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From: Mark W. DeLaquil – Baker & Hostetler LLP
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Re: Florence Copper's Substantive Position on Minerals-Based Aquifer Exemptions

Florence Copper, Inc. ("**FCI**") believes that the Underground Injection Control ("**UIC**") program rules necessitate that an aquifer exemption established under 40 C.F.R. §§ 146.4(a)-(b)(1) and 144.7(b)-(c)—i.e., a minerals-based aquifer exemption—cannot be diminished or revoked while (i) there are activities ongoing that a UIC permit issued based on the exemption authorizes within the boundaries of the exemption or (ii) activities in material reliance on the exemption are reasonably expected to occur within the boundaries of the exemption. FCI's argument in support of this position is as follows:

1. The rules authorizing minerals-based aquifer exemptions should be construed in a way that preserves (a) the balance that Congress intended between the protection of underground sources of drinking water and the need to accommodate underground solution mining and (b) the utility and functionality of the Class II and Class III permit rules.

a. "The principal legislative history [of the Safe Drinking Water Act] explains that the statute was primarily aimed at controlling underground injections of waste; although Congress also intended that injection mining activities be covered, it contemplated regulation, not prohibition, because of the importance of avoiding needless interference with energy production and other commercial uses." *Western Nebraska Resources Council v. EPA*, 943 F.2d 867, 870 (8th Cir. 1991) (citing H.R. Rep. No. 93-1185, 93rd Cong., 2d Sess., reprinted in 4 1974 U.S. Code, Cong. & Admin. News 6454, 6480-6484). The UIC program rules achieve the balance that Congress intended. In a July 21, 2014 memorandum from EPA's Office of Ground Water and Drinking Water ("**OGWDW**") to the Water Division Directors of Regions I-X, at page 3, the Director of OGWDW stated as follows:

> EPA's regulatory approach to aquifer exemptions was promulgated in a 1980 rulemaking. EPA determined that without aquifer exemptions, certain types of energy production, solution mining, or waste disposal would be severely limited. Thus, the regulatory approach that EPA adopted—a broad definition of covered underground waters coupled with a discretionary exemption mechanism—allows the agency to prevent endangerment consistent with the statute while allowing some case-by-case consideration. This approach protects underground sources of drinking water while also allowing underground injection associated with industrial activities including the production of minerals, oil, or geothermal energy. EPA retains the final approval authority over aquifer exemption decisions regardless of state primacy status.

See also 45 Fed. Reg. 42472, 42480-81 (June 24, 1980) (discussing concern that limiting minerals-based exemptions to those portions of an aquifer that are currently "[m]ineral, hydrocarbon, or geothermal energy producing" could hamper future development of mining sites "because of the uncertainty of whether or not the mining site could receive an exemption"); 46 Fed. Reg. 48243 § II.B (October 1, 1981) ("The Agency is also proposing to modify the first exemption criterion which could have been construed as prohibiting mineral exploitation of previously unproduced areas . . . EPA is proposing a modification to allow for exemption of aquifers if they are expected to yield commercially-producible minerals or hydrocarbons."); 47 Fed. Reg. 4992, 4998 (February 3, 1982) (revising exemption criterion at 40 C.F.R. § 146.04(b)(1), later renumbered to § 146.4(b)(1), to add basis of exemption if the portion of the aquifer "can be demonstrated by a permit applicant as part of a permit application for a Class II or Class III operation to contain minerals or hydrocarbons that considering their quantity and location are expected to be commercially producible").

b. The utility and functionality of the Class II and Class III permit rules depend on the continuation of each aquifer exemption established under 40 C.F.R. §§ 146.4(a)-(b)(1) and 144.7(b)-(c) for the duration of all activities that the permit issued based on the exemption authorizes within the boundaries of the exemption and all activities that are otherwise reasonably expected to occur in reliance on the exemption. This is because: (i) underground solution mining cannot legally occur within an underground source of drinking water ("**USDW**"); (ii) the majority of aquifers in the U.S. (all aquifers that contain fewer than 10,000 ppm total dissolved solids), including those that contain commercially producible minerals, are legally USDW unless they are exempted; (iii) a Class II or Class III UIC permit effectively ceases to have legal force as written if the exemption that was a material basis of its issuance is diminished, because the permit's conditions to protect USDW are based on the lateral and vertical limits of the exemption; and (iv) underground solution miners would be reluctant to invest significant resources in reliance on a Class II or Class III permit or the UIC program rules if aquifer exemptions, though required for such permits' issuance, are considered to be diminishable.

2. While the rules explicitly provide for the expansion of aquifer exemptions, *see, e.g.,* 40 C.F.R. § 146.4(d), the rules provide no administrative mechanism for the diminishment of an aquifer exemption subsequent to its establishment and a permittee's expenditures in reliance on the exemption. Nor is there any precedent for such a diminishment of an exemption. Given (a) the Class II and Class III permittees currently operating in reliance on over 3,000 minerals-based exemptions throughout the U.S., (b) the substantial disruption to their existing investments if such precedent is set, (c) the adverse effect on the industry's willingness to invest further in underground solution mining if such precedent is set, (d) the legislative and regulatory history of the UIC program which favors a balance between protecting USDW and accommodating underground solution mining, and (e) the need to preserve the utility and functionality of the Class II and Class III permit rules, the UIC program rules should never be interpreted in a way that allows for an aquifer exemption established under 40 C.F.R. §§ 146.4(a)-(b)(1) and 144.7(b)-(c) to be diminished or revoked while (i) there are activities ongoing that a permit issued based on the exemption authorizes within the boundaries of the exemption or (ii) activities in material reliance on the exemption are reasonably expected to occur within the boundaries of the exemption. This position would not preclude the revocation of a minerals-based aquifer exemption after the minerals within the lateral and vertical limits of the exemption have been mined to the point that there remain no commercially producible minerals within the limits of the exemption.