Proposed N.M. Mining Rules Under Fire

STACI MATLOCK, The New Mexican

SANTA FE, N.M. (AP) — A state water quality commission will soon vote on a proposed copper mining rule that some experts say violates state law, could upend New Mexico's long efforts to protect groundwater and would give other industries in the state a loophole to pollute aquifers.

Currently, state law prohibits pollution of groundwater above water quality standards by any industry, but the Environment Department has provided some exceptions through variances.

The proposed new rule would let copper mine operations contaminate groundwater without variances, as long as the contamination was contained and fully removed up to state standards before the mine closed. Specifically, the change would allow Freeport-McMoRan Copper and Gold to contaminate groundwater beneath any of its Southern New Mexico mining properties, as long as it followed the containment and cleanup regulations.

The copper mining industry and the Cabinet secretary for the state's Environment Department contend the rule will streamline the permitting process and is more protective of groundwater than current regulations.

"The idea that we're violating the (water quality) law is ridiculous," said Environment Secretary Ryan Flynn. "Opponents of the proposed rule are fighting for a broken system, which many of them are responsible for designing."

But a former state regulator, the New Mexico attorney general and environmentalists say the language in the proposed rule sets a dangerous precedent: Other industries, like Los Alamos National Laboratory and a gold mine in the works near Santa Fe, could claim a legal right to pollute groundwater beneath their properties without variances.

The Gila Resource Information Project, the Rio Grande Chapter of the Sierra Club and Amigos Bravos all oppose the proposed copper rule. New Mexico Attorney General Gary King has asked the Water Quality Control Commission to send the copper rule back to the New Mexico Environment Department "on the ground that the rule as proposed violates the Water Quality Act."

"The evidence . shows that for 36 years, the New Mexico Environment Department, under the Water Quality Act and regulations, has not allowed groundwater contamination above standards for any facility," said Tannis Fox, an assistant attorney general handling the case. "Under the act, like all environmental acts, a certain amount of pollution is allowed. Industry is allowed to pollute the air to a certain extent. Industry is allowed to pollute water to a certain extent. But you can't exceed the water quality standards."

The decision on the copper rule — and whether or not it will create a loophole for other industries discharging pollutants — now rests with the Water Quality Control Commission appointed by Gov. Susana Martinez. The commission begins deliberations Sept. 10 and could make a decision on the rule that day.

Discharge permits

Groundwater in New Mexico is a public resource managed by the state. A private property owner or business can obtain the right to use groundwater, but the water doesn't belong to them under state law, according to the attorney general.

Since the groundwater belongs to the state, groundwater quality standards are set by the state, not the federal government. Companies producing contaminants that could pollute groundwater have to obtain a discharge permit from the state Environment Department under the Water Quality Act. The discharge permit is good for five years.

Copper mining, wastewater-treatment plants, the state's two national laboratories, the Waste Isolation Pilot Plant, dairies, power companies and other businesses all produce contaminants that can leach into groundwater. The Environment Department currently manages 1,000 groundwater discharge permits.

A primary reason to protect the water quality through permits — one recognized in state law — is that the groundwater could be needed as a future drinking water or agricultural resource in a chronically water-short state.

Under the Water Quality Act, companies can ask for a variance to allow pollution above state water standards for some mine activity on portions of a mine's property. Freeport-McMoRan has received two of those variances recently for waste piles leaching into mine pits. The variances must be approved by the Water Quality Control Commission. The process gives the public an opportunity to comment and gives the state some measure of control by requiring companies to contain the pollution.

But Cabinet Secretary Flynn and Freeport-McMoRan said requiring variances creates an air of uncertainty and is unnecessary if the copper rule is carefully crafted.

"Requiring a mine to go through a variance process each time it wants to expand would require a redundant permitting process," noted a Freeport-McMoRan statement. "The proposed Copper Rules streamline the process by taking into account the approved requirements from past variance proceedings and enforcing them in an overarching regulatory framework, so mine operators clearly understand what is expected, and can factor consistent groundwater protection requirements into their growth and investment strategies. . Variances would still be required for building copper mining facilities that are different than those specifically addressed by the proposed rules."

Flynn said the copper rule streamlines what the state has already been doing for

years with discharge permits — using variances to give companies permission to pollute.

Still, in years past, the department has only approved two variances for New Mexico's copper mines, said Bill Olson, a geohydrologist and former chief of the Environment Department's Groundwater Bureau, who worked on the copper rule under a $101,000 contract with the state. Neither variance was protested by environmental groups, he said.

Olson said the proposed copper rule would give Freeport-McMoRan the right to pollute above state water quality standards below all of its mine property. Give these "pollution rights" to one industry, he said, and there's no reason to think other mines and industries won't step forward to seek the same right.

Fox said Flynn's argument misses a crucial point. Variances are currently granted for a firm to pollute groundwater at only certain portions of its mine operations. The copper rule as written would grant the company carte blanche to pollute groundwater under all of its property without needing a variance, including areas where the water has not yet been contaminated.

Flynn says the rule protects groundwater better than current regulations. Any groundwater contaminated by a copper mine under the rule would have to be cleaned up to state drinking water standards when the mine closed, he reiterated. Flynn also believes the proposed copper rule is the best balance of environmental protections and regulatory certainty for the mining industry.

"We tried to strike the appropriate balance between the economic impacts and the environmental impacts of mining, and come up with a rule that was protective of groundwater without driving mining out of the state," he said.

But Olson and Fox disagree.

"We would like to see all leach pits lined, all waste rock piles lined and tailings lined, or some other technology to prevent contamination in the first place, rather than allow the contamination and then crossing your fingers and hoping it is all captured," Fox said.

"Ninety percent of the state's drinking water is groundwater," Olson said. "New Mexico has been a national leader in protecting groundwater. This rule could set that back."

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