

**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)**

**AMIGOS BRAVOS' SECOND MOTION TO POSTPONE THE HEARING**

On February 18, 2013, the New Mexico Environment Department (“NMED”) filed an Amended Petition for Adoption of the Copper Rule. This Amended Petition was filed four (4) days prior to the Notice of Intent to Present Technical Testimony is required by the Procedural Order to be filed. Because of this Amended Petition, Amigos Bravos again respectfully requests that the hearing currently scheduled for April 9, 2013 be postponed.

The Procedural Order requires that technical testimony, including the full direct testimony of all the witnesses, be filed by February 22, 2013 and rebuttal testimony be filed by March 15, 2013. Procedural Order, §§301 & 302. It is impossible to prepare for hearing if the draft Copper Rules are amended so close to the time required to file the Notice of Intent to Present Technical Testimony. Amigos Bravos is harmed by NMED’s Amended Petition, because it has expended extensive resources to prepare for hearing on the Petition filed October 30, 2012. At this late date, NMED’s changes to the Petition on which the parties are going to hearing dictate that the hearing be postponed. Amigos Bravos has limited funds available to participate in this rulemaking and its due process rights are violated because the Petition is changed so close to a critical filing date.

Due process requirements require that hearing be postponed. The parties are only being given four days notice to prepare their technical case for these Copper Rule amendments. The amendments made by NMED in its February 18, 2013 filing are substantive. For example, on page 1 of the redline version of draft Section 20.6.7.7.B(5), NMED changes the technical definition of “Area of hydrologic containment” to an “Area of open pit hydrologic containment.”

NMED then removes from that definition the ground water “adjacent to an open pit” and adds into the definition “an open pit that intercepts the water table.” These amendments completely change the definition of “area of hydrologic containment” and are not the natural outgrowth of the definition originally proposed. These changes are not correcting typographical errors, they change the entire meaning of this definition and this is just page 1.

Another change includes the addition of definitions for “seepage” and “slag”. See, page 4, Redline Petition. The addition of these definitions may or may not be controversial, but they are technical and substantive. There are numerous changes like these in the Notice of Amended Petition. Even Freeport McMoRan, Inc. and the Attorney General are not addressing NMED’s Amended Petition in their direct testimony. See, 2<sup>nd</sup> Postponement Motion, Exhibit 1, attached hereto. FMI and the AG state that because they are “well along with preparation of written direct testimony,” their February 22, 2013 filing will reflect the October 30, 2012 Petition. This late substantive filing is a violation of the parties’ due process rights.

Due process requires reasonable notice and an opportunity to be heard. *Tw Telecom of N.M. v. N.M. Pub. Regulation Comm'n*, 2011 -NMSC- 29, 150 N.M. 12, 256 P.3d 24. The opportunity to be heard should be “at a meaningful time and in a meaningful manner.” *N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n*, 104 N.M. 565, 568, 725 P.2d 244, 247 (1986). Substantive and technical amendments to the NMED’s draft Copper Rule four days prior to the due date for full testimony are a violation of Amigos Bravos due process rights.

Amigos Bravos renews its original Motion to Postpone the Hearing filed January 11, 2013, and incorporates those arguments by reference. That Motion was based on the Water Quality Control Commission Chair’s unilateral decision to hear dispositive motions on NMED’s draft Copper Rule at the beginning of the hearing on April 9, 2013, implying that the outcome of those motions are predetermined. Adding this due process violation by amending the Petition

four days prior to the filling of technical testimony, Amigos Bravos is harmed by not having adequate time to prepare in a “meaningful manner” for this precedent setting hearing.

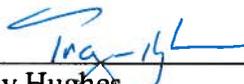
Turner Ranch and the Gila Resources Information Project concur in this motion.

### CONCLUSION

Amigos Bravos’ due process rights are violated by NMED’s last minute changes to its Copper Rule. The Commission does not have a time limit on how long it takes to promulgate the proposed Copper Rule. NMSA 1978, §74-6-4.K. Amigos Bravos respectfully request that the hearing currently scheduled for April 9, 2013 be postponed.

Respectfully submitted:

HIGH DESERT ENERGY + ENVIRONMENT LAW  
PARTNERS, LLC

By:   
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*Attorney for Amigos Bravos*

### CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2013, I sent Amigos Bravos’ Second Motion to Postpone the Hearing by email to the following:

Andrew Knight  
Kathryn Becker  
Assistant General Counsels  
New Mexico Environment Department  
1190 St. Francis Drive  
Santa Fe, New Mexico 87502-6110

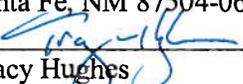
Tannis Fox  
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Tracy Hughes

## Tracy Hughes

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**From:** Fox, Tannis [tfox@nmag.gov]  
**Sent:** Tuesday, February 19, 2013 10:31 AM  
**To:** Moellenberg, Dalva L.  
**Cc:** Knight, Andrew, NMENV; Becker, Kathryn, NMENV; Trujillo, Anthony J.; Bruce Frederick; Tracy Hughes; Louis W. Rose; Jon J. Indall; Castaneda, Pam, NMENV; Sean Cunniff  
**Subject:** Re: Copper Mine Rule

Counsel,

For the same reasons, the Attorney General will address NMED's amended language in rebuttal. As well, given the timing of the filing of the amended petition and the time constraints of filing NOIs this Friday, the Attorney General will provide its proposed amendments to the Copper Mine Rule in rebuttal (instead of providing them on the original proposed rule, which has now been amended).

Tannis

On Mon, Feb 18, 2013 at 5:21 PM, Moellenberg, Dalva L. <[DLM@gknet.com](mailto:DLM@gknet.com)> wrote:

Andrew,

Thank you for sending the Notice of Amended Petition. As we are well along with preparation of written direct testimony, and we anticipate that the Department's direct testimony will address the modified language of the proposed rule, we plan to address the modified language, as well as the withdrawal of the financial assurance section, in Freeport's rebuttal testimony. Consequently, Freeport's direct testimony will reflect the proposed rule language submitted with the October 30, 2012 petition.

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**From:** Knight, Andrew, NMENV [mailto:[Andrew.Knight@state.nm.us](mailto:Andrew.Knight@state.nm.us)]  
**Sent:** Monday, February 18, 2013 4:19 PM  
**To:** Fox, Tannis; Becker, Kathryn, NMENV; Moellenberg, Dalva L.; Trujillo, Anthony J.; Bruce Frederick; Tracy Hughes; Louis W. Rose; Jon J. Indall  
**Cc:** Castaneda, Pam, NMENV; Sean Cunniff  
**Subject:** RE: Copper Mine Rule

Counsel,

Attached is the Department's Notice of Amended Petition filed with the Commission today.

Andrew P. Knight

Assistant General Counsel

Phone: [\(505\) 222-9540](tel:(505)222-9540)

Ex 1