

12-01



**THE NEW MEXICO MINING COMMISSION  
IN THE MATTER OF THE PETITION FOR REVIEW OF THE DIRECTOR'S  
ACTION, DATED JANUARY 31, 2012, PERMIT REVISION 10-1 TO PERMIT NO.  
CI002RE**

**THE MULTICULTURAL ALLIANCE FOR A SAFE ENVIRONMENT and AMIGOS  
BRAVOS, PETITIONERS**

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The Multicultural Alliance for a Safe Environment (“MASE”) and Amigos Bravos (“Amigos”) (collectively “Petitioners”) hereby petition the New Mexico Mining Commission (“Commission”) for review of the Mining and Minerals Division Director’s (“Director”) decision to grant Rio Grande Resources’s (“RGR”) application for a standby permit (“Order”) in the above matter. A copy of that Order is attached as Exhibit A. MASE and Amigos submit this petition for review pursuant to NMSA 1978, § 69-36-15 and 19.10.14.1 NMAC *et. seq.*

**I. Introduction**

When the Director approved RGR’s standby permit application, he violated both the Mining Act and its implementing regulations in several important ways. First, the Director failed to review and hold a public hearing on the adequacy of RGR’s financial assurance for reclamation.

Second, the Director incorrectly found that RGR had adequately demonstrated that the Mt. Taylor Mine would be economically viable during the standby permit period because RGR produced no economic data and only vague assurances that mining would resume in the next five years. Apparently, the Director’s decision was based exclusively on secret data that RGR allegedly provided, but which Petitioners were unable to inspect or evaluate.

Third, the Director impermissibly abdicated his independent duty to find that RGR would meet all environmental standards during the standby permit period. It is undisputed that RGR is

currently violating groundwater standards for uranium and the source of the contamination has not been identified.

Finally, in almost every instance where Petitioners attempted to present testimony on issues relevant to RGR's standby permit application, the Director prohibited them from doing so. The Director's actions violated the Mining Act's public participation requirements and the New Mexico Supreme Court's decision in *Colonias Development Council v. Rhino Environmental Svcs.* The Director's decision should be reversed.

## **II. Facts and Procedure**

### **A. Rio Grande Resource's Standby Permit Renewal Application.**

On June 16, 2010, Rio Grande Resources submitted an application to the Mining and Minerals Division ("Division" or "MMD") for renewal of its standby permit for the Mt. Taylor Mine. The Division began processing this standby permit application as a revision of RGR's Permit No. CI002RE, under the number Permit Revision 10-1. *See*, Sept. 29, 2010 letter from David Ohori to Joe Lister, available at [http://www.emnrd.state.nm.us/MMD/MARP/permits/documents/20100929\\_ReviewofApplicationforRenewalofStandbyStatus\\_Rev10-1\\_CI002RE.pdf](http://www.emnrd.state.nm.us/MMD/MARP/permits/documents/20100929_ReviewofApplicationforRenewalofStandbyStatus_Rev10-1_CI002RE.pdf). As part of the review process, MMD solicited comments from other agencies on RGR's permit revision application. *See*, July 22, 2010 letters from David Ohori to the New Mexico Environment Department ("NMED"), Office of the State Engineer, New Mexico Department of Game and Fish, the Historic Preservation Division, and the State Forestry Division, available at [http://www.emnrd.state.nm.us/MMD/MARP/permits/documents/20100722\\_RequestforReviewComments\\_MtTaylorMineStandbyStatus\\_CI002RE.pdf](http://www.emnrd.state.nm.us/MMD/MARP/permits/documents/20100722_RequestforReviewComments_MtTaylorMineStandbyStatus_CI002RE.pdf). NMED provided comments in a letter dated September 1, 2010, where NMED expressed concerns about uranium contamination in the alluvium near the existing waste rock pile at the Mt. Taylor Mine.

A copy of that letter is attached as Exhibit B. Because of those concerns and the fact that the source of the contamination had not yet been identified, NMED recommended that RGR's standby period be granted for two, rather than the maximum permissible five, years. *Id.*

In November 2010, Susana Martinez was elected Governor of New Mexico. Despite no change in circumstances (other than a new Governor) and no new technical developments, NMED issued a new determination on May 27, 2011 that RGR would meet all groundwater standards at the Mt. Taylor Mine for the entire five year standby permit period. A copy of that determination is available at: [http://www.emnrd.state.nm.us/MMD/MARP/permits/documents/20110527\\_NMEDSupportof5YearStandbyRenewal\\_CI002RE.PDF](http://www.emnrd.state.nm.us/MMD/MARP/permits/documents/20110527_NMEDSupportof5YearStandbyRenewal_CI002RE.PDF).

RGR's Application also did not contain any information regarding the current sufficiency of its financial assurance for reclamation or close out plan. The extent of RGR's treatment of the sufficiency of its financial assurance is found in Section 11 of its Application, where RGR notes "on December 18, 1998, the Mining and Minerals Division approved the closeout plan and financial security for the mine as an existing mining operation."

RGR's Application also failed to provide any meaningful information about whether the Mt. Taylor Mine would be economically viable during the standby permit period. RGR's Application contains nothing more than a cursory statement about the uranium reserves at the Mt. Taylor Mine and RGR's expectation that the uranium market will support mining operations within the next five years. Application at § 1.6, p. 3. The Application does not provide any discussion or supporting data about projected domestic or international uranium demand compared to current and projected supply from existing uranium mining operations. The Application was not amended to provide any discussion of the effect of the Fukushima reactor explosions and meltdowns on international demand. The Application does not discuss the lack

of ore milling capacity nationally. Finally the Application does not mention or discuss the reasons why RGR believes the uranium market will rebound in the next five years, despite evidence that it will likely remain flat.

B. The Public Hearing on RGR's Permit Application.

Petitioners requested a public hearing on RGR's standby permit renewal application. The Division scheduled a public hearing for August 17, 2011 in Grants. *See*, Public Notice: Mt. Taylor Mine Public Hearing, available at: [http://www.emnrd.state.nm.us/MMD/MARP/permits/documents/Mt\\_Taylor\\_PublicNotices\\_StandbyRenewal.pdf](http://www.emnrd.state.nm.us/MMD/MARP/permits/documents/Mt_Taylor_PublicNotices_StandbyRenewal.pdf). Amigos Bravos and MASE appeared at the August 17 hearing through their representatives and legal counsel. The Division presented testimony about the standby permit process and RGR presented testimony in favor of its standby permit application.

Petitioners attempted to present evidence concerning the undisputed groundwater contamination at the Mt. Taylor Mine. However, Rio Grande Resources objected, arguing that the Mining Act and its regulations only allowed the Division to accept, without question, NMED's determination that the Mt. Taylor Mine would meet groundwater standards during the standby permit period. Audio Transcript of August 17 Public Hearing, STE-000 at 2:51:31 – 2:51:49 (“Tr.”). Any question as to the source of the groundwater contamination or how it would be remediated was, according to RGR's argument, a challenge to the NMED's determination, which could only be challenged through a petition for a writ of certiorari to the district court pursuant to New Mexico Rule of Civil Procedure 75. Tr. at 3:07:45 – 3:08:10. The Hearing Officer upheld RGR's objection, and Petitioners were prohibited from presenting any evidence on the issue of groundwater contamination or RGR's technical or financial ability to remediate that contamination. Tr. at 2:52:20 – 2:53:00.

Further, Petitioners attempted to present testimony concerning RGR's unwillingness to conduct interim reclamation measures on the likely source of the alluvial contamination, i.e., the waste rock pile. RGR's attorney again objected, claiming that Petitioners were attempting to challenge RGR's close out plan, which MMD approved in 1998. Tr. at 2:50:59 – 2:51:22. Again, the Hearing Officer upheld RGR's objection and Petitioners were prohibited from presenting any evidence about interim reclamation measures that would be appropriate to address the alluvial contamination. Tr. at 2:51:54 – 2:52:19.

Petitioners also sought to challenge RGR's unsupported assertion that the Mt. Taylor Mine would be economically viable during the standby permit period. Prior to Petitioners conducting cross-examination of RGR's witnesses regarding the mine's financial viability, they were informed that MMD based its analysis of RGR's financial viability largely on secret information that was not publicly available.

Petitioners subsequently attempted – pursuant to the Inspection of Public Records Act - to obtain the information RGR submitted to support its contention that the Mine would be economically viable during the standby permit period, but their request was denied. Letter from Mr. Fernando Martinez to Mr. Eric Jantz and Mr. Stuart Butzier re: Inspection of Public Records Act Request (Oct. 31, 2011), attached as Exhibit C. Notably, even though Petitioners requested that if certain portions of the requested information were reasonably segregable from the confidential information, then those portions should be released, the Director refused, indicating that redacting confidential information from public information would, in effect, be too difficult for MMD staff. *Id.* at 4.

Finally, Petitioners attempted to present testimony that RGR's financial assurance was outdated and would be insufficient to cover any interim reclamation of the waste rock pile or groundwater remediation. However, RGR's attorney also objected to this testimony, arguing that evidence about the sufficiency of RGR's financial assurance was beyond the scope of the standby proceeding. Tr. at 2:34:26 – 2:35:58. The Hearing Officer again agreed with RGR, deciding that

Petitioners must pursue any concerns about RGR's financial assurance in a separate proceeding. Tr. at 2:36:07 – 2:37:54.

### **III. Statutory and Regulatory Framework**

#### **A. The New Mexico Mining Act.**

The purposes of the New Mexico Mining Act (“Act” or “Mining Act”) “include promoting responsible utilization and reclamation of lands affected by exploration, mining or the extraction of minerals that are vital to the welfare of New Mexico.” NMSA, 1978 § 69-36-2. In order to realize the Mining Act’s purposes, the New Mexico legislature delegated authority for its implementation to the Commission and the Director. *Id.*, §§ 69-36-7, 69-36-9; *see also*, *Rio Grande Chpt. of the Sierra Club v. Mining and Minerals Div.*, 130 N.M. 497, 501, 27 P.3d 984, 988 (Ct. App. 2001).

Among the responsibilities delegated to the Commission is the requirement that it adopt regulations for standby permits that at a minimum insure that a mining operation on standby status meet applicable federal and state environmental standards and regulations for the duration of the standby period. *Id.* at § 69-36-7(E)(3). The Commission’s regulations must also insure that a permittee comply with the application requirements of the Mining Act and its regulations. *Id.* at § 69-36-7(E)(5).

Further, the Act places a particular emphasis on public notice and participation. The Act requires the Commission to promulgate regulations that give “all interested persons ... a reasonable chance to submit data, views, or arguments orally or in writing and to examine witnesses testifying at the hearing.” *Id.* at § 69-36-7(K).

The Legislature also delegated specific duties to the Director. Under the Mining Act the Director is required to exercise all powers of enforcement and administration under the Act not delegated to the Commission, and execute and administer the Commission’s regulations. *Id.* at §

69-36-9(A). Additionally, the Director is required to “confer and cooperate with the secretary of the environment in administering the New Mexico Mining Act, in developing proposed regulations and obtain the concurrence of the secretary of the environment regarding areas of the regulations that have an impact upon programs administered by the department of the environment.” *Id.* at §69-36-9(D).

The Mining Act’s plain language also provides limited exceptions to what can be withheld from public disclosure. These exceptions are limited to “exploration map[s], financial information, information concerning the grade or location of ore reserves or trade secret information”. NMSA 1978, § 69-36-10. Even these limited categories of documents may be disclosed if disclosure would not harm a permittee’s competitive advantage. *Id.* The statute’s plain language does not contemplate that an entire analysis of a mine’s future economic viability as required by the Act and its implementing regulations should remain confidential.

Finally, the Mining Act provides for both administrative and judicial review. Any “order, penalty assessment or issuance or denial of a permit by the director” pursuant to the Act may be appealed to the Commission by an adversely affected person within sixty days of its issuance. *Id.* at § 69-36-15(A). A final action of the Commission may be appealed to the district court. *Id.* at § 69-36-16(C).

B. Mining and Minerals Division Regulations.

Pursuant to its responsibilities under the Act, in 1996 the Commission promulgated regulations implementing the Mining Act. These regulations govern the Director’s implementation of the Act.

The primary regulation governing standby permit applications is 19.10.7.701 NMAC. That regulation requires, in relevant part, that the permit applicant provide, at a minimum, a

description of how applicable federal and state environmental standards and regulations will be met during the standby status. 19.10.7.701.B.(3) NMAC. The applicant's submission must include a written determination from the Secretary of the Environment stating that the permittee has demonstrated that the operation is expected to achieve compliance with applicable state environmental standards. *Id.* Further, the applicant must describe how it will meet the requirements of the Act and Part 19.10 regulations. *Id.* at §701.B.(5). A standby permit application must be approved if the Director finds the applicant has met the requirements of § 701.B. *Id.* at § 701.F.

Pursuant to the Act, the Commission adopted regulations encouraging public participation. Those public participation procedures include procedures for public hearings, where any interested person may testify or submit written statements containing data, views or arguments. 19.10.9.905.C, E NMAC.

#### **IV. Bases for Review**

##### **A. The Director Failed to Review RGR's Financial Assurance for Reclamation.**

At the public hearing on RGR's permit application, the Director, acting as the Hearing Officer, improperly prohibited Petitioners from presenting evidence on the sufficiency of RGR's financial assurance. The regulations implementing the New Mexico Mining Act clearly require that the Mining and Minerals Division evaluate whether a permittee's financial assurance is sufficient when it applies for a standby permit.

In their posting-hearing submittal to the Director, Petitioners pointed out that §1206 of the Mining Act regulations provides, "[i]n the event that the approved permit is revised or modified, the director shall review the financial assurance for adequacy, and if necessary, shall require adjustment of the financial assurance to conform to the permit as revised or modified."



19.10.12.1206.D NMAC, emphasis added. The regulations further provide, “[i]f, due to a temporary cessation of mining operations exceeding 180 days, a permittee desires to suspend reclamation pursuant to a permit for an existing or new mining operation, the permittee shall submit an application for a permit revision for standby status ... “. 19.10.7.701.A NMAC, emphasis added. Thus, RGR’s application for a standby permit is a permit revision, and under § 1206.D the Director is required to review RGR’s financial assurance for adequacy and adjust it if necessary.

The Director should have allowed Petitioners to submit testimony regarding the sufficiency of RGR’s surety. Moreover, allowing public testimony on this issue has heightened importance in this case because the record of the administrative proceeding contains no evidence whatsoever that MMD considered the adequacy of RGR’s financial assurance.

Apparently realizing his error, the Director, in his decision approving RGR’s standby permit application, is now requiring RGR to submit an updated financial assurance and closeout plan for MMD review. Order, § 8.BB at 4. However, the Director’s decision makes no provision for a public hearing on whether RGR’s financial assurance and closeout plan updates are sufficient. Thus, the Director has effectively denied MASE, Amigos and the general public the opportunity, as guaranteed by the Mining Act, to have a hearing on RGR’s financial assurance plan. The Commission should mandate a public hearing on RGR’s financial assurance plan.

B. The Director Had No Basis for Determining that the Mt. Taylor Mine Will be Economically Viable During the Standby Period.

The Act and MMD regulations require a standby permit applicant to demonstrate that the mine proposed for standby status will be economically viable during the standby period. NMSA 1978, 69-26-7(E)(6); 19.10.7.701.B.6 NMAC. In this case, RGR failed to demonstrate with any

credibility that the Mt. Taylor Mine will be economically viable between now and 2014, when the current standby permit expires.

In its standby application that it submitted to MMD, RGR asserts, without support, that:

RGR has the largest uranium deposit in the United States, which is well over 100,000,000 pounds of U<sub>3</sub>O<sub>8</sub> in the Mt. Taylor Mine ore body. The market price now does not permit a viable mining operation, primarily because of the availability of uranium from weapons decommissioning in the world and U.S. markets. However, such material will be used up after a period of time, after which the market demand for new uranium oxide should increase. Additionally, in the future the demand for clean [sic] nuclear power generating plants will increase as low-cost coal reserves are depleted and demand for electric power increases. These conditions and the high grade ore reserves at Mt. Taylor will increase the value of the Mt. Taylor Mine and lead to the resumption of operations in the relatively near future.

Standby Application at 3, § 1.6. Because there is no basis other than unsupported assertions from RGR that the Mt. Taylor Mine will be economically viable during the standby permit period, the Director had no basis for his determination that RGR's economic analysis was sufficient. Order, § 3.DD at 2.

1. RGR Failed to Analyze Uranium Demand.

RGR has provided no substantive demonstration that the Mt. Taylor Mine will be economically viable during the standby permit period. Most significantly, neither RGR's written or verbal statements give any meaningful analysis of global demand for uranium.

RGR's written statement gives no meaningful analysis of uranium demand, asserting only that the supply of uranium from decommissioned weapons will fall "after a period of time" and that increased demand for nuclear power will fuel demand for uranium. However, RGR does not indicate when the uranium supply from decommissioned weapons will be depleted. Further, as explained in Section IV.B.2, below, RGR fails to analyze global energy demand in support of its assertion that demand for nuclear energy will increase. RGR's written statement regarding the

Mt. Taylor Mine's economic viability over the next two years lacks any specific information, data or analysis and is insufficient to support its standby permit application.

RGR also failed to provide adequate economic analysis in its testimony at the August 17, 2011 public hearing. There, RGR's witness, Mr. Doug Irving, simply touted RGR's position relative to other potential uranium operations that do not have existing mine infrastructure or permits. Testimony of Doug Irving ("Irving Testimony"), Tr. at 45:00 – 47:40.

Moreover, in his direct testimony, Mr. Irving offered no meaningful analysis of domestic or global uranium demand. He simply asserted, without support or analysis, that worldwide demand for uranium was increasing, that uranium prices are increasing, and uranium stockpiles from decommissioned weapons are decreasing. Irving Testimony, Tr. at 51:20 – 53:30.

On cross-examination, Mr. Irving was presented with data from the International Atomic Energy Agency ("IAEA"), Nuclear Energy Agency ("NEA") and Organization for Economic Cooperation and Development ("OECD") annual report on uranium supply and demand ("Uranium Red Book") showing that existing uranium mining capacity could fulfill global uranium demand until 2025. However, Mr. Irving was unable to rebut these data or provide data that contradicts the IAEA, NEA, and OECD data. Irving Testimony, Tr. at 1:39:04 – 1:42:30. A copy of the Uranium Red Book data is attached hereto as Exhibit D. Because IAEA data show that projected demand for the next 16 years can be satisfied with existing uranium mining capacity and RGR offered no evidence to contradict those data, RGR failed to satisfy its burden of showing that the Mt. Taylor Mine will be economically viable for the term of its standby permit and the Director had no basis for finding that the Mt. Taylor Mine would be economically viable during the standby permit period.

2. RGR Failed to Analyze Energy Demand.

Additionally, RGR's permit application fails to analyze domestic or global energy demand during the permit period. RGR offered no testimony on this issue at hearing. Because of its failure to consider global energy demand – other than the cursory statement that demand for nuclear power will rise – RGR's analysis of the Mt. Taylor Mine is inadequate and provides no basis for the Director's determination that the mine will be economically viable through 2014.

Indeed, had RGR provided such an analysis, it would have shown that global energy demand trends do not favor nuclear power in the long term and a surge in demand in the short term, i.e., during the standby permit term, is highly unlikely. For example, RGR failed to provide any analysis about how the worldwide and domestic economic downturn affects electric power demand. According to the United States Energy Information Administration ("EIA"), the global economic downturn slowed energy consumption in 2008 and energy consumption contracted in 2009. United States Energy Information Administration, *World Energy Demand and Economic Outlook*, Report #:DOE/EIA-0484(2010), Chpt. 1 at 9 (July 27, 2010). The EIA's World Energy Demand and Economic Outlook report does not assume global economic recovery and energy demand growth until 2015. *Id.*

RGR also failed to consider how improvements in energy efficiency and demand for renewable energy sources will affect demand for nuclear power<sup>1</sup>. As indicated in the EIA world energy demand report, global demand for renewable sources of energy (and all other sources of energy) is projected to far outstrip demand for nuclear power. *World Energy Demand and Economic Outlook* at 11, Fig. 16.

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<sup>1</sup> Interestingly, although not a renewable resource, EIA projects that the percentage of electricity generated by coal will remain largely unchanged through 2035, directly contradicting RGR's statement that diminishing reserves of low-cost coal will increase demand for uranium. *World Energy Demand and Economic Outlook* at 12, Fig. 18.

Finally, RGR failed to account for the effect on worldwide nuclear energy demand due to countries such as Germany, Italy, Switzerland and Japan phasing out nuclear power. Mr. Lister's flat assertion that demand for uranium will grow despite the Fukushima disaster is insufficient. *See*, Testimony of Joe Lister ("Lister Testimony"), Tr. at 1:02:19. Because RGR has failed to analyze energy demand, it has no basis for asserting that the Mt. Taylor Mine will be economically viable during the standby permit period and the Director had no basis for determining that it would be.

3. RGR Fails to Consider the Lack of Uranium Ore Milling Capacity.

Finally, in order for uranium ore to be economically viable, it must be milled so that it can be further processed into fuel for nuclear power plants. Lister Testimony, Tr. at 1:03:02. In its written permit application, RGR fails completely to mention where Mt. Taylor Mine ore might be milled and whether the proposed mill has the capacity to receive RGR's ore.

At the August 17 public hearing, Mr. Lister provided some insight into how vague RGR's plans for securing a place to mill Mt. Taylor Mine ore actually are. Mr. Lister conceded that the only operating uranium mill in the United States is the White Mesa Mill in Blanding, Utah, owned by Denison Mines. Lister Testimony, Tr. at 1:03:09. Mr. Lister further testified that while Denison Mines was likely to use ore from its own mines for feed at White Mesa, it could accept ore from other mines. *Id.*, Tr. at 1:03:10 – 1:03:32. When asked whether the White Mesa Mill would accept Mt. Taylor ore, Mr. Lister stated that RGR had "talked" to Denison about milling. *Id.*, Tr. at 1:03:33. Mr. Lister did not offer any information to indicate that any agreements to mill Mt. Taylor ore had been made or were pending with Denison.

Further, Mr. Lister was vague about whether transportation costs to Blanding were prohibitive. *Id.*, Tr. at 1:04:30-31. However, Mr. Lister did concede that it was prohibitive to

transport ore to Blanding at the spot price of \$50.00/lb. *Id.*, Tr. at 1:05:19. Significantly, this is the price for uranium that Mr. Lister indicated would be the price at which the Mt. Taylor Mine would be profitable. *See*, Mining and Minerals Division, March 25, 2009 Annual Inspection Report, attached as Exhibit E. Mr. Lister's inconsistent statements cast further doubt on the Mt. Taylor Mine's economic viability during the standby permit period.

Finally, RGR indicated that it is planning a mill near the mine site. However, since notifying the U.S. Nuclear Regulatory Commission ("NRC") in 2008 of its intent to build a mill near the Mt. Taylor Mine, RGR has delayed submission of required archaeological and radiological surveys twice. Moreover, Mr. Lister testified that RGR had not yet completed the archaeological survey for the proposed mill site, nor had it begun the required radiological survey. Lister Testimony, Tr. at 1:09:50-51, 56-58.

Even assuming, however, that RGR is able to build a uranium mill as planned, it provided no evidence concerning how the significant expenditures needed to construct and operate a mill might affect ongoing remediation efforts or final reclamation operations at the mine. Because RGR failed to evaluate how limited uranium ore milling capacity would affect the Mt. Taylor Mine's economic viability during the standby permit period, the Director's decision should be reviewed and reversed.

4. The Director Improperly Relied on Secret Economic Analyses.

Despite the overwhelming lack of evidence and data to support RGR's assertions that the Mt. Taylor Mine will be financially viable within the next five years, the Director nonetheless determined that RGR had satisfied its burden of proving financial viability. Order, § 3.DD at 2. Because RGR provided no public economic data or analysis, the Director's decision must have been based exclusively on the secret economic analyses purportedly in RGR's Application.

During the August hearing, Petitioners unsuccessfully attempted to require production of the apparently detailed economic analyses upon which the Division relied to determine that the Mt. Taylor Mine would be economically viable during the standby permit period. Subsequently, Petitioners sought that same information in a request to the Division, which the Director considered an Inspection of Public Records Act (“IPRA”) request. *See*, Exhibit C.

However, the Director improperly considered the request as an IPRA request.<sup>2</sup> Instead, the Director should have treated Petitioners’ request as the request of a party to an administrative adjudication. Under those circumstances, a process similar to that described in *Pincheira v. Allstate Ins. Co.* would have been appropriate.

In *Pincheira*, the New Mexico Supreme Court considered when “trade secrets” were appropriately withheld from discovery and evidence. 144 N.M. 601, 603, 90 P.3d 322, 324 (N.M. 2008). In reaching its decision, the Court outlined a two step process for district courts to evaluate whether information is a trade secret. First, if the parties are not competitors, as is the case here, the trial court should issue an appropriate protective order and hold an adversarial evidentiary hearing on the material in question. *Id.* at 612, 333. Second, if a party seeks admission of the material into evidence at trial, the party advocating the trade secret must assert the trade secret privilege and the trial court makes an evidentiary ruling. *Id.*

The Director, however, put Petitioners in the untenable position of having to argue about the sufficiency of information that they had never even seen. The Director’s decision should therefore be reversed and Petitioners have the opportunity to make an argument that RGR’s

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<sup>2</sup> Petitioners sought the information initially during the public hearing. Only subsequently did Petitioners seek RGR’s economic viability analysis under the Mining Act or in the alternative, under IPRA.

economic analysis should be publicly available and part of the administrative record on the substance of that information.

C. The Director Improperly Prohibited Testimony on Rio Grande Resources' Ability to Meet Environmental Standards.

The Director's determination that RGR will meet all environmental standards and comply with all applicable environmental laws and regulations is incorrect for three reasons. Order at § 3.FF at 2. First, the Director's decision is based on the Hearing Officer's incorrect ruling that prevented Petitioners from presenting any testimony on the uranium groundwater contamination at the Mt. Taylor Mine site or the NMED's determination that RGR would meet all environmental standards. This ruling was contrary to the mandates of the Mining Act's public participation requirements. Second, the Director's decision, based on that same ruling, undermines the Mining Act's interagency cooperation framework. Finally, the Hearing Officer's ruling preventing Petitioners from presenting any evidence on the NMED's determination or the uranium contamination at the mine site was incorrect as a matter of law. The Director's conclusion that RGR will meet all environmental standards and comply with all applicable environmental laws during the standby permit period is erroneous and should be reversed.

1. The Hearing Officer's Determination Renders the Public Participation Provision of the Mining Act and Its Regulations Meaningless.

The Hearing Officer's determination that Amigos Bravos and MASE were prohibited from presenting any evidence on the issue of groundwater contamination at the public hearing renders the Mining Act regulations encouraging public participation meaningless, and directly contradicts the mandate of the Act itself. The Act requires the Commission to promulgate regulations that give "all interested persons ... a reasonable chance to submit data, views, or arguments orally or in writing and to examine witnesses testifying at the hearing." NMSA 1978,



§ 69-36-7(K). The Commission promulgated regulations further defining the boundaries of public participation, but still seeking to maximize public input on regulatory decision-making by mandating that all interested persons have a reasonable opportunity to present testimony, data, views or arguments. 19.10.9.905.C, E NMAC. Moreover, both the Act and the regulations have extensive notice requirements to ensure that the public can take advantage of the public participation processes. NMSA 1978, § 69-36-7(K)(1)-(6); 19.10.902, 903 NMAC. Based on these extensive statutory and regulatory notice and hearing requirements, the Legislature's intent to promote broad and meaningful public participation is clear.

In this case, Petitioners were prevented from presenting any evidence on groundwater contamination at the Mt. Taylor Mine or RGR's ability to address the contamination and its source<sup>3</sup>. By prohibiting Petitioners from meaningfully participating in the public hearing, the Hearing Officer undermined the Legislature's intent to promote public participation.

The New Mexico Supreme Court decision in *Colonias Development Council v. Rhino Environmental Services, Inc.* ("Rhino") is instructive in this case. *Id.*, 138 N.M. 133, 117 P.3d 939 (N.M. 2005). In *Rhino*, the petitioner community group appealed a decision by the New Mexico Environment Department approving a landfill in their community pursuant to the New Mexico Solid Waste Act. *Id.*, 117 P.3d at 942. On appeal, the community group argued that although the hearing officer conducting the public hearing on the solid waste permit application had allowed community members to speak, NMED violated the Solid Waste Act's public participation provisions by failing to consider the community group's "quality of life" testimony. *Id.* The Supreme Court agreed. *Id.* at 945. The Court reasoned that the extensive public notice

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<sup>3</sup> It is noteworthy that NMED's process for making a determination that a permittee will meet all applicable environmental standards has no mechanism for public input. In this case, NMED did not seek public input on its determination, provided no public notice of its determination process, and provided no public notice of the determination itself.

and hearing provisions in the Solid Waste Act demonstrated the Legislature's intent to foster broad and meaningful public participation in solid waste permit proceedings. *Id.* at 944-946. The Environment Department's failure to consider "quality of life" public testimony violated these provisions and NMED's decision was set aside and remanded for further proceedings. *Id.* at 949-950.

In this case, the Mining Act's public notice and hearing provisions are nearly identical to those in the Solid Waste Act. *See, e.g.*, NMSA, 1978 § 74-9-29 (ensuring all interested persons "a reasonable opportunity" to be heard at a public hearing); *compare with* NMSA, 1978 § 69-36-7(K) (ensuring all interested persons shall be given "a reasonable chance" to submit data, views or arguments). Unlike the *Rhino* case, however, in this case MASE and Amigos Bravos were not even given the opportunity to submit data, views or arguments on the groundwater contamination at the Mt. Taylor Mine site, much less have their data, views and arguments considered. By prohibiting MASE and Amigos Bravos from presenting any information on the groundwater contamination at the Mt. Taylor Mine site, the Hearing Officer violated the public participation requirements of the Mining Act and its implementing regulations. The record in this case should remain open and MASE and Amigos Bravos should be allowed to submit testimony and data on the alluvial groundwater contamination at the Mt. Taylor Mine site.

2. The Hearing Officer's Interpretation of the Mining Act and Regulations Eliminates MMD's Independent Duty to Regulate Mining's Environmental Impacts.

In addition to violating the public participation requirements of the Mining Act and its implementing regulations, if the Hearing Officer's interpretation of MMD's regulations is accepted, MMD's role in regulating environmental impacts of mines on standby status is virtually eliminated in violation of the mandate of the Act that the Director ensure that a

permittee abides by all applicable environmental laws and standards. By prohibiting MASE and Amigos Bravos from challenging MMD's acceptance of NMED's determination, the Hearing Officer effectively made the standby permit evaluation and review process one in which MMD checks off boxes on a list of required documents. This interpretation not only undermines the Division's independent responsibility to ensure that all environmental laws, regulations and standards are met during the standby period, it also virtually eliminates any consultation and coordination function the MMD has under the Mining Act by forcing MMD to accept as valid any determination by NMED, irrespective of whether it is based on legally or technically supportable grounds.

In this case, based on documentation and cross examination of an NMED representative, MASE and Amigos Bravos established that NMED had no technical basis for making a determination that RGR would meet groundwater standards for the term of its standby permit. The administrative record indicates that on September 1, 2010, NMED sent a letter to RGR indicating that NMED could not determine that RGR would be in compliance with New Mexico groundwater standards for more than two years. Exhibit B. NMED cited evidence of uranium contamination of the alluvium at the Mt. Taylor Mine and the fact the contamination's source had not been identified as the basis for the two-year limit on its determination. *Id.* At the time of that letter, according to NMED's representative at the public hearing, NMED had not approved RGR's Stage 2 abatement plan. Testimony of Mary Ann Menetrey ("Menetrey Testimony"), Audio Transcript of August 17, 2011 Hearing, STE-003 at 8:24 – 8:55 ("Tr.-3"). Ms. Menetrey also stated that between the time of the September 2010 letter in which NMED refused to make a determination for more than two years and May 27, 2011, when NMED determined that RGR

would be able to meet groundwater standards for five years, no circumstances had changed except that RGR's Stage 2 abatement plan had been approved. *Id.*

Significantly, however, NMED's approval of RGR's Stage 2 abatement plan does not address the presumed source of the alluvial contamination, i.e., the waste rock pile. May 2, 2011 letter from NMED to RGR giving conditional approval of RGR's Stage 2 abatement plan, attached as Exhibit F at p. 2; Menetrey Testimony at Tr-3, 6:19 – 6:45. Indeed, the conditions placed on the abatement plan require that the abatement plan be revised if groundwater sampling and waste characterization studies show that the waste rock pile or storm water retention pond are the source of the alluvial contamination. Based on NMED's own documents, the source of the uranium contamination in the alluvium remains unidentified and the Stage 2 abatement plan does not address the uranium contamination. Therefore, the NMED had no apparent technical basis whatsoever to change its determination from a two year to a five year term.

Given the lack of basis for NMED's conclusion, the Division had an obligation to independently evaluate the NMED's determination in order to insure that RGR would, in fact, be able to comply with all applicable environmental laws, standards and regulations during the permit period. The Hearing Officer's conclusion that the Division must accept NMED's determination without question, irrespective of whether that determination has a legitimate technical basis, subverts the Act's requirements that permitted operations meet all applicable environmental laws, regulations and standards.<sup>4</sup> NMSA 1978, §§ 69-36-7(A)(1), (E)(3), (N), (P)(2), (S)(3),(4); 19.10.701.B.3. Moreover, the Hearing Officer's conclusion that any public challenge to the Division's acceptance of NMED's determination is beyond the scope of a

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<sup>4</sup> Conversely, there is no provision in the Act that prohibits the Division from questioning the comments or determinations from other agencies.

standby permit proceeding, likewise violates the Act's and regulations' mandate to ensure that permittees comply with all applicable environmental laws and standards. *Id.*

The Hearing Officer's determination also undermines the consultation provisions of the Act and its regulations. *See*, NMSA 1978, § 69-36-7(J); 19.10.5.505.B.3 NMAC. The consultation requirements evince the Legislature's clear intent for MMD and the Director to consult with, but not be beholden to, other agencies that also have responsibility for regulating environmental matters. Moreover, while the Act explicitly provides that the Director may not implement environmental statutes which are the responsibility of other agencies, reclaiming the purported source or sources of contamination, i.e., the waste rock pile and storm water lagoon, are activities that lie squarely within the Director's regulatory authority. Thus, the Hearing Officer's interpretation of the Act and regulations subverts the Legislature's intent and improperly deprived MASE and Amigos Bravos of the opportunity to challenge MMD's acceptance of NMED's determination.

3. NMED's Determination is Not a Final Agency Decision.

Finally, the Hearing Officer's decision during the public hearing that NMED's determination that RGR would meet all environmental standards was more appropriately challenged by a Rule 1-075 appeal is incorrect as a matter of law. Whether an agency decision is appealable is governed by the judicial doctrine of "finality". A court will generally not entertain an administrative appeal unless it is based on a final agency decision. *Harris v. Revenue Div. of State Tax & Rev. Dept.*, 105 N.M. 721, 722, 737 P.2d 80, 81 (Ct. App. 1987). An agency action is final if it: 1) represents a terminal, complete resolution of the case before the agency and 2) determines rights or obligations or has some legal consequence. *Intercity Transp. Co. v. U.S.*,

737 F.2d 103, 106 (D.C. Cir. 1984); *see also*, *Mills v. State Bd. of Psychologist Examiners*, 123 N.M. 421, 425-426, 941 P.2d 502, 506-507 (1997).

Here, NMED's determination meets neither criteria and is not a final appealable decision. First, the plain language of the Act and regulation make clear that NMED's determination is just one of several factors the Director must consider before making the final decision to grant or deny a standby permit application. *See*, NMSA 1978, § 69-36-7(E); § 19.10.7.701 NMAC. The Director's decision, in turn, is appealable to the Commission, and any decision the Commission makes is the agency's final decision. NMSA 1978, § 69-36-16.

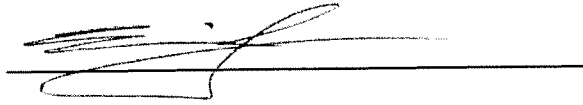
Second, NMED's determination, alone, does not settle any rights or obligation, nor does it have any legal consequences. Outside the context of the Director's or the Commission's decision to grant or deny a standby permit application, the NMED's determination represents nothing more than an advisory opinion and does not require RGR to take any action or stop any activity. The NMED's determination is therefore not a final agency decision and not appealable under Rule 1-075.

## **V. Conclusion**

For all the foregoing reasons, Petitioners seek a public hearing before the Commission to:

- 1) review RGR's financial assurance and close-out plan for the Mt. Taylor Mine;
- 2) determine whether the Mt. Taylor Mine will be economically viable during the standby permit period; and
- 3) determine whether RGR will meet environmental standards and laws during the standby permit period.

Respectfully submitted this 30<sup>th</sup> day of March, 2012.

A handwritten signature in black ink, appearing to read "Eric Jantz", is written over a solid horizontal line.

Eric Jantz  
Douglas Meiklejohn  
Bruce Frederick  
Jonathan Block  
New Mexico Environmental Law Center  
1405 Luisa Street, Suite 5  
Santa Fe, New Mexico 87505  
Telephone: 505-989-9022  
Facsimile: 505-989-3769  
[ejantz@nmelc.org](mailto:ejantz@nmelc.org)

Attorneys for Petitioners

**CERTIFICATE OF SERVICE**

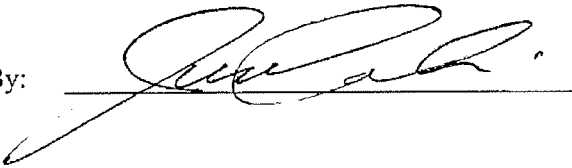
I hereby certify that on this 30<sup>th</sup> day of March, 2012, I have delivered a copy of the foregoing pleading in the above-captioned case via U.S. mail, first class, to the following:

Mr. Fernando Martinez  
Director  
Mining and Minerals Division  
New Mexico Energy, Minerals and Natural Resources Department  
1220 South St. Francis Dr.  
Santa Fe, New Mexico 87505

Mark Smith, Esq.  
Assistant General Counsel  
Mining and Minerals Division  
New Mexico Energy, Minerals and Natural Resources Department  
1220 South St. Francis Dr.  
Santa Fe, New Mexico 87505

Stuart Butzier, Esq.  
Modrall Law Firm  
500 Fourth Street, NW  
Albuquerque, New Mexico 87102

By: \_\_\_\_\_







New Mexico Energy, Minerals and Natural Resources Department

**Susana Martinez**  
Governor

**John H. Bemis**  
Cabinet Secretary-Designate

**Fernando Martinez**  
Division Director  
Mining and Minerals Division



**Brett F. Woods, Ph.D.**  
Deputy Cabinet Secretary

7008 3230 0000 2319 8068

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

January 31, 2012

Mr. Eric Jantz, Esquire  
New Mexico Environmental Law Center  
1405 Luisa St., Suite 5  
Santa Fe, NM 87505

**RE: Approval of Standby Status Renewal, Revision 10-1, Mount Taylor Mine, Permit No. CI002RE**

Dear Mr. Jantz,

The New Mexico Mining and Minerals Division (“MMD”) has approved the renewal of standby status for the Mount Taylor Mine, located in Cibola County, New Mexico. Enclosed is a copy of permit revision 10-1 that was approved by the MMD Director on January 30, 2012. You may also view the approved permit revision document at:

<http://www.emnrd.state.nm.us/MMD/MARP/permits/CI002RE.htm>

Please contact me at 505-476-3432 or at david.ohori@state.nm.us, if you have any questions.

Sincerely,



David R. Ohori, Permit Lead  
Mining Act Reclamation Program (“MARF”)

Enclosure

cc: Holland Shepherd, Program Manager, MARP  
Mark Smith, Assistant General Counsel, MMD  
Fernando Martinez, Director, MMD  
Jerry Schoeppner, Acting Bureau Chief, NMED GWQB  
Joe Lister, Mount Taylor Mine  
Stuart Butzier, Modrall Sperling  
Mine File (CI002RE)

Exhibit A





- 6) Work Plan for the Waste Pile Characterization Mount Taylor Mine San Mateo New Mexico letter, dated December 22, 2010.

**Section 3.**                    **FINDINGS OF FACT**

- X. The 2010 PRP for standby status for the Mount Taylor Mine, is complete.
- Y. The Permittee has paid the permit revision application fee of \$5000.00 as required by 19.10.2.201.J NMAC and 19.10.7.701.F NMAC.
- Z. The Permittee agrees while in standby status to take measures to reduce, to the extent practicable, the formation of acid and other toxic drainage and to prevent releases that cause federal or state environmental standards to be exceeded during the period of the standby status, as required by 19.10.7.701.F.1 NMAC.
- AA. The Permittee agrees to meet applicable federal and state environmental standards and regulations during the period of standby status, and the Secretary of the Environment Department has indicated environmental standards of the Department are expected to be met during the term of standby status, as required by 19.10.7.701.F.2 NMAC.
- BB. The Permittee agrees to stabilize all facilities during the period of standby status, as required by 19.10.7.701.F.3 NMAC.
- CC. The Permittee agrees to comply with the applicable requirements of the New Mexico Mining Act ("Act"), the New Mexico Mining Act Rules and the Permit during the period of standby status, as required by 19.10.7.701.F.4 NMAC.
- DD. The Permittee has provided an analysis of the economic viability of the Mount Taylor Mine, as required by 19.10.7.701.F.5 NMAC.
- EE. The Permittee has fulfilled the public notice requirements of Subpart 9 of the Act for standby status, as required by 19.10.7.701.G NMAC.
- FF. Pursuant to 19.10.7.701.B.3 NMAC, The Secretary of the Environment Department provided a written determination on May 27, 2011 stating that the permit applicant has demonstrated that the activities to be permitted or authorized will be expected to achieve compliance with all applicable air, water quality, and other environmental standards if carried out as described in the standby status plan. The Permittee is engaged in an NMED approved Stage 2 Abatement Plan, following the NMED approval of a Stage 1 Abatement Plan for the Mount Taylor Mine.

- GG. In accordance with New Mexico Water Quality Control Commission ("WQCC") Regulations 20.6.2.4106.E.(7) NMAC, on September 10, 2010, RGR published public notice of the Stage 2 Abatement Plan; and NMED provided an opportunity for statements, comments, and a public hearing on the Stage 2 Abatement Plan.
- HH. Public notice of the permit revision application was published by RGR on June 22, 2010, as required by 19.10.9 NMAC and 19.10.5.503.F(5) NMAC.
- II. Public notice of the public hearing was published by MMD on July 15, 2011, as required by 19.10.9.904.B NMAC.
- JJ. A public hearing was held on August 17, 2011, in Grants, NM. The public hearing record was open through September 1, 2011. MMD received written testimony from RGR; the New Mexico Environmental Law Center; Amigos Bravos; Environment New Mexico; the Pueblo of Acoma; Laura Watchempino; and Larry Ausherman and Stuart Butzier, Attorneys for RGR.
- KK. The public participation requirements of 19.10.9 NMAC have been met.
- LL. A closeout plan for the Mt. Taylor Mine was approved on December 18, 1998.
- MM. Financial assurance for the Mt. Taylor Mine was approved on December 18, 1998.
- NN. The permit was approved by MMD on July 28, 1995. The closeout plan was approved by MMD on December 18, 1998, under permit revision 98-1. The Permittee applied for standby status on March 25, 1999. MMD approved standby status on October 12, 1999 under permit revision 99-1, for a term that ended on October 7, 2004. The Permittee applied for a first renewal of standby status on September 24, 2004. MMD approved the first renewal of standby status on July 27, 2005, under permit revision 04-1, for a term that ended on July 5, 2010.

**Section 8.**                    **GENERAL OBLIGATIONS AND CONDITIONS**

Standby status and approval of this revision by the Director for the Mount Taylor Mine are subject to the following conditions:

- X. During the period of standby status the Permittee shall annually inspect all waste piles for excessive erosion (i.e., gulying or extensive rilling) and structural failures, and significant erosion features will be mitigated to prevent future instability of the site. Drainage channels, diversion structures, and auxiliary erosion control features will be inspected in accordance with professionally recognized standards (e.g., Natural Resources Conservation Service or Forest

Service). RGR will report evidence of excessive erosion, significant erosion features, and/or structural failures to MMD and other appropriate agencies in a timely manner. A written report detailing the nature and extent of such erosion features and failures and a corrective action plan shall be submitted to MMD within 45 days after the inspection of the waste piles, channels, structures and erosion control features, which identify such deficiencies.

- Y. The second renewal of standby status is granted for a term beginning July 5, 2010 and ending October 12, 2014. The Director may renew the standby status for no more than one additional term, not to exceed five years.
- Z. If the Permittee applies for a renewal of standby status, the Permittee shall submit an application to renew standby status at least 180 calendar days prior to October 12, 2014.
- AA. The Permittee shall perform environmental remediation as required by NMED based on the results of the Stage One and Stage Two Abatement Plans for the Mount Taylor Mine site. The Permittee shall propose a corrective action plan for the waste rock pile at the Mount Taylor Mine, if NMED determines that remedial action is required, based on the Stage 1 and Stage 2 Abatement process, related to the mine's waste rock piles.
- BB. Pursuant to 19.10.12.1206.A NMAC, within 180 calendar days of this revision approval, the Permittee shall submit to MMD, for MMD approval, (i) an updated reclamation cost estimate for the Mount Taylor Mine for the purpose of updating financial assurance and (ii) an updated closeout plan, upon which the reclamation cost estimate shall be based.

All other provisions, modifications, and revisions for mining and reclamation contained in the Mount Taylor Mine Permit No. CI002RE, remain unchanged.

**Section 9.**                    **CONCLUSIONS OF LAW**

- A. The Director has jurisdiction over the Permittee and the subject matter of this proceeding.
- B. The 2010 PRP is complete, accurate, and complies with requirements of the Act and 19.10.5.502 and 19.10.5.503 NMAC with conditions described in this Permit Revision.
- C. The 2010 PRP is complete, accurate, and complies with the requirements of the Mining Act and 19.10.5.505 NMAC. The Permittee, Rio Grande Resources Corp. is permitted, pursuant to the New Mexico Mining Act to conduct mining and reclamation operations at the Mount Taylor Mine, Cibola County, New Mexico,

upon the condition that the Permittee complies with the requirement of the Order, the Act, the Rules, and the Permit, as revised and modified, and this Revision.

- D. The NMED environmental determination states that during the standby status period, compliance with all applicable air, water quality and other environmental standards will be achieved, in compliance with 69-36-7 P(2) of the Act.
- E. The Permittee meets the requirement for standby status.
- F. The application meets the requirements of 19.10.7.701.B and C NMAC.
- G. Standby status shall be granted for a maximum term of five years.

**CERTIFICATION**

I certify that I have personally examined and am familiar with the information submitted herein, and based on my inquiry of those individuals responsible for obtaining the information; I believe the submitted information is true, accurate, and complete. I certify that I have read, understand and will comply with the requirements of this Permit Revision. Permittee agrees to comply with the performance and reclamation standards and requirements of the Permit, the Rules, and the Act, and allow the Director to enter the Permit Area without delay for the purpose of conducting inspections during standby, mining and reclamation.

The Permittee also agrees (i) that while in standby status it will take measures to reduce, to the extent practicable, the formation of acid and other toxic drainage and to prevent releases that cause federal or state environmental standards to be exceeded during the period of the standby status, as required by 19.10.7.701.F.1 NMAC, (ii) to meet applicable federal and state environmental standards and regulations during the period of standby status as required by 19.10.7.701.F.2 NMAC, (iii) to stabilize all facilities during the period of standby status, as required by 19.10.7.701.F.3 NMAC, and (iv) to comply with the applicable requirements of the New Mexico Mining Act, the New Mexico Mining Act Rules and the Permit during the period of standby status, as required by 19.10.7.701.F.4 NMAC.

J. C. Austin  
Authorized Representative of the Permittee

Mine Manager  
Title

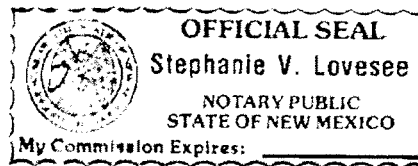
Rio Grande Resources  
Company

Subscribed and sworn to before me this 16 day of Jan, 2018.

Stephanie V. Lovesee  
Notary Public

My Commission Expires

8/22/15  
(date)



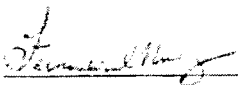
**ORDER**

NOW THEREFORE, IT IS HEREBY ORDERED that Permit Revision 10-1 of the Mount Taylor Mine Permit, to renew the suspension of reclamation under Permit No. CI002RE is approved. The Permit may not be transferred without approval by the Director. The Permit, as revised, is subject to all conditions set out in the Director's Findings of Fact, General Obligations and Conditions, or otherwise in the Permit, as revised, including by this Revision 10-1 and this Order. Permit Revision 10-1 is effective July 5, 2010 and shall expire October 7, 2014, subject to renewal as may be provided in Title 19, Chapter 10 NMAC.

By Order of the Director, Mining and Minerals Division, Energy, Minerals and Natural Resources Department, of the State of New Mexico.

Mining and Minerals Division

The State of New Mexico

By:   
Fernando Martinez, Director  
Mining and Minerals Division  
Energy, Minerals and Natural  
Resources Department

DATED: 11/30/2012





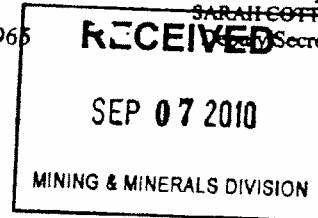
NEW MEXICO  
 ENVIRONMENT DEPARTMENT  
*Ground Water Quality Bureau*



BILL RICHARDSON  
 Governor  
 DIANE DENISH  
 Lieutenant

Harold Runnels Building  
 1190 St. Francis Drive, P.O. Box 5469  
 Santa Fe, New Mexico 87502-6110  
 Phone (505) 827-2918 Fax (505) 827-2965  
 www.nmenv.state.nm.us

RON CURRY  
 Secretary  
 SARAH COTTRELL  
 Secretary



September 1, 2010

Charles Thomas, Chief  
 Mine Reclamation Bureau  
 Energy, Minerals and Natural Resources Department  
 1220 South St. Francis Drive  
 Santa Fe, New Mexico 87505

**RE: NMED Determination for Mt. Taylor Mine Standby Request**

Dear Mr. Thomas:

The New Mexico Environment Department (NMED) received correspondence from the Mining and Minerals Division (MMD) dated July 22, 2010, regarding Rio Grande Resources Corporation's (RGRC) request for Standby Status for the Mt. Taylor Mine. MMD requested that NMED either provide the written determination that environmental standards will be achieved during the standby period, or provide MMD with further information needed from the operator to address the NMED determination.

Additional information has been obtained through the Water Quality Control Commission Abatement regulations over the last few years related to contamination in the alluvium. RGRC has not ruled out the potential contribution from the un-reclaimed waste rock pile at the site. Therefore, NMED cannot provide a written determination that environmental standards will be met over the 5-year period proposed for standby.

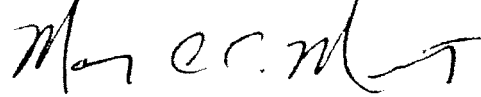
RGRC has however, submitted a Stage 2 Abatement Plan to address the contaminated saturated alluvium which can be amended to investigate the waste rock pile. NMED therefore believes that a standby period of 2 years would be appropriate while the waste rock pile is investigated for potential contribution to the contaminated saturated alluvium. The Standby Status application or the MMD permit revision must therefore reflect a shorter standby period in order for the NMED to provide a written determination.

Exhibit B

RGRC Standby Status  
September 1, 2010  
Page 2

If you have any questions regarding the above, please contact me at (505)827-2944.

Sincerely,



Mary Ann Menetrey  
Program Manager  
Mining Environmental Compliance Section

---

cc: Tom Skibitski, Manager, NMED District 1  
David Otori, MARP  
Jerry Schoeppner, MECS  
DP-61 file

# New Mexico Energy, Minerals and Natural Resources Department

**Susana Martinez**  
Governor

**John H. Bemis**  
Cabinet Secretary-Designate

**Brett F. Woods, Ph.D.**  
Deputy Cabinet Secretary

**Fernando Martinez**  
Acting Division Director  
Mining and Minerals Division



October 31, 2011

Eric Jantz, Esq.  
New Mexico Environmental Law Center  
1405 Luisa Street, Suite 5  
Santa Fe, New Mexico 87505

Stuart Butzier, Esq.  
Modrall Law Firm  
500 Fourth Street N.W.  
Albuquerque, New Mexico 87102

Via E-mail and Facsimile

Re: Inspection of Public Records Act Request

Gentlemen:

This letter responds to Mr. Jantz's August 23, 2011, request ("Request") to inspect the economic analysis that Rio Grande Resources ("RGR") submitted as "Confidential" in connection with its application to renew standby status for the Mt. Taylor Mine ("Mine"), Permit No. CI002RE ("Permit"). For your convenience, the Request is attached.

The Request was emailed by Mr. Jantz to David Otori, Permit Lead, Mining Act Reclamation Program ("MARF"), when Mr. Otori was out of the office. Upon learning that Mr. Otori was away from the office, on August 26, 2011, Mr. Jantz emailed a similar request to Mark Smith, counsel for the Mining and Minerals Division ("MMD"). Unfortunately, that email was incorrectly addressed, and it was not until September 2, 2011, a Friday, that either Mr. Otori or Mr. Smith learned of Mr. Jantz' Request.

On September 2, 2011, Mr. Smith contacted Mr. Jantz to tell him that a request for information marked "confidential" by an operator would require a process to determine whether disclosure was appropriate, that State offices were closed on September 5, 2011, and that Mr. Smith would investigate that process and respond to Mr. Jantz thereafter. On September 6, 2011, MMD notified RGR of the Request. On September 7, 2011, Mr. Smith notified Mr. Butzier, RGR's counsel, of the Request.

Under NMSA 1978, Section 69-36-10, an operator may designate certain material as "confidential." If a request to review such material is made, the MMD Director is required to provide the operator a "reasonable opportunity [to] substantiat[e] ... the claim that public disclosure of the information could harm the competitive position of the operator." Also on

Exhibit C

Mining and Minerals Division  
1220 South St. Francis Drive • Santa Fe, New Mexico 87505  
Phone (505) 476-3400 • Fax (505) 476-3402 • [www.emnrd.state.nm.us/MMD](http://www.emnrd.state.nm.us/MMD)



October 31, 2011

Page 2

September 7, 2011, Mr. Smith notified Messrs. Jantz and Butzier of the provisions of Section 69-36-10, and that the Director requested that RGR submit its substantiation of the claim of confidentiality by September 20, 2011. RGR complied with that request. Mr. Jantz was out of the office during the week that RGR submitted its substantiation letter, but having been contacted by Mr. Smith, Mr. Jantz requested until October 3, 2011, to respond to RGR's substantiation letter, which response was timely received by MMD.

There are a couple of preliminary matters in Mr. Jantz's Request that I would like to address. First, Mr. Jantz refers to Mr. Ohori's "testimony" at the August 17, 2011, public hearing on the renewal of standby status for the Permit. For clarity, I remind you that MMD staff did not testify at the hearing. MMD conducted the hearing, and staff made a presentation on the history and status of the permitting process for the purposes of providing information to attendees and providing context for the hearing.

Second, in his Request, Mr. Jantz remarks that RGR's submission of a confidential economic analysis was not made known until the August 17, 2011, hearing. To the contrary, on June 21, 2010 notice of the application was published in the *Gallup Independent* newspaper and on June 22, 2010, notice of the application was published in the *Cibola County Beacon* newspaper. Both notices contained the following provisions:

A copy of the Standby Status Application is available for inspection at the Public Library in Grants, New Mexico and also at the MMD [previously defined] offices below. \*\*\* The application may also be viewed on the MMD website at: <http://www.emnrd.state.nm.us/MMD/MARP/MARPMainPage.htm>. \*\*\* (Click on Pending Permit Application, then scroll down to Pending Mine Applications, Regular Existing).

Additionally, the New Mexico Environmental Law Center ("NMELC") had earlier requested notice of the filing of the application, and a copy of the notice was mailed directly to NMELC on June 17, 2010.

In the copies of the applications that were made available for public inspection, including inspection by NMELC, Attachment 3 of the application ("Attachment 3") was marked with the following language: "**Confidential Business Information NOTE:** Attachment removed and placed in the **Confidential File for the Mt. Taylor Mine, Permit No. CI002RE.**" (Emphasis in original). Thus, it was plain to all who reviewed the application that RGR had submitted confidential business information as part of its application, and that that part of the application was being shielded from public inspection.

It is my understanding that Mr. Jantz visited the MMD offices on January 26, 2011, reviewed the application, and had copies made. MMD staff were present and available to answer questions that Mr. Jantz may have had. No question was raised about the portion of the application that was being treated as confidential and that was not provided for inspection.

Having reviewed RGR's September 20, 2011 submittal and Mr. Jantz' October 3, 2011 submittal, RGR has substantiated to my satisfaction that public disclosure of Attachment 3 could harm RGR's competitive position.

I am treating Mr. Jantz's request as having been made under the Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 through 12 ("IPRA"). The right to inspect that is granted by IPRA does not apply when it is "otherwise provided by law." § 14-2-1(A)(8). Section 69-36-10 provides that exploration maps, financial information, information concerning the grade or location of ore reserves or trade secret information will remain confidential if the Director is satisfied that releasing it could harm the competitive position of the operator.

Attachment 3 is RGR's analysis of the viability of the Mine. It includes historical and projected demand for, supplies of and prices of, uranium, both generally and for the Mine in particular. It also contains detailed historical and projected operating costs of the mine, broken down into various, specific cost categories, a projected cost per pound to produce uranium from the Mine and a cash flow analysis. In short, Attachment 3 contains various analyses, which culminate in conclusions concerning the viability of the Mine. According to RGR's September 20, 2011 submittal, certain of the data contained in these analyses are derived from subscription services, for which RGR pays a fee.<sup>1</sup>

Attachment 3 information is financial information. It also appears to be trade secret information. While not controlling in this context, the New Mexico Trade Secrets Act may be instructive. NMSA 1978, Section 7-3A-2 defines a trade secret as:

information, including a formula, pattern, compilation, program, device, method, technique or process, that:

- (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

With respect to condition number (1), an analysis of the viability of the Mine, along with the sub-analyses of anticipated demand, supply, price and costs could be valuable to others, if disclosed, and the value of the analysis to RGR is increased if not divulged. With respect to condition (2), above, the efforts undertaken to maintain Attachment No. 3's secrecy pursuant to State statute seem to me to be reasonable.

I believe, then, that the analyses and information in Attachment 3 are the type of information that is to be protected under Section 69-36-10. The remaining question is whether disclosure "could harm the competitive position of" RGR. I believe that it could. Detailed operating cost estimates and projected price, supply and demand, upon which RGR will apparently rely, could influence competitor's decisions related to production timing, schedules and pricing, thereby harming RGR's competitive position. The information and analyses in Attachment 3 also could affect RGR's negotiations with virtually any third party upon whom it will rely in order to operate the Mine, including vendors and employees. Whether the competitor is another provider of uranium ore or an entity with whom RGR must negotiate in order to operate the mine on a day-to-day basis, knowledge of RGR's finances and expectations with respect to market and costs could yield an advantage to those with whom RGR competes.

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<sup>1</sup> I do not believe that the subscription service's prohibition on reproducing the "Report" is a prohibition on disseminating the information in it, as RGR implies; but the point stands nonetheless that RGR paid for such information.

October 31, 2011

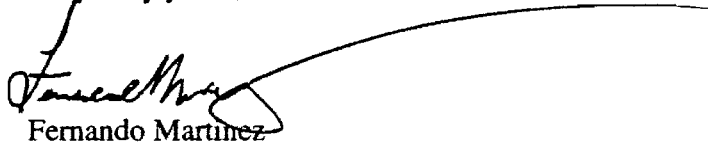
Page 4

Mr. Jantz appears to invite parsing Attachment 3: "The statute's plain language does not contemplate that an entire analysis of a mine's future economic viability as required by the Act and its implementing regulations should remain confidential."<sup>2</sup> October 3, 2011 letter, p. 3. While it is true that an agency may redact exempt material from a document and produce the remainder, I do not believe that this is such an instance. To do so would require MMD to attempt to separate data and analysis that is integrated into a whole. As I stated, above, I believe that the analyses and the reasoning contained in them are information that is to be protected. Much of the data is confidential, in its own right, as well. Even if some of the data might be subject to release if they were simply listed, unsurrounded by other data and analyses, in another format, the selection of those data and the use to which they are put in the format of this analysis could be revelatory to competitors. I do not believe that it is appropriate for MMD to attempt to winnow data from one document that, if in another format, might be subject to inspection. The obligation of an agency under IPRA relates to providing documents, or portions of them, for inspection, not to sifting through information provided in one, confidential format in order to place it in another, producible format.

For these reasons, I believe that I am obligated to maintain the confidentiality of Attachment 3.

I thank you both for your submittals and the work that each of you did in helping me come to a decision on this matter.

Very truly yours,



Fernando Martinez  
Acting Director, Mining and Minerals Division

Attachment

bcc: Holland Shepherd, Program Manager, MARP  
David Otori, Permit Lead, MARP  
Mark C. Smith, Assistant General Counsel, MMD

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<sup>2</sup> It is not accurate to say that the entire analysis is shielded from production. A summary of portions of the analysis is contained in Section 1.6 of the application.



*Handwritten mark*

**STATE OF NEW MEXICO  
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT  
Director  
Mining and Minerals Division  
1220 St. Francis St.  
Santa Fe, New Mexico 87505  
Telephone: (505) 476-3400**

**MINING INSPECTION REPORT**

<b>Name of Operator:</b> Rio Grande Resources, Inc. (RGR)	
<b>Name of Mine:</b>	Mt. Taylor Mine
<b>Address:</b> About 20 miles north of Grants (UTM 13S 0260351, 3914011)	
<b>Permit Number:</b> CI002RE	
<b>Commodity:</b> Uranium	<u>  </u> SURFACE <u>  </u> <u>  </u> X
<b>UNDERGROUND</b>	
<b>Date of Inspection:</b> March 25, 2009	
<b>Time of On-Site Inspection:</b> 10:00 am – 1:00 pm	
<b>Weather Conditions:</b> Sunny 40° - 55°F	
<b>Purpose of Inspection:</b> Annual inspection.	
<b>Lead Inspector:</b> David Ogori	
<b>Present During Inspection:</b> NMED – Jerry Schoeppner; RGR - Joe Lister	
<b>ENFORCEMENT ACTION TAKEN:</b> None	
<b>NOTICE OF VIOLATION:</b> # <u>      </u> YES: <u>  </u> NO: <u>  </u> X	
<b>CESSATION ORDER:</b> YES: <u>  </u> NO: <u>  </u> X	
<b>Time: On-Site:</b> <u>  3  </u> <b>Permit Review:</b> <u>  1  </u> <b>Travel:</b> <u>  5  </u> <b>Report Writing:</b> <u>  1  </u>	
<b>TOTAL INSPECTION TIME:</b> <u>  10  </u> HOURS	
<b>NOTE:</b> Mt. Taylor Uranium Mine is located NE of the Town of San Mateo, UTM 13S 0260351, 3914011 on the San Mateo Quad.	

Exhibit E



**ANNUAL INSPECTION****March 25, 2009  
Mount Taylor Mine****PERMIT UPDATE:**

The Mt. Taylor Uranium Mine is in standby status until it expires on July 5, 2010. The current standby status is the first renewal of standby after the initial standby status period. The renewal and the original standby status periods were for 5 years each. The mine is eligible for 2 more extensions of standby with a maximum of 5 years per extension.

NMED is currently processing DP-1712 for the discharge of up to 14,400 gallons per day (10 gpm) of mine water that has been treated using an ion exchange treatment system back into the mine for a period of up to 120 days. The pilot scale project is designed to test various water treatment ion exchange resins to remove uranium, radium and other contaminants from the mine water. The successful treatment system may be used in the future when the mine is preparing to reopen and the underground mine workings are dewatered.

**INSPECTION NARRATIVE:**

Joe Lister, the mine manager, escorted the MMD and NMED inspectors around the mine site. The mine was owned by Gulf Oil Corporation from the early 1970's until 1984 when it merged with Chevron. The mine operated until 1989 when it was shut down due to depressed uranium prices. RGR, a subsidiary of General Atomics bought the mine in 1991. At the peak of mining, Joe said that the mine employed over 800 miners and staff. Per Joe, there are over 100MM pounds of uranium oxide ore in reserve at the mine. Over \$150MM was spent to develop the mine and it would take another \$100MM to reopen it according to Joe.

The first stop was the water supply area located to the east and upgradient of the other mine facilities (see photos). Here a series of wells are used to supply process and potable water for the site. Since the water is geothermal and is approx. 130°F some of it must be cooled using chiller units and cooling towers and a portion diverted for potable use is disinfected using chlorine gas. A portion of the geothermal water has been used for heating buildings and preheating potable hot water systems.

The main head frame (see photo) is located above the 24 foot diameter, 3,300+ foot deep main mine shaft. A smaller head frame (see photo) is located above a 14 foot diameter shaft of the same depth. Other buildings (see photo) house support shops. The existing waste rock stockpile top surface has been used as an equipment lay down yard (see photo). The waste rock pile is located near the southwest corner of the permit area. The outcrops (see photos) are partially revegetated from seeding done in the past and from volunteer vegetation. Stormwater is retained along the perimeter of the waste rock pile and directed to a nearby stormwater retention pond. The outcrops have erosion rills in them, however, the erosion appears to be minor and is retained onsite along with the

stormwater. The mine appears to be in compliance with the terms of the standby status in preventing discharges from the mine of acidic or toxic substances, and meeting state and federal environmental standards. Stormwater appears to be handled using appropriate methods.

A forest service road bisects the mine site traveling from southwest to northeast. The mine maintains the road up to where it leaves the mine property onto USFS controlled land (see photo). According to Joe, periodically the mine has to deal with trespassers that are dumping garbage in the nearby arroyos, processing drugs, or hunting in the area.

The location of a proposed new waste rock pile is to the north (see photos) of the current mine disturbance. The new waste rock pile will be used when the mine starts up again. Prior to depositing waste rock to the new pile, RGR will excavate and store borrow material from that area to be used for mine reclamation. Most of the mine area that is used for treatment of mine water will be used for water treatment as a PMLU when the mine permanently ceases operations. In addition, most of the mine buildings will also remain after cessation of operations.

Joe took the inspectors into the administration and warehouse building that is connected by underground tunnels to the hoist house and the two shafts. These facilities are currently being maintained by the mine and appear as if the mine closed down only yesterday. A system of water and air handling systems are maintained in the main mine buildings and in underground tunnels so that when the mine reopens these systems can be used with modification to bring them up to current safety and operational standards.

Joe said that there are no current plans to reopen the mine prior to the expiration of the current standby extension period. He said that the parent company, General Atomics, is currently putting significant resources into other mines in Australia and other places. However, he said that the mine could be profitable if the price of uranium was at least \$50 per pound. Currently uranium is at approx. \$80 per pound. If the mine reopens, RGR is considering opening a mill facility that would be located approx. 6 miles farther north up the canyon.

The state inspectors exited the mine at approximately 1 pm.

**ACTION ITEMS:**

NMED will continue processing DP-1712. MMD will consider requiring the inclusion of the approx. 6 mile long treated mine water pipeline into the permit area or as an affected area when the mine applies for an extension of standby status in 2010.



SUSANA MARTINEZ  
Governor

JOHN SANCHEZ  
Lieutenant Governor

State of New Mexico  
**ENVIRONMENT DEPARTMENT**  
Ground Water Quality  
Harold Runnel

1190 St. Francis Drive  
Santa Fe, New Mexico

Telephone (505) 827-2918

www.nmenv.state.nm.us

**CERTIFIED MAIL - RETURN**

May 2, 2011

Mr. Joe Lister  
Rio Grande Resources Corporation  
Mt. Taylor Mine  
P. O. Box 1150  
Grants, New Mexico 87020

**RE: Conditional Approval of Stage 2 Abatement Plan for the Mt. Taylor Mine, DP-61**

Dear Mr. Lister:

Pursuant to the New Mexico Water Quality Control Commission Regulations (WQCC), 20.6.2.3109.E.1 NMAC, the Stage 2 Abatement Plan Proposal dated August 2010 and additional information submitted on February 1, 2011 for the Mt. Taylor Mine is hereby approved subject to the conditions and requirements listed below. In conditionally approving this proposal, the New Mexico Environment Department (NMED) has determined that the Stage 2 Abatement Plan proposal (Plan) as contained in the August 2010 and February 1, 2011 submittals meets the requirements of WQCC Regulation 20.6.2.3109.E.1 NMAC.

The Mt. Taylor Uranium Mine was originally owned by Gulf Mineral Resources, a subsidiary of Gulf Oil. The mine has since been sold, first in 1985 to Chevron Resources and then in 1991 to Rio Grande Resources Corporation (RGRC), who owns both the mineral and surface rights. Development of the mine started in 1971 with the drilling of two shafts and ore was produced during two separate occasions, 1979 to 1982 and from 1985 to 1990. In 1990 the mine was placed on stand-by due to low uranium prices and has remained there ever since.

During development and operation of the mine, a cattle pen and watering hole was converted to a sewage lagoon and was used to manage domestic waste until a wastewater treatment system was installed in 1980. Based on previous Stage 1 Abatement Plan investigation activities, it appears that the sewage lagoon seeped fluids which created saturated conditions in the previously dry alluvium directly downgradient of the lagoon. Contaminants including nitrate, sulfate, total dissolved solids, and uranium are present in concentrations above standards in the saturated alluvium. Previous Stage 1 Abatement Plan investigation activities have delineated the extent and magnitude of groundwater contamination as well as a characterization of the hydrogeology of the site. The purpose of the Plan is to remediate alluvial groundwater downgradient of the former sewage lagoon. Approval of this Plan does not relieve RGRC of its responsibility to comply with federal state and/or local laws and regulations.

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Mt. Taylor Mine/PO Box 1150  
Grants, New Mexico 87020

Street, Apt. or PO Box  
City, State

PS Form 3800, August 2008 See Reverse for Instructions

Exhibit F

### **CONDITIONS FOR APPROVAL**

This conditional Plan approval is subject to the following conditions:

1. RGRC shall pump alluvial groundwater from well WP-5 to augment dewatering of the alluvial aquifer by Saltcedar uptake and dispose of contaminated water in the existing open top tank through evaporation.
2. RGRC shall collect groundwater samples from all existing wells that have groundwater present on a semi-annual basis and submit samples to the laboratory for analysis for nitrate, sulfate, total dissolved solids, and uranium.
3. The Stage 2 Abatement Plan shall be revised if results from the characterization activities for the waste rock pile indicate that the waste rock pile or storm water retention pond is a source for alluvial groundwater contamination.
4. The proposed site abatement activities shall be performed in accordance with the Plan dated August 2010 and additional information dated February 1, 2011.

### **GENERAL ABATEMENT PLAN REQUIREMENTS**

In addition to any other requirements provided by law, approval of this abatement plan proposal is subject to the general requirements specified in WQCC Section 20.6.2.4107. This regulation provides for:

1. NMED entry, inspection and sampling at the site and on the property;
2. Notification to NMED of sampling and well plugging, abandonment or destruction; and
3. Requirements for well plugging, abandonment or destruction.

### **MODIFICATIONS**

RGRC shall notify NMED, pursuant to WQCC Section 20.6.2.4111A, of any proposed modifications to this approved plan and shall obtain NMED's written approval for such modifications. WQCC Section 20.6.2.4111.B also provides for possible future amendment of the abatement plan by NMED.

### **DISPUTE RESOLUTION AND RIGHT TO APPEAL**

If RGRC is dissatisfied with the action taken by NMED, RGRC may either initiate the dispute resolution procedures of the WQCC Section 20.6.2.4113 NMAC or file a petition for a hearing before the WQCC pursuant to WQCC Section 20.6.2.4114. Either request shall be made within thirty (30) days of the receipt of this letter. The notification of a dispute shall be by certified mail to the secretary of NMED. The petition for hearing shall be in writing to the WQCC. Unless a timely request for dispute resolution or hearing is made, the decision of the NMED shall be final.

**TRANSFER OF ABATEMENT PLAN**

Pursuant to WQCC Section 20.6.2.4104.B, at least 30 days prior to any transfer of ownership or responsibility, RGRC shall notify the transferee in writing that an abatement plan has been required or approved for this facility and shall deliver or send by certified mail to NMED a copy of such notification together with a certificate or other proof that such notification has in fact been received by the transferee.

**ENFORCEMENT**

Please be aware that the conditions, requirements and provisions of this abatement plan approval are enforceable pursuant to § 74-6-10 NMSA 1978. Violations of this abatement plan may subject RGRC to a notice of violation, compliance order, civil penalties or an action in district court. Violations may also subject RGRC to NMED modification of DP-61 pursuant to 20.6.2.3109.E NMAC.

If you have any questions, please contact Jerry Schoeppner at (505) 827-0652.

Sincerely,



William C. Olson, Chief  
Ground Water Quality Bureau  
New Mexico Environment Department

cc: Mary Ann Menetrey, Manager, MECS  
Charles Thomas, Chief, Mine Reclamation Bureau  
David Otori, MMD  
Jerry Schoeppner, GWQB ✓  
Gary Richardson, Metric Corporation  
DP-61 file