



Counsel for the Environment Department allegedly participated in a discussion of the merits of matters pending before the WQCC, and (2) alleged bias. As discussed below, there is no factual support for either proposition. Accordingly, there is no cause for the Commission to disqualify itself or contemplate recusal. That having been said, Freeport proposes that the participants in the closed session provide a more detailed explanation of what was said in the closed session about the postponement of the December 10, 2013 hearing on the Joint Request for Stay as a result of the Attorney General's apparent last-minute decision to withdraw as counsel for the Commission.

## **II. PROCEDURAL BACKGROUND REGARDING THE POSTPONEMENT OF THE HEARING ON THE JOINT REQUEST FOR STAY OF THE COPPER MINE RULE**

The Joint Request for Stay of 20.6.7 NMAC ("Joint Request") was filed by GRIP, Amigos Bravos and TRP on October 23, 2013. Subsequently, a Procedural Order was issued by the Hearing Officer with the consent of all parties. As laid out in the Procedural Order, the parties filed responsive pleadings and evidence in support of and in opposition to the Joint Motion in advance of the hearing. On November 15, notwithstanding his role as attorney for the WQCC, the Attorney General filed a written joinder in the Joint Request asking that the Copper rule be stayed pending appeal.

On December 4, 2013, the Hearing Officer unexpectedly sent an email notifying all of the parties that "[t]he Chair of the Commission has removed the hearing on the Joint Request for Stay from the December 10, 2013 draft meeting agenda. The decision follows discussions with the Attorney General's Office, and their identification of a potential conflict; the Commission plans to resolve the question of its legal representation in the appeal of the Copper Rule prior to considering the merits of the Request for Stay." A copy of the email is attached as Exhibit "A"

to the Department's Response. The parties received notice of the amended agenda for the December 10 meeting on December 6 by email, attached as Exhibit "B" to the Department's Response. The revised agenda was clear that the only matter to be discussed in executive session was the Commission's need for new legal representation in connection with the various pending matters related to the Copper Rule.

Mr. Frederick responded to the email seeking clarification on the agenda item and asking whether the Commission was going into session to "debate their conundrum over representation . . ." or whether the parties should anticipate any discussion of the merits of the Joint Request. The Hearing Officer responded by email, clarifying that there would be no discussion of the merits of the Joint Request. A copy of that email exchange is attached as Exhibit "1" hereto.

At the December 10, 2013 Commission meeting, legal counsel from the Attorney General's Office, Mr. Cunniff, was present. He had represented the Commission during the entire hearing on the Copper Mine Rule. When it came to agenda item 6, the Commission passed a motion to go into executive session to discuss the single subject listed under this agenda item. The Commission was accompanied in executive session by Mr. Cunniff, despite the indication in the December 4, 2013 email of a potential "conflict of interest" with regard to the Commission's representation by an attorney from the Attorney General office, and by Mr. Kendall, General Counsel for the Environment Department. It is reasonable to expect that if Mr. Cunniff had identified any irregularities with regard to the executive session, he would have so advised the Commission, but there is no indication of such. It should be noted that although Movants complain bitterly about the presence of the Department's General Counsel in the closed session, they do not have the same problem with the Attorney General's office participating in the discussion of new legal counsel for the Commission even though the Attorney General had

effectively conceded at this point that his office had a conflict of interest representing the Commission going forward.

Following the conclusion of the executive session, the Commission returned to public session and confirmed that the only matters discussed during executive session were those identified on the meeting agenda and in the motion to go into executive session, *i.e.*, the Commission's need for legal representation in connection with the Copper Rule going forward. Although Movants insinuate that the Commission discussed the merits of the Joint Request in executive session, there is no evidence that this is so. And despite Movants penchant for conspiracy theories, it is difficult to understand what conspiracy might have been hatched given that the interests of the AG and the Department are adverse as a matter of record, and both had lawyers in the closed session. A far more reasonable explanation is that the Commission's closed session discussion included only the matters described by the Chair upon returning to open session.

After returning from the executive session, the Commission Chair stated that it would schedule a hearing on the Joint Request for either January 14, 2014 or another date between December 10 and January 14. The Commission also voted to authorize the Chair to obtain alternative counsel for the Copper Mine Rule matters. Little was disclosed regarding the reasons for the Commission's need to seek alternative counsel, other than that the Commission had "received a letter" from the Attorney General.

Based upon the December 4 email and the discussion following the December 10, 2013 executive session, it appears that the "conundrum" regarding the legal representation of the Commission was a result of action by the Attorney General and not the Commission. Mr. Cunniff represented the Commission throughout that proceeding, through and including the

December 10 meeting and the executive session, even though the Attorney General appeared as a party and advocated his own position on the proposed Copper Mine Rule. There has been no public explanation of any change in circumstances that may have resulted in the Attorney General's apparent withdrawal of representation of the Commission the week before the December 10 hearing. Of record, however, is that the Attorney General filed a Notice of Appeal of the Copper Mine Rule in the Court of Appeals on October 10, 2013, supplemented that Notice of Appeal on October 16, 2013, and filed a pleading supporting the Request for Stay on November 15, 2013. If those actions by the Attorney General created a conflict or other reason for the Attorney General's withdrawal why did the Attorney General wait several weeks to notify the Commission of a concern with a "potential conflict"?

All parties appeared to be prepared for the December 10 hearing on the Joint Request. Counsel for the Attorney General was the only exception. On December 3 she notified the Hearing Officer of a pending Inspection of Public Records Act request served on the Environment Department and raised a concern with the lack of a response. *See* Exhibit "2" hereto. The next day, the Attorney General notified the Hearing Officer of the Department's response to the IPRA request. That same day, the parties received email notice of the issue with legal representation of the Commission and that the hearing on the Joint Request had been taken off of the Agenda for the December 10 meeting. The Attorney General still was seeking additional information to prepare for the hearing on the Joint Request as of December 11, 2013. *See* Exhibit "2" hereto.

### III. ARGUMENT

- A. Freeport Joins in the Department's Argument that It Was Appropriate for NMED's General Counsel to Act in a Limited Capacity to Advise the Commission on Its Options for Obtaining Legal Counsel.

Freeport joins in the Department's Response, Section I, on pages 1-3. It was reasonable for the Commission to seek the advice of NMED's General Counsel considering the last minute withdrawal of the Attorney General as the Commission's counsel, the very limited agenda for the executive session and the unique circumstances presented here, including the Commission's inability to rely on the Attorney General to give legal advice under the circumstances.

B. Freeport Joins in Part II of the Department's Response That It Was Appropriate for the Commission to Go into Executive Session.

Freeport joins in Part II of the Department's Response, pages 3-5. In addition to the arguments raised by the Department, Freeport notes that Movants cite to section 20.1.3.11 NMAC as prohibiting *ex parte* communications. This rule applies only to adjudicatory proceedings and does not apply to rulemaking proceedings. The Commission's guidelines for rulemaking proceedings, which govern this matter, do not contain any prohibition on *ex parte* communications. Moreover, even the rule, 20.1.3.11 NMAC, prohibits only *ex parte* discussions of the *merits* of a proceeding. As explained in the Department's Response and above, the limited nature of the executive session discussion would not have violated the rule against *ex parte* discussions even if such a rule applied.

Furthermore, even if there were some procedural flaw in the Department's argument that the executive session during the December 10 meeting was not in full compliance with the Open Meetings Act, the remedy would hardly be to disqualify the Commission from hearing the Joint Request. The record is clear that the only action taken by the Commission following the executive session was to authorize the Chairman to procure other counsel for the matters listed on the agenda item. Movants do not object to the Commission obtaining independent legal counsel, and since this is the only matter discussed in the executive session it is hard to understand what Movants are complaining about at least with respect to the Open Meetings Act.

Presumably, if other counsel is procured in compliance with the Water Quality Act, section 74-6-3.1 NMSA 1978, Movants will not object to proceeding with the hearing on the Joint Request with that counsel advising the Commission.

The Motion raises an issue regarding whether, despite the unique circumstances of the Attorney General's apparent withdrawal as counsel and the presence of counsel for the Attorney General's office in the executive session, the presence of Mr. Kendall in the executive session means that the discussion between the Commission and counsel may not have been covered by the attorney-client privilege. As a result, the Motion argues that the executive session was not in compliance with the Open Meetings Act. As described in the Department's Response, given the very limited nature of the matter of legal representation discussed in the executive session, that should not be the case. But even if this were so the Commission has an opportunity to cure any technical deficiency in the closed session by making a more transparent record of the closed session prior to the January 8, 2014 hearing on the Joint stay request. A potential remedy might be public disclosure of the letter from the Attorney General to the Commission, if that letter was discussed during executive session and the presence of Mr. Kendall resulted in waiver of attorney client privilege (assuming that the letter is truly privileged in the first instance). On January 8<sup>th</sup>, new Commission counsel would be available to assist in this regard.

C. No Parties, Including Movants, Were Prejudiced by any Discussion of the Schedule for the Hearing on the Joint Request.

The only specific claim of any possible prejudice to Movants stated in the Motion is that the rescheduling of the hearing may have been discussed during executive session, and that could have prejudiced Movants. Instead of scheduling a new hearing date, however, the Commission referred the rescheduling to the Hearing Officer. All parties, including Movants, agreed during a December 13 scheduling conference to a new hearing date of January 8 and indicated their

witnesses could be available on that date. Consequently, any on-going objection to the scheduling of the hearing on January 8 is waived and moot. Despite the resolution of the scheduling issue to their satisfaction during the December 13 conference, Movants nevertheless filed the Motion the same day, still raising the scheduling issue in the Motion. This is hardly good faith.

If any party has grounds to complain regarding the hearing schedule, it would be the Department or Freeport. As discussed above, the sole apparent reason why the hearing on the Joint Request was not held on December 10 is the action of the Attorney General apparently withdrawing as counsel six days before the December 10 hearing, leaving its client without legal counsel.

Moreover, the Attorney General's action abandoning its client and leaving the Commission without counsel for the December 10 hearing on the Joint Request potentially jeopardizes the timing of the Commission's hearing; by statute if the Commission does not act on the Joint Request within 90 days of its filing, then the request can be "deemed denied," and the stay request can be pursued in the Court of Appeals. *See* § 74-6-7(C) NMSA 1978. In that case, there might not be a record of the Commission's action to be considered by the Court of Appeals. At present, this should not be an issue with the hearing scheduled for January 8, 2014, provided that the Commission is able to secure alternative counsel for a hearing on that date.

D. Movants Have Waived Any Objections to the Commission Hearing the Request for Stay.

By their actions, movants have waived any objection to the Commission hearing the Joint Request. These actions include: (1) submitting the Request for Stay to the Commission, (2) agreeing to hearing schedules and procedures for the December 10, 2013 and January 8, 2014 hearings, (3) submitting proposed testimony and pleadings for the hearing, and (4) and failing to

timely object to the Commission hearing the Joint Request. Notably, all parties should have been prepared for a hearing on the Joint Request on December 10, 2013. Only the actions of the Attorney General in apparently withdrawing as counsel prevented the hearing from taking place on December 10.

E. There is No Legal Basis for Disqualification of the Commission for Alleged Bias.

Freeport joins in part III of the Department's Response on pages 5-6 in response to the Motion's claims of bias. Freeport adds that Movants cite no case law in support of their claim that the Commission should recuse itself for alleged "bias." Case law in fact shows that there is a high bar to disqualify a Commissioner or to claim a violation of due process because of alleged bias. For example, the courts have recognized that "[i]n selecting public members, the Governor will likely select those members from pools consisting of people who have been politically and publicly active, people from industry, and people who have expressed their views and who have been engaged in the regulatory process. It is unrealistic to expect that the public members will be people who have not taken positions, or people who come 'with a clean slate.'" *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission*, 2006-NMCA-115, ¶42, 140 N.M. 464, 143 P.3d 502, citing *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 26 123 N.M. 239, 938 P.2d 1384. That decision confirmed that (1) a Commissioner who had appeared on behalf of the Sierra Club in a Mining Commission hearing in opposition to a party's position on a similar matter would not be disqualified on grounds of bias, (2) a Commissioner who previously had worked on matters related to the permit under appeal should not be disqualified, and (3) a change in composition of the Commission, including a change in the Commission chair, between an evidentiary hearing and closing arguments and deliberation was not a due process violation.

The court noted that “[w]e have required disqualification when there is evidence that a particular commissioner has made comments indicating that he or she has prejudged the case to be heard.” *Phelps Dodge, supra*, 2006-NMCA-115 ¶ 46. The Motion presents no such evidence regarding any Commissioner, yet it seeks to disqualify the whole Commission. Indeed, as grounds for alleged bias of the Commission, Movants inexplicably assert, in paragraph 17 of the Motion, that “NMED” allegedly has aligned itself with Freeport’s interests. Such allegations, even if they were true, provide no basis whatsoever for a claim that the Commission itself is biased. Similarly, the allegations that the Commission is biased because it allowed the Department’s counsel to participate in the executive session and that the WQCC adopted a Statement of Reasons proposed by the Department fail to show any bias that could disqualify the Commission. Indeed, the Department and Freeport disclosed to the Commission that they worked together to prepare a joint proposed Statement of Reasons, a practice which was encouraged at the close of the hearing, and the Commission actively deliberated and voted on several changes to the proposed Copper Mine Rule as advocated by Movants.

Movants assert the “removal” of Mr. Bland is a basis for the Motion. Mr. Bland resigned from the Commission, and there is no evidence whatsoever that any Commissioner, or the Commission as a whole, had anything to do with Mr. Bland’s resignation. Consequently, Movants argument in this regard is entirely baseless.

#### **IV. CONCLUSION**

For the reasons set forth above, the Motion is without basis in law or fact and should be denied. The Commission should proceed with a hearing on the Request for Stay on January 8, 2014, as agreed by all parties and ordered by the Hearing Officer.

Respectfully Submitted,

**GALLAGHER & KENNEDY, P.A.**



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing pleading was hand-delivered to the following parties on Friday, December 27, 2013:

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and Turner Ranch Properties

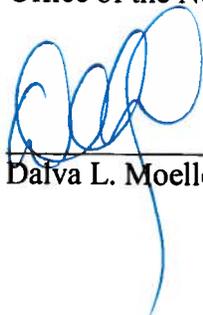
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## Moellenberg, Dalva L.

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**From:** Orth, Felicia, NMENV <felicia.orth@state.nm.us>  
**Sent:** Friday, December 06, 2013 9:48 PM  
**To:** bfrederick@nmelc.org; Castaneda, Pam, NMENV  
**Cc:** Moellenberg, Dalva L.; Tannis Fox; Tracy L. Hofmann; Becker, Kathryn, NMENV  
**Subject:** RE: Revised Amended Draft Agenda 12-10-13 meeting

Mr. Frederick-

The Motion for Stay hearing is not back on the agenda, and I don't believe the Copper Rule parties or the public will be invited to say anything on Tuesday about the new agenda item.

As I understand it, the Commissioners will be talking amongst themselves, perhaps in closed session, about identifying and choosing counsel to represent them in the Copper Rule appeal and in considering the Motion for Stay.

Pam sent the revised amended draft agenda for the parties' information only, not as an invitation to participate. I am sorry for any confusion.

P.S. Did you mean to copy Tracy Hughes rather than Tracy Hofmann?

Felicia Orth, Hearing Officer  
New Mexico Environment Department  
1190 St. Francis Drive, Suite 2100 S  
Santa Fe, New Mexico 87502  
505.827.0339 (phone)  
505.827.0310 (fax)

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**From:** bfrederick@nmelc.org [bfrederick@nmelc.org]  
**Sent:** Friday, December 06, 2013 8:24 PM  
**To:** Castaneda, Pam, NMENV; Orth, Felicia, NMENV  
**Cc:** 'Moellenberg, Dalva L.'; Tannis Fox; Tracy L. Hofmann; Becker, Kathryn, NMENV  
**Subject:** RE: Revised Amended Draft Agenda 12-10-13 meeting

Dear Madame Hearing Officer,

I have to object to these last minute changes in WQCC's agenda. I had witnesses and a client flying in; now they've cancelled their flights. But now we're back on the agenda, or somewhat back on the agenda.

What is expected of the parties now on Tuesday? If anything substantive is expected then we're obviously going to have due process problems. Is the WQCC simply going into executive session to debate their conundrum over representation or is there going to be some public discussion or argument or something else?

I realize this is not your fault but would appreciate whatever guidance you can provide.

Thank you,

Bruce Frederick

-----Original Message-----

**From:** "Castaneda, Pam, NMENV" <Pam.Castaneda@state.nm.us>  
**Sent:** Friday, December 6, 2013 5:07pm



To:  
Subject: Revised Amended Draft Agenda 12-10-13 meeting

Good afternoon. See attached.

**Pam Castaneda**

*Administrator to Boards and Commissions*

**Environmental Improvement Board**

**Water Quality Control Commission**

**1190 St. Francis Drive Room S2102/PO Box 5469**

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**(505) 827-2425**

**Email. [pam.castaneda@state.nm.us](mailto:pam.castaneda@state.nm.us)**

**Moellenberg, Dalva L.**

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**From:** Fox, Tannis <tfox@nmag.gov>  
**Sent:** Wednesday, December 04, 2013 9:41 AM  
**To:** Orth, Felicia, NMENV  
**Cc:** Bruce Frederick; Tracy Hughes; Bill Olson; Kathryn NMENV Becker; Knight, Andrew, NMENV; Moellenberg, Dalva L.; Jon J. Indall; Louis W. Rose; Trujillo, Anthony J.; Castaneda, Pam, NMENV  
**Subject:** Re: Copper Mine Rule - stay hearing - telephone conference

Madam Hearing Officer,

I just received a response from NMED to the IPRA request, which I hope addresses one of the reasons the Attorney General requested a telephone conference. We still think it would be helpful to have a telephone conference to discuss the procedures for the hearing next week, e.g., will the parties be given an opportunity to give an opening statement and/or closing argument, will the parties be given an opportunity to submit post-hearing briefs.

Thank you for consideration of this request.

Tannis Fox

On Tue, Dec 3, 2013 at 5:13 PM, Fox, Tannis <tfox@nmag.gov> wrote:  
Good afternoon Madam Hearing Officer.

The Procedural Order, para. 7, issued for the stay hearing anticipated that a telephone conference among the parties would be held on November 27 or December 2 to discuss the hearing procedures. The AGO believes such a telephone conference would be helpful for this purpose.

The Attorney General's Office also seeks a telephone conference with you and the parties because we submitted an IPRA request to NMED on November 15, 2013 seeking documents that might be used in the stay hearing. The response from NMED stated the documents would be produced by December 4, 2013. *See* AGO request and NMED response, attached. However, as of close of business today, I do not have confirmation from NMED that the documents will be produced by tomorrow. *See* emails between AGO and NMED, attached. I would like to discuss production of the documents in a timely fashion so that the AGO does not need to consider seeking a postponement of the hearing, presently scheduled for December 10, 2013.

Thank you for your consideration of this request.

Sincerely,

Tannis L. Fox  
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Office of the New Mexico Attorney General  
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**Moellenberg, Dalva L.**

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**From:** Fox, Tannis <tfox@nmag.gov>  
**Sent:** Wednesday, December 11, 2013 1:51 PM  
**To:** Moellenberg, Dalva L.; Trujillo, Anthony J.  
**Subject:** Cu Rule

Hi Dal and TJ. Could you please provide me with copies of the 17 discharge permits for the copper mines referred to in paragraph 8 of Tim Eastep's affidavit (that have pending renewal applications before NMED), attached as Exhibit A to FMI's Opposition to Request for Stay of the Copper Mine Rule, 20.6.7. NMAC?

Thank you much.  
Tannis

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