STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

In the Matter of:

PROPOSED AMENDMENTS TO *GROUND AND SURFACE WATER PROTECTION* REGULATIONS, 20.6.2 NMAC

No. WQCC 17-03 (R)

THE NEW MEXICO ENVIRONMENT DEPARTMENT'S RESPONSE IN OPPOSITION TO AMIGOS BRAVOS' AND GILA RESOURCES INFORMATION PROJECT'S MOTION TO DISMISS IN PART THE NEW MEXICO ENVIRONMENT DEPARTMENT'S PETITION TO AMEND 20.6.2 NMAC

Pursuant to the New Mexico Water Quality Control Commission's ("WQCC" or "Commission") regulations at 20.1.6.207.D NMAC, the New Mexico Environment Department (the "Department" or "NMED") submits this response in opposition to Amigos Bravos' and Gila Resources Information Project's (collectively "AB/GRIP") Motion to Dismiss in Part the New Mexico Environment Department's Petition to Amend 20.6.2 NMAC (the "Motion"). The changes that the Department has proposed to the Commission's Ground and Surface Water Protection regulations at 20.6.2 NMAC (the "Regulations") are fully within the Commission's and the Department's authority under the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 ("WQA"). The Motion is without merit and should be denied for the reasons set forth below.

BACKGROUND

On May 1, 2017, following an extensive public outreach and stakeholder engagement process, the Department filed its Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC) (the "Petition"), proposing numerous changes to the Regulations. Among the Department's proposed changes are two that AB/GRIP now challenge as contrary to the WQA. First, AB/GRIP objects to the Department's proposal to amend 20.6.2.1210 NMAC to allow the Commission to grant variances from the Regulations for periods longer than five years.

The proposed changes include a requirement for submission of "variance compliance reports" to the Department to ensure that the conditions of the variance are being met, and requiring notification of changed circumstances or newly-discovered facts. If the conditions are not being met, or if there is evidence indicating changed circumstances or newly discovered facts or conditions unknown at the time the Commission originally granted the variance, the proposed changes would allow any person, including the Department, to request a hearing before the Commission to revoke, modify, or otherwise reconsider the variance.

The second proposed change challenged by AB/GRIP is the addition of a definition of "discharge permit amendment" to the Regulations at 20.6.2.7.D(4), as follows:

> **"discharge permit amendment"** means a minor change to the requirements of a discharge permit that meets the requirements of 20.6.2.3109.I NMAC, and does not result in:
>
> **(a)** a change in the location of a discharge that would affect groundwater beyond that impacted by the existing discharge location;
>
> **(b)** an increase in daily discharge volume of greater than ten percent of the daily discharge volume approved in the most recent discharge permit approval, renewal or modification for an individual discharge location, and where the sum of any volume increases via amendments during a permit term is greater than ten percent of the approved, renewed or modified discharge permit volume, or greater than 50,000 gallons/day, whichever is less;
>
> **(c)** any increase in discharge volume for a facility that is conducting abatement of water pollution;
>
> **(d)** an increase in an effluent limit set forth in the most recent discharge permit approval, renewal or modification for an individual discharge location;
>
> **(e)** introduction of a new water contaminant;
>
> **(f)** a reduction of existing monitoring, reporting, or recordkeeping requirements; or
>
> **(g)** submission of multiple amendment applications that, taken together, would not be eligible as an amendment. The secretary may, at his discretion, require that multiple related amendments be treated as a discharge permit modification.[1]

[1] The Department notes that subsections (f) and (g) are new additions since the last version of the Department's proposed rule changes was filed on July 27, 2017. The revised definition will be included in a revised version of the proposed rules filed along with the Department's rebuttal testimony on October 27, 2017.

This definition would expressly delineate what is currently the implicit counterpart to the existing definition of a "discharge permit modification," which means:

> a change to the requirements of a discharge permit that result from a change in the location of the discharge, a significant increase in the quantity of the discharge, a significant change in the quality of the discharge, or as required by the secretary.

20.6.2.7.P NMAC. The proposed definition of "discharge permit amendment" would codify the Department's long-standing practice of allowing for certain minor changes to discharge permits that do not fall within the regulatory definition of "discharge permit modification" without the full, extensive public notification and hearing procedures required for discharge permit modifications. Prior to and following the filing of the Department's Petition, the Department met and corresponded with AB/GRIP and their counsel, and made numerous changes to the language to address concerns raised by AB/GRIP. Nonetheless, AB/GRIP has chosen to categorically oppose those changes.

As explained below, the Department's proposed changes are fully consistent with the WQA, and AB/GRIP's challenge to the Commission's authority is premature. Thus the Commission should allow the Department's proposed changes to proceed to hearing, after which the Commission can decide whether to adopt these changes and, if so, what particular language should be implemented.

ARGUMENT

I. The WQA Expressly Allows the Commission to Grant Variances for Periods Longer than Five Years

Section 74-6-4(H) of the WQA sets forth the Commission's authority to grant variances from the Commission's regulations as follows:

> [The Commission] may grant an individual variance from any regulation of the commission whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. The

> commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time. ***Any variance shall be granted for the period of time specified by the commission.*** The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted[.]

(Emphasis added). There is absolutely nothing in this language that limits the Commission to granting variances for a period of five years, or that ties a variance to the term of a permit. Indeed, the statute expressly leaves the time period of a particular variance to the discretion of the Commission, providing that a variance "shall be granted for the period of time specified by the commission."

The Department's proposed changes are entirely consistent with the language of the statute. Currently, 20.1.2.1210.C NMAC reads as follows: "The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. The commission shall not grant a variance for a period of time in excess of five years." The Department's proposed changes would align the regulation with the statute, providing as follows: "The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. If the variance is granted in whole or in part, or subject to conditions, the commission shall specify the period of time that the variance shall be in place."[2] The proposed language mirrors the plain language of the statute, and therefore does not transgress or exceed the Commission's statutory authority in any way. Accordingly, the Department should be permitted to submit testimony and evidence at the rulemaking hearing to

[2] The Department notes that this language is modified slightly from the last version of the proposed rule filed by the Department on July 27, 2017. The quoted language is what the Department intends to include in a revised version of its proposed changes that will be filed on October 27, 2017, along with the Department's rebuttal testimony. The changes are minor and do not alter the substance of the previously proposed changes in any way.

demonstrate to the Commission why this change is preferable to the current provisions of the rule that limit the Commission to granting variances for five year periods.

AB/GRIP make a number of statements and arguments regarding the Department's proposed changes to the variance provisions that are entirely unsupported by the language of the proposed changes as well as the language of the WQA. AB/GRIP assert that "the WQA does not authorize a variance to exceed the term of a permit," citing Section 74-6-5(I) of the WQA which provides that permits shall be issued for fixed terms not to exceed five years. However, there is nothing in the language of the WQA indicating that a variance issued by the Commission under Section 74-6-4(H) is limited to the term of a permit issued by the Department under Section 74-6-5(I). In fact, as noted previously, the WQA expressly leaves the term of a variance to be set at the discretion of the Commission. While the Commission previously decided to limit the term of a variance to five years by regulation, there is nothing that prevents the Commission from now changing its regulations to be consistent with the language of the WQA. As the Department will show through its testimony at the hearing in this matter, the Commission should remove the five-year limit on variances so as to allow for regulatory flexibility and efficiency.

Next, AB/GRIP speculate on a variance being granted "for the life of a facility," with such a hypothetical variance being granted for over 100 years. AB/GRIP assert that there "can be no doubt that this violates both the [WQA's] purpose of preventing and abating pollution of ground water and the 'reasonable period of time' limitation of Section 74-6-4(H)." Motion at p. 6. The language proposed by the Department does not say anything about "the life of a facility." It simply allows the Commission, after evaluating testimony and evidence presented at a hearing, to determine the length of a variance. Nor would all variances necessarily result in water pollution that would need to be abated. As explained in the written direct testimony of the Department's

witness Kurt Vollbrecht ("Vollbrecht Direct Testimony"), given the highly prescriptive nature of the Commission's modern-day regulations, including the Copper Rule and the Dairy Rule, variances could be for anything from the number or location of monitoring wells, to certain design specifications of a facility. Such a variance could be granted for the life of a facility without causing any pollution whatsoever. The point is that the Commission should have the flexibility to grant variances, if, following a public hearing, the Commission finds that a time period longer than five years – perhaps even for the life of a facility – is appropriate based on the specific circumstances demonstrated by the evidence and testimony presented at the variance hearing.

AB/GRIP next argue that the Department's proposed language providing for five-year reviews of variances granted for longer than five years "would be the functional equivalent of a variance renewal or extension" of a variance. In support of this argument, AB/GRIP purport to quote Section 74-6-4(H) of the WQA as providing that a variance "may not be extended or renewed unless a new petition is filed and ***a public hearing is held***." Motion at p. 6 (emphasis in original). However, such language does not appear in Section 74-6-4(H), or anywhere in the WQA for that matter. The Department has not been able to discern where the quoted language comes from. Regardless, the Department's proposed language providing for a "variance compliance report" to be submitted at five year intervals is not the equivalent of a petition for renewal or an extension, since the variance would have been issued by the Commission, following a public hearing, for the specified time period and would not need to be renewed or extended. The report is simply to ensure compliance with any conditions of the variance, and to identify any changed circumstances or newly discovered facts that might warrant revision or revocation of the variance.

Relatedly, AB/GRIP claim that the Department's proposal "would authorize NMED to eliminate the mandatory holding of a public hearing on petitions for variances . . . by issuing

variances 'for the life of the facility.'" Motion at p. 6. Once again, the Department's proposal simply allows the Commission to consider and grant variances for the length of time determined by the Commission to be appropriate under the particular circumstances presented by an individual variance petition. Any such variance would have to go through a full public hearing before the Commission, as mandated under Section 74-6-4(H) of the WQA, and the person requesting the variance would have to satisfy the Commission that the period of time for which they were requesting the variance was reasonable. And the Commission could set a different length of time for the variance if the Commission determined based on the evidence presented that such a period of time was warranted. Thus, there is nothing in the Department's proposal that eliminates the mandatory public hearing on variance petitions.

The Commission's authority to issue variances for longer than five years is clearly provided in the language of the WQA. The Commission should reject AB/GRIP's arguments, and should allow the Department to proceed to hearing on its proposal.

II. The Department Has Implied Authority to Make Minor Amendments to Permits

As executive agencies, the jurisdiction and authority of the Commission and the Department are defined and limited by statute, namely, the WQA. *See Dona Ana Mut. Domestic Water Consumers Ass'n v. New Mexico Public Regulation Com'n*, 2006-NMSC-032, ¶ 7, 139 P.3d 166. However, "[t]he authority of an administrative agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may be fairly implied therefrom." *Wimberly v. New Mexico State Police Bd.*, 1972-NMSC-034, ¶ 6, 83 N.M. 757, 497 P.2d 968. Statutes are necessarily broad in their wording, as it is not practical for the Legislature to explicitly address every detail of an administrative agency's authority. Thus, there will always be matters that are within the implied authority of an agency. The ability of an agency that issues permits to make

minor changes to those permits at the request of permitted entities without having to go through the full public process specified for issuing a new permit is one such matter.

As explained in depth in Mr. Vollbrecht's direct testimony,[3] the Department requires the ability to make minor changes to a discharge permit that do not result in a significant change to the quantity of a discharge, or a change in the quality or location of a discharge, without having to go through a full, extensive public notification and hearing process as required for new permits or significant modifications. That ability is necessary for the Department to effectively carry out its regulatory obligations under the WQA, and to allocate its limited resources in a manner that prioritizes its mandate under the WQA: the protection of human health and the environment. If the Department had to go through a full public notification and hearing process for every single change to a permit requested by a permittee, regardless of how insignificant or nonexistent its impact on groundwater, it would take away vast amounts of resources from other, more significant matters, without any corresponding benefit. The types of changes that are made using discharge permit amendments are those that have little to no impact to groundwater beyond what is authorized under the existing permit. Under the Department's proposal, public notice of approved amendments would be provided, allowing for appeal to the Commission if a member of the public believed that the authorized change was significant such that it should have been treated as a modification subject to the public notice requirements under 20.6.2.3108 NMAC.[4] In such an appeal, all the Commission would have to determine would be whether the change should have been treated as a

[3] And which will be more fully demonstrated in Mr. Vollbrecht's written rebuttal testimony to be filed on October 27, 2017, as well as at the hearing in this matter beginning on November 14, 2017.

[4] The Department notes that for several years now it has been copying GRIP on the approval letters for all amendments to the discharge permits for Freeport McMoran's copper mines in New Mexico, and Amigos Bravos on permit amendments associated with Chevron's Questa Mine. *See, e.g.*, Discharge Permit Amendment Approval Letters attached as Exhibits E to AB/GRIP NOI (showing Amigos Bravos and GRIP copied on letters). Thus, AB/GRIP had notice of all such amendments, and since such amendments are final agency actions, AB/GRIP had the right to appeal any of those amendments and argue that it should have been treated as a permit modification. However, AB/GRIP have never done so.

modification, and if the Commission so determined, the matter would be remanded back to the Department to put the requested change through the required public notice process under 20.6.2.3108 NMAC. *See* Vollbrecht Direct Testimony at p. 8-13.

AB/GRIP point to the New Mexico Solid Waste Act and the New Mexico Air Quality Control Act as examples of where the Legislature expressly authorized the promulgation of regulations that address conditions under which permits may be modified, or procedures and requirements for such modifications. However, the WQA contains a similar authorization in Section 74-6-5(F), which provides that the Commission "shall by regulation develop procedures that ensure that the public, affected governmental agencies and any other state whose water may be affected shall receive notice of each ***application for*** issuance, renewal or ***modification*** of a permit." (Emphasis added). Which is exactly what the Commission did in adopting the current definition of "discharge permit modification." That definition specifies the types of modifications that are subject to public notice, while implicitly recognizing the authority of the Department to issue other types of minor changes without going through the full public notice process. The WQA also anticipates modifications at the request of a permittee in Section 74-6-5(K) regarding fees, stating in pertinent part that "[t]he commission shall provide by regulation a schedule of fees for permits, not exceeding the estimated cost of investigation and issuance, modification and renewal of permits." The Department does not require permittees to pay fees for unilateral modifications that the Department makes under Section 74-6-5(M), unless the modification is required as part of an enforcement action. *See* Exhibit 17 to Vollbrecht Direct Testimony, at p. 31.

AB/GRIP also cite the New Mexico Hazardous Waste Act ("HWA") as an example of a statute that expressly authorizes a "two-tier" system of "major" and "minor" modifications, stating that if the Legislature had intended to set up such a system in the WQA, it would have done what

it did in the HWA. Motion at p. 10-11. However, those provisions of the HWA were adopted pursuant to the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6910, et seq., the pertinent parts of which were passed in 1992, nearly two decades after the WQA permitting provisions, which were adopted in 1973 following the newly-adopted federal Clean Water Act, 33 U.S.C. § 1251 et seq. (1972) ("CWA"). The permitting provisions of the WQA were modeled on those of the CWA, and granted the Commission broad authority to adopt regulations setting up a permitting program, and the Department broad authority to administer that program. *See, e.g.*, 33 U.S.C. § 1342(b)(1)(C) (specifying that CWA permitting programs administered by the states must provide for permits to be terminated or modified for cause). The Legislature can choose to adopt a more specific statute such as the Hazardous Waste Act, or a more general statute, such as the WQA. Adoption of a general statute does not mean that there is no authority for the Commission to adopt the Department's proposals. AB/GRIP entirely ignore the principle of implied authority, of which the ability to make minor changes to previously-approved discharge permits is a textbook example.

The key point to note is that many statutes, both within New Mexico as well as in other states and the federal government, expressly authorize regulations governing modification of permits without expressly authorizing minor modifications. And yet, regulations that allow for minor modifications to permits without requiring the same notice as more significant modifications are standard across permitting programs, demonstrating that they are a necessary component of such programs. For instance, the CWA authorizes the establishment of the National Pollutant Discharge Elimination System permitting program that addresses modifications broadly, and, like the WQA, sets limits on the Environmental Protection Agency's ability to unilaterally terminate or modify such permits. *See* 33 U.S.C. § 1342(a)(1)(A) (mentioning modification during term of

permit); *id.* at § 1342(b)(1)(C) (providing that state-administered permitting programs must provide for permits to be terminated or modified for cause – this is the provision that Section 74-6-5(M) of the WQA was modeled on). And yet, the regulations promulgated pursuant to the CWA specifically provide for minor modifications of permits without public notice and participation, which are nowhere addressed in the authorizing statute. *See* 40 C.F.R. § 122.63. Likewise, the Oil Conservation Commission adopted regulations at 19.15.36 NMAC establishing a permitting program for solid waste management facilities pursuant to the New Mexico Oil and Gas Act, NMSA 1978, §§ 70-2-1 to -38. Those regulations distinguish between an application for a "major modification" of a permitted facility, 19.15.36.7.B(9) NMAC, which requires public notice and participation, and a "minor modification" of a permitted facility, 19.15.36.7.B(10) NMAC, which does not require public notice or participation. However, the Oil and Gas Act does not even mention modification of permits at all.

An example from a neighboring state is Arizona's aquifer protection permit program, which is the equivalent of the Department's groundwater discharge permit program. Like the WQA, Arizona's statute sets forth a broad authorization for that program in A.R.S. §§ 48-241 and 49-242, which only generally mention "modifications." The regulations adopted by the Arizona Department of Environmental Quality then specifically provide for "permit amendments," setting up a three-tiered system of "significant permit amendments", "minor permit amendments", and "other permit amendments," each of which is subject to differing levels of required public notice and participation. *See* A.A.C. R18-9-A211. Notably, the definition of "significant permit amendment" is largely the inverse of the Department's proposed definition of "discharge permit amendment" (and the equivalent of the current definition of "discharge permit modification), providing that such amendments are those that would result in, among other things, an increase of

10 percent or more in the permitted discharge volume, discharge of an additional pollutant, or an increase in the concentration of a pollutant; these types of amendments require public notice, comment, and a public hearing if there is substantial public interest. *See* A.A.C. R18-9-A211(B); R18-9-A211(E); R18-9-108; R18-9-108. "Minor permit amendments" are for such things as typographical errors, nontechnical administrative information, or increasing the frequency of monitoring or reporting; these require no public notice whatsoever. *See* A.A.C. R18-9-A211(C); R18-9-A211(E). Arizona's definition of "other permit amendment," being anything that is not a significant or a minor amendment, *see* A.C.C. R18-9-A211(D), is the equivalent of the Department's proposed "discharge permit amendment," and the public notice process for such amendments in Arizona is exactly what the Department has proposed for discharge permit amendments: the Arizona Department of Environmental Quality provides notice to specified entities and interested persons of such amendments. *See* A.C.C R18-9-A211(E). There is no notice of the request for an amendment, nor is there any requirement for public participation. *See* R18-9-108. This tiered system for permit amendments is not expressly set forth in the language of the authorizing statute.

Importantly, AB/GRIP represented by the New Mexico Environmental Law Center, was involved in the promulgation of the Copper Rule, which includes a definition of "discharge permit amendment." The Copper Rule was promulgated under the same authority as this proposed rule would be (i.e., the WQA), and yet AB/GRIP never contended in that proceeding, which took place just a few years ago, that the Department was without authority to make minor changes to discharge permits, or that the Commission was without authority to consider or promulgate rules governing such minor changes. AB/GRIP had every opportunity to do so, as they even commented on and suggested changes to the Department's initial proposal regarding the definition of

"discharge permit amendment." *See* September 5, 2012 email from Bruce Frederick to Bill Olson, attached as Exhibit 1 (including attached word documents, specifically the August 17, 2012 discussion draft including language for definition of "discharge permit amendment"). The Commission should reject the attempt of AB/GRIP and their counsel to argue in this proceeding that the Commission does not have authority to promulgate an express definition for what is already implied in the definition of "discharge permit modification."

In arguing that the Commission's current definition of discharge permit modification is "unlawful," AB/GRIP fixates on the word "modification" and asserts that because the word "amendment" does not appear in the WQA, the Commission has no authority to promulgate the definition proposed by the Department. Motion at p. 10-11. This is a very blunt and simplistic reading of the statute that pays no regard to the entire purpose of statutory interpretation, which is to determine the intent of the Legislature. The use of the word "modification" and not the word "amendment" says very little about the particular definition that the Department has proposed and whether it falls within the necessarily implied powers of the agency tasked with implementing the permitting program that the Legislature expressly authorized. The hyper-technical nature of AB/GRIP's argument is exposed by considering what would become of that argument had the Department proposed definitions for "minor discharge permit modification" and "major discharge permit modification," using the exact same language as proposed for "discharge permit amendment" and "discharge permit modification." If that were the case, under AB/GRIP's logic, the proposals would be authorized by the WQA, even though the language of the proposed definitions would be exactly the same.

AB/GRIP also misapprehend the provisions of the WQA that address when the Department can unilaterally modify a permit. AB/GRIP claim that the WQCC's definition of discharge permit

modification somehow conflicts with Section 74-6-5(M) of the WQA. Motion at p. 10. However, Section 74-6-5(M) specifies the circumstances under which the Department can ***unilaterally*** terminate or modify a discharge permit. The Department's power to take such unilateral action is necessarily constrained to certain types of situations, such as when a condition of the permit is being violated, or when Department discovers that the permittee obtained the permit based on misrepresentation or failure to disclose relevant facts. Such limitations are common in statutory and regulatory permitting schemes,[5] and they in no way preclude the adoption of regulations that define when and how a permitting agency can make changes to a permit ***at the request of a permittee***. Section 74-6-5(M) has nothing to do with – and is in fact completely irrelevant to – the circumstances under which the Department can modify a permit at the request of the permittee. As noted above, that issue is contemplated under Section 74-6-5(F), which states that the Commission shall adopt regulations specifying public notice procedures for applications for issuance, renewal, or ***modification*** of permits, as well as in the fee provisions under Section 74-6-5(K).

When a permittee requests a modification, the question is whether the modification is significant enough that it should require the same public notice and procedures as an application for a permit. That is what the Commission's current definition of "discharge permit modification" addresses, and what the Department's proposed new definition of "discharge permit amendment" further clarifies. There is absolutely nothing about those definitions that conflict with the WQA. AB/GRIP's assertion that the only permissible definition of "discharge permit modification" is what is provided in Section 74-6-5(M), *see* Motion p. 10, would mean that the Commission could never promulgate regulations governing modifications of a permit at the request of a permittee,

[5] *See, e.g.*, 33 U.S.C. § 1342(b)(1)(C); Mich. Admin. Code 324.30313 (1995); N.Y. Comp. Codes R. & Regs., tit. 9, § 581-3.1.

and the Department could never undertake such modifications. The Department is unaware of any permitting program in the nation that operates with such an absurd restriction.

In sum, the Department has implicit authority to make minor changes to permits at the request of the permittee, and the Commission has authority under the WQA to promulgate rules delineating the criteria and process for such minor changes. That is what the Department is proposing, and that is what the Commission should consider at the hearing in this matter.

III. The Commission Should Read its Authority Broadly in This Rulemaking

The statutory authority of the Commission to adopt the Department's proposals on variances and discharge permit amendments is very clear, and the Department is confident that if the Commission ultimately chooses to do so at the conclusion of this rulemaking proceeding, the resulting regulations will be upheld in any future appeal. However, even if the Commission believes there is some question as to its authority, it should err on the side of construing its statutory authority broadly and allowing the Department to present its testimony and evidence in favor of its proposals at the hearing on this matter. Then, at the conclusion of the hearing and post-hearing briefing, the Commission can decide as a matter of policy whether it wants to adopt those proposals, and if so, the Court of Appeals can then make the legal decision of whether the Commission has authority to do so if an appeal is filed. If the Commission were to foreclose the presentation of the Department's proposals at this stage in the proceedings, then, should the Court of Appeals find that the Commission does in fact have authority to consider and adopt such proposals (which the Department believes the Court of Appeals would do), then the Commission will have to hold additional proceedings in the future to consider those proposals. Because this proceeding is so far along in the process, with direct testimony already filed and the hearing just weeks away, it is in the interests of administrative efficiency and conservation of resources to

allow the Department to present its proposals at the hearing on this matter and leave the ultimate decision on authority to the Court of Appeals.

CONCLUSION

For the foregoing reasons, Amigos Bravos' and GRIP's Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the WQCC Administrator and was served on the following via electronic mail on October 16, 2017:

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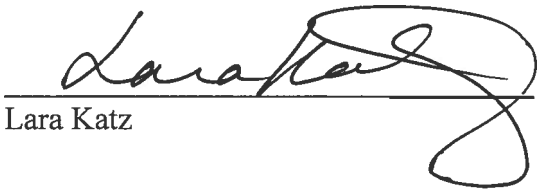

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From: Vollbrecht, Kurt, NMENV
Sent: Monday, October 16, 2017 11:10 AM
To: Katz, Lara, NMENV
Subject: FW: NMELC Group Comments on Draft Copper Regulations
Attachments: Copper Rule-NMELC group comments 9.5.12.doc; Copper Rule - FA - JK comnts 9.5.12.doc

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From: Bill Olson [mailto:billjeanie.olson@gmail.com]
Sent: Wednesday, September 5, 2012 3:11 PM
To: Vollbrecht, Kurt, NMENV <kurt.vollbrecht@state.nm.us>; Schoeppner, Jerry, NMENV <jerry.schoeppner@state.nm.us>; Braswell, Misty, NMENV <Misty.Braswell@state.nm.us>
Subject: FW: NMELC Group Comments on Draft Copper Regulations

Here are the NMELC comments.

Bill

William Olson Consulting Services
14 Cosmic Way
Lamy, NM 87540
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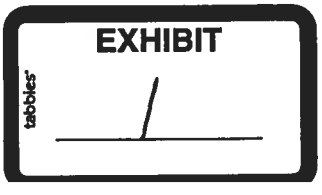
From: Bruce Frederick [mailto:bfrederick@nmelc.org]
Sent: Wednesday, September 05, 2012 2:27 PM
To: 'Bill Olson'
Cc: 'Bruce Frederick'; 'Jim Kuipers'; 'Brian Shields'; 'Rachel Conn'; 'Allyson Siwik'; 'Sally Smith'
Subject: NMELC Group Comments on Draft Copper Regulations

Bill,

Attached are comments from the groups working with NMELC. The comments are provided in redline/strikeout on the attached two documents—the financial assurance provisions and the rest of the rule.

As you will see, we suggest several substantive and stylistic changes, most of which are self-explanatory. I would, however, like to briefly explain why we NMED should *not* include in its petition to adopt copper regulations any incidental request to also change WQCC's existing variance regulations.



NMED is petitioning WQCC to adopt copper regulations pursuant to 74-6-4(K) of the Water Quality Act, which requires WQCC to "specify in regulations the measures to be taken to prevent water pollution and to monitor water quality" and, since 2009, expressly authorizes and requires WQCC to "adopt regulations for the dairy industry and the copper industry." In contrast, variances are covered under Section 74-6-4(H) of the Act, and this Section does not require or authorize WQCC to adopt special variance rules for the dairy, copper, or any other industries.

The groups represented by NMELC are not necessarily opposed to the proposed changes to the existing variance regulations. However, we do not believe it is appropriate to include such proposed changes in a petition to adopt copper regulations. Instead, any proposed change to the variance regulations should be proposed in a separate petition devoted exclusively to that purpose. This petition would be separately noticed and may well attract a larger and more diverse population than those who are only interested in copper mining.

We also would eliminate several definitions that are related to the "hybrid" hearing procedures that NMED is no longer proposing.

Finally, we reserve the right to propose further changes, to revise our latest proposed changes, and to take any position at hearing that we deem appropriate to best protect the public's water resources for current and future generations.

Thank you for all your excellent work on this very difficult petition.

R. Bruce Frederick, Staff Attorney

New Mexico Environmental Law Center

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<<...>> <<...>>

COPPER MINE RULE
DISCUSSION DRAFT
(August 17, 2012)

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 6 WATER QUALITY
PART 7 GROUND WATER PROTECTION - SUPPLEMENTAL PERMITTING
REQUIREMENTS FOR COPPER MINE FACILITIES

20.6.7.1 ISSUING AGENCY: Water Quality Control Commission.

20.6.7.2 SCOPE: ~~All persons subject to the Water Quality Act, NMSA 1978, Sections 74-6-1 et seq and specifically copper mine facilities and their operations.~~This Part 20.6.7 shall apply only discharges of water contaminants from a copper mine facility within the meaning of the Water Quality Act, NMSA 1978, § 74-6-1 *et seq.*

20.6.7.3 STATUTORY AUTHORITY: Standards and regulations are adopted by the commission under the authority of the Water Quality Act, NMSA 1978, Sections 74-6-1 through 74-6-17.

20.6.7.4 DURATION: Permanent.

20.6.7.5 EFFECTIVE DATE: ??/??/????, unless a later date is cited at the end of a section.

20.6.7.6 OBJECTIVE: The purpose of 20.6.7 NMAC is to supplement the general permitting requirements of 20.6.2.3000 through 20.6.2.3114 NMAC to control discharges specific to copper mine facilities and their operations.

20.6.7.7 DEFINITIONS:

A. Terms defined in the Water Quality Act and 20.6.2.7 NMAC shall have the meanings as given in such.

B. A term defined in this part shall have the following meaning.

(1) "Acid rock drainage" means water that is discharged from an area affected by mining exploration, mining, or reclamation, with a pH of less than 5.5 and in which total acidity exceeds total alkalinity as defined by the latest edition of *standard methods for the examination of water and wastewater*.

"Additional conditions" means conditions and requirements included in a discharge permit pursuant to Section 74-6-5(D) that are based on site-specific circumstances and that are in addition to those imposed in the regulations of the Water Quality Control Commission.

(2) "Affected discharge site" means the discharge site to which a variance petition applies.

(3) "Applicable standards" means either the standards set forth in 20.6.2.3103 NMAC ("3103 Standards"), the background concentration approved by the department or, for an existing copper mine facility, ~~and~~ any alternative abatement standard approved by the commission pursuant to 20.6.2.4000 NMAC to 20.6.2.4115 NMAC.

(4) "Applicant" means the person applying for a new, renewed, modified, or amended discharge permit, including all persons who own or control the Applicant. The Applicant shall be the owner or operator of the copper mine facility or the duly-authorized agent of the owner or operator of the facility.

(5) "As-built drawings" means engineering drawings signed and sealed by a qualified professional engineer registered in New Mexico which portray facilities as constructed.

(6) "Background" means the concentration of water contaminants naturally occurring from undisturbed geologic sources of water contaminants.

(7) "Below-grade tank" means a tank including sumps where a portion of the tanks side walls is below the surrounding ground surface elevation. A below-grade tank does not include an above ground tank that is located above or at the surrounding ground surface elevation and is surrounded by berms.

"Closure" means all activities, including but not limited to surface reclamation and monitoring and remediation of soils and groundwater, that are reasonably required to stop, mitigate, prevent, minimize, control, or abate discharges and resulting water pollution associated with a copper mine facility after operations at the facility, or at part of the facility, have ceased.

"Closure discharge permit" means a discharge permit that is intended to apply after active operation of a copper mine facility has ceased and closure has begun.

(8) "Construction quality assurance" or "CQA" means a planned system of activities necessary to ensure that standards and procedures are adhered to and that construction and installation meet design criteria, plans and specifications. A CQA includes inspections, verifications, audits, evaluations of material and workmanship necessary to determine and document the quality of the constructed impoundment or structure, and corrective actions when necessary.

(9) "Construction quality control" or "CQC" means a planned system of operational techniques and activities used to preserve the quality of materials and ensure construction to specifications. Elements of a CQC include inspections, testing, data collection, data analysis and appropriate corrective actions.

(10) "CQA/CQC Report" means a report that summarizes all inspection, testing, data collection, data analysis and any corrective actions completed as part of CQA or CQC for a project.

(11) "Copper mine facility" means all areas within which mining and its related activities that may discharge water contaminants occurs and where the discharge and associated activities will or do take place including, but not limited to open pits, waste rock piles, ore stockpiles, leaching operations, solution extraction and electrowinning plants, ore crushing, ore milling, ore concentrators, tailings impoundments, smelters, slag piles, air and water treatment residues, pipeline systems, tanks or impoundments used to convey or store process water, tailings or impacted stormwater, truck or equipment washing facilities and any other mining related operations that may discharge water contaminants.

(12) "Copper mine rule" means 20.6.7 NMAC, as amended.

(13) "Cover System" means any engineered or constructed system designed as a source control measure to minimize to the maximum extent practicable the ingress of water or oxygen into a waste rock pile, leach stockpile or tailing material. A cover system may be comprised of a monolithic layer of, or any combination of, earthen materials, synthetic materials, vegetation, and amendments. Critical design elements to maximize the effectiveness of store and release type covers systems include the ability to store water, resist erosion and sustain native vegetation without augmentation.

(14) "Critical structure" means earthen or rock structures or embankments (such as an outslope of a rock stockpile), that are likely to cause an exceedance of applicable groundwater standards or undue risk to human life or property in the event of a significant unexpected slope movement,

(15) "Date of postal notice" means the date when the United States postal service first makes notice to the applicant or permittee of its possession of certified mail addressed to the applicant or permittee.

(16) "Discharge" means storing, spilling, leaking, pumping, pouring, emitting, or dumping of a water contaminant in a location and manner where there is a reasonable probability that the discharged substance may reach surface or subsurface water.

(17) "Discharge permit amendment" means a minor ~~modification of a~~ change to a discharge permit that does not require public notice and participation. Discharge permit amendments may be approved to correct typographical errors or

to make minor adjustments to the location of a discharge. The department may also approve a one-time discharge permit amendment to increase the volume of a discharge at a particular location by no more than 10 percent, provided that the type and concentration of the water contaminants discharged are not changed and the department determines that the risk of exceeding standards or of causing other water pollution will not be materially increased. ~~does not result in a significant change in the location of a discharge, an increase in daily discharge volume of greater than 10 percent of the daily discharge volume permitted for an individual discharge location, a significant increase in the concentration of water contaminants discharged, or introduction of a new water contaminant discharged.~~

(18) "Discharge volume" means the volume of discharged fluids (e.g. process water, leachate, contaminated stormwater ~~or tailings~~) measured at a specific point at the copper mine facility over a specified period of time.

Commented [JK1]: Tailings includes both solids and liquids and process water is associated with solution portion of tailings – needs to includes discharge volume for other sources

"Environmental law" means any federal or any state law or regulation that regulates, limits, or otherwise concerns discharges into surface water, discharges into ground water, air emissions, or solid, toxic and hazardous wastes (including the handling, disposal, transport and generation of such wastes).

"Environmental permit" means a permit that is issued pursuant to an environmental law.

(19) "EPA" means the United States Eenvironmental Pprotection Aagency.

(20) "Existing copper mine facility" means a copper mine facility operating under an approved discharge permit as of the effective date of the copper mine rule.

(21) "Existing impoundment" means an impoundment that is currently receiving or has ever received process water or collected impacted stormwater and that has not been closed pursuant to a discharge permit.

(22) "Expiration" means the date upon which the term of a discharge permit ends.

(23) "Factor of safety" means, for slope stability purposes, the ratio of the resisting forces to the driving forces.

(24) "Final CQA Report" means a report prepared by the CQA officer that includes as-built drawings and a detailed description of the installation methods and procedures that document that the work was conducted as designed.

DISCUSSION DRAFT
(AUGUST 17, 2012)

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 6 WATER QUALITY
PART 8 GROUND WATER PROTECTION – FINANCIAL ASSURANCE REQUIREMENTS FOR COPPER MINE FACILITIES

20.6.8.1 ISSUING AGENCY: Water Quality Control Commission.

20.6.8.2 SCOPE: All persons subject to the Water Quality Act, NMSA 1978, Sections 74-6-1 et. seq. and specifically copper mine facilities and their operations.

20.6.8.3 STATUTORY AUTHORITY: Standards and regulations are adopted by the commission under the authority of the Water Quality Act, NMSA 1978, Sections 74-6-1 through 74-6-17.

20.6.8.4 DURATION: Permanent.

20.6.8.5 EFFECTIVE DATE: ??/??/????, unless a later date is cited at the end of a section.

A. All references to the copper mine rule in any other rule shall be understood as a reference to 20.6.7 NMAC.

B. The amendment and replacement of the copper mine rule shall not affect any administrative or judicial action pending on the effective date of this amendment nor the validity of any permit issued pursuant to the copper mine rule.

20.6.8.6 OBJECTIVE: The purpose of 20.6.8 NMAC is to establish financial assurance regulations for copper mine facilities pursuant to the New Mexico Water Quality Act. These regulations are designed to prevent and abate water pollution through discharge permit closure of copper mine facilities that are subject to the permitting requirements of 20.6.2.3000 through 20.6.2.3114 NMAC and 20.6.7.1 through 20.6.7.39 NMAC.

20.6.8.7 DEFINITIONS: [RESERVED]
[Definitions for this part can be found in the Water Quality Act, 20.6.2.7 NMAC and 20.6.7 NMAC

20.6.8 – 20.6.8.1200 [RESERVED]

20.6.8.1201 REQUIREMENT TO FILE FINANCIAL ASSURANCE:

A. An applicant for a new, renewed, or modified discharge permit for a copper mine facility shall provide a financial assurance proposal to the secretary at the time that a discharge permit is deemed technically complete but prior to the secretary deeming the administrative record complete and that all required information is available. An applicant's financial assurance proposal shall be based upon the estimates for a third-party contractor to complete all closure work for the prevention and abatement of water pollution, including long-term maintenance, water treatment and monitoring.

B. A permittee shall provide the secretary with financial assurance for a copper mine facility as follows:

(1) New copper mine facility. The permittee of a new copper mine facility shall provide the approved financial assurance authorized by a discharge permit before commencing construction of department regulated facilities covered by a secretary approved discharge permit issued pursuant to the copper mine rule

(2) Existing copper mine facility. The permittee of an existing copper mine facility shall provide the approved financial assurance authorized by a discharge permit renewal or modification within 30 days of secretary approval of a discharge permit renewal or modification.

C. Financial assurance shall be payable to the state of New Mexico and conditioned upon the performance of all the requirements of the Water Quality Act, the copper mine rule, and the discharge permit, including long-term maintenance, water treatment and monitoring.

D. Financial assurance proposals submitted by an applicant or permittee may be required to be reviewed by a third-party contractor as ordered by the secretary. All costs for such review shall be paid by the applicant or permittee.

20.6.8.1202 AREA TO BE COVERED BY FINANCIAL ASSURANCE:

A. The permittee or applicant shall file, with the approval of the secretary, financial assurance under one of the following schemes to cover the discharge permit closure costs as determined in accordance with20.6.8.1205 NMAC:

(1) financial assurance for the approved discharge permit closure plan for all areas covered by the discharge permit, including long-term maintenance, water treatment and monitoring; or

(2) financial assurance may be provided and approved to guarantee specific increments of discharge permit closure within the area covered by the discharge permit, including long-term maintenance, water treatment and monitoring, provided the sum of incremental financial assurance equals or exceeds the total amount required under 20.6.8.1205 NMAC and 20.6.8.1206 NMAC. The area to be closed pursuant to the discharge permit and the amount of financial assurance required for each increment shall be specified in detail, and the permittee shall comply with the following:

(a) An incremental financial assurance schedule and the financial assurance required for full discharge permit closure of the first increment of the schedule shall be provided.

(b) Before mine discharge or discharge permit closure operations on succeeding increments are initiated and conducted within the area covered by the discharge permit, the permittee shall file with the secretary additional financial assurance to cover such increments in accordance with 20.6.8 NMAC.

(c) The permittee or applicant shall identify the initial and successive areas or increments on a map submitted with the permit application and shall specify the financial assurance amount to be provided for each area or increment.

(d) Identified increments shall be of sufficient size and configuration to provide for efficient discharge permit closure operations should closure by the secretary become necessary pursuant to 20.6.8.1211 NMAC.

B. A permittee or applicant shall not disturb any area prior to acceptance by the secretary of the required financial assurance.

20.6.8.1203 FORM OF FINANCIAL ASSURANCE:

A. The secretary may accept the lowing forms of financial assurance:

(1) cash;
(2) trusts;
(3) surety bonds;
(4) letters of credit;
(5) ~~collateral bonds;~~
(6) ~~third party guarantees;~~
(7) insurance; or
(8) a combination of any of the above.

B. The secretary shall not accept any type or variety of self-guarantee or self-insurance for the required financial assurance.

Commented [JK1]: We do not believe these are valid forms of FA. We also have concerns about surety bonds and letters of credit in terms of their applicability to long-term costs which are typically addressed by using trust funds.

20.6.8.1204 PERIOD OF LIABILITY:

A. The permittee shall maintain the financial assurance in effect, except as reduced pursuant to 20.6.8 NMAC, until such time as the secretary releases the financial assurance pursuant to 20.6.8.1210 NMAC.

B. Isolated and clearly defined portions of the discharge permit area not qualifying for financial assurance release may be separated from the original area and assured separately with the approval of the secretary. Access to the separated areas for discharge permit closure work may be included in the area under extended liability if deemed necessary by the secretary.

C. For areas where long-term operations, management and monitoring may be required the third party will be required to establish cost which might be incurred over a 500-yr period. The need for this period may be reviewed by the department at the request of the applicant following completion of reclamation and closure activities and a period of at least 25 years without evidence of operations, management and monitoring being performed or an evident need for those activities within the next 500 years.

20.6.8.1205 DETERMINATION OF FINANCIAL ASSURANCE AMOUNT:

A. The amount of financial assurance shall be determined by the secretary and shall take into account, but not be limited to, the estimated cost submitted by the permittee or the applicant. This estimated cost should include at a minimum the following costs: contract administration; mobilization; demobilization; engineering redesign; profit and overhead; procurement costs; discharge permit closure plan management; and contingencies. Credit for the salvage value of building materials or abandoned equipment and supplies shall not be allowed. Equipment normally available to a third party contractor should be used in determining the estimated cost; and shall:

(1) reflect the probable difficulty of discharge permit closure, including long-term maintenance, water treatment and monitoring, giving consideration to such factors as topography, geology, and hydrology;

(2) depend on the requirements of the copper mine rule and approved discharge permit;

(3) not duplicate any federal or state financial requirements for the same area so long as the secretary approves of a joint financial instrument to meet the requirements of this Part;

(4) not be less comprehensive than the federal requirements, if any;

B. The amount of the financial assurance shall be sufficient to assure the completion of the discharge permit closure plan if the work has to be performed by the state of New Mexico or a contractor with the state in the event of forfeiture. The applicant must demonstrate that the financial responsibility is adequate for:

(i) the completion of the measures as described in the reclamation and closure plan in the event of any future closing or abandonment, and

(ii) will use the precautionary principle and require reasonable additional mitigation measures as may be identified in an Adaptive Management Plan.

C. The secretary may accept a net present value calculation for the amount of financial assurance required pursuant to Subsections A and B of 20.6.8.1205 NMAC, if the scheduled completion date for the discharge permit closure plan exceeds five years following closure and if the financial assurance will be provided in the form of cash or other allowable form of financial assurance to be converted into cash upon forfeiture. The secretary shall require an appropriate adjustment be made to the net present value calculation to exclude anticipated delays for converting financial assurance into cash.

(1) The net present value calculation shall be based upon the projected inflation rates and projected rates of return over the term of the discharge permit closure plan and shall be based upon publicly available indices and data. The secretary shall determine whether a proposed net present value calculation is acceptable and complies with the requirements of Subsection B of 20.6.8.1205 NMAC. The secretary shall issue guidance on acceptable methods for calculating net present value with one year from the effective date of this rule.

(2) The secretary shall review any approved net present value calculation as needed, but at least once every five years upon discharge permit renewal, to take into consideration additional information regarding rates of return and inflations rates.

20.6.8.1206 ADJUSTMENT OF AMOUNT:

A. The amount of the financial assurance required and the terms of its acceptance shall be adjusted by the secretary from time-to-time as the area requiring financial assurance is increased or decreased or when the future discharge permit closure costs change.

B. The secretary shall:

(1) notify the permittee, the surety, any person with a property interest in collateral who has requested notification under Paragraph (4) of Subsection C of 20.6.8.1208 NMAC and any person who has requested notification of actions concerning the discharge permit , of any proposed adjustment to the financial assurance amount; and

(2) provide the permittee an opportunity for an informal conference on the adjustment.

C. The permittee may request reduction of the amount of the financial assurance upon submission of evidence to the secretary demonstrating that the permittee's methods of operation or other circumstances reduce the estimated cost for the state of New Mexico or its contractor to complete the discharge permit closure plan for the area covered by the discharge permit. Adjustments which involve lands on which no discharge has occurred or revision of the cost estimate for discharge permit closure plan completion are not considered financial assurance release subject to procedures of 20.6.8.121 NMAC.

D. In the event that the approved discharge permit is revised or modified, the secretary shall review the financial assurance for adequacy, and if necessary, shall require adjustment of the financial assurance to conform to the discharge permit as revised or modified.

20.6.8.1207 GENERAL TERMS AND CONDITIONS OF FINANCIAL ASSURANCE:

A. The financial assurance shall be in an amount determined by the secretary as provided in 20.6.8.1205 NMAC.

B. The financial assurance shall be payable to the state of New Mexico.

C. The financial assurance shall be conditioned upon performance of all the requirements of the Water Quality Act, the copper mine rule and the approved discharge permit, including completion of the discharge permit closure plan.

D. The duration of the financial assurance shall be for the time period provided in 20.6.8.1204 NMAC.

E. Failure of financial providers.

(1) The financial assurance shall provide a mechanism for a bank or surety company or guarantor to give prompt notice to the secretary by certified mail and the permittee of any administrative or judicial action filed or initiated alleging the insolvency or bankruptcy of the surety company, the bank, or alleging any violations which would result in suspension or revocation of the surety or bank charter or license to do business.

(2) Upon the incapacity of a bank or surety company or guarantor by reason of bankruptcy, insolvency, suspension or revocation of charter or license or for any other reason, the permittee shall be deemed to be without financial assurance coverage and shall promptly notify the secretary in writing. Upon notification the secretary shall specify to the permittee in writing a reasonable period, not to exceed 90 days, to replace the financial assurance coverage. If adequate financial assurance is not provided by the permittee by the end of the period allowed, the permittee shall cease all discharges and shall immediately begin to conduct closure measures in accordance with the discharge permit closure plan. The secretary may, for good cause shown, grant up to two 30-day extensions. Discharges shall not resume until the secretary has determined that an acceptable replacement financial assurance has been provided.

20.6.8.1208 FINANCIAL ASSURANCE MECHANISMS:

A. Surety bonds.

(1) A surety bond shall be executed by the applicant or the permittee and a corporate surety licensed to do business in the state of New Mexico.

(2) Surety bonds shall be non-cancellable during their terms, except that surety bond coverage for areas on which no discharge has occurred may be cancelled with the prior written consent of the secretary provided that the financial assurance does not cover any discharge permit closure activities related to prevention or abatement of water pollution in that area. The secretary shall advise the surety, with 30 days after receipt of a notice to cancel bond, whether the bond may be cancelled on an area on which no discharge has occurred.

(3) Surety bond terms shall be established for a minimum of five years. One hundred and twenty (120) days prior to the expiration of the term, the permittee must provide the secretary with evidence that the current surety bond will be continued, another surety company is to provide a financial assurance, or another form of financial assurance will replace the surety bond. Upon receiving notification, the secretary shall respond to the permittee within 30 days, in writing, indicating whether or not the proposed form and amount of financial assurance will be acceptable. If adequate financial assurance is not provided 30 days prior to the expiration of the term of the original surety bond, the permittee shall cease all discharges and shall forfeit the existing surety bond. Discharges shall not resume until the secretary has determined that an acceptable replacement financial assurance has been provided. If an acceptable financial assurance is provided with a time frame specified by the secretary, not to exceed 180 days, the forfeited funds, less any costs associated with the forfeiture, will be refunded to the surety company. If adequate financial assurance is not provided within the specified time frame, the secretary will authorize closure of the copper mine facility using the forfeited funds.

B. Letters of credit.

(1) The letter of credit must be issued by a bank organized or authorized to do business in the United States. The secretary may require an independent rating of the proposed bank and the cost of any such rating shall be paid by the applicant or permittee.

(2) Letters of credit shall be irrevocable during their terms. A letter of credit used as security in areas requiring continuous financial assurance coverage shall be forfeited and shall be collected by the state of New Mexico if not replaced by other suitable financial assurance or letter of credit at least 30 days before its expiration.

(3) Discharges shall not resume until the secretary has determined that an acceptable replacement financial assurance has been provided. If an acceptable financial assurance is provided with a time frame specified by the secretary, not to exceed 180 days, the payment amount, less any costs associated with the demand for

payment, will be refunded to the bank. If adequate financial assurance is not provided within the specified time frame, the secretary will authorize closure of the copper mine facility using the payment from the letter of credit.

(4) The letter of credit shall be payable to the state of New Mexico upon demand, in part or in full, upon receipt form the secretary of a notice of forfeiture issued in accordance with 20.6.8.1211 NMAC.

C. Collateral bonds.

(1) Valuation of collateral.

(a) If the nature of the collateral proposed to be given as security for financial assurance is subject to fluctuations in value over time, the secretary shall require that such collateral have a fair market value at the time of discharge permit approval in excess of the financial assurance amount by a reasonable margin. The amount of such margin shall reflect changes in value anticipate over a period of five years, including depreciation, appreciation, marketability and market fluctuation. In any event, the secretary shall require a margin for legal fees and costs of disposition of the collateral in the event of forfeiture.

(b) The annual report filed by the permittee must indicate the current market value of any collateral accepted by the secretary pursuant to this part.

(c) The financial assurance value of collateral may be evaluated at any time, but it shall be evaluated as part of discharge permit renewal and, as necessary, its amount increased or decreased. In no case shall the value attributed to the collateral exceed its market value.

(2) Collateral bonds. Collateral bonds except for cash accounts and real property, shall be subject to all of the following conditions:

(a) the secretary must have custody of collateral deposited by the applicant or permittee until authorized for release or replacement as provided in this part;

(b) the secretary shall value collateral at its current market value, not at face value:

(c) the secretary shall not accept as collateral shares of stock issued by the following:

(i) the applicant or permittee;

(ii) an entity that owns or controls the applicant or permittee; or

(iii) an entity owned or controlled by the applicant or permittee;

(d) the secretary shall require that certificates of deposit be made payable to or assigned to the state of New Mexico, both in writing and upon records of the bank issuing the certificates; if assigned, the secretary shall require the banks issuing these certificates to waive all rights of setoff or liens against those certificates prior to the secretary's acceptance;

(e) the secretary shall not accept an individual certificate of deposit in an amount in excess of one hundred thousand dollars ($100,000) or the maximum insurable amount as determined by the federal deposit insurance corporation or the federal savings and loan insurance corporation.

(3) **Real property.** Real property provided as collateral bond shall meet the following conditions:

(a) the real property must be located in the state of New Mexico. The real property cannot be within the discharge permit or affected area of a copper mine facility;

(b) the permittee shall grant the state of New Mexico a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell in accordance with state law or otherwise dispose of the property in the event of forfeiture under 20.6.8.1211 NMAC.

(c) for the secretary to evaluate the adequacy of the real property, the permittee must submit the following information for the real property, un less the secretary, for good cause, waives any of the requirements:

(i) a description of the property, which shall include a site improvement survey plat to verify legal descriptions of the property and to identify the existence of recorded easements;

(ii) the fair market value as determined by a current appraisal conducted by an independent qualified appraiser, previously approved by the secretary;

(iii) proof of ownership and title to the real property;

(iv) a current title binder which provides evidence of clear title containing no exceptions, or containing only exceptions acceptable to the secretary; and

(v) a phase I environmental assessment.

(d) in the event the permittee pledges water rights, the permittee shall provide such additional information as may be required by the secretary to meet any additional conditions prescribed by him for accepting water rights as collateral.

(4) Persons with an interest in collateral provided as financial assurance who desire notification of actions affecting the collateral shall request notification in writing to the secretary at the time collateral is offered.

D. Cash accounts. Cash accounts shall be subject to the following conditions:

(1) The secretary may authorize the permittee to meet its financial assurance obligations through the establishment of a cash account in one or more federally-insured or equivalently protected accounts made payable upon demand to, or deposited directly with the state of New Mexico.

(2) Any interest paid on a cash account must be retained in the account and applied to the account unless the secretary has approved the payment of interest to the permittee.

(3) Certificates of deposit may be substituted for a cash account with the approval of the secretary.

(4) The secretary shall not accept an individual cash account in an amount in excess of one hundred thousand ($100,000) or the maximum insurable amount as determined by the federal deposit insurance corporation or the federal savings and loan insurance corporation, unless the cash account has been deposited with the state of New Mexico.

E. Trusts. Trusts shall be subject to the following conditions:

(1) The secretary may approve the use of a trust to hold and manage funds for the purpose of implementing discharge permit closure as prescribed in the discharge permit closure plan, including long-term maintenance, water treatment and monitoring. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated by a federal or state agency and which has been approved by the secretary. The secretary must be notified of any change of trustee and any successor trustees must be approved by the secretary.

(2) The trust fund is also subject to the following conditions:

(a) the initial payment into the trust must be made by the date established by the secretary;

(b) the trust shall be funded in accordance with the terms of the discharge permit;

(c) investments of the trust shall be reviewed and approved by the secretary and may include fixed income investments such as U.S. treasury obligations, state issued securities, time deposits and other investments of similar risk as approved by the secretary;

(d) income accrued on the trust funds shall be retained in the trust, except as otherwise agreed by the secretary under the terms of an agreement governing the trust;

(e) the trustee may be compensated under the terms defined by the secretary, upon approval of the secretary;

(f) the trust may be terminated by the permittee only if the permittee substitutes, with the approval of the secretary, alternate financial assurance as specified in this section or the permittee has completed discharge permit closure in accordance with Subsection E of 20.6.8.1210 NMAC.;

(g) a copy of the trust agreement, as well as quarterly and annual report of the trustee on the trust fund balance shall be provided to the secretary upon request;

(h) any disbursements of funds from the trust shall be approved by the secretary in writing.

F. Insurance.

(1) The insurer must be authorized to transact the business of insurance in the state of New Mexico and a licensed carrier or a registered carrier of surplus lines of insurance or reinsurance and authorized to transact business of insurance in the state of New Mexico, and have an AM BEST rating of not less than A- or the equivalent rating of other recognized rating companies.

(2) The insurance policy shall be issued for the amount equal to the discharge permit closure plan cost estimate as approved by the secretary or for a lesser amount if used in conjunction with other forms of financial assurance and approved by the secretary.

(3) The insurance policy shall guarantee that funds will be available for discharge permit closure in accordance with the discharge permit closure plan and that the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon direction of the secretary. Actual payments by the insurer will not change the face amount, although the insurer's future liability may be reduced by the amount of the payments, during the policy period.

(4) The permittee must maintain the policy in full force and effect until the secretary approves termination or replacement of insurance with another form of financial assurance acceptable to the secretary.

G. Third party guarantee.

(1) A third party guarantee is a written agreement from a guarantor, which provides that if the permittee fails to complete the performance requirements of the permit, including closure, the guarantor shall do so or, upon forfeiture in accordance with 20.6.8.1211 NMAC, shall fund such account(s) as the secretary may instruct in the full amount of that portion of the financial assurance covered by the third party guarantee.

(a) A third party guarantee may not exceed seventy-five percent of the total amount of the financial assurance for a discharge permit established pursuant to 20.6.8.1205 NMAC. Any permittee with a third

party guarantee in place at the effective date of this subparagraph shall meet the limitation within one year after the effective date of this subparagraph.

(b) A third party guarantee may not include any type of self-guarantee or self-insurance. The secretary may investigate to determine whether a sham relationship exists between the guarantor and the permittee. The secretary may reject a third part guarantee as a form of self-guarantee if the secretary concludes that substantial evidence supports a finding that either the guarantor or the permittee exercises dominion and control over the other so pervasive as to render the one a mere instrumentality of the other.

(2) The permittee or applicant shall submit financial information as requested by the secretary unless doing so would place guarantor in violation of an applicable legal agreement.

(3) The third party guarantee shall be signed by an authorized representative, and legal counsel of the guarantor shall certify that the guarantor can legally engage in the guarantee and shall certify the amounts and names of beneficiaries of all other guarantees for which the guarantor is obligated.

(4) If the guarantor is a corporation, the authorization documentation will include a board of secretary's' resolution or shareholders vote or similar verification and proof that the corporation can validly execute a guarantee under the laws of the state or country of its incorporation, and its bylaws and articles of incorporation.

(5) If the guarantor is a partnership, joint venture, syndicate, or other business entity, each party or an authorized representative for the party with the beneficial interest, direct or indirect, shall sign the agreement.

(6) The guarantor's financial statements shall be audited by an independent certified public accountant and the accountant's certification provided to the secretary. All costs and fees for such audit and certification shall be paid by the applicant or permittee. If the accountant gives an adverse opinion of the financial statements, the guarantor cannot qualify for the third party guarantee. The permittee shall also pay for any evaluation and analysis by an independent reviewer selected by the secretary to evaluate and analyze for the secretary any information regarding the guarantor provided to the secretary or requested by the secretary to evaluate the guarantor's financial ability to provide a guarantee.

(7) The guarantor as well as its successors and assignees agree to remain bound jointly and severally liable for all litigation costs incurred in any successful effort to enforce the third party guarantee against the guarantor.

(8) The guarantor must demonstrate financial soundness by meeting either alternative I or alternative II soundness tests.

(a) **Alternative I financial soundness test:**

(i) guarantor has a tangible net worth of at least ten million dollars ($10,000,000);

(ii) guarantor's tangible net worth and working capital are each equal to or greater than six times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the United States for which the guarantor is obligated;

(iii) guarantor's assets located in the United States amount to at least ninety percent of its total assets or its assets in the United States are at least six times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the United States for which the guarantor is obligated; and

(iv) guarantor meets at least two of the following three financial ratios: the ratio of total liabilities to net worth is less than 2:1; the ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities is greater than 0.1:1; the ration of current assets to current liabilities is greater than 1.5:1.

(b) **Alternative II financial soundness test:**

(i) guarantor's most recently issued senior credit obligation are rated "BBB" or higher by standard and poor's corporation, or "Baa" or higher by moody's investors service, inc;

(ii) the guarantor has a tangible net worth of at least ten million dollars ($10,000,000) and is greater than six times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the United States for which the guarantor is obligated; and

(iii) guarantor's assets located in the United States amount to at least ninety percent of its total assets or its assets in the United States are at least six times the sum of the proposed financial assurance and all other guarantees for environmental permits issued in the United States for which the guarantor is obligated

(9) The secretary may require monitoring of the guarantor's financial condition by a contractor with the state during the time that a third party guarantee is used for financial assurance. The costs of such monitoring shall be paid by the permittee. The frequency of such monitoring shall be determined by the secretary.

(10) At any time that the guarantor's financial condition is such that the guarantor no longer qualifies pursuant to this part, the permittee shall be deemed without financial assurance coverage. The secretary shall specify to the permittee in writing a reasonable period, not to exceed 90 days, to replace the financial assurance

coverage. If adequate financial assurance is not provided by the end of the period allowed, the permittee shall cease mining and shall immediately begin to conduct reclamation or closeout measures in accordance with the reclamation or closeout plan. The secretary may, for good cause shown, grant up to two 30-day extensions. Mining operations shall not resume until the secretary has determined that an acceptable replacement financial assurance has been provided.

20.6.8.1209 REPLACMENT OF FINANCIAL ASSURANCE:

A. The secretary may allow a permittee to replace existing financial assurance with other approved financial assurance mechanisms that provide equivalent coverage.

B. The secretary shall not release existing financial assurance until the permittee has submitted, and the secretary has approved, acceptable replacement financial assurance. Replacement of financial assurance pursuant to 20.6.8.1209 NMAC shall not constitute a release of the financial assurance under 20.6.8.1210 NMAC.

20.6.8.1210 RELEASE OF FINANCIAL ASSURANCE: The following requirements apply to the release of discharge permit closure plan financial assurance for a copper mine facility except that the provisions of Paragraphs (3) and (4) of Subsection A of this section and Subsections B, C and D of this section do not apply if the area for which release of financial assurance is sought is subject to the mining and mineral division provisions of 19.10.12.1210 NMAC.

A. Release application.

(1) The permittee may file an application with the secretary for the release of all or part of the financial assurance. The permittee may file only one release application per year for each permit.

(2) The application shall describe the discharge permit closure measures completed and shall contain an estimate of the cost of discharge permit closure, including long-term maintenance, water treatment and monitoring, that has not been completed.

(3) At the time the release application is filed with the secretary, the permittee shall submit proof that the notice of application has been provided in accordance with 20.6.2.3108 NMAC. The notice shall be considered part of any release application and shall contain: the permittee's name; discharge permit number and approval date; notification of the precise location of the real property affected; the number of acres; the type and amount of the financial assurance filed and the portion sought to be released; the type and appropriate dates of discharge permit closure plan performed; a description of the results achieved as they relate to the permittee's approved discharge permit closure plan; and the name and address of the secretary, to whom written comments, objections, or requests for public hearings on the specific financial assurance release may be submitted pursuant to Subsection C of 20.6.8.1210 NMAC.

(4) The secretary shall promptly provide notice of receipt of the application for release of all or part of the financial assurance to the mining and mineral division, the office of the state engineer, the department of game and fish, the forestry division, the state historic preservation division, other agencies he deems appropriate, and if the operation is on state or federal land, to the appropriate state or federal land management agency.

B. Inspection by secretary. Upon receipt of the complete financial assurance release application, the secretary shall within 30 days, or as soon thereafter as weather conditions permit, conduct an inspection and evaluation of the discharge permit closure measures completed. The evaluation shall consider among other factors, the degree of difficulty to complete any remaining discharge permit closure. The surface owner or lessor of the real property, other state and federal agencies as listed in Subsection A, Paragraph 4 of 20.6.8.1210NMAC above, and any other persons who have requested advance notice of the inspection shall be given notice of such inspection and may be present at the release inspection as may any other interested members of the public. The secretary may arrange with the permittee to allow access to the discharge permit area, upon request by any person with an interest in the financial assurance release, for the purpose of gathering information relevant to the proceeding.

C. Public hearing.

(1) Within 30 days from the date of the inspection, a person with an interest that is or will be adversely affected by the proposed financial assurance release may file written objections to the proposed release with the secretary. If written objections are filed and a hearing is requested, the secretary shall inform all persons who have requested notice of hearings and persons who have filed written objections in regard to the application of the time and place of the hearing at least 30 days in advance of the public hearing. The hearing shall be held in the locality of the permit area proposed for release.

(2) The date, time and location of the public hearing shall be advertised by the secretary in a newspaper of general circulation in the locality of the permit area once a week for two consecutive weeks. All persons who have submitted a written request in advance to the secretary to receive notices of hearing shall be

provided notice at least 30 days prior to the hearing. The hearing procedures of 20.6.2.3110 NMAC shall be followed.

D. Within 45 days after the inspection, if no public hearing is held pursuant to Subsection C of 20.6.8.1210 NMAC, or, within 45 days after a public hearing has been held pursuant to Subsection C of 20.6.8.1210 NMAC, the secretary shall notify in writing the permittee, the surety or other persons with an interest in the collateral who have requested notification under 20.6.8.1208 NMAC and the persons who either filed objections in writing or participants in the hearing proceedings who supplied their addresses to the secretary, if any, of the decision whether to release all or part of the financial assurance.

E. The secretary may release all or part of the financial assurance for the entire discharge permit area or incremental area if the secretary is satisfied that the discharge permit closure plan or a phase of the discharge permit closure plan covered by the financial assurance, or portion thereof, has been accomplished in accordance with the Water Quality Act, the copper mine rule and the discharge permit.

F. If the secretary denies the release application or portion thereof, the secretary shall notify the permittee, the surety, and any person with an interest in collateral as provided in Subsection C, Paragraph 4 of 20.6.8.1208 NMAC, in writing stating the reasons for disapproval and recommending corrective actions necessary to secure the release.

20.6.8.1211 FORFIETURE OF FINANCIAL ASSURANCE:

A. If a permittee refuses or is unable to conduct or complete the discharge permit closure plan, if the terms of the discharge permit are not met, or if the permittee defaults on the conditions under which the financial assurance was accepted, the secretary shall take the following action to forfeit all or part of the financial assurance for the discharge permit area or an increment of the discharge permit area.:

(1) Send written notification by certified mail, return receipt requested, to the permittee and the surety if any, informing them of the determination to forfeit all or part of the financial assurance, including the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the estimated cost of achieving discharge permit closure.

(2) Advise the permittee and surety, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, but are not limited to:

(a) An agreement by the permittee or another party to perform discharge permit closure operations in accordance with the conditions of the discharge permit, discharge permit closure plan, the Water Quality Act and the copper mine rule and a demonstration that such a party has the ability to satisfy the conditions; or

(b) The secretary may allow a surety to complete the discharge permit closure plan, or the portion of the discharge permit closure plan applicable to the financial assurance phase or increment, if the surety can demonstrate an ability to complete the discharge permit closure plan in accordance with the approved discharge permit. Except where the secretary approves partial release authorized under 20.6.8.1210 NMAC, no surety liability shall be released until successful completion of all discharge permit closure under the terms of the discharge permit, including applicable liability periods of 20.6.8.1204 NMAC

B. In the event forfeiture of the financial assurance is required by this part, the secretary shall:

(1) proceed to collect the forfeited amount as provided by applicable laws if actions to avoid forfeiture have not been taken; and

(2) use funds collected from the forfeiture to complete the discharge permit closure, or portion thereof, on the area covered by the discharge permit or increment to which financial assurance coverage applies.

C. Upon default of the conditions under which the financial assurance was accepted, the secretary may cause the forfeiture of any and all financial assurance to complete discharge permit closure for which the financial assurance was provided. Unless specifically limited, as provided in 20.6.8.1202 NMAC, financial assurance liability shall extend to the entire area covered by the discharge permit under conditions of forfeiture.

D. In the event the estimated amount forfeited is insufficient to pay for the full cost of discharge permit closure, the permittee shall be liable for remaining costs. The secretary may complete, or authorize completion of discharge permit closure of the area in accordance with the copper mine rule and the discharge permit terms and may recover from the permittee all reasonably incurred costs of discharge permit closure and forfeiture in excess of the amount forfeited.

E. In the event the amount of financial assurance forfeited was more that the amount necessary to complete discharge permit closure and all costs of forfeiture, the excess funds shall be returned by the secretary to the party from whom they were collected.