

1           **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Opinion Number:** \_\_\_\_\_

3 **Filing Date:** **March 8, 2018**

4 **NOS. S-1-SC-35279, -35289, & -35290**

5 **GILA RESOURCES INFORMATION**  
6 **PROJECT, AMIGOS BRAVOS, TURNER**  
7 **RANCH PROPERTIES, L.P., STATE OF**  
8 **NEW MEXICO, ex rel., HECTOR**  
9 **BALDERAS, Attorney General, and**  
10 **WILLIAM C. OLSON,**

11           Appellants-Petitioners,

12 v.

13 **NEW MEXICO WATER QUALITY CONTROL**  
14 **COMMISSION,**

15           Appellee-Respondent,

16 and

17 **FREEPORT-MCMORAN CHINO MINES**  
18 **COMPANY, FREEPORT-MCMORAN TYRONE,**  
19 **INC., FREEPORT-MCMORAN COBRE MINING**  
20 **COMPANY, and NEW MEXICO ENVIRONMENT**  
21 **DEPARTMENT,**

22           Intervenors-Respondents.

1 **ORIGINAL PROCEEDING ON CERTIORARI**

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1 **OPINION**

2 **NAKAMURA, Chief Justice.**

3 {1} In September 2013, the New Mexico Water Quality Control Commission (the  
4 Commission) adopted the Copper Mine Rule, 20.6.7 NMAC (Copper Rule).  
5 Petitioners argue that the Copper Rule violates the Water Quality Act (WQA), NMSA  
6 1978, §§ 74-6-1 to -17 (1967, as amended through 2013) because it is premised on  
7 an impermissible construction of the statutory phrase “place of withdrawal of water  
8 for present or reasonably foreseeable future use.” Section 74-6-5(E)(3). Petitioners  
9 assert that, as a consequence of this impermissible construction of the statutory  
10 phrase, the Copper Rule permits rather than prevents groundwater contamination at  
11 open pit copper mining facilities. We reject these arguments, conclude that the  
12 Copper Rule is premised on a permissible construction of the statutory phrase, and  
13 affirm the Commission’s decision to adopt the Copper Rule.

14 **I. BACKGROUND**

15 {2} The WQA was enacted in 1967. Its purpose is “to abate and prevent water  
16 pollution.” *Bokum Res. Corp. v. N.M. Water Quality Control Comm’n*,  
17 1979-NMSC-090, ¶ 59, 93 N.M. 546, 603 P.2d 285. Prior to 2009, the WQA did not  
18 allow the Commission to specify by rule the “method to be used to prevent or abate

1 water pollution . . . .” Section 74-6-4(D) (2003). Amendments to the WQA enacted  
2 in 2009 altered this legislative framework.

3 {3} The 2009 amendments to the WQA directed the Commission to adopt  
4 regulations particular to specific industries, including the copper mining industry,  
5 specifying “the measures to be taken to prevent water pollution and to monitor water  
6 quality.” Section 74-6-4(K). The regulations were to be developed by the New  
7 Mexico Environment Department (NMED). Section 74-6-4(K) (“The constituent  
8 agency shall establish an advisory committee . . . to advise the constituent agency on  
9 appropriate regulations to be proposed for adoption by the commission.”); Section  
10 74-6-2(K)(1) (“[C]onstituent agency’ means . . . the department of environment[.]”).  
11 The NMED engaged in an open rulemaking process that resulted in the Copper Rule,  
12 which the Commission adopted when it entered its Order and Statement of Reasons  
13 on September 25, 2013. Petitioners appealed the Commission’s decision to adopt the  
14 Copper Rule. *See Gila Res. Info. Project v. N.M. Water Quality Control Comm’n*,  
15 2015-NMCA-076, ¶ 1, 355 P.3d 36.

16 {4} The Court of Appeals rejected Petitioners’ contention that the Copper Rule  
17 violates the WQA and affirmed the Commission’s order adopting it. *Id.* ¶¶ 2, 19, 61.  
18 We granted certiorari to review Petitioners’ requests that we set aside the Copper

1 Rule and remand this matter to the Commission with instructions that it promulgate  
2 a new rule that complies with the WQA.

3 **II. DISCUSSION**

4 {5} The Commission’s order adopting the Copper Rule shall be set aside if it is “(1)  
5 arbitrary, capricious or an abuse of discretion; (2) not supported by substantial  
6 evidence in the record; or (3) otherwise not in accordance with law.” Section  
7 74-6-7(B). Petitioners contend that the Commission’s decision to adopt the Copper  
8 Rule is not in accordance with law because the Copper Rule is inconsistent with and  
9 violates the WQA.

10 {6} Petitioners do not ask us to evaluate the lawfulness of the Copper Rule under  
11 some specific set of circumstances; the Copper Rule has not yet been applied at a  
12 copper mine. Instead, Petitioners mount a facial challenge to the Copper Rule. *See*  
13 *Am. Hosp. Ass’n v. N.L.R.B.*, 499 U.S. 606, 619 (1991) (“This case is a challenge to  
14 the validity of the entire rule in all its applications.”). The inquiry before us is  
15 whether the Copper Rule is a permissible exercise of the Commission’s statutory  
16 authority, *N.M. Mining Ass’n v. N.M. Water Quality Control Comm’n*,  
17 2007-NMCA-010, ¶ 21, 141 N.M. 41, 150 P.3d 991, and Petitioners must establish

1 that no set of circumstances exist where the Copper Rule could be valid. *Reno v.*  
2 *Flores*, 507 U.S. 292, 301 (1993).

3 {7} Petitioners make varying specific claims in support of their assertion that the  
4 Copper Rule violates the WQA. To meaningfully discuss those specific claims, we  
5 must first examine how open pit copper mining is conducted. We then provide an  
6 overview of the Copper Rule focusing on the provisions that are central to its function  
7 as a regulatory tool and to which Petitioners object. Finally, we consider Petitioners'  
8 specific arguments.

#### 9 **A. Copper Mining**

10 {8} Petitioners contend that “the undisputed testimony and other evidence in the  
11 record show[s] that open pit copper mines have caused tens of thousands of acres of  
12 ground water pollution in New Mexico and that this pollution persists for hundreds  
13 of years.” Nevertheless, the legality of open pit mining is not disputed and no party  
14 advocates banning this form of mining.

15 {9} According to Respondents, open pit copper mining is the typical method to  
16 mine copper. An “open pit” is “the area within which ore and waste rock are exposed  
17 and removed by surface mining.” 20.6.7.7(B)(41) NMAC. For context of the scale  
18 of open pit mines, one such mine in Grant County, New Mexico is 11,600 feet long,

1 8,500 feet wide, and 2,000 feet deep. Open pits eventually become deep enough to  
2 reach the groundwater table. At that point, water must be pumped out of the open pit  
3 to mine it any deeper.

4 {10} As the depth of the open pit increases, gravity causes groundwater in the  
5 vicinity of the open pit to flow towards the bottom of the pit. The area affected by  
6 this hydrological phenomenon is referred to as the “[a]rea of open pit hydrologic  
7 containment.” 20.6.7.7(B)(5) NMAC (“Area of open pit hydrologic containment’  
8 means . . . where ground water drains to the open pit and is removed by evaporation  
9 or pumping, and is interior to the department approved monitoring well network  
10 installed around the perimeter of an open pit[.]”). Some surface waters also drain into  
11 the open pit. “[T]he area in which storm water drains into an open pit and cannot  
12 feasibly be diverted by gravity outside the pit perimeter” is referred to as the “[o]pen  
13 pit surface drainage area.” 20.6.7.7(B)(42) NMAC. Petitioners aver that, while the  
14 area of open pit hydrologic containment and open pit surface drainage area are  
15 distinct in that one concerns groundwater and the other surface water, the areas both  
16 exist as a consequence of the open pit, exist at the same general location, and are  
17 properly considered as companion concepts.

1 {11} The actual extraction of copper from mined rock occurs at mine “units.” A  
2 “[u]nit” is “a component of a mining operation including but not limited to  
3 processing, leaching, excavation, storage, stockpile or waste units.” 20.6.7.7(B)(63)  
4 NMAC. Some of the mined rock contains useful copper ore; other mined rock is  
5 waste. “Waste rock” is “all material excavated from a copper mine facility that is not  
6 ore or clean top soil.” 20.6.7.7(B)(65) NMAC. Waste rock is typically placed in  
7 waste rock stockpiles. A variety of methods are used to process the ore.

8 {12} Some ore is placed into leach stockpiles, which are “piles associated with  
9 mining disturbances that have been leached, are currently being leached or have been  
10 placed in a pile for the purpose of being leached.” 20.6.7.7(B)(33) NMAC. Once the  
11 leach stockpile is formed, acidic solution is poured onto it. Copper is extracted at the  
12 bottom of the leach stockpile and piped to a processing plant.

13 {13} Other ore is sent to a concentrator where it is ground into small particles and  
14 mixed with water to form a slurry. Some of the slurry becomes copper, and other  
15 portions of it become “tailings,” which are “finely crushed and ground rock residue  
16 and associated fluids discharged from an ore milling, flotation beneficiation and  
17 concentrating process.” 20.6.7.7(B)(59) NMAC. Tailings are deposited in “[t]ailings

1 impoundments,” which can be as large as several square miles.

2 20.6.7.7(B)(60) NMAC.

3 {14} All of these copper extraction processes, as well as waste rock stockpiles, can  
4 cause discharges that impact groundwater quality. For this reason, mining units are  
5 frequently located near the open pit and within the open pit surface drainage area so  
6 as to capture any discharges at a mining unit.

7 {15} The open pit itself is also capable of generating discharges that may  
8 contaminate groundwater. When rain water contacts the exposed surfaces of the open  
9 pit, acidic solutions can be generated. Other sources of possible contaminant  
10 discharge at open pit mining facilities include “surface impoundments that store or  
11 retain process water; wastewater or storm water runoff that has contacted mined  
12 materials; pipeline and tank systems used to convey or store process water; and  
13 equipment washing facilities.”

#### 14 **B. The Copper Rule**

15 {16} The Copper Rule is comprised of thirty-nine different sections and a myriad of  
16 subsections which address all manner of discharge control for the copper mining  
17 industry. It is a “supplement [to] the general permitting requirements . . . to control  
18 discharges of water contaminants specific to copper mine facilities . . . .”

1 20.6.7.6 NMAC. The “purpose” of the Copper Rule, as stated by the Commission,  
2 “is to control and contain discharges of water contaminants specific to copper mine  
3 facilities and their operations to prevent water pollution so that ground water meets  
4 the quality standards of 20.6.2.3103 NMAC at locations of present and potential  
5 future use.” The groundwater quality standards set out at 20.6.2.3103 NMAC (3103  
6 standards) specify the allowable pH range and maximum allowable contaminant  
7 concentration for groundwater. 20.6.2.3103(A)-(C) NMAC. Groundwater is polluted  
8 when the contaminant concentration levels identified in the 3103 standards are  
9 exceeded.

10 {17} Petitioners’ objections to the Copper Rule arise from two of its features. First,  
11 the Copper Rule specifies that, “[d]uring operation of an open pit, the standards of  
12 20.6.2.3103 NMAC do not apply within the area of open pit hydrologic containment.”

13 20.6.7.24(D) NMAC. Second, the Copper Rule requires an applicant for a discharge  
14 permit to install monitoring wells in specific locations at an open pit mining facility.

15 20.6.7.28(A) NMAC. The monitoring wells must be placed “around the perimeter  
16 and downgradient of each open pit, leach stockpile, waste rock stockpile, tailings  
17 impoundment, process water impoundment, and impacted stormwater impoundment.”

18 20.6.7.28(B) NMAC. The monitoring wells must also be installed “as close as

1 practicable” to the open pit or mining unit in order “to detect an exceedance(s) or a  
2 trend towards exceedance(s) of the applicable standards at the earliest possible  
3 occurrence, so that investigation of the extent of contamination and actions to address  
4 the source of contamination may be implemented as soon as possible.” *Id.* “The  
5 [NMED] may require additional wells around the perimeter of mine units that are  
6 underlain by areas where ground water flow directions are uncertain” and may  
7 “require additional monitoring wells at any other unit of a copper mine facility that  
8 has the potential to cause an exceedance of applicable standards . . . .” *Id.*

### 9 **C. Petitioners’ Arguments**

#### 10 **1. Section 74-6-5(E)(3) and “place of withdrawal”**

11 {18} Petitioners’ primary contention in this appeal is that the Copper Rule permits  
12 the copper mining industry to pollute groundwater above the 3103 standards  
13 wherever its mines are located. It does this, Petitioners explain, by waiving  
14 compliance with 3103 standards within the area of open pit hydrologic containment  
15 and by assessing the impacts of mining on groundwater at monitoring wells rather  
16 than at the open pit and mining units themselves. This is, Petitioners argue,  
17 inconsistent with the plain language of Section 74-6-5(E)(3), which states that

1 [t]he [NMED] shall deny any application for a permit or deny the  
2 certification of a federal water quality permit if:

3 . . . .

4 (3) the discharge would cause or contribute to water contaminant  
5 levels in excess of any state or federal standard. Determination of the  
6 discharge's effect on ground water shall be measured at any place of  
7 withdrawal of water for present or reasonably foreseeable future use.

8 This provision is incorporated into the Copper Rule at 20.6.7.10(J)(3) NMAC, which  
9 requires compliance with Section 74-6-5(E)(3).

10 {19} According to Petitioners, the WQA's mandate that determination of the effects  
11 of a discharge shall be measured at "any place of withdrawal of water for present or  
12 reasonably foreseeable future use" is "clear and unambiguous." A place of  
13 withdrawal, Petitioners argue, is "a place where ground water is presently being used  
14 or foreseeably could be used in the future." Petitioners assert that Section 74-6-  
15 5(E)(3) requires a site specific evaluation of whether a discharge will contaminate  
16 groundwater with present or future use and argue that, "[i]f any discharge will pollute  
17 above standards groundwater with present or reasonably foreseeable future use, the  
18 permit application must be denied."

19 {20} Petitioners claim that the Copper Rule violates the WQA because it permits  
20 contamination of groundwater at the open pit and at mining units without a site

1 specific determination. In fact, according to Petitioners, the Copper Rule does not  
2 require any determination at all whether the open pit and mining units are places of  
3 withdrawal because the Copper Rule, they claim, operates from the errant supposition  
4 that a “[p]lace of [w]ithdrawal is not a ‘place’ that exists apart from a copper mine.  
5 Its existence and location depend entirely on the location of monitoring wells  
6 installed at a particular copper mine.” It is essential that the preceding quote from  
7 Petitioners’ briefing is understood, and we will risk redundancy to ensure that it is.  
8 {21} Petitioners understand the Copper Rule to require an assessment of whether  
9 groundwater exists at a place of withdrawal *only after a mine is in place*. This is  
10 because, Petitioners assert, the monitoring wells establish the locations of places of  
11 withdrawal at open pit copper mining facilities. Petitioners contend that this is  
12 inconsistent with the plain language of Section 74-6-5(E)(3). According to  
13 Petitioners, the place of withdrawal language in Section 74-6-5(E)(3) unambiguously  
14 requires a determination of whether groundwater at any given location exists at a  
15 place of withdrawal prior to and independent of the installation of a mine or  
16 monitoring wells. For the reasons that follow, we reject Petitioners’ contention that  
17 the meaning of Section 74-6-5(E)(3) is discernible from its plain language and that  
18 its application at an open pit copper mine facility is plainly determinable.

1 a. *Analysis of the plain language of Section 74-6-5(E)(3)*

2 {22} Section 74-6-5(E)(3) does *generally* require the NMED to deny a discharge  
3 permit if the anticipated discharge “would cause or contribute to water contaminant  
4 levels in excess of [3103 standards].” But Section 74-6-5(E)(3) *specifies* how  
5 contaminant levels shall be measured to determine if 3103 standards have been  
6 exceeded: “Determination of the discharge’s effect on ground water shall be  
7 measured at any place of withdrawal of water for present or reasonably foreseeable  
8 future use.” *Id.* This specification is significant.

9 {23} The WQA requires mandatory denial of a discharge permit *only where* the  
10 discharge has measurable adverse effects at “a place of withdrawal” and *only if* the  
11 groundwater at that “place of withdrawal” has present or reasonably foreseeable  
12 future use. This feature of the WQA poses interpretive problems: where, exactly, are  
13 these places of withdrawal? What makes a location a “place of withdrawal?” Where  
14 might these locations be at a site like an open pit mine?

15 {24} Petitioners’ contention that Section 74-6-5(E)(3) is sufficiently clear to discern  
16 its purpose and application from the words of the provision alone does not withstand  
17 scrutiny. Their assertion that the provision merely requires a site specific evaluation  
18 of whether a discharge will contaminate groundwater with present or future use so as

1 to ensure that all groundwater with present or future use is protected oversimplifies  
2 the interpretive problem.

3 {25} Petitioners are effectively arguing that the place of withdrawal language  
4 reflects a legislative intent to protect all groundwater at any location from  
5 contamination. But it is difficult to see how this argument flows from the plain  
6 language of Section 74-6-5(E)(3). The first sentence of the provision does state that  
7 a discharge permit shall not be issued if “the discharge would cause or contribute to  
8 water contaminant levels in excess of [the 3103 standards].” Section 74-6-5(E)(3).  
9 If the provision said only this, then we would have to agree that its plain language  
10 precludes contamination of any groundwater, period, and we would have to agree  
11 with Petitioners’ plain meaning argument. But the provision says more. It goes on  
12 to specify how a discharge’s effect shall be measured and clarifies that it shall be  
13 measured at a place of withdrawal, and we have already determined that this  
14 additional language is significant.

15 {26} When we engage in statutory interpretation, we must give effect to all of the  
16 words used in a statutory provision. *State ex rel. Kline v. Blackhurst*,  
17 1988-NMSC-015, ¶ 12, 106 N.M. 732, 749 P.2d 1111. We would not achieve that  
18 end in this case if we embraced Petitioners’ reading of the statute. Their plain-

1 language argument does not meaningfully engage the “place of withdrawal” phrase  
2 in Section 74-6-5(E)(3). This is not the only reason we doubt Petitioners’ plain  
3 meaning argument. Respondents offer a plausible alternative construction of the  
4 statutory phrase that is entirely different from the construction advanced by  
5 Petitioners.

6 {27} Respondents assert that the most sensible reading of the requirement under  
7 Section 74-6-5(E)(3) that the effect of discharges be measured at “any place of  
8 withdrawal” is that the WQA requires installation of the very types of monitoring  
9 wells contemplated by the Copper Rule. They state the case for this reading of the  
10 provision convincingly:

11       The Legislature’s directive that a discharge’s effect on groundwater  
12       “shall be measured” implies that groundwater will actually be brought  
13       to the surface for analysis. The normal method for bringing  
14       groundwater to the surface is a well. [Thus, t]he Legislature’s directive  
15       that NMED measure groundwater quality at “any place of withdrawal”  
16       means that NMED is to select specific locations at which groundwater  
17       will be withdrawn for measurement.

18 Respondents contend that, by requiring extensive monitoring wells where water  
19 quality is measured to detect exceedances of 3103 standards, the Copper Rule does  
20 precisely what the plain language of Section 74-6-5(E)(3) commands.

1 {28} Respondents’ alternative construction of Section 74-6-5(E)(3) establishes the  
2 validity of a conclusion the Court of Appeals reached more than a decade ago:  
3 Section 74-6-5(E)(3) is sufficiently nebulous to elicit legitimate differences of  
4 opinion concerning its meaning. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality*  
5 *Control Comm’n (Phelps Dodge)*, 2006-NMCA-115, ¶¶ 27-28, 140 N.M. 464, 143  
6 P.3d 502. Petitioners’ discussion of the genesis of the phrase “any place of  
7 withdrawal of water for present or reasonably foreseeable future use” does little to  
8 clarify the obscurity we perceive within Section 74-6-5(E)(3).

9 {29} Petitioners contend that the phrase has, from its first appearance in the WQA  
10 in 1993, 1993 N.M. Laws, ch. 291 § 5, always been meant to “place the basic burden  
11 of proof where it belongs, on the discharger to prove that [the] discharge would not  
12 impair any other use of ground water.” To support this position, Petitioners point to  
13 historical sources including past statements of officials, minutes of meetings, and  
14 correspondence or letters. These arguments are unpersuasive.

15 {30} “It is the policy of New Mexico courts to determine legislative intent primarily  
16 from the legislation itself.” *Regents of Univ. of N.M. v. N.M. Fed’n of Teachers*,  
17 1998-NMSC-020, ¶ 30, 125 N.M. 401, 962 P.2d 1236. “We do not attempt to divine  
18 what legislators read and heard and thought at the time they enacted a particular item

1 of legislation.” *Id.* Even if we were to consider the historical sources Petitioners rely  
2 on, those sources do not explain why—if the statutory phrase has always been  
3 understood to convey a basic principle—the phrase has repeatedly confounded those  
4 called upon to interpret it, including the Commission itself. *See Phelps Dodge*, 2006-  
5 NMCA-115, ¶¶ 27-31 (describing the phrase as “one of beguiling simplicity” and  
6 observing that even the Commission has struggled to define and apply it (internal  
7 quotation marks and citation omitted)). Indeed, the Commission’s position in this  
8 present appeal is that the phrase is undeniably vague and permits certain flexibility  
9 with regards to enforcing the mandates of the WQA. We have little hesitation  
10 concluding that Section 74-6-5(E)(3) is ambiguous; however, this does not mean that  
11 the core purpose of this provision is indiscernible.

12 *b. The core purpose of Section 74-6-5(E)(3)*

13 {31} In *Phelps Dodge*, the Court of Appeals capably articulated what we perceive  
14 to be the core purpose of the place of withdrawal language within Section 74-6-  
15 5(E)(3). “Certainly,” the Court observed, “the [L]egislature meant to capture the  
16 concept that clean water that is currently being withdrawn for use, or clean water that  
17 is likely to be used in the reasonably foreseeable future, must be protected.” *Phelps*  
18 *Dodge*, 2006-NMCA-115, ¶ 27. The Court went on to add that the

1 phrase suggests that the [L]egislature meant for impacts to be measured  
2 in a practical and sensible fashion, but the issue is complicated by the  
3 fact that groundwater and surface water systems are interconnected.  
4 Contaminated waters migrate into areas that were previously pristine.  
5 We have no doubt that the [L]egislature intended to limit that kind of  
6 migration.

7 *Id.* ¶ 29. We agree that these concerns lie at the heart of Section 74-6-5(E)(3) and  
8 express its core purpose.

9 {32} But we also agree with the Court of Appeals that such broad pronouncements  
10 of purpose tell us very little about how Section 74-6-5(E)(3) is to be applied in a  
11 specific situation like an open pit mine. *See Phelps Dodge*, 2006-NMCA-115, ¶¶ 27,  
12 28 (observing that the Legislature’s decision to utilize the statutory phrase place of  
13 withdrawal “leads to genuine uncertainty about the legislative intent for a site like  
14 [the] Tyrone [mine]” and inquiring whether water quality should “be measured at the  
15 bottom of a waste rock pile, at the bottom of the mine pit, at wells located at the  
16 perimeter boundary of the mine property, or at some other point or points”).  
17 Additionally, we agree with the Court of Appeals that recognition of Section 74-6-  
18 5(E)(3)’s broadest purposes reveals very little about how the statute might apply at  
19 a mine given the fact that our Legislature has gone so far as to describe the activity  
20 of mining as “vital to the welfare of New Mexico.” NMSA 1978, § 69-36-2 (1993);

1 *Phelps Dodge*, 2006-NMCA-115, ¶ 29 (“[M]ining is a necessary and important  
2 component of our economy and our modern way of life. We believe that the  
3 [L]egislature intended that our laws, regulations, and any interpretation of them,  
4 strike a wise balance between . . . competing interests.”).

5 {33} How should our Legislature’s clear and vigorous statement about the  
6 importance of mining bear on our understanding of Section 74-6-5(E)(3)? How  
7 should the importance of mining bear on our understanding of Section 74-6-5(E)(3)  
8 when the WQA itself directs the Commission to consider the “economic value of the  
9 sources of water contaminants” when crafting regulations? Section 74-6-4(E)(2).  
10 Principles of administrative law make clear that the judiciary does not bear singular  
11 responsibility for resolving these conflicts and interpretive difficulties. Other  
12 institutional actors are allocated responsibility in this task.

13 *c. Applicable administrative law principles*

14 {34} It is a settled principle of administrative law that the Legislature, when  
15 “through express delegation or the introduction of an interpretive gap in the statutory  
16 structure, has delegated policy-making authority to an administrative agency, the  
17 extent of judicial review of the agency’s policy determinations is limited.” *Pauley*  
18 *v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). This is because

1 [w]hen [the Legislature] drafts a statute that does not resolve a policy  
2 dispute that later arises under the statute, some institution must resolve  
3 that dispute. The institution called upon to perform this task is not  
4 engaged in statutory interpretation. It is engaged in statutory  
5 construction. It is not resolving an issue of ‘law.’ Rather, it is resolving  
6 an issue of policy.

7 I Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.3, at 160-61 (5th ed. 2010).

8 Our case law acknowledges and embraces these principles.

9 {35} We “defer to an agency interpretation if the relevant statute is unclear or  
10 ambiguous,” *Doña Ana Mut. Domestic Water Consumers Ass’n v. N.M. Pub.*  
11 *Regulation Comm’n*, 2006-NMSC-032, ¶ 10, 140 N.M. 6, 139 P.3d 166, and “will  
12 confer a heightened degree of deference to . . . special agency expertise or the  
13 determination of fundamental policies within the scope of the agency’s statutory  
14 function.” *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm’n*,  
15 2003-NMSC-005, ¶ 25, 133 N.M. 97, 61 P.3d 806 (internal quotation marks and  
16 citation omitted). We will overturn the administrative construction “of statutes by  
17 appropriate agencies *only if they are clearly incorrect.*” *Bokum*, 1979-NMSC-090,  
18 ¶ 58 (internal quotation marks and citation omitted).

19 {36} The Commission is the appropriate policy-making entity in this context.  
20 Because we have concluded that Section 74-6-5(E)(3) is ambiguous, the question

1 before us is whether the Commission has permissibly construed Section 74-6-5(E)(3).  
2 Stated more specifically, we must resolve whether the Copper Rule’s treatment of  
3 Section 74-6-5(E)(3) advances the core purposes of the provision. *See Chevron,*  
4 *U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) (“If this choice  
5 represents a reasonable accommodation of conflicting policies that were committed  
6 to the agency’s care by the statute, we should not disturb it unless it appears from the  
7 statute or its legislative history that the accommodation *is not one that Congress*  
8 *would have sanctioned.*” (emphasis added) (internal quotation marks and citation  
9 omitted)). Before we turn to that inquiry, we address Petitioners’ assertion that the  
10 Commission is entitled to little or no deference in this case.

11 {37} Petitioners contend that the deference normally afforded to administrative  
12 agencies should not be extended to the Commission in this case because the  
13 Commission adopted *verbatim* NMED’s proposed statement of reasons and,  
14 according to Petitioners, NMED’s statement of reasons was “ghost written” by  
15 Freeport-McMoran, a mining company and one of the respondents in this case.  
16 Petitioners argue that the Commission effectively adopted Freeport-McMoran’s  
17 statement of reasons and “appellate courts give less deference to findings of fact and

1 conclusions of law that are adopted *verbatim* from a party, especially in complex  
2 cases.” These claims do not persuade us.

3 {38} The NMED was the constituent agency tasked with creating the Copper Rule.  
4 Section 74-6-2(K)(1). The Copper Rule is a complicated and lengthy regulatory  
5 document overflowing with technical requirements. The order and statement of  
6 reasons the Commission issued to explain its adoption of the Copper Rule is 214  
7 pages long and explains, in detail, why the Commission embraced the varying  
8 technical standards in the Copper Rule and why certain proposed amendments to the  
9 Copper Rule were rejected. We have previously explained that an administrative  
10 entity must provide the reasons upon which it bases its decision to adopt regulations.  
11 *Bokum*, 1979-NMSC-090, ¶ 39. This information is necessary because it reveals “the  
12 reasoning of the [agency] and the basis on which it adopted the regulations.” *Id.* ¶ 37  
13 (internal quotation marks and citation omitted). The Commission’s order and  
14 statement of reasons more than satisfied this requirement.

15 {39} It is hardly surprising that the Commission relied on the NMED when  
16 fashioning the order and statement of reasons as the NMED was responsible for the  
17 Copper Rule’s development and both parties serve the citizens of New Mexico. *See*  
18 NMSA 1978, § 9-7A-6(B)(6) (1991) (stating that the secretary of the NMED shall

1 “conduct research and studies that will improve . . . the provision of services to the  
2 citizens of the state”); Section 74-6-4(D) (stating that the Commission shall adopt  
3 regulations to protect “public health or welfare”). The Commission’s collaboration  
4 with NMED does not cause us to question or doubt the Commission’s order and  
5 statement of reasons.

6 {40} To the extent that Petitioners’ argument is focused on and objects principally  
7 to NMED’s collaboration with industry, we think it sufficient to point out that a  
8 tribunal’s adoption of findings proposed by a party, even a *verbatim* adoption, is not  
9 error so long as the findings are supported by substantial evidence. *In re Hamilton*,  
10 1981-NMSC-120, ¶ 6, 97 N.M. 111, 637 P.2d 542. This proposition has particular  
11 consequence here.

12 {41} The focus of Petitioners’ appeal is not the sufficiency of the evidence  
13 underlying the order and statement of reasons. Indeed, the Court of Appeals, in its  
14 opinion below, declined to address Petitioners’ sufficiency of the evidence arguments  
15 because they were not properly presented. *See Gila Res. Info. Project*, 2015-NMCA-  
16 076, ¶ 56 (“[Petitioners’] decisions to omit citations to the evidence in the record that  
17 supported the agency’s decision and to present the evidence in the light most  
18 favorable to itself leaves to this Court the task of digging through the voluminous

1 record to determine whether, on balance, the evidence fails to support the  
2 [Commission’s] finding[s]. This we will not do.” (second and third alterations in  
3 original) (internal quotation marks and citation omitted)). Rather, Petitioners’  
4 arguments in this appeal are focused on the lawfulness of the Copper Rule. Thus, we  
5 need only focus on whether the Commission’s decision to adopt the Copper Rule was  
6 lawful.

7 {42} To the extent our inquiry of the lawfulness of the Copper Rule requires  
8 considerations of evidentiary matters, “this Court reviews the whole record to see if  
9 the agency decision is supported by substantial evidence.” *AA Oilfield Serv., Inc. v.*  
10 *N.M. State Corp. Comm’n*, 1994-NMSC-085, ¶ 2, 118 N.M. 273, 881 P.2d 18. “We  
11 will uphold the agency decision so long as the evidence in the record satisfies us that  
12 the agency decision is reasonable.” *Id.*

13 *d. The Commission’s construction of Section 74-6-5(E)(3)*

14 {43} To understand the Commission’s construction of Section 74-6-5(E)(3), it is  
15 necessary to understand the regulatory strategy underlying the Copper Rule. The  
16 record supports Respondents’ contention that open pit copper mining leads inevitably  
17 to some degree of contaminant discharge. The Copper Rule acknowledges this reality  
18 and operates from the premise that the most effective way to mitigate these inevitable

1 discharges is through containment. Thus, 3103 standards may be exceeded within the  
2 area of open pit hydrologic containment not, as Petitioners contend, because the  
3 Copper Rule invites pollution there, but because the Copper Rule accepts that some  
4 discharge contamination is inevitable, seeks to contain that contamination, and relies  
5 on the hydrologic phenomenon produced by the open pit to contain it. This  
6 justification for the waiver is supported by evidence in the record and by provisions  
7 within the Copper Rule.

8 {44} One of Respondents' experts offered the following explanation for why the  
9 Copper Rule waives the 3103 standards in the area of open pit hydrologic  
10 containment:

11 The reason for this [waiver] is evident from the definition of the area of  
12 hydrologic containment and the exhibits. Ground water within the area  
13 of hydrologic containment, whether impacted by mine operations or not,  
14 will flow to, and be extracted at, the pit. The disposition of this ground  
15 water, therefore, is known, and it will be utilized and managed in  
16 accordance with an NMED approved water management plan. Water  
17 extracted at open pits is most commonly utilized as part of the mine  
18 operational water requirements, such as replenishment of the leach  
19 circuit.

20 Another of Respondents' experts stated that "complete effective hydrologic control"  
21 can be achieved in the open pit surface drainage area and, consequently, it is  
22 preferable to locate mine units in this area because "there is excellent containment to

1 protect surrounding ground water.” Evidence presented to the Commission indicated  
2 that storm water will be diverted away from the open pit and groundwater underlying  
3 or adjacent to the pit will drain to the pit and will be removed by evaporation or  
4 pumping. The Copper Rule provides that the monitoring well system must be placed  
5 “as close as practicable” to the open pit, 20.6.7.28(B) NMAC, and that “[w]ater  
6 generated from within the perimeter of the open pit and pit dewatering activities shall  
7 be managed according to a mine operation water management plan.” 20.6.7.24(C)  
8 NMAC.

9 {45} When properly considered, the Copper Rule’s waiver of 3103 standards in the  
10 area of open pit hydrologic containment reflects policy preferences and strategic  
11 choices designed to mitigate the environmental harms inherent in open pit copper  
12 mining. The waiver provision in no way invites industry to contaminate freely in that  
13 area. This strategic containment approach is also reflected in the way the Copper  
14 Rule treats the “place of withdrawal” language in Section 74-6-5(E)(3).

15 {46} The Copper Rule makes no express delineation regarding which areas at a mine  
16 facility are places of withdrawal and which are not. Respondents contend that the  
17 regulatory structure embraced by the Copper Rule makes certain essential  
18 assumptions about this subject. We agree.

1 {47} The Copper Rule requires “detailed unit-by-unit ground water monitoring”  
2 utilizing monitoring wells that must be placed as close as practicable to the open pit  
3 and also as close as practicable to mining units regardless of whether those units are  
4 located within the open pit surface drainage area or not. *See* 20.6.7.28(B)(2), (B)(4)-  
5 (6) NMAC. The Copper Rule, Respondents claim, excludes the area of open pit  
6 hydrologic containment and areas inside the perimeter of the required monitoring well  
7 system as places of withdrawal. Conversely, the Copper Rule treats areas outside  
8 these locations as places of withdrawal. Respondents claim that there are legitimate  
9 and sensible reasons for this arrangement, all of which were presented to and  
10 considered by the Commission.

11 {48} First, the open pit is not a place of withdrawal because, as already discussed,  
12 it functions as one of the principal containment tools and as a barrier beyond which  
13 contamination produced from mine units within the open pit surface drainage area or  
14 the open pit itself cannot migrate.

15 {49} Second, the Copper Rule functions on a unit-by-unit basis and ensures  
16 groundwater protection at each unit through discharge control and monitoring at the  
17 monitoring well network. NMED must approve the monitoring well locations for  
18 each copper mine unit and may require additional wells to ensure that the monitoring

1 system is sufficiently comprehensive. 20.6.7.28 NMAC. According to the  
2 Commission, these requirements pertaining to NMED's oversight of the monitoring  
3 well system are the most intensive required by any state.

4 {50} Third, copper mining involves significant amounts of water to process ore.  
5 Waters inside the monitoring well system are used for mining activities during active  
6 mining operations.

7 {51} Fourth, it is inconceivable that anyone would attempt or desire to access  
8 groundwater from the bottom of an open pit or from areas underlying active mining  
9 units. Similarly, it would be contrary to common sense to treat units that must be  
10 lined as places of withdrawal as it would be necessary to breach the lining to access  
11 the groundwater.

12 {52} Fifth, the Copper Rule presumes that the Legislature did not intend the WQA  
13 to preclude *any* degradation of *any* groundwater at *every* location at an open pit  
14 copper mine. If this were not true, open pit copper mining would not be lawful in  
15 New Mexico as there is no legitimate dispute that open pit mining necessarily causes  
16 some degradation of surface and groundwater. The validity of this presumption was  
17 recognized more than a decade ago. In *Phelps Dodge*, the Court of Appeals  
18 explained that, although water might be withdrawn from a variety of locations on a

1 mine site, “it would be incorrect to conclude that, as a consequence, the entire mine  
2 is a measuring point . . . .” 2006-NMCA-115, ¶ 33. It cannot be, the Court reasoned,  
3 that water quality standards must be met “everywhere” on a mine site. *Id.* To  
4 conclude otherwise, the Court emphasized, would be to embrace an overbroad and  
5 unrealistic standard as it is not feasible “to require all water at [a] mine site to meet  
6 drinkable water standards.” *Id.*

7 {53} Sixth and lastly, the Copper Rule’s post-closure groundwater protection system  
8 will limit “discharge from the closed mine facilities to rates that protect ground water  
9 of the state for potential future use as domestic and agriculture water supply and  
10 surface water recharge.” A copper mine operator must submit a closure water  
11 management and treatment plan that “shall include an analysis of the expected  
12 operational life of each long-term water management or water treatment  
13 system . . . until each system is no longer needed to protect ground water quality and  
14 applicable standards are met.” 20.6.7.33(H) NMAC; 20.6.7.7(B)(3) NMAC  
15 (“Applicable standards’ means the standards set forth in 20.6.2.3103 NMAC[.]”).  
16 According to the Commission, this means that “[a]ll ground water—even that within  
17 the area circumscribed by the monitoring wells (with the exception of an area of an  
18 open pit for which hydrologic containment has been achieved)—must be abated to

1 3103 standards.” Freeport-McMoran adds that “[g]roundwater monitoring is required  
2 for many years after mine closure, and will not cease until sufficient time has passed  
3 to measure the performance of the closure methods and monitoring shows that ground  
4 water satisfies 3103 standards.” *See* 20.6.7.35(A), (C)(5) NMAC (stating post-  
5 closure requirements).

6 {54} This evidence persuades us that the Copper Rule makes permissible  
7 assumptions about the statutory phrase “place of withdrawal” and where these places  
8 exist at open pit copper mine facilities. It makes these assumptions not to permit  
9 pollution but to advance a comprehensive containment strategy. The Copper Rule’s  
10 presumption that the area of open pit hydrological containment and areas inside the  
11 monitoring well network are not places of withdrawal is not predicated on a clearly  
12 incorrect reading of the place of withdrawal language of Section 74-6-5(E)(3). To the  
13 contrary, these exclusions and the design of the Copper Rule more generally advance  
14 the core purpose of Section 74-6-5(E)(3) by protecting groundwater outside the area  
15 of open pit hydrologic containment and monitoring wells. One additional point  
16 assures us of the correctness of our conclusion that the Copper Rule advances the  
17 core purpose of the statute.

1 {55} The Copper Rule’s exclusion of certain areas as places of withdrawal does not  
2 grant the copper industry license to freely contaminate groundwater inside the  
3 monitoring well network system. Various provisions within the Copper Rule are  
4 intended to ensure that this will not occur.

5 e. *Copper Rule provisions applicable to areas excluded as places of withdrawal*

6 {56} All waste rock shall be evaluated for its potential to release contaminants in  
7 excess of the 3103 standards. 20.6.7.21(A)(1) NMAC. Testing of waste rock will  
8 take various forms consistent with best practices and will “identify whether waste  
9 rock may generate acid or release regulated ground water contaminants when placed  
10 in a stockpile.” Expert testimony indicated that “the containment approach to waste  
11 rock stockpiles under the [Copper] Rule” is more “protective” than the approaches  
12 used in Arizona and Nevada.

13 {57} Units *outside* the open pit surface drainage area are subject to stringent  
14 requirements. Leach stockpiles outside the open pit surface drainage area “shall be  
15 placed on an engineered liner” and must incorporate leach solution collection and  
16 containment systems. 20.6.7.20(A)(1)(a)-(e) NMAC. According to the Commission,  
17 lined leach stockpiles will not contaminate groundwater above 3103 standards.  
18 Waste rock stockpiles outside the open pit surface drainage area shall be designed and

1 engineered to capture, contain, or divert storm water and seepage and to capture or  
2 contain “[g]round water impacted by waste rock stockpiles” through an interceptor  
3 system. 20.6.7.21(B)(1)(a)-(e) NMAC. Testimony was submitted that these  
4 regulatory protections are consistent with and more specific than regulations in other  
5 copper-producing states. Crushing and milling units outside the open pit surface  
6 drainage area “shall be designed to contain and manage all materials containing water  
7 contaminants that have the potential to migrate to ground water and cause an  
8 exceedance of applicable standards on concrete or low permeability  
9 surfaces . . . .” 20.6.7.22(A)(1) NMAC.

10 {58} Units *inside* the open pit surface drainage area are subject to lesser  
11 requirements, but are still subject to regulation. Leach stockpiles inside the open pit  
12 surface drainage area may be alternatively designed and need not be placed on an  
13 engineered liner “provided that the stockpile and solution capture systems are  
14 designed to maximize leach solution capture considering the site-specific conditions  
15 of the open pit, underlying geology and hydrology, and leach solutions will not  
16 migrate outside of the open pit surface drainage area.” 20.6.7.20(A)(1)(f) NMAC.  
17 Stormwater run-on at any waste rock stockpile located inside the open pit surface

1 drainage area must “be diverted or contained to minimize contact between stormwater  
2 run-on and the stockpiled material.” 20.6.7.21(B)(2) NMAC.

3 {59} Other units are subject to requirements that apply regardless of where the units  
4 are located. The requirements for new tailings impoundments make no distinction  
5 whether the impoundment is outside or inside the surface drainage area. At new  
6 tailings impoundments,

7 [s]tormwater run-on shall be diverted and/or contained to minimize  
8 contact between stormwater run-on and the tailing  
9 material[,] . . . [s]eepage from the sides of a tailing impoundment shall  
10 be captured and contained[,] . . . and [g]round water impacted by the  
11 tailing impoundment in excess of applicable standards shall be captured  
12 and contained through the construction of interceptor systems . . . .

13 20.6.7.22(A)(4)(a)-(c) NMAC. The permit applicant must submit a design report  
14 demonstrating that the “interceptor system design will capture ground water impacted  
15 by the tailings impoundment such that applicable standards will not be exceeded at  
16 monitoring well locations . . . .” 20.6.7.22(A)(4)(d)(viii) NMAC. The Commission  
17 found that “an interceptor well system can be successfully designed and operated to  
18 contain drainage from an unlined tailings impoundment, when necessary, during and  
19 after operation.”

1 {60} If “monitoring of a water contaminant source indicates that applicable  
2 standards are exceeded,” then the Copper Rule imposes varying contingency  
3 requirements. 20.6.7.30 NMAC. The Commission found that “contingencies in each  
4 case comprise some or all of the following actions: notify, confirm, repair, correct,  
5 and abate.”

6 {61} The Copper Rule’s waiver of standards within the area of open pit hydrologic  
7 containment and its exclusion of certain areas as places of withdrawal does not negate  
8 or otherwise eliminate the existence or effect of the provisions summarized above.  
9 We cannot conclude that the Copper Rule violates the WQA because it purportedly  
10 permits rather than prevents contamination when the Copper Rule’s plain terms  
11 contain an abundance of provisions that afford significant groundwater protections  
12 at copper mine facilities designed to prevent pollution.

13 *f. Conclusion: Section 74-6-5(E)(3) and “place of withdrawal”*

14 {62} This Court is not competent to judge what is the most effective and efficient  
15 way to combat the adverse consequences of open pit copper mining. Our task in this  
16 case is limited to assessing whether the Copper Rule violates the WQA. The  
17 inclusion of the “place of withdrawal” language in Section 74-6-5(E)(3) suggests not,  
18 as Petitioners insist, that the WQA clearly and plainly forbids the containment

1 strategy the Commission implemented through the Copper Rule. Rather, this  
2 uncertain language provides flexibility within which the Commission is free to  
3 implement the policies it deems most prudent. The Commission is limited only to the  
4 extent that its construction of Section 74-6-5(E)(3) must serve this provision's core  
5 purposes which we can discern from the otherwise ambiguous language of the  
6 provision. For the reasons stated, we conclude that the Copper Rule is premised on  
7 a permissible construction of Section Section 74-6-5(E)(3).

## 8 **2. The WQA's Variance Provision**

9 {63} Petitioners point out that Section 74-6-4(H) of the WQA instructs that the  
10 Commission "may grant an individual variance from any regulation of the  
11 commission whenever it is found that compliance with the regulation will impose an  
12 unreasonable burden upon any lawful business, occupation or activity[,]" and argue  
13 that the Copper Rule "circumvents [this provision] because it permits widespread  
14 ground water pollution above 3103 standards at all copper mines without a variance."  
15 We have rejected Petitioners' assertion that the Copper Rule permits widespread  
16 pollution above 3103 standards at open pit copper mine facilities. Thus, Petitioners'  
17 assertion that the Copper Rule violates the variance provision of the WQA is fatally  
18 flawed.

1 **3. Point of Compliance**

2 {64} Petitioners contend that the Copper Rule functions as a “point of compliance”  
3 system and that the Legislature did not authorize the Commission to embrace this  
4 type of regulatory framework. The Court of Appeals sufficiently addressed this  
5 argument in the opinion below. *Gila Res. Info. Project*, 2015-NMCA-076, ¶¶ 27-28.  
6 We quote a passage from that opinion as it adequately responds to Petitioners’  
7 argument: “Assuming that the [Copper Rule] created a system that is properly  
8 characterized as a point-of-compliance system, nothing in the WQA prohibited the  
9 Commission from doing so.” *Id.* ¶ 28.

10 **4. The Commission’s Prior Regulatory Practice**

11 {65} Petitioners argue that the Copper Rule is invalid because it is a departure from  
12 past Commission practice. They also contend that the 2009 Amendments to the  
13 WQA implicitly approved a factor-based approach to “determining places of  
14 withdrawal.” We reject both claims.

15 {66} The Legislature gave the Commission no guidance in 2009 as to what form or  
16 substance the regulations to manage discharges in the copper industry should take.  
17 We decline to read the Legislature’s silence as embracing (implicitly or otherwise)  
18 any particular approach to determining places of withdrawal or, more broadly, to

1 discharge management in the copper mining industry. *See State ex rel. Barela v. N.M.*  
2 *State Bd. of Educ.*, 1969-NMSC-038, ¶ 7, 80 N.M. 220, 453 P.2d 583 (“We are not  
3 permitted to read into a statute language which is not there . . .”); *Gonzales v. Oil,*  
4 *Chem. & Atomic Workers Int’l Union*, 1966-NMSC-211, ¶ 28, 77 N.M. 61, 419 P.2d  
5 257 (“The statute is to be read and given effect as written.”). Rather, we construe that  
6 silence as a broad conferral of authority to the Commission allowing it to pursue the  
7 policies and regulatory approaches it deemed most wise.

8 {67} To the extent the Copper Rule is a departure from past Commission practice,  
9 the law makes clear that the Commission is not constrained by its prior practices.  
10 “An agency is always free to change its policy, as long as it announces a policy that  
11 is within the range permitted by [the Legislature], uses a procedure [the Legislature]  
12 has authorized it to use to make binding policy decisions, and explains the reasons  
13 for its change in policy.” I Pierce, *supra*, § 3.3, at 165.

14 {68} We have already determined that the Copper Rule is a permissible policy, and  
15 there is no question that the rulemaking proceedings that led to the adoption of the  
16 Copper Rule were open and transparent. Petitioners contend that the procedures used  
17 here were “not in accordance with law because *no notice* was given to parties or the

1 public that reversal of the [*Phelps Dodge* d]ecision was within the scope of the  
2 rulemaking[.]” We reject this claim.

3 {69} The Legislature’s decision to grant the Commission broad discretionary  
4 authority—to fashion whatever regulations the Commission thought best—put  
5 Petitioners on notice that a new approach to regulating discharges at copper mines  
6 was possible. Our review of the record reveals that Petitioners knew a new approach  
7 was indeed under consideration.

8 {70} Petitioners moved to admit the record proper in the *Phelps Dodge* remand  
9 proceedings into the administrative record in the Copper Rule rulemaking  
10 proceedings. They did this because they objected to the fact that the Copper Rule was  
11 inconsistent with the factor-based approach embraced by the Commission after the  
12 remand following the issuance of *Phelps Dodge*. This evidence shows that  
13 Petitioners knew that the Commission was considering a course different than that  
14 reached on remand following *Phelps Dodge*. Accordingly, Petitioners cannot argue  
15 that they lacked notice that the Commission was considering this course of action.

1 **5. The Copper Rule’s Closure Provisions**

2 {71} Petitioners object to the closure provisions of the Copper Rule. They contend  
3 that these provisions allow “extensive ground water pollution above 3103 Standards,  
4 in perpetuity[.]” Petitioners misstate what the Copper Rule allows.

5 {72} The Commission found that “[p]ost-closure protection of ground water is  
6 achieved by making the closed open pit a ground water sink, either by evaporation  
7 or by pumping.” The Commission heard evidence and was persuaded that “[t]his  
8 protection will be effective.” Accordingly, the Copper Rule allows 3103 standards  
9 to be exceeded only at a closed open pit mine that is a hydrological evaporative sink,  
10 i.e., where evaporation exceeds water inflow. 20.6.7.33(D)(1) NMAC. In this  
11 circumstance, the contaminated water will evaporate over time. By definition, this  
12 is not “in perpetuity.” Moreover, 20.6.7.33(D)(1) NMAC expressly limits the types  
13 of exceedances permitted in a closed open pit that is a hydrological evaporative sink.  
14 And lastly and as already noted, the Commission’s position is that, at closure, all  
15 groundwater at a mine site—with the exception of groundwater at an open pit that is  
16 a hydrologic evaporative sink—must be abated to 3103 standards. We reject  
17 Petitioners’ arguments concerning the Copper Rule’s closure provisions.

1 **III. CONCLUSION**

2 {73} Petitioners have not established that the Copper Rule is inconsistent with the  
3 WQA or otherwise clearly incorrect. Nor have they established that there are no  
4 conceivable set of facts under which the Copper Rule might be valid. We affirm the  
5 Commission's decision to adopt the Copper Rule.

6 {74} **IT IS SO ORDERED.**

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**JUDITH K. NAKAMURA, Chief Justice**

1 **WE CONCUR:**

2

3 **PETRA JIMENEZ MAES, Justice**

4

5 **EDWARD L. CHÁVEZ, Justice**

6

7 **CHARLES W. DANIELS, Justice**

8

9 **BARBARA J. VIGIL, Justice**