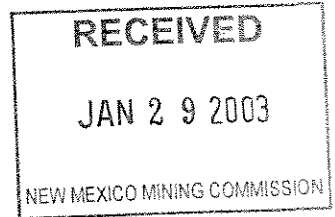


BEFORE THE NEW MEXICO MINING COMMISSION



In Re:

MINING AND MINERALS DIVISION
DIRECTOR'S NOTICE OF VIOLATION
No. NO2-12-16, PERMIT No. GR010RE
TO PHELPS DODGE TYRONE, INC.

No. 02-03

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND FINAL ORDER**

THIS MATTER came before the New Mexico Mining Commission (the "Commission") on December 13 and 14, 2002 on the Petition for Review and Request for Expedited Hearing filed on November 1, 2002 by Petitioner Phelps Dodge Tyrone, Inc. ("Tyrone"). The Commission heard testimony and received exhibits from all interested parties. The hearing was tape-recorded and the tapes are in the custody of the Energy, Minerals and Natural Resources Department, Mining and Minerals Division ("MMD").

After fully considering the record established during open deliberations on December 14, 2002, the Commission announced its decision at the conclusion of the hearing generally upholding the Notice of Violation but extending the time for abatement and now enters the following order:

Preliminary Matters

On or about December 2, 2002, MMD filed its Response to Phelps Dodge Tyrone, Inc.'s Petition for Review and Request for Expedited Hearing, Motion to Dismiss Certain Claims in the Petition and Motion to Consolidate Petitions. For its Motion to Dismiss Certain Claims, MMD urged the Commission to (1) dismiss all objections and claims presented by Tyrone relating to dates other than the

final abatement date of September 30, 2003; (2) dismiss all objections and claims presented by Tyrone relating to the future assessment of monetary penalties by the Director against Tyrone; (3) consolidate the proceedings in Petition No. 02-03 with Commission proceedings for Petition Nos. 02-02 and 02-04; and (4) dismiss Tyrone's Petition for Review.

At the start of the hearing, the parties submitted for the Commission's consideration a Consolidated Pre-Hearing Stipulation and Procedural Order for the December 13, 2002 Hearing (the "Stipulation"). In the Stipulation, the parties agreed to consolidate the hearing record for Petition Nos. 02-02, 02-03, and 02-04. The parties also agreed to the order and length of their respective presentations, to designate certain public records as part of the consolidated hearing record, to exchange exhibit lists, and to withdraw any claims concerning the MMD Director's October 18, 2002 cover letters that transmitted the Notices of Violation. After brief discussion during which the Hearing Officer advised the parties that the Commission is not bound by the parties' goal of having a final order entered by the Commission by December 31, 2002, the Commission accepted the stipulation and it was made a part of the record.

Following acceptance of the Stipulation by the Commission, MMD presented oral argument on its Motion to Dismiss Certain Claims and to Consolidate Petitions. In addition to the grounds stated in its motion, MMD also urged the Commission to dismiss as premature Tyrone's requested findings that (1) Tyrone used its best efforts to comply with the October 1, 2002 deadline for

closeout plan approval, and (2) Tyrone has cooperated with MMD and otherwise acted in good faith to secure closeout approval by October 1, 2002.

MMD's motion to dismiss objections and claims relating to dates other than the September 30, 2003 abatement date, as well as MMD's Motion to Consolidate Petitions, were resolved by the aforementioned Stipulation. The Commission took all other matters under advisement until the close of the hearing because the motions presupposed in part that the Commission would uphold the Notice of Violation issued by the Director.

Findings of Fact

1. Tyrone is the permittee under Permit GR010RE issued by MMD on July 10, 1996. The Tyrone permit is for "an existing mining operation" as that term is defined in the New Mexico Mining Act, NMSA 1978, §§ 69-36-1 through 69-36-20 (2002) (the "Act"). *Petition for Review and Expedited Hearing*, ¶ 1.
2. NMAC § 19.10.5.501.E of the Mining Act Rules requires every existing mining operation to have a closeout plan approved by the Director by no later than October 1, 2002.
3. Tyrone did not have a closeout plan approved by the MMD Director by October 1, 2002. *Testimony of Bland; MMD's Response to Petition*, ¶ 3.
4. On October 18, 2002, the MMD Director issued a Notice of Violation ("NOV") alleging that Tyrone was in violation of Section 19.10.5.501.E of the Mining Act Rules, because of its "failure to obtain approval of a closeout plan for the Tyrone Mine by the October 1, 2002 deadline."

Petition, ¶ 2; NOV, page 3 (attached to the Petition for Review and Expedited Hearing as Exhibit A).

5. The NOV directs Tyrone to take such actions and to submit such information and documentation that will allow the Director to approve a closeout plan by September 30, 2003. *NOV, pages. 3-4.*
6. The NOV does not include a penalty assessment, but reserves the right of the Director to impose a penalty assessment separately, as deemed appropriate by the Director. *NOV, p. 4.*
7. The NOV does not characterize as good faith or bad faith Tyrone's failure to meet the October 1, 2002 deadline.
8. At various times, the Commission has heard testimony that the Secretary of Environment must provide a written determination stating that an applicant has met all applicable air, water quality and other environmental standards before a closeout plan may be approved by the Director. *Testimony of Bland and Moellenberg; Exhibits PD-3, PD-4, PD-6, and PD-7.*
9. The MMD Director has testified in previous hearings that a fundamental component of the Secretary of Environment's determination is the discharge permit issued by the New Mexico Environment Department, Groundwater Quality Bureau ("NMED"). *Exhibit PD-6.*
10. At its August 28-29, 2002 hearing on Petition 02-01, the Commission heard testimony that NMED's hearing officer was expected to make a

decision on the issuance of a discharge permit for Tyrone by October 25, 2002. *Exhibit PD-5; NMED Exhibit 1(August 28-29, 2002 NMMC hearing).*

11. As of December 13, 2002, NMED's hearing officer had not made a final decision on the Tyrone discharge permit. *Testimony of Leavitt, Brunner and Moellenberg.*
12. Tyrone, MMD, and/or NMED have no control as to when or whether the NMED hearing officer will make a decision on the Tyrone discharge permit. *Testimony of Bland and Brunner.*

Conclusions of Law

1. The Commission has jurisdiction to hear and decide this matter.
2. NMAC § 19.10.5.501.E of the Mining Act Rules provides in pertinent part that every existing mining operation must have the closeout plan approved by the Director by no later than October 1, 2002.
3. The MMD Director may not approve Tyrone's closeout plan in part because NMED has not issued a discharge permit and its Secretary has not provided a determination pursuant to NMSA 1978, § 69-36-11 of the Mining Act and NMAC § 19.10.5.501 of the Mining Act Rules.
4. The MMD Director properly concluded that Tyrone is in violation of NMAC § 19.10.5.501.E of the Mining Act Rules, because Tyrone did not have a closeout plan approved by the Director by the October 1, 2002 deadline.
5. The issuance of the NOV was appropriate and not a misuse of the Director's enforcement authority.

6. Until such time as the Director actually assesses a civil penalty pursuant to the applicable provisions of the Mining Act Rules, Tyrone's objections to the possible assessment of civil monetary penalties are premature and not properly before the Commission.
7. Until the time for abatement has expired, any determination by the Commission that Tyrone's efforts to secure closeout plan approval were made in good faith or bad faith is premature and not properly before the Commission.

ORDER

The New Mexico Mining Commission therefore orders and adjudges that:

- A. The October 18, 2002 Notice of Violation is hereby upheld;
- B. The time fixed for abatement in the Notice of Violation is hereby amended and shall read as follows: Abatement must be fully accomplished within twelve (12) months from the date of issuance of NMED discharge permit.
- C. The Director for good cause shown may extend the time fixed for abatement herein.
- D. MMD's motion to dismiss as premature all objections and claims presented by Tyrone relating to the future assessment of monetary penalties by the Director against Tyrone is hereby GRANTED.
- E. MMD's motion to dismiss as premature Tyrone's requested findings that (1) Tyrone used its best efforts to comply with the October 1, 2002 deadline for closeout plan approval, and (2) Tyrone has cooperated with

MMD and otherwise acted in good faith to secure closeout approval by
October 1, 2002 is hereby GRANTED.

NEW MEXICO MINING COMMISSION

Terry J Fletcher
Terry Fletcher, Chairman

Dated: 1/29/03