GreenFire report

New Mexico Environmental Law Center

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March 2019

Legislative Update

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The Law Center and our environmental and environmental justice allies were optimistic after the environmentally friendly "blue wave" in the November elections last year. After eight years of playing defense in the Legislature, we were looking forward at long last to the possibility of enacting good environmental legislation. Reality in the Legislature during this 60-day session has been more sobering.

The Law Center and its clients Amigos Bravos and the Gila Resources Information Project (GRIP) actively supported two bills dealing with mining. Under the New Mexico Mining Act, mining companies are required to provide financial assurance to cover the costs of post-mining cleanup so that the State and taxpayers are not left on the hook. Freeport McMoRan, which operates copper mines in Grant County and is the second largest copper producer in the world, failed a financial "stress test" several years ago. During negotiations with the State, the company switched its financial assurance to one of its mining affiliates. **HB 255** would prohibit using

a guarantee from an affiliated corporation as financial assurance, which would help eliminate the risk that if the mining company failed – something that would likely also impact an affiliate corporation – the financial assurance would not be available. The proposed legislation would have given mining companies two years to switch to other forms of guarantee. However, even with a long transition period and the fact that other mining states in the country prohibit corporate guarantees, Freeport and other mining interests strongly opposed the legislation, claiming it would threaten mining and mining jobs in New Mexico. The legislation died.

HB 220 was aimed at fixing language in the Water Quality Act (WQA) that had been exploited by copper mining interests during the writing of the Copper Mining Rule. The WQA says that water quality standards apply to groundwater "at any place of withdrawal of water for present or reasonably foreseeable future use." For surface water, water quality standards apply at the point of discharge of contaminants. This had long been understood by the courts to mean that because New Mexico is an arid state with limited water, any source of groundwater is a "reasonably foreseeable" place of withdrawal for use and each mine operating permit would be decided on a case-by-case basis. However, the Copper Rule, written primarily by the mining industry, created an industry-wide exemption of all groundwater located beneath mine operating units because it allowed monitoring wells only at the periphery of mine operations. Using a tortured reading of the Act, the New Mexico Supreme Court interpreted "place of withdrawal" to refer to withdrawal using monitoring wells to test water quality, not place of withdrawal "for use", as the Act reads. HB 220 substituted the place-of-withdrawal language with the same language used for surface water: water quality standards would apply at the point a discharge entered the groundwater. The mining industry, which has operated successfully under the Water Quality Act since it was adopted in 1967 and the Mining Act since it was adopted in 1993, launched an aggressive and at times ugly campaign saying that HB 220 would shut down all mining in the state forever, in part because, they said, it is "impossible" to meet water quality standards with open pit mining. The legislation died.

One success came in killing SB 621. This bill would have done several things: change the definition of a "rule" and rulemaking; have every rule automatically expire after 12 years, with the option of re-adoption by the relevant agency at any time; and codify public petition for rulemaking with an affirmative duty by the relevant agency to approve the petition or explain why not. We opposed the bill for several reasons. The new definition of a "rule" made it unclear whether certain agency actions were – or were not – "rules" subject to the new procedures. Forcing agencies to constantly re-adopt their rules – agencies have hundreds of rules – would drain agency resources in staff time and outside costs for hearing officers and technical and legal experts and also put a heavy burden on communities impacted by the loss of rules and constant re-adoption. Finally, the public is already able to petition for rule changes but forcing agencies to grant all petitions – regardless of merit – or issue a substantive reason why a petition is not being granted would be both disruptive and time-consuming, especially because many of the decisions would require public hearings.

The Law Center is still following several bills, some good, some not. The session ends on March 16. A lot can happen before then.

Case Updates

Mt. Taylor Mine – On February 28, the Law Center filed our Statement of Appellate Issues with the 1stJudicial District Court (Santa Fe). Our clients, the Multicultural Alliance for a Safe Environment and Amigos Bravos, are appealing the Mining Commission approval of the Mining and Minerals Division Director's approval of the Mt. Taylor mine revision to "operational" status. Among other reasons, we are challenging the permit returning the mine to "operational" status because the mine will not be producing minerals for the foreseeable future and because the Commission prohibited any evidence on the lack of economic viability under "operational" status. *Attorney: Eric Jantz.*

LANL Consent Order – On March 6, we filed our Replies with the US District Court in our client's lawsuit regarding the Los Alamos National Laboratory Consent Order. Our client, Nuclear Watch New Mexico (NWNM), had filed a Motion for Partial Summary Judgement against the Department of Energy (DOE) and Los Alamos National Security (LANS), which operates the Lab, regarding liability (potentially about $300 million) for violations of the Resource Conservation and Recovery Act (RCRA). At issue are violations that took place under the original 2005 Consent Order, which the Lab and the New Mexico Environment Department (NMED) sought to avoid by agreeing to a new Consent Order in 2016. DOE, LANS, and NMED responded to the Motion, and this filing is our set of replies. Because neither the DOE nor LANS has ever been able to document that the violations have stopped and/or will not occur again in the future, we argue that the 2016 Consent Order does not make the NWNM lawsuit moot nor does it remove possible civil penalties. *Attorneys: Jon Block & co-counsel John Stroud; Kendra Palmer, Law Center paralegal.*

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