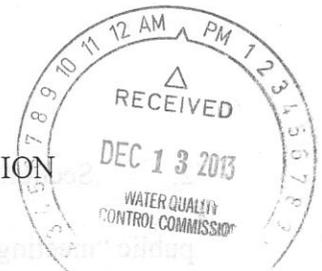


COPY



STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

In the matter of:)
)
PROPOSED AMENDMENT TO)
PART 20.6.2 NMAC (Copper Rule))
_____)

No. WQCC 12-01(R)

**MOTION TO DISQUALIFY WQCC FROM DECIDING WHETHER
TO STAY THE COPPER RULE BASED ON EX PARTE
COMMUNICATION WITH A PARTY BEFORE IT AND BIAS**

The Gila Resources Information Project (“GRIP”), Amigos Bravos, and Turner Ranch Properties, L.P. (“TRP”) (collectively referred to as “Movants”) object to the Water Quality Control Commission’s (“WQCC”) closed *ex parte* meeting with the New Mexico Environment Department (“NMED”) on December 10, 2013 during which Movants’ Motion for Stay was discussed. Movants further object to the WQCC’s clear bias in favor of NMED and the Freeport-McMoRan entities (“Freeport”) throughout the Copper Mine Rule proceeding. The WQCC’s closed *ex parte* discussion with NMED and its clear bias in favor of NMED and Freeport prejudice Movants and render the WQCC incapable of making a fair decision on the pending Motion for Stay. Because of this, and because Movants’ efforts to obtain a stay before the WQCC are futile, Movants request that the WQCC recuse itself from deciding the Motion for Stay. Further grounds for motion are as follows:

1. The WQCC held a public meeting on December 10, 2013. The published agenda for this meeting included eight items, including:
 6. Discussion and possible action on legal representation of the Commission in WQCC 12-01 (R), The Copper Rule, in the Court of Appeals, and *matters related to the Motion for Stay*. The Commission may vote to adjourn into Closed Executive Session to discuss the matter pursuant to Section 10-15-1(H)(7), NMSA 1978 of the Open Meetings Act.

(Emphasis added.)

2. Section 10-15-1(H)(7) of the Open Meetings Act allows the WQCC to close otherwise public “meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant.”

3. The Open Meetings Act also provides:

[The] subject to be discussed [in a closed meeting] shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting Only those subjects announced or voted upon prior to closure by the policymaking body may be discussed in a closed meeting.

NMSA 1978, § 10-15-1(I)(1).

4. At the December 10th meeting, the WQCC voted to go into a closed session to discuss Item 6 on its agenda. As the WQCC was going into closed session, the WQCC Chair announced that General Counsel for NMED would join WQCC in closed session. Although it was clearly contemplated before, the General Counsel’s participation in the WQCC’s closed session was not mentioned in the meeting agenda.

5. NMED is a party in the Copper Mine Rule proceeding now pending before the WQCC and it is adverse to Movants. Specifically, NMED is adverse to the Motion for Stay, a subject that was discussed by the WQCC in closed session.

6. It is highly improper for the WQCC to have allowed a party presently before it to participate in closed session, *ex parte* and to the exclusion of the other parties, to discuss a matter pending before the WQCC. For example, Section 20.1.3.11 NMAC provides:

EX PARTE DISCUSSIONS: At no time after the initiation and before the conclusion of a proceeding under this part shall any person discuss *ex parte* the merits of the proceeding with any commissioner or the hearing officer. This prohibition does not preclude any constituent agency commissioner from conferring with commission counsel, the commission administrator, or agency employees who are not, and have not been, involved in the matter before the commission.

Accord 20.1.3.11 NMAC (prohibiting WQCC members from having *ex parte* discussions in adjudicatory proceeding); 20.1.1.112 NMAC (same prohibition applied to members of the Environmental Improvement Board (“EIB”) in a rule making); 20.1.9.11 NMAC (same prohibition applied to NMED Secretary in a rulemaking); 20.1.2.110 NMAC (same prohibition applied to members of the EIB in an adjudicatory proceeding); 20.1.4.100.G NMAC (same prohibition applied to NMED Secretary in a permit proceeding); 20.1.5.100.H NMAC (same prohibition applied to NMED Secretary in an adjudicatory proceeding).

7. A fundamental precept in our legal system forbids a judge or, in this case, an administrative decision maker, from engaging in *ex parte* communications with a party before it except under very limited circumstances set forth in law. The WQCC violated this fundamental principal of fairness by allowing *ex parte* discussions with the NMED General Counsel on “matters relating to the motion for stay”.

8. Furthermore, it is a violation of the Open Meetings Act for NMED to have participated in closed session with the WQCC, the basis of which was to discuss matters subject to attorney-client privilege. NMED’s General Counsel does not represent WQCC. In fact, under the Water Quality Act, he is *prohibited* from representing the WQCC. NMSA 1978, § 74-6-3.1(A). The Water Quality Act provides that, “In the exercise of any of its powers or duties, the water quality control commission shall act with *independent legal advice*.” *Id.* (emphasis added). The WQCC may obtain legal advice from the Attorney General, independent counsel hired by the WQCC or “another state agency whose function is sufficiently distinct from the *department of environment* and each constituent agency *to assure independent, impartial advice*.” *Id.* (emphasis added). Thus, the Water Quality Act requires the WQCC to obtain independent and impartial legal

advice, and expressly recognizes that NMED is not a disinterested party before the WQCC and therefore prohibits NMED from representing the WQCC.

9. Accordingly, the communications between NMED's General Counsel and the WQCC in closed session could not have been not subject to attorney-client privilege. Indeed, the WQCC waived its attorney-client privilege as to all matters discussed in that closed session because of the presence and participation of a third party.

10. The WQCC's closed meeting with NMED's General Counsel violated the Open Meetings Act because the discussions with NMED's General Counsel were not subject to attorney-client privilege, and therefore there was no basis under Section 10-15-1(H)(7) of the Open Meetings Act for the WQCC to be in closed session.

11. The WQCC stated in the open portion of the December 10th meeting preceding the closing meeting that discussions with NMED's General Counsel would involve "non-substantive matters." However, the WQCC's basis for closing the session was to discuss matters "pertaining to threatened or pending litigation in which the public body is or may become a participant." Threatened or pending litigation against the WQCC is *not* a "non-substantive matter."

12. The specific agenda item for closed session stated that discussion would involve possible legal representation of the WQCC in the Court of Appeals in the Copper Mine Rule appeal and "matters related to the motion for stay". The legal representation of the WQCC is not a non-substantive matter. More problematic, however, is the broadly-framed "matters related to motion for stay" item. That item left open for the WQCC to discuss *ex parte* with NMED counsel any and all matters relating to the stay, a matter in which NMED is a party before the WQCC.

13. The closed meeting lasted approximately one hour.

14. After conferring with NMED in a closed *ex parte* meeting, the WQCC Chair announced that it may schedule a special meeting on Movants' Motion for Stay, which would occur before the WQCC's next regularly scheduled meeting on January 14, 2014.

15. The scheduling of the stay hearing, clearly discussed in closed session, can result in an advantage to NMED in its opposition to the Motion for Stay, and a disadvantage to Movants in its support of the stay. Movants' witnesses are from out-of-town. They cannot be available to attend a hearing until after January 14; they are not available on certain dates; and they and the parties require at least thirty days prior notice of the hearing date. WQCC's *ex parte*

communication with NMED's counsel was substantive, unfair, and prejudicial to Movants.

16. The WQCC's closed *ex parte* meeting with NMED further demonstrates its undue bias in favor of NMED and Freeport in this proceeding.

17. The record shows that NMED has aligned itself with and advanced Freeport's private interests throughout this proceeding. For example:

a. At Freeport's request, NMED changed the final draft Copper Mine Rule developed by the Copper Rule Advisory Committee to effectively legitimize the extensive existing ground water pollution at Freeport's mines in Grant County, New Mexico, and to allow more of the same pollution in the future to continue *in perpetuity*. NMED senior management adopted Freeport's draft against the recommendation of its principal technical staff person that Freeport's proposed provisions violated the Water Quality Act.

b. NMED presented no technical witnesses from NMED staff in support of its proposed Copper Mine Rule and relied heavily on Freeport's ten witnesses and its hired expert witness from the mining industry. Not relying upon NMED's own staff in a rulemaking such as

this one is unheard of and occurred, presumably, because there was no NMED technical staff who, in their professional judgment, could support the rule.

c. NMED's then-General Counsel (now Secretary-designate) threatened to sue Mr. William Olson, NMED's contractor to develop the Copper Mine Rule, because Mr. Olson filed a notice of intent to present technical evidence in opposition to parts of NMED's proposed rule, i.e., those same parts of the rule that NMED's principal technical staff person believed violated the Water Quality Act.

d. NMED's lawyers filed an objection to Mr. Olson's testimony, alleging without facts in support, that he had violated his professional services contract with NMED. The WQCC hearing officer struck NMED's objection as baseless.

e. NMED allowed Freeport's attorneys to ghostwrite NMED's 200+ page proposed Order and Statement of Reasons, but NMED presented this work to the WQCC as its own.

f. NMED initially claimed that communications between itself and Freeport were subject to attorney-client privilege, even though there is no legal basis for such a claim.

g. Freeport did not object when WQCC's invited NMED's General Counsel into a closed *ex parte* meeting.

18. The WQCC adopted the Statement of Reasons NMED proposed, but that Freeport secretly wrote, *in toto*, based on a perfunctory deliberations record in this matter. This Statement of Reasons contains no discussion, analysis or even citation to Movants' proposed Statement of Reasons or closing argument, because these materials were not available when Freeport ghostwrote "NMED's" proposed Statement of Reasons.

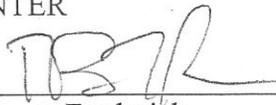
19. The one member of the WQCC who voted against the Copper Mine Rule, Doug Bland, and who offered substantive analysis of the rule during the WQCC's deliberations, has been removed from the Commission.

20. The WQCC is obviously biased and has a closed mind on this issue. Freeport even admits that it is "futile" for Movants to request the WQCC to stay the Copper Rule, because the WQCC has already made up its mind that the Rule complies with law. See, e.g. Freeport Response at 4 ("In any event, it is important to recognize that the [Motion for Stay] asks this Commission to [to] enjoin its own action in adopting the Copper Mine Rule.")

WHEREFORE, Movants respectfully request the WQCC to recuse itself from deciding the Motion to Stay so that Movants may immediately seek relief in the Court of Appeals.

Respectfully submitted:

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CERTIFICATE OF SERVICE: I hereby certify that on 12/13, 2013 I sent the foregoing paper by email to the following:

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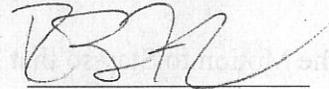
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