaminants from the pit to surface water - whether Percha Creek, Las Animas Creek, Greyback Arroyo, or the Rio Grande - and the effect to off-site properties such as Ladder Ranch. The Environment Department must therefore deny the Draft Discharge Permit. Section 20.6.7.10.J NMAC.

3. *Tailings Run-Off From the TSF and Waste Rock Stockpiles Collected in Unlined Ditches Could Seep into Groundwater, Posing a Hazard to Public Health and Undue Risk to Property.*

Diverting stormwater away from the Mine's tailings impoundment, surge pond, underdrain collection pond, and process water reservoir is a method used for minimizing the potential for groundwater pollution. Exhibit F, page 14. However, the Draft Discharge Permit Application proposes to collect stormwater run-off through the Mine site, in particular outside the area of open hydrologic containment, with **unlined** ditches which would then report to a lined conveyance ditch at the toe of the tailings dam. *Id.* (emphasis added). According to hydrogeologist Tom Myers, the "biggest threat to groundwater from runoff at the tailings impoundment is runoff leaking from the unlined ditches into and through the embankment and into the ground near the base of the TSF. These ditches would collect water and form a source for seepage into the embankment." *Id.*

The Draft Discharge Permit Application also proposes to divert stormwater run-off away from the waste rock stockpiles (*Id.*), utilizing a nearly forty (40) year old diversion structure remaining at the Mine site since the 1982 three-month operation. The collection ditches for run-off diverted from the waste rock stockpiles would also be **unlined ditches**. Hydrogeologist Tom Myers has concluded, "As with the tailings, these unlined collection ditches would concentrate run-off, creating sources of seepage that would percolate through the waste rock to the ground surface, eventually entering groundwater. Because the collection ditches are not

lined...seepage would occur through the bottom of the ditches. This additional seepage would add to the direct seepage through the waste rock stockpiles.” *Id.*

The use of unlined collection ditches to divert stormwater run-off from the TSF and the waste rock stockpiles thereby poses a hazard to public health and undue risk to property. Wells and springs on TRP’s Ladder Ranch could become contaminated by discharges from the unlined collection ditches, negatively impacting the Ranch’s water resources and conservation programs, as well as its ranching and ecotourism activities, which rely on clean perennial surface water. *Id.*

The Draft Discharge Permit therefore poses a hazard to public health and undue risk to property and must be denied. Section 20.6.7.10.J NMAC.

*4. The Draft Discharge Permit’s Proposed Groundwater Monitoring Well Network is Grossly Insufficient to Detect Migration of Contaminants, Posing a Hazard to Public Health and Undue Risk to Property.*

The Copper Rule provides that, “Monitoring wells shall be located...to detect an exceedance(s) or a trend toward exceedance(s) of the applicable standards at the earliest possible occurrence, so that investigation of the extent of contamination and actions to address the source of contamination may be implemented as soon as possible.” Section 20.6.7.28.B NMAC. Upon review of the Draft Discharge Permit’s proposed groundwater monitoring well network, Hydrogeologist Tom Myers has concluded that, “[t]he monitoring wells are spaced too widely to even detect contaminant plumes emanating from the sources (such as the TSF, pit, and waste rock stockpiles). Even with dispersion, the wide spacing would allow plumes to slip between monitoring wells undetected.” Exhibit F, page 15.

The Draft Discharge Permit therefore violates the Copper Rule, poses a hazard to public health and undue risk to property, and must be denied.

**B. In the Alternative, if the Environment Department Does Not Determine that the Draft Discharge Permit, On Its Face, Poses a Hazard to Public Health and Undue Risk to Property, the Draft Discharge Permit's Deficiencies Substantially Undermine the Hazard to Public Health/Undue Risk to Property Determination and Therefore the Draft Discharge Permit Must be Denied.**

- 1. The Draft Discharge Permit Significantly Underestimates the Maximum Daily Discharge Volume, Substantially Undermining the Required Determination Regarding Whether the Permit Poses a Hazard to Public Health and/or Undue Risk to Property.*

The Copper Rule requires a discharge permit applicant to calculate the maximum daily discharge volume, as this factor substantially impacts the required determination regarding whether a discharge permit poses a hazard to public health and/or undue risk to property. Section 20.6.7.11.H NMAC. The Draft Discharge Permit and Application significantly underestimate the Mine's maximum daily discharge volume in the following ways.

First, neither the DP Application nor the Draft Discharge Permit include leakage estimates from the TSF and its underdrain collection system and pond in the maximum daily discharge volume calculation.<sup>6</sup> Exhibit G, pages 3-6; Exhibit F, page 4. Under the Copper Rule, maximum daily discharge volume is "the total daily volume of *process water*...or tailings...authorized for discharge." Section 20.6.7.7.B(35) NMAC (emphasis added). Process water includes any water within the mine site that has contaminants exceeding 3103 standards, including leachate from waste rock or tailings impoundments. Section 20.6.7.7.B(50) NMAC. Therefore, potential discharges from the TSF and its underdrain collection system and pond must be included in the maximum daily discharge volume calculation.

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<sup>6</sup> It is also standard industry practice to include a TSF liner seepage analysis as part of any TSF design report required by the Copper Rule. Exhibit G, page 6. NMCC failed to include this analysis in its TSF Report.

The DP Application relies upon a tailings underdrain collection system and pond to minimize leakage of contaminants to groundwater. Even though the proposed tailings liner would be comprised of eighty (80) millimeter high-density polyethylene and twelve (12) inch liner bedding material, and the underdrain collection pond would be a double-lined sixty (60) millimeter high-density polyethylene liner, the efficacy of the liners directly impacts the maximum daily discharge volume of the proposed Mine. *Id.*

According to hydrogeologist Tom Myers, “Even well-installed liners have pinhole leaks that allow leakage to enter the groundwater beneath the facility,” and, “Liners with merely good installation can have leakage rates six times higher than liners with excellent installation for the same head over the liner.” *Id.*; see also Exhibit G, 5-6. The Draft Discharge Permit’s maximum daily discharge volume is therefore significantly underestimated, substantially undermining the required determination regarding whether the permit poses a hazard to public health and/or undue risk to property.<sup>7</sup>

Second, the DP Application and Draft Discharge Permit fail to estimate the amount of discharge that would occur from the unlined collection ditches that would be used for stormwater run-off diversion. Exhibit F at page 14. This too results in a significantly underestimated maximum daily discharge volume.

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<sup>7</sup> The failure to analyze TSF liner seepage does not merely result in a significant underestimation of the Mine’s maximum daily discharge volume. It also results in both NMCC’s and the Environment Department’s failure to address an almost certain unauthorized discharge. Exhibit G, page 6. Unauthorized discharges violate the Water Quality Act and its implementing regulations, including the Copper Rule, and may result in either modification or termination of a discharge permit. NMSA 1978, Section 74-6-5(M).

Accordingly, the Environment Department cannot make an adequate assessment regarding the Draft Discharge Permit's hazard to public health/undue risk to property without an accurate maximum daily discharge volume. The DP Application must therefore be denied.

2. *The Draft Discharge Permit Grossly Underestimates the Amount of Fresh Groundwater Necessary for Start-Up Operations, Substantially Undermining the Required Determination Regarding Whether the Permit Poses a Hazard to Public Health and/or Undue Risk to Property.*

The Copper Rule requires applicants to provide an accurate Mine Water Management Plan, as a Mine's water balance directly impacts the Mine's potential hydrologic effects and, thereby, the determination regarding whether a discharge permit poses a hazard to public health and/or undue risk to property. Section 20.6.7.11.H(2) NMAC. NMCC's DP Application, however, fails to provide an accurate Mine Water Management Plan for the following reasons.

First, NMCC's water balance calculations do not account for fresh groundwater that would initially be added to the ore processing system, otherwise known as start-up water. Exhibit F, page 9. The DP Application claims that the source water for the majority of water necessary for ore-processing will be "water reclaimed from the TSF"- or "recycled water." However, according to hydrogeologist Tom Myers, "Until the water balance reaches steady state, the amount of recycled water presented in Table 3 of the water balance is underestimated and the make-up water must be much higher than predicted. In other words, the applicant will have to pump much more groundwater than acknowledged in the water balance just to commence the mine processing." *Id.* at page 10.

Because there is initially no source of reclaimed TSF water at the start of operations, and the fact that it could takes years to achieve a steady state that would provide NMCC's claimed 9,708 gallons per minute of recycled TSF water, the Mine's water balance calculations are grossly inaccurate. *Id.* at page 9.



Second, NMCC's water balance calculations also ignore the tailings water that would remain in the saturated portions of the tails, otherwise known as free tails water. *Id.* Water that remains in the tailings or evaporates cannot be reclaimed or reused. *Id.* This failure to include free tails water in NMCC's water balance calculations also results in a grossly inaccurate Mine Water Management Plan.

It is clear that the Mine's impacts to groundwater from pumping its groundwater production wells have not been estimated at all and the actual impacts to groundwater-related resources have been grossly underestimated. Without this required analysis, the Environment Department cannot accurately and definitively rule out whether the Draft Discharge Permit will pose a hazard to public health and undue risk to property due to substantially lowered groundwater tables and associated lowering of hydrologically connected surface water, such as the Rio Grande and its tributaries. *Id.* at page 10. The Environment Department must therefore deny the Draft Discharge Permit.

3. *The Draft Discharge Permit is Based on the Erroneous Assumption that the Mine's Open Pit Will be a Hydrologic Evaporative Sink at All Times, Substantially Undermining the Required Determination Regarding Whether the Permit Poses a Hazard to Public Health and/or Undue Risk to Property.*

The Copper Rule provides significantly different post-closure requirements for open pits depending on whether the open pit is a hydrologic evaporative sink or a flow-through pit. If the Environment Department determines that an open pit is an evaporative hydrologic sink, then 3103 ground water quality standards do not apply within the area of open hydrologic containment. Section 20.6.7.33.D(1) NMAC. In contrast, if the Environment Department determines that an open pit is a flow-through pit, the open pit water quality must meet 3103

standards or the open pit must be pumped in order to maintain an area of open pit hydrologic containment. Section 20.6.7.33.D(2) NMAC.

The Third Judicial District Court's *Copper Flat Extradited Inter Se Decision* recently held that the Mine's pit lake is hydrologically connected to groundwater, therefore the pit cannot be a hydrologic evaporative sink that does not mingle with groundwater. Exhibit A, page 61. However, the Draft Discharge Permit is based on the erroneous assumption that the Mine's pit will be a hydrologic evaporative sink at all times and that the Copper Rule's post-closure requirements for flow-through pits are not applicable. The Draft Discharge Permit's erroneous assumption that toxic pit lake water will not mingle with groundwater substantially undermines the required determination regarding whether the permit poses a hazard to public health and/or undue risk to property.

Furthermore, MMD has also concluded that, "[I]t seems likely that the water placed in the pit [from rapid-fill post-closure] **will leak back into the surrounding aquifer.**" MMD Comments on the Copper Flat Copper Mine Draft EIS (March 4, 2016) (emphasis added). See attached Exhibit H.

TRP's expert has also demonstrated to the Environment Department that the Mine's open pit will not be an evaporative hydrologic sink at all times. On July 3, 2017, TRP requested that NMED's Surface Water Quality Bureau ("SWQB") continue regulating the Mine's pit lake as a surface water of the State, subject to the ground water quality standards of Section 20.6.2.3103 NMAC and the Copper Rule's requirements found at Section 20.6.7.33.D(2) NMAC. See attached Exhibit I; see also Exhibit F, pages 10-13.

In TRP's request, hydrogeologist Tom Myers provided the Environment Department with a technical memo concluding that "pit lake water would enter the surrounding formations as

groundwater” due to rapid-fill of the pit post-closure, thus becoming a flow-through pit for an unknown period of time. Exhibit I’s Exhibit C, page 8. Accordingly, the open pit is clearly subject to Section 20.6.2.3103 NMAC water quality standards and the Copper Rule’s flow-through pit requirements.

Finally, the SWQB recently submitted comments to BLM on the Copper Flat Administrative Final EIS. The SWQB has advised the following, in pertinent part:

The determination that the pit lake will respond as a hydrologic sink through variable site conditions over time is subject to continued monitoring and verification. The SWQB feels it premature to assert jurisdiction of waters within the mine pit lake **until such a time to which the New Mexico Environment Department has been provided sufficient information to support a determination.** The SWQB requests language reflecting conditions for both scenarios; that in which the water is deemed to be private and does not combine with other surface or subsurface water, and that in which it does.

Exhibit S, page 2 (emphasis added).<sup>8</sup> Accordingly, NMED concedes that the department does not have sufficient information to determine whether the Mine’s pit lake will be a hydrologic evaporative sink at all times. The Environment Department therefore must deny the Draft Discharge Permit.<sup>9</sup>

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<sup>8</sup> SWQB then submitted a second comment letter to BLM on the Copper Flat Administrative Final EIS stating that “there is sufficient information” to make a determination regarding whether the Mine’s pit lake will be a hydrologic evaporative sink at all times, but that “it is not the appropriate time in the process to issue a written determination by the NMED Secretary.” Exhibit T, page 2. It is unclear what new information came to light since April 17, 2018 that now provides the SWQB with “sufficient information” to make a determination regarding the Mine’s pit lake being a hydrologic evaporative sink. Furthermore, the appropriate time for such a determination is now and not after the close of the public comment period on the Draft Discharge Permit.

<sup>9</sup> The Copper Rule expressly states that, “Compliance with these rules does not relieve an applicant or permittee of a copper mine facility from complying with the Mining Act rules in Title 19, Chapter 10 NMAC under the authority of the mining and minerals division.” Section 20.6.7.6 NMAC. The Copper Rule also provides that, “Compliance with commission rules including the requirements of 20.6.7 NMAC does not relieve a copper mine facility owner, operator or permittee from complying with the requirements of other applicable local, state and federal regulations or laws.” Section 20.6.7.8 NMAC.

4. *The Environment Department Cannot Determine Whether the Permit Poses a Hazard to Public Health and/or Undue Risk to Property Without Required Tailings Dam Safety Information and Analyses.*

The Copper Rule requires applicants or permittees proposing or required to construct a tailings dam to submit “documentation of compliance with the requirements of the dam safety bureau of the state engineer pursuant to Section 72-5-32 NMSA 1978, and rules promulgated under that authority, unless exempt by law from such requirements” (Section 20.6.7.17.C(1)(d)) to the department for approval “**with an application** for a new, renewed or modified discharge permit.” Section 20.6.7.17.C NMAC (emphasis added). This is mostly likely because tailings dam failures pose a significant hazard to public health and undue risk to property, and an approved OSE-DSB permit is the only definitive means of demonstrating compliance with OSE-DSB’s requirements and rules.

The Draft Discharge Permit Application fails to demonstrate compliance with OSE-DSB rules and regulations for the following reasons. First, NMCC has failed to submit and obtain OSE-DSB permit approval for its proposed tailings dam.<sup>10</sup> As previously discussed, the Copper Flat Copper Mine only operated for a little over three months in 1982. The previous owners left in place the Mine’s 3.5 months of tailings production. The tailings dam was placed under a State

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The Mining Act’s regulations require the mine to “achieve a self-sustaining ecosystem appropriate for the life zone of the surrounding areas following closure,” Section 19.10.6.603 NMAC, and for a new mining operation to be “designed to meet without perpetual care all applicable environmental requirements of the Act.” Section 19.10.6.603.H NMAC. A discharge permit that allows perpetual pump and treat of the open pit will result in violation of Section 20.6.7.6 NMAC and Section 19.10.6.603.H NMAC. Therefore the Draft Discharge Permit must be denied.

<sup>10</sup> NMCC’s failure to submit documentation of compliance with OSE-DSB rules and regulations for the proposed TSF dam also demonstrates that the Discharge Permit Application is technically incomplete, a further violation of the Copper Rule and grounds for denying the Draft Discharge Permit.

Engineer Order, dated April 19, 1983 and amended on April 18, 1985 (“1985 Order”), requiring the Mine operators to submit annual monitoring data to OSE-DSB and to perform routine maintenance. Exhibit G, page 7.

However, NMCC obtained a waiver from OSE-DSB in 2012 and has alarmingly not been required to perform routine maintenance and monitoring pursuant to the 1985 Order, on the grounds that NMCC is in the process of obtaining a new mining permit.<sup>11</sup> In fact, the last report received by the OSE-DSB on the Mine’s existing tailings dam was in 1986, over thirty (30) years ago. Exhibit G, page 7.

Second, even though the Discharge Permit Application includes a TSF Report, this report has not been reviewed or approved by the OSE-DSB and fails to provide the following required information:

- The Mine’s maximum daily discharge volume and annual volume of tailings as design factors;
- TSF topography, geology and footprint adequate to assess the geologic setting and corresponding risks related to the foundation and seismic risk; and
- TSF hazard classification, design storm requirements, and free board requirements.

Exhibit G, pages 10-13; Section 20.6.7.17.C(1)(d) NMAC; Section 20.6.7.22.C(1) NMAC.

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<sup>11</sup> NMCC first requested a waiver from routine maintenance and monitoring of the existing tailings dam in 2012. OSE-DSB approved the waiver. NMCC requested that the waiver be extended to June 30, 2017. NMCC Letter to OSE-DSB, dated April 20, 2014. The waiver extension was approved. OSE-DSB Letter to NMCC, dated April 30, 2014. The waiver expired on June 30, 2017. Nearly thirty (30) days after the waiver expired, NMCC submitted a request to extend the waiver. NMCC Letter to OSE-DSB, dated July 21, 2017. Even though the waiver had expired on June 30, 2017, OSE-DSB granted NMCC’s request to extend the waiver through June 30, 2020. OSE-DSB Letter to NMCC, dated September 18, 2017. It is most likely that this waiver extension is unlawful and subject to legal challenge.

Accordingly, the TSF Report clearly does not comply with OSE-DSB rules and regulations and cannot be used to satisfy Section 20.6.7.17.C(1)(d)'s requirement. Only an approved OSE-DSB permit for the proposed tailings dam can satisfy the Copper Rule's Section 20.6.7.17.C(1)(d). For these reasons, the Environment Department must therefore deny the Draft Discharge Permit.

Furthermore, without an approved OSE-DSB permit, the Environment Department cannot determine whether the proposed tailings dam poses a hazard to public health and/or undue risk to property. The Environment Department must therefore deny the Draft Discharge Permit.

### **III. The Draft Discharge Permit Is Technically Incomplete.**

#### **A. NMCC's MORP, the Critical Document for the Draft Discharge Permit, Has Yet to be Finalized or Approved and is Still Undergoing Revision.**

As discussed above, the Environment Department takes the position that the MORP and its associated operational, monitoring and closure plans "are **critical to development of the draft Ground Water Discharge Permit.**" Environment Department Comments on NMCC's October 14, 2016 Revised MORP, page 2 (January 6, 2017) (emphasis added). TRP and Pitchfork Ranch are also in agreement that these documents are critical to drafting a lawful, effective discharge permit. Sections 20.6.7.11 - 37 NMAC. However, confusingly, the Environment Department proceeded to draft a discharge permit and determine that the Draft Discharge Permit is approvable without having these critical documents finalized and approved by both BLM and MMD.<sup>12</sup> These critical documents were first submitted to BLM and state agencies in 2010. They were revised in July 2012, again in October 2016, and again in July

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<sup>12</sup> The Draft Discharge Permit concedes that the Closure/Closeout Plan relied upon is not yet finalized by MMD. Draft Discharge Permit, page 23, paragraph C113.A.

2017.<sup>13</sup> Neither BLM nor MMD has approved a final MORP and associated operational, monitoring and closure plans. These critical documents are still undergoing revision at this time.

In fact, the recently issued Third Judicial District Court's *Copper Flat Expedited Inter Se Decision* demonstrates that the last iteration of the MORP and associated operational and closure plans are based on outdated and incorrect information regarding the Mine's sole fresh water supply source required for both mining operations and reclamation.

The *Copper Flat Expedited Inter Se Proceeding* to determine water rights claimed by NMCC, the proponent of the proposed Copper Flat Copper Mine, and William Frost and Harris Gray, legal owners of the water rights to be used by NMCC, came before the Third Judicial District Court in January 2014. A ten (10) day trial was held on March 14 through 18, 2016 and June 27 through July 1, 2016.

After trial on the issues and after considering the parties' proposed findings of fact and conclusions of law, the Court concluded the following on December 28, 2017:

- 1) Any inchoate water rights are extinguished;
- 2) The combined amount of the water element for LRG-4652, LRG-4652-S, LRG-4652-S-2, and LRG-4652-S-3 **is 861.84 acre-feet per year** ("afy");
- 3) LRG-4652, LRG-4652-S, LRG-4652-S-2, and LRG-4652-S-3 have an additional, combined stock right;
- 4) LRG-4652-S-8 has a stock right; and
- 5) The amount of the water element for the open pit, LRG-4652-17 is 34.45 afy.

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<sup>13</sup> NMED has also misrepresented the chronology of and metamorphosis of NMCC's discharge permit application by stating that the first discharge permit application submitted was on December 11, 2015. The first discharge permit application was actually submitted on March 31, 2011. The application was then revised on December 9, 2015, and again on June 21, 2016, again on July 17, 2017, and again in August 2017. It is concerning that NMED clearly does not have a basic understanding of the procedural history of this discharge permit application. Draft Discharge Permit, page 4, paragraph A.

*Third Judicial District Copper Flat Expedited Inter Se Proceeding Decision*, page 3 (December 28, 2017) (emphasis added); *See* attached Exhibit A.

The *Inter Se Decision* held that NMCC has a water right of only 861.84 acre-feet of water per year in its four groundwater production wells. However, NMCC has summarized its Mine Operation Water Management Plan as follows: 15,504 acre feet of “recycled” water will be used per year; 5,738 acre feet of “non-recycled” water will be used per year; with a total of 21,242 acre feet of water being used per year for ore processing.<sup>14</sup> August 2017 Revised DP Application, Table 11J-2, page 74. NMCC fails to account for the 4,876 acre feet of “non-recycled” water necessary for ore processing, hereby violating Section 20.6.7.11.H(2) NMAC. The Environment Department must therefore deny the Draft Discharge Permit.

NMCC also fails to properly account for start-up water needed for ore processing, thereby violating Section 20.6.7.11.H(2) NMAC. At the commencement of mining there are no tailings, so there is no tailings reclaim water; initial water must be obtained from freshwater sources. TRP has previously advised BLM that it will take the Mine at least five years to reach a recycling capacity of 9,096 af/y at a seventy-five percent recycling efficiency. TRP Comments on the Draft EIS, page 5, attached as Exhibit J; *See also* New Mexico Interstate Stream Commission Comments on the Draft EIS, page 5, attached as Exhibit K. Accordingly, the Environment Department must therefore deny the Draft Discharge Permit.

Furthermore, NMCC’s revised MORP and associated Closure Plan state that the Mine will use 2,202 acre-feet of water from its four groundwater production wells to rapid-fill the pit over a six-month period. The recent *Inter Se Decision* makes clear that the Mine’s MORP and

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<sup>14</sup> This summarized Mine Operation Management Plan contradicts the water balance summarized in the Draft EIS: “Alternative 2 (30,000 tpd) uses 22,210 af/y, recycling 15,504 af/y and obtaining from freshwater sources 6,105 af/y.” Draft EIS Figure 2014.



associated plans are based upon outdated and incorrect water accounting, thereby violating Section 20.6.7.11.H(2) NMAC. The Environment Department must therefore deny the Draft Discharge Permit. *See* TRP's and Pitchfork Ranch's February 27, 2018 Request to MMD (attached as Exhibit L).

The *Inter Se Decision* also demonstrates that NMCC's proposed open pit reclamation measure of rapid-fill is currently technically infeasible. However, the Environment Department includes the technically infeasible reclamation measure as a condition of the permit. Draft Discharge Permit, page 4, paragraph H. Due to the technical infeasibility of pit rapid-fill, it is unknown what reclamation measures will be required for the pit in the final approved Closure/Closeout Plan. TRP and Pitchfork Ranch have therefore requested MMD to require further revisions of the MORP to: 1) properly account for an annual 5,243.1 acre-foot water deficit in the Mine's sole freshwater supply source needed for mining operations and reclamation, and 2) identify a technically feasible open pit reclamation measure. *See* TRP's and Pitchfork Ranch's February 27, 2018 Request to MMD (attached as Exhibit L). The Environment Department must therefore deny the Draft Discharge Permit.

Another issue with the Environment Department's reliance on an outdated MORP is that the Draft Discharge Permit mistakenly assumes the July 2017 MORP's proposed reclamation measures will actually be implemented and that the July 2017 MORP will not undergo any further revisions. For example, the Draft Discharge Permit assumes that not only will the open pit be reclaimed using rapid-fill, but that the open pit will be reclaimed to provide wildlife habitat in line with pre-mining standards. Draft Discharge Permit, page 4, paragraph H; page 23, paragraph A; page 24, paragraph 1. However, through documents obtained from BLM via a

Freedom of Information Act (“FOIA”) request, it is clear NMCC will not be reclaiming the open pit area to meet pre-mining conditions for wildlife habitat.

The BLM has recently determined the following in regard to the Mine’s open pit:

The EIS (affected environment section and wildlife impacts section) has been revised to better describe the pit lake with respect to wildlife and habitat. As described in the EIS, water in the existing pit is high in cadmium, copper, manganese, and selenium. The revision will articulate that the pit lake is not now a water of the State, nor will it be post-mining, and therefore it is not and will not be subject to surface water quality standards applicable to waters of the State. The water quality standard that would apply is a mining permit condition from MMD that post-mining pit lake water quality would be similar to pre-mining pit lake water quality. This discussion will be carried forward through the wildlife sections to better articulate that **the current pit lake does not provide habitat and the post mining pit will not provide habitat.**

November 2017 BLM “Briefing Memorandum” Supporting Document. (Attached as Exhibit M) (emphasis added).

BLM’s recent determination that the open pit area was never wildlife habitat and never will be post-closure directly contradicts NMCC’s statement that:

At the completion of mining activities, the site will be restored to conditions and standards that meet approved post-mining land uses. These uses will include native plant communities similar to surrounding undisturbed areas **for wildlife habitat**, and grazing land potentially suitable for livestock. **Once reclamation is successfully completed, wildlife populations would be expected to return to existing (i.e. pre-mining operation) levels** (BLM DEIS Nov. 2015, p. 3-137 and 138).

NMCC’s July 2017 Revised MORP, page 2-54 (emphasis added).

NMCC’s July 2017 Revised MORP expressly states that its “Reclamation and Closure Plan is designed to re-establish grazing in the area and allow for long-term use of the reclaimed areas by wildlife known to historically use the area,” *Id.* at page 2-62, and “...**the pit lake that will form over time upon mine closure will provide enhanced avian wildlife habitat and a water source for transient wildlife.**” *Id.* at page 2-63 (emphasis added). Most importantly, NMCC has declared in its July 2017 Revised MORP, which the Environment Department has

deemed critical to the Draft Discharge Permit, that “the company is **committed to a reclamation and closure plan that re-establishes grazing and wildlife habitat land use of the site at closure.**” *Id.* (emphasis added).

Furthermore, NMCC has requested NMED to administer the current and future expanded pit lake as a “private water of the State,” thereby being exempt from both ground and surface water quality standards.<sup>15</sup> If NMED regulates the pit lake as a private water, NMCC will leave behind a substantial body of toxic water without reclaiming to pre-mining standards for wildlife, grazing, and warmwater aquatic life habitat.<sup>16</sup>

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<sup>15</sup> This request letter has unlawfully been omitted from the DP-1840 Administrative Record provided to the public on March 21, 2018 by the Environment Department. It is attached as Exhibit N to these comments. TRP’s request to the Environment Department to continue to administer the Mine’s current and future expanded pit lake as a surface water of the State has also been unlawfully omitted from the DP-1840 Administrative Record. It is attached as Exhibit I of these comments. NMELC has advised NMED that a number of documents are missing from the March 21, 2018 Administrative Record. NMED sent NMELC a “corrected” Administrative Record disc dated May 2, 2018 that was received on May 3, 2018 – less than two days before the public comment period deadline. NMED failed to identify hundreds of records added to the “corrected” Administrative Record and has not provided an index. NMELC advised NMED that due process is being denied by the Department’s refusal to provide a correct, complete Administrative Record for DP-1840 and refusal to extend the public comment period so that interested parties could continue to identify missing documents and review the May 2, 2018 Administrative Record. TRP and Pitchfork Ranch therefore reserve the right to submit additional comments and raise additional concerns based on the May 2, 2018 Administrative Record, and to supplement the Administrative Record with additional documents.

<sup>16</sup> The Copper Rule expressly states that, “Compliance with these rules does not relieve an applicant or permittee of a copper mine facility from complying with the Mining Act rules in Title 19, Chapter 10 NMAC under the authority of the mining and minerals division.” Section 20.6.7.6 NMAC. The Copper Rule also provides that, “Compliance with commission rules including the requirements of 20.6.7 NMAC does not relieve a copper mine facility owner, operator or permittee from complying with the requirements of other applicable local, state and federal regulations or laws.” Section 20.6.7.8 NMAC. The Mining Act’s regulations require the mine to “achieve a self-sustaining ecosystem appropriate for the life zone of the surrounding areas following closure,” Section 19.10.6.603 NMAC, and for a new mining operation to be “designed to meet without perpetual care all applicable environmental requirements of the Act.” Section 19.10.6.603.H NMAC. Accordingly, classification of the Mine’s pit lake as a private water will violate the Mining Act’s requirements for new mines.

It is clear that the Draft Discharge Permit is based upon an incomplete description of proposed mining operations and reclamation measures, resulting in a draft permit comprised of outdated, technically incomplete, and contradictory information. Currently, based on the most recent discharge permit application (August 2017) and supporting documents (which include the July 2017 revised MORP and associated operational, monitoring and closure plans), the public could only conclude that the Draft Discharge Permit requires the Mine to reclaim the open pit area to pre-mining standards for wildlife, grazing, and warmwater aquatic life habitat. That conclusion, based on the above discussed documents, is incorrect.

Finally, without an approved MORP and associated operational, monitoring and closure plans in place, the Environment Department cannot adequately assess whether the Mine's discharge permit complies with the Copper Rule and other applicable law, such as the Mining Act. Section 20.6.7.6 NMAC; Section 20.6.7.10.J NMAC; Sections 20.6.7.11 - .37 NMAC. For these reasons, the Environment Department must deny the Draft Discharge Permit.

**B. The Draft Discharge Permit is Not Based Upon a Finalized Probable Hydrologic Consequences Report and a Finalized Predictive Geochemical Modeling of the Pit Lake Report.**

The Copper Rule requires discharge permit applicants to provide hydrologic information and a hydrologic conceptual model for a copper mine. Sections 20.6.7.11.K(3) and 20.6.7.11.P NMAC. This information is another critical component of a discharge permit and assists the Environment Department in its evaluation of whether the discharge permit poses a hazard to public health and/or undue risk to property. A discharge permit cannot be granted if it poses a hazard to public health and/or undue risk to property. Section 20.6.7.10.J NMAC. NMCC submitted to the Environment Department and MMD two hydrologic reports in December 2017 in support of its discharge permit application and mining permit application.

The first report submitted was NMCC's "Probable Hydrologic Consequences" Report ("PHC Report"). The objective of this report is to "develop a determination of the probable hydrologic consequences of the operation and reclamation on both the permit and affected areas with respect to the hydrologic regime, quantity and quality of surface and groundwater systems that may be affected by the proposed operations." NMCC's PHC Report, page ii (December 2017).

The second report submitted was NMCC's "Predictive Geochemical Monitoring of Pit Lake Water Quality" Report ("PGM Report"). The objective of this report is to "provide an analysis that demonstrates that future pit lake water quality results in a water body with similar chemistry to that of pre-mining conditions upon implementation of the reclamation actions proposed by NMCC in its MORP and Reclamation Plan." Copper Corporation's PGM Report, page ii.

However, it is clear that the Environment Department did not base the Draft Discharge Permit on information provided in these two December 2017 hydrologic reports for the following reasons. First, the Environment Department began drafting the Draft Discharge Permit well before it even made a technical completeness determination. *See* attached Exhibit O. Second, the Environment Department made its technical completeness finding for the discharge permit application on February 1, 2018 without having reviewed these two hydrologic reports. *See* attached Environment Department Comments on these two hydrologic reports provided to MMD, Exhibit P. Third, the Environment Department did not complete its review of these two hydrologic reports until March 16, 2018 – forty-two (42) days **after** it determined the Draft Discharge Permit approvable. *Id.*

Furthermore, based on the Environment Department's comments submitted to MMD on these two hydrologic reports, as well as the comments of MMD and NM Game & Fish, further revisions to these hydrologic reports and the underlying hydrologic model are required. *Id.*; *see also* MMD and NM Game & Fish comments on the hydrologic reports, attached as Exhibit Q and R, respectively. In fact, NMCC has until May 22, 2018 to respond in writing to MMD's, the Environment Department's, and NM Game and Fish's comments on the two hydrologic reports.

The Environment Department expressed the following concerns regarding NMCC's two hydrologic reports:

- The SWQB [Surface Water Quality Bureau] has concerns regarding the potential hydrologic consequences to perennial flows in Las Animas Creek and Percha Creek;
- MECS [Mining Environmental Compliance Section] ...questions the interpretations of infiltration into the [tailing area] cover system, the properties of the cover materials and waste rock and ultimately the net-percolation from the waste rock storage areas; and
- MECS disagrees with the conclusion that net-percolation to groundwater from the waste rock storage areas is not expected. The evaluation presented is rudimentary at best and not appropriate for an evaluation of water and evaporative flux within a waste rock cover system and waste rock stockpile. In addition, the numbers are inconsistent with predictions from other mine sites with similar rainfall and evaporative regimes.

Exhibit Q, pages 3-4. Based upon these concerns, the Environment Department has recommended NMCC conduct a number of model revisions. *Id.* at pages 4-7.

Additionally, NM Game & Fish advised MMD the following, in pertinent part:

The modeling effort was limited to projecting pit lake water quality for 100 years. However, **the pit lake will persist 'in perpetuity'...**

and,

The current model appears to **rely on historic climate data** to predict the rate of evapoconcentration [of the pit lake]. The modeling should consider projected future climate regimes that would provide a plausible range of possible pit lake water quality outcomes.

Exhibit R (emphasis added).

Finally, MMD also has a number of concerns with NMCC's two hydrologic reports and is requiring NMCC to make a number of revisions addressing probable hydrologic consequences such as achieving pre-mining hydrologic balance, predicted drawdown within the Santa Fe Group at the end of mining, anticipated cumulative effects of groundwater drawdown in Grayback/Greenhorn arroyos, pit lake surface elevation and stabilization post-mining, and pit lake chemistry for the existing pit lake. Exhibit Q.

NMCC's hydrologic reports are now undergoing state agency requested revisions based upon the above discussed concerns. It is unclear when these hydrologic reports will be finalized and approved.

Accordingly, the procedural timeline for the Draft Discharge Permit clearly demonstrates that the Environment Department, at the least, drafted a discharge permit based on outdated, technically incomplete information, and, at the most, speedily and hastily determined that an unlawful draft discharge permit is approvable despite the fact that NMCC has yet to address concerns raised by the Environment Department itself. Because the critical hydrologic components of the discharge permit application have yet to be finalized, the Environment Department must deny the Draft Discharge Permit.

**IV. The Draft Discharge Permit is Arbitrarily Based on New Information Not Provided in the Draft Discharge Permit Application Documents. In the Alternative, the Draft Discharge Permit Indicates that NMCC May Have Made False Material Statements, Representations, Certifications or Omissions of Material Fact.**

**A. The Draft Discharge Permit is Arbitrarily Based on New Information Not Provided by NMCC's August 2017 Revised Discharge Permit Application, July 2017 Revised MORP, and the Draft EIS.**

As previously discussed, the Mine's MORP and associated operational, monitoring and closure plans are critical to the Draft Discharge Permit's development. NMCC has stated that its July 2017 Revised MORP and associated plans are "consistent with information contained in NMCC's Discharge Permit application," and information contained in the Draft EIS, "in particular, with regard to Alternative 2 as described in the DEIS." NMCC's July 2017 Revised MORP, page 1-1. However, the Draft Discharge Permit, which is based upon the July 2017 Revised MORP and associated plans – which in turn are based upon the Draft EIS's Alternative 2 – contains numerous inconsistencies regarding the Mine's history and facility description, as well as the Mine's proposed operations.

First and foremost is the proposed daily production rate in the Draft Discharge Permit. The Draft Discharge Permit states that the daily production rate for the Mine will be 38,000 tons per day ("TPD"). Draft Discharge Permit, page 3, paragraph C. However, the August 2017 Revised Discharge Permit Application, upon which the Draft Discharge Permit is also based, states that the Mine's daily production rate will be, at the most, 30,000 TPD. August 2017 Revised Discharge Permit Application, page 1.<sup>17</sup> The July 2017 Revised MORP states that the daily production rate will be "approximately 25.5 to 29.6 thousand TPD." July 2017 Revised

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<sup>17</sup> The August 2017 Revised Discharge Permit Application also states that the daily production rate will be 32,000 TPD. August 2017 Revised DP Application, page 41. It does not, however, state that the daily production rate will be 38,000 TPD.



MORP, page 2-1. Alternative 2 in the Draft EIS also states that the production rate will be 30,000 TPD for the Mine. DEIS ES-4.

This inconsistency demonstrates that the Draft Discharge Permit is arbitrarily based on new information not provided by NMCC in its DP Application, MORP and associated plans, and the BLM's Draft EIS. It is unclear why the Environment Department has arbitrarily increased the Mine's daily production rate by nearly thirty (30) percent for purposes of a discharge permit. It is, however, clear that all of the models, analyses, and reports relied upon by the Draft Discharge Permit are not based upon this increased daily production rate.

A nearly thirty (30) percent increase in the Mine's daily production rate clearly impacts whether the Mine will pose a hazard to public health and/or undue risk to property. The Environment Department cannot make this required public hazard/undue risk to property determination without analyzing the Mine's impacts pursuant to this increased daily production rate. Section 20.6.7.10.J NMAC. The Environment Department must therefore deny the Draft Discharge Permit.

Other inconsistencies in the Draft Discharge Permit relate to the Mine's water management plan, area of disturbance, the amount of ore to be processed and the amount of waste rock to be produced, the size of the existing pit lake, and the depth of the future expanded pit lake. All of these factors influence the Mine's impact to ground and surface water quality and whether the Mine will pose a hazard to public health and undue risk to property. Section 20.6.7.10.J NMAC.

As previously discussed, NMCC's summary of its Mine Operation Management Plan in its Revised August 2017 DP Application states that the Mine will use 5,738 af/y of fresh groundwater for ore processing. Revised August 2017 DP Application, Table 11J-2, page 74. In

contrast, the Draft EIS states that 6,105 af/y of fresh groundwater will be needed for ore processing. NMCC fails to account for the 367 ac/f of fresh groundwater necessary for operations. Additionally, the water balance provided in the Draft EIS is for a *maximum* of 30,000 TPD - not the 38,000 TPD rate provided in the Draft Discharge Permit. A nearly thirty (30) percent increase in the Mine's daily production rate would result in a corresponding thirty (30) percent increase in water consumption necessary for ore processing.

The increase in ore production and its corresponding increase in fresh water consumption directly affect whether the Mine will pose a hazard to public health and/or undue risk to property in the following ways. First, the increase in ore production results in increased amounts of waste rock, thereby resulting in an increased risk of waste rock run-off, leaching and seepage into groundwater, in turn resulting in an increased risk of groundwater and surface water contamination. Second, the increased consumption of fresh groundwater for the increased ore production could result in further lowering the groundwater table and hydrologically connected surface water flows of the Rio Grande, thereby posing a hazard to public health and undue risk to property. The Environment Department therefore cannot make the required public hazard/undue risk to property determination without analyzing the Mine's impacts pursuant to this increased daily production rate, and therefore must deny the Draft Discharge Permit. Section 20.6.7.10.J NMAC.

The Draft Discharge Permit also states that the project will disturb approximately 1,290 acres, of which approximately 910 acres were previously disturbed from historic mining operations at the site. Draft Discharge Permit, page 3, paragraph A. In the Draft EIS, the proposed action (17,500 tpd) identifies a total of 1,586 acres of disturbance within the Mine area and 97.2 acres outside the Mine area for ancillary facilities (DEIS 2-5, Table 2-1, Table 2-2); for

Alternative 1 (25,000 tpd) it identifies a total of 1,401 acres of disturbance within the Mine area (DEIS 2-59, Table 2-16); for Alternative 2 (30,000 tpd and BLM's preferred alternative) it identifies a total of 1,444 acres of disturbance within the Mine area) (DEIS 2-73, Table 2-24). An increase in the Mine's area of disturbance will naturally result in an increased risk to ground and surface waters, as well as to wildlife and grazing habitat. Without an accurate accounting of the Mine's area of disturbance, the Environment Department cannot make the required public hazard/undue risk to property determination and therefore must deny the Draft Discharge Permit. Section 20.6.7.10.J NMAC.

Also of concern is the Draft Discharge Permit's statement that "over an estimated eleven-year operational period, the permittee intends to mine the copper-rich ore body and process approximately **125 million tons of ore** at the Process Facility Area, and place **33 million tons of waste rock** on three delineated waste rock stockpiles peripheral to the open pit". Draft Discharge Permit, 3, paragraph C (emphasis added). This contradicts the July 2017 Revised MORP, which states that NMCC will mine approximately **113 million tons of ore and 45 million tons of waste rock** during the operating life of the Mine (158 million tons). July 2017 Revised MORP, page 2-1.

Though the total of processed ore and waste rock is the same, 158 million tons, it appears that the Environment Department has reduced the amount of waste rock by 12 million tons and has increased the amount of ore to be processed by 12 million tons. It is unclear how the Environment Department was able to reach this conclusion, given the very low grade of the ore to be processed. Without an accurate accounting of waste rock to be produced by the Mine's operations, the Environment Department cannot make the required public hazard/undue risk to

property determination and therefore must deny the Draft Discharge Permit. Section 20.6.7.10.J NMAC.

Additionally, according to the Draft Discharge Permit, the current pit encompasses “eighty acres of disturbance including a five-acre water body.” Draft Discharge Permit, page 3, paragraph B. However, this contradicts information in the DEIS stating that the current pit encompasses “102 acres” of disturbance. DEIS 2-6. The size of the current and future expanded pit lake is directly related to its impact to wildlife, grazing and warmwater aquatic life, thereby affecting the determination regarding whether the Draft Discharge Permit poses a hazard to public health and/or undue risk to property. Without an accurate accounting of the pit lake’s current and future expanded size, the Environment Department cannot make the required public hazard/undue risk to property determination and therefore must deny the Draft Discharge Permit. Section 20.6.7.10.J NMAC.

Finally, the July 2017 Revised MORP, which the Environment Department has identified as critical to the Draft Discharge Permit, purportedly contains information consistent with that provided in the Draft EIS. However, when it comes to information regarding the depth of the future expanded pit lake, the July 2017 Revised MORP provides a depth of “approximately 850 to 900 feet,” (July 2017 Revised MORP, page 2-7), whereas the Draft EIS provides a depth of “approximately 1,000 feet.” DEIS, page 2-73, 2-74. The depth to groundwater ratio directly affects whether the Mine’s Draft Discharge Permit will pose a hazard to public health and/or undue risk to property. Without an accurate accounting of the Mine’s pit depth, the Environment Department cannot make the required public hazard/undue risk to property determination and therefore must deny the Draft Discharge Permit. Section 20.6.7.10.J NMAC.

In conclusion, the Draft Discharge Permit, on its face, is arbitrarily based upon information not provided by NMCC for key mining units and operations and contains numerous inconsistencies, rendering determination of hazard to public health and/or undue risk to property impossible. The Environment Department must therefore deny the Draft Discharge Permit.

**B. In the Alternative, the Draft Discharge Permit Indicates that NMCC May Have Made False Material Statements, Representations, Certifications or Omissions of Material Fact.**

Information pertaining to the Mine's units and operations must be consistent with NMCC's Discharge Permit Application and the BLM's Draft EIS. In the alternative, if NMED determines that the Draft Discharge Permit is not arbitrarily based on new information not provided by NMCC, the above-discussed inconsistencies indicate that NMCC may be making false material statements, representations, certifications or omissions of material facts in its discharge permit application, its MORP and associated operational, monitoring and closure plans, and in the Draft EIS, which is of grave concern to both TRP and Pitchfork Ranch. Any false material statements, representations, certifications or omissions of material fact made by NMCC are direct violations of the Water Quality Act. NMSA 1978, Section 74-6-10.2.A(2).

The Environment Department must therefore deny NMCC's application for a discharge permit pursuant to the Water Quality Act. Section 74-6-5.E(4)(a),(b).

**V. The Draft Discharge Permit's Use of Discharge Permit Amendments Violates the New Mexico Water Quality Act.**

The Draft Discharge Permit is replete with the use of discharge permit amendments for making future significant changes to the permit - after the permit's effective date - without public notice, comment or opportunity for a public hearing. A discharge permit amendment is defined under the Copper Rule as:

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

Section 20.6.7.7.B(19) NMAC.

The Environment Department is authorizing the use of discharge permit amendments for the following future significant changes to the Draft Discharge Permit, *after* the permit's effective date: 1) expansion of the TSF beyond the permitted footprint of the TSF (Draft Discharge Permit, page 16, paragraph C.4); 2) changing the location of discharges of contaminated, untreated water for dust suppression (*Id.* at page 18, paragraph C108.B); 3) changing monitoring and reporting requirements (*Id.* at page 19, paragraph C111.F); and 4) abandonment of required monitoring wells (*Id.* at page 20, paragraph 8).

The use of discharge permit amendments throughout the Draft Discharge Permit is of great concern to TRP and Pitchfork Ranch for several reasons. First, the use of amendments unlawfully eliminates public notice, comment and opportunity for a public hearing on significant changes to a permit. Second, allowing substantial permit conditions to be amended after the permit's effective date undermines both the purpose of permit conditions and public participation in the permit process. Third, the use of discharge permit amendments is unlawful under the Water Quality Act. Finally, the permit conditions identified in the Draft Discharge Permit that "could be changed via an amendment" constitute significant changes to the permit that would result from a change in the location of a discharge, a significant increase in the quantity of the discharge, and from a significant change in the quality of the permitted discharge that are required to be administered as permit modifications.

**A. Use of Discharge Permit Amendments in Lieu of Discharge Permit Modifications Unlawfully Eliminates Public Notice, Comment and Opportunity for a Public Hearing on Significant Permit Condition Changes.**

The Water Quality Act expressly states that, “No ruling shall be made on any application for a permit without opportunity for a public hearing...” Section 74-6-5(G). Therefore, decisions regarding applications for a new discharge permit or for modification of an existing discharge permit cannot be made without an opportunity for a public hearing. *Id.* It is clear that the Environment Department’s substantial reliance upon discharge permit amendments – which are not subject to public notice, comment or opportunity for a public hearing – for significant changes to DP-1840 after the permit’s effective date is a means of circumventing the Water Quality Act’s public participation requirements.

The Environment Department’s attempts at circumventing the Water Quality Act’s public participation requirements become even more apparent when the Draft Discharge Permit states that significant changes to permit conditions – that would certainly result from a change in location of a discharge, increase in quantity or change in quality of a discharge and thus satisfying the current regulatory definition for discharge permit modification which are subject to public notice, comment and opportunity for a public hearing – are to be unlawfully administered as amendments. Section 20.6.2.7.P NMAC.

New Mexico Courts have made clear that the Environment Department’s repeated attempts to circumvent and chill public participation in the discharge permit process are unlawful. Communities for Clean Water v. New Mexico Water Quality Control Commission, 2017 N.M. App. LEXIS 115; In re Rhino Envntl. Servs., 2005-NMSC-024, P 23, 138 N.M. 133, 139, 117 P.3d 939, 945. The Draft Discharge Permit’s violation of the Water Quality Act’s

public participation provisions requires the Environment Department to deny NMCC's permit application pursuant to Section 74-6-5.E(2).

**B. Allowing "Amendment" of Significant Permit Conditions After a Permit's Effective Date Undermines Both the Purpose of Permit Conditions and Public Participation in the Permit Process.**

A key distinction between a discharge permit amendment and a discharge permit modification is that amendments are not subject to public notice, comment and opportunity for a public hearing. Section 20.6.7.14.C NMAC. In contrast, discharge permit modifications, whether initiated by NMED or by the permittee, are subject to public notice, comment and opportunity for a public hearing. Section 20.6.2.3108 NMAC; NMSA 1978, Section 74-6-5(G). The Environment Department's substantial reliance on amendments to change significant permit conditions after DP-1840's effective date is extremely concerning for the following reasons.

First, the public has no guarantee that the proposed permit conditions of the Draft Discharge Permit will remain in effect for the entire term of the discharge permit, or for even one day after DP-1840's effective date.

Second, the public would not even know whether significant permit conditions pertaining to the TSF footprint, changes in location of discharges, changes to the boundaries of the monitoring well network, changes to monitoring and reporting requirements and abandonment of required monitoring wells are made because the public would receive no notice, opportunity to comment, or opportunity to request a public hearing on such changes.

Third, the use of amendments to change vital permit conditions that help prevent or mitigate ground water pollution clearly undermines the purpose of permit conditions initially imposed and that were subject to robust public review, comment and opportunity for a public hearing. If the Environment Department and the permittee can, behind closed doors, undo any or



all permit conditions of DP-1840 that the public sought to impose through public review, comment and hearings on the initial permit after the permit's effective date – all of the permit conditions would be rendered meaningless.

### **C. The Use of Discharge Permit Amendments Violates the Water Quality Act.**

The Water Quality Act (“Act”) expressly authorizes the Environment Department to perform the following actions: deny a permit, terminate a permit, *modify* a permit, or grant a permit subject to a condition. *See* NMSA 1978, Sections 74-6-5(M), (N) (emphasis added). The Act provides the following criteria for when a permit may be modified:

A permit may be terminated or *modified* by the constituent agency that issued the permit prior to its date of expiration *for any of the following causes*:

- 1) Violation of any condition of the permit;
- 2) Obtaining the permit by misrepresentation or failure to disclose fully all relevant facts;
- 3) Violation of any provisions of the WQA or any applicable regulations, standard of performance or water quality standards;
- 4) Violation of any applicable state or federal effluent regulations or limitations; or
- 5) Change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge

Section 74-6-5(M) (emphasis added). The Act therefore provides a definition for permit modification as follows:

*A permit modification results from the violation of any condition of the permit, from obtaining the permit by misrepresentation or failure to disclose fully all relevant facts; from violation of any provisions of the WQA or any applicable regulations, standard of performance or water quality standards; from violation of any applicable state or federal effluent regulations or limitations; or from a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.*

The Legislature expressly provided the criteria for when the Environment Department may modify a permit, whether the Environment Department determines to modify a permit on its own or whether a permitted facility submits an application for permit modification. *Id.* Thus, if a

permittee requests a change to a permit condition because a violation will occur or is occurring, the request must be administered as a modification. *Id.* If the Environment Department determines that a change to a permit condition is necessary because a violation will occur or is occurring, then it must be administered as a modification.<sup>18</sup> *Id.*

Furthermore, “Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. This is a part of the so-called doctrine of *expressio unius est exclusio alterius* [the express mention of one thing excludes all others]”. Fancher v. Bd. of Comm’rs, 1921-NMSC-039, ¶ 11; 28 N.M. 179, 188. The Legislature expressly gave the Environment Department the authority to *modify* a permit under the prescribed mode provided in Section 74-6-5(M). The Environment Department is limited to modifying a permit pursuant to the prescribed mode in Section 74-6-5(M). All other modes the Water Quality Control Commission (“Commission”) has provided through regulation, such as through the current regulatory definition for discharge permit modification found at Section 20.6.2.7.P NMAC, are unlawful.

Therefore, any and all changes to a permit condition for DP-1840 must be processed as a discharge permit modification, subject to public notice, comment and opportunity for a public hearing. Section 20.6.2.3108. NMAC. The Draft Discharge Permit’s violation of the Water

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<sup>18</sup> For example, the Draft Discharge Permit includes a condition to “install two additional monitoring wells to evaluate current ground water conditions proximal to the open pit and historic waste rock stockpiles.” Draft Discharge Permit, page 25, paragraph C.1. After the effective date of the permit, NMCC may decide that it does not want to comply with this condition. Non-compliance would result in violation of this permit condition. Therefore, Section’s 74-6-5(M)’s criteria for when a permit may be modified requires NMCC to submit a discharge permit modification application to change this permit condition. If NMED determined that removal of this condition would be warranted, then NMED would have to administer such removal as a permit modification pursuant to Section 74-6-5(M).

Quality Act's criteria for when a permit may be modified requires the Environment Department to deny NMCC's permit application pursuant to Section 74-6-5.E(2).

Finally, the recent New Mexico Supreme Court decision in GRIP v. New Mexico Water Quality Control Commission, 2018 N.M. LEXIS 22, did not address the Copper Rule's use of discharge permit amendments under the Water Quality Act or whether the Copper Rule *as applied* violated the Water Quality Act. The Environment Department cannot justify its unlawful use of discharge permit amendments with the recent Supreme Court's Copper Rule decision. *Id.*

**D. In the Alternative, the Draft Discharge Permit Conditions Identified as "Subject to Change Via Discharge Permit Amendment" Must Actually Be Subject to Change Via Discharge Permit Modification.**

In the alternative, if the New Mexico Courts were to conclude that Section 74-6-5(M) does not provide the sole criteria for when a permit may be modified and that the current regulatory definition for discharge permit modification found at Section 20.6.2.7.P NMAC and the Copper Rule's current regulatory definition for discharge permit amendment found at Section 20.6.7.7.B(19) NMAC are lawful under the Water Quality Act, then the Draft Discharge Permit conditions identified as "subject to change via discharge permit amendment" must actually be subject to change via discharge permit modification for the following reasons.

First, each of the permit conditions identified in the Draft Discharge Permit as being "subject to change via discharge permit amendment" constitute significant changes to the permit "that would result from a change in the location of a discharge, a significant increase in the quantity of the discharge, and from a significant change in the quality of the permitted discharge," thereby satisfying the regulatory definition of discharge permit modification. Section 20.6.2.7.P NMAC.

To increase the TSF beyond the permitted footprint would certainly result in a change in the location of a discharge, and likely result in a significant increase in the quantity of the discharge. Additionally, changing the location of discharges of contaminated, untreated water for dust suppression would clearly result in a change in the location of a discharge. Accordingly, the Environment Department must therefore deny the Draft Discharge Permit.

Second, the regulatory definition of discharge permit modification allows the Environment Department Secretary discretion in requiring permit condition changes that may not result in changes to discharge location, quantity and quality to be processed as modifications pursuant to Section 20.6.2.7.P NMAC's "or as required by the secretary" language. Changes to significant discharge permit components, such as the location of the monitoring well network, monitoring and reporting requirements, and abandonment of required monitoring wells, warrant being processed as a modification subject to public notice, comment and opportunity for a public hearing. All of these permit components impact the permittee's and the Environment Department's ability to monitor and prevent contamination of ground and surface waters. The Environment Department must therefore deny the Draft Discharge Permit.

### **Conclusion**

The above discussed comments demonstrate that the Environment Department's consideration of the Draft Discharge Permit is premature at this time and all permit action must be stayed. In the alternative, TRP's and Pitchfork Ranch's comments demonstrate why the Environment Department must deny the Draft Discharge Permit.

The Environment Department must deny the Draft Discharge Permit because it poses a hazard to public health and undue risk to property for the following reasons:

- The andesite bedrock beneath the proposed waste rock stockpiles is not an impermeable liner and therefore will not completely prevent all leaks to groundwater, thereby posing a hazard to public health and undue risk to property;
- The applicant's water balance calculations reveal a huge error regarding initial startup water and free tails water. Because of this error, the DP Application grossly underestimates the amount of fresh water the applicant will pump at the beginning of the project. This, therefore, violates the Copper Rule's requirement that the applicant submit an accurate water management plan. This factor is also key to the Secretary's determination whether the Draft Permit poses a hazard to public health and undue risk to property;
- Contaminants discharged from the Mine's waste rock stockpiles and TSF pursuant to the Draft Permit could reach surface water near the Mine, including the Rio Grande, thereby posing a hazard to public health and undue risk to property;
- Tailings run-off collected in unlined ditches could seep into groundwater, posing a hazard to public health and undue risk to property; and
- The proposed groundwater monitoring well network is grossly insufficient to detect contamination moving from the Mine's pit lake, waste rock stockpiles or TSF. Even with contaminant dispersion, entire contaminant plumes could escape the Mine site undetected, thereby posing a hazard to public health and undue risk to property.

Specific to Ladder Ranch, the Draft Discharge Permit poses a hazard to public health and undue risk to property for the following reasons:

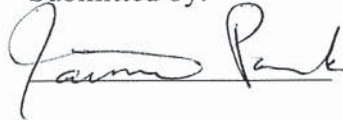
- The Greyback Arroyo lies just south of the Ranch property line, so any Mine-impacted surface water/stormwater flow that could jump the banks or cause changes in the arroyo plan could negatively impact the Ranch through contamination of springs. Potential contamination resulting from the Mine's discharges poses a hazard to public health and undue risk to property;
- Contaminants discharged from the Mine's waste rock stock piles and TSF pursuant to the Draft Permit could reach springs on the Ranch. Wells and springs on the Ranch could become contaminated by the Mine's discharges that exceed water quality standards set forth in Section 20.6.2.3103 NMAC, posing a hazard to public health and undue risk to property; and
- The proposed groundwater monitoring well network is grossly insufficient to detect contamination moving from the Mine site onto the Ranch. The monitoring wells are

spaced too widely and contaminant plumes could slip through undetected, thereby posing a hazard to public health and undue risk to property on the Ranch.

The Environment Department must also deny the Draft Discharge Permit because it is technically incomplete and fails to demonstrate compliance with OSE-DSB rules and regulations for the proposed tailings dam. The Draft Discharge Permit's conditions also violate the New Mexico Water Quality Act and its implementing regulations, as well as the New Mexico Mining Act (and its implementing regulations).

Dated: May 4, 2018

Submitted by:

A handwritten signature in black ink, appearing to read "Jaimie Park". The signature is written in a cursive style with a horizontal line underneath the name.

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