

contaminated groundwater at its mine site from spreading offsite. Because of this, PD argues, it does not need to place a cover on hundreds of acres of leach ore and waste rock piles, although it admits this would substantially reduce the discharge of acid rock drainage into groundwater. PD further admits that a substantial portion of the alluvial and regional aquifers lying beneath its 12,000 acre mine site will be contaminated above state standards, but it argues that no one will ever withdraw groundwater from the mine site, even for hundreds of years. PD makes this argument despite the fact that water is currently withdrawn from the mine site each year for purposes of water supply, that this withdrawal of water will likely continue for hundreds of years, and that it is reasonably foreseeable that third persons will use the water withdrawn from the mine site.

Rick Mohr, General Manager at Tyrone, testified that rather than implementing source control -- preventing pollution at its source -- PD will implement institutional controls to prohibit anyone from withdrawing water from the mine site. This is the equivalent of keeping a dangerous hole in a playground, fencing it rather than filling it in.

The hearings aren't over. When they resume in September, NMED officials will argue that the mine site is in fact a place of withdrawal in the foreseeable future and therefore the groundwater under the mine site needs to be protected.

GRIP agrees. The GRIP position is that PD intends to pump and treat contaminated groundwater from the open pit after the mine is closed. It is therefore reasonably foreseeable that the company will want to use or sell this water for municipal or agricultural use. Moreover, there are locations within the mine site where water could be withdrawn for domestic or agricultural use.

The Water Quality Control Commission, thanks to the appeals court remand, must identify specific policies by which to make a decision. On behalf of GRIP, Bruce Frederick, attorney with the New Mexico Environmental Law Center, filed a motion that the WQCC adopt three policies to guide its decision on whether the Tyrone mine site must be protected

under the Water Quality Act:

1) The Commission should assume that every aquifer within a declared underground water basin is a "place of withdrawal" and that it is the applicant's burden to prove otherwise. The New Mexico Constitution provides that all "unappropriated water within New Mexico... is public water and subject to appropriation for beneficial use." Since the Tyrone mine sits above the Mimbres and Gila-San Francisco groundwater basins with discharges from the mine site directly affecting water in these aquifers, the Commission should assume that the Tyrone mine is a place of withdrawal for present or reasonably foreseeable future use.

2) The Commission should assume that in an arid state such as New Mexico, it is contrary to public policy that an aquifer will NOT be a "place of withdrawal" for extremely long or indefinite periods of time. It has long been the policy of the state to maximize the utilization of water and not underutilize it. Because the state is "water-poor", we can't afford to "write-off" our groundwater supplies. Existing contamination of the shallow and regional aquifer caused by the Tyrone mine and the potential for continued contamination of groundwater for hundreds of years is against public policy as it promotes the underutilization of groundwater resources.

3) The Commission should favor closure plans that do not rely on perpetual maintenance. Phelps Dodge argues that because all contaminated water flows to the open pit and the closure plan requires perpetual pumping and treating to meet water quality standards, it doesn't need to prevent groundwater contamination from acid rock drainage from stockpiles at the mine site. However, the state's Mining Act requires that mine closure plans be "designed to meet without perpetual care all applicable environmental requirements of the Mining Act."

There is also uncertainty in predicting what will happen hundreds of years from now. What if Freeport-McMoRan/Phelps Dodge goes bankrupt and can no longer pump and treat contaminated water from the pit?

GRIP's technical witness, mine engineer Jim Kuipers, testified that source controls are the only long-term solution for minimizing creation of pollution, resulting in the reduction of treatment and long-term operation and maintenance costs. In many cases it is not possible to capture and treat contamination, thus source control methods, such as regrading and covering stockpiles, typically take a high priority in reclamation and closure plans. At the Tyrone mine, site-specific geological and hydrological conditions make it impossible to capture all of the groundwater contamination. Historical and current monitoring well data shows exceedances of water quality standards in the shallow and regional aquifers at various locations in and around the mine site.

It is hard to overstate the importance of the Water Quality Control Commission's decision, since this is, after all, our local water supply at issue. A decision that the mine site is not a place of withdrawal of water for present or reasonably foreseeable future use would allow Phelps Dodge to forego source control that would otherwise prevent continued acid rock drainage. If the company prevails in this case, Phelps Dodge officials have proposed applying "institutional controls" to reduce public health risk from groundwater contamination. This means that rather than implementing a comprehensive discharge plan to prevent acid rock drainage, PD would try to prohibit groundwater use from within the permit boundary. The enforceability of institutional controls over hundreds of years -- the potential time frame of discharges from the mine site -- is highly uncertain. Institutional controls reduce clean-up costs for Phelps Dodge, but may transfer the cost of water treatment to the public, if and when contaminated groundwater needs to be used by municipalities in the future.

The WQCC's decision is expected in the fall, after the hearing ends in mid-September. The hearings are open to the public and oral and/or written public comments will be accepted. PD has stated that active mining will end at the Tyrone and Chino mines in the next 10 - 15 years.