

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)

**NOTICE OF PROPOSED TESTIMONY AND OTHER  
EVIDENCE OFFERED IN SUPPORT OF MOTION TO STAY  
THE COPPER MINE RULE PENDING APPEAL**

Pursuant to the Procedural Order Relating to the Joint Motion for Stay of 20.6.7 NMAC, the Gila Resource Information Project (GRIP), Amigos Bravos, and Turner Ranch Properties, L.P. (TRP) (“Movants”) hereby offer the following “proposed live testimony, record references [and] other evidence” in support of their Motion:

1. Exhibit A: Proposed Testimony of James R. Kuipers, P.E. (This testimony will be provided in affidavit form if the parties waive cross-examination.) The purpose of Exhibit A is to show irreparable harm to Ladder Ranch if the Copper Mine Rule is not stayed pending appeal.

2. Exhibit B: Email from Kurt Vollbrecht to Bill Olson, dated September 7, 2012. The purpose of Exhibit B is to show the provisions of the Copper Mine Rule that violate the Water Quality Act according to NMED staff.

3. Exhibits C-I Exhibits C through I are documents related to the request to inspect public records made by the New Mexico Environmental Law Center (Law Center) pursuant to the Inspection of Public Records Act (IPRA). The Law Center made the request to the New Mexico Environment Department (NMED) regarding communications between Freeport-McMoRan’s (Freeport) attorneys and NMED regarding NMED’s proposed Order and Statement of Reasons (SOR):

a. Exhibit C is the Law Center’s request to inspect records.

b. Exhibit D is NMED's response, claiming that communications between it and Freeport were subject to attorney-client privilege or work product.

c. Exhibit E is NMED's retraction of claim that all documents were privileged.

d. Exhibit F is a partial<sup>1</sup> draft of NMED's proposed SOR, dated August 21, 2013. At the bottom of every page of this document is a client/document identification number that is identical in form to that used by Gallagher and Kennedy, PA on papers that they filed on behalf of Freeport in this proceeding. See, e.g., Exhibit G. When all the changes to Exhibit F are accepted, then this document is virtually identical to the final Order and Statement of Reasons proposed by NMED and adopted *in toto* by this Commission.

e. Exhibit H is excerpted from a draft of NMED's proposed SOR, dated August 19, 2013. This draft has comments and redlining by Freeport's attorneys and a client/document identification number on the last page that is similar to the Gallagher and Kennedy numbers on Exhibits F and G.

f. Exhibit I is an initial draft of NMED's SOR that appears to have actually been written by NMED staff rather than Freeport's lawyers. It is only 26 pages long and does not have Gallagher and Kennedy's client/document identification number on it or any comments from them. This draft bears little resemblance to the SOR that this Commission adopted, except that certain of its paragraphs appear therein.

g. Exhibits F, H and I were passed between Freeport and NMED in electronic format. However, NMED made no emails available for inspection, indicating that NMED either destroyed the emails by which drafts were passed between NMED and Freeport, or NMED and Freeport used hand-carried thumb drives or other hand-carried portable storage devices to jointly review and comment on drafts. In either case, NMED and Freeport have evaded and undermined the open government policies underlying IPRA.

---

<sup>1</sup> NMED only provided a copy of this draft SOR through paragraph 1179.

h. Exhibit C-I are relevant to the public interest, because they show that Freeport wrote the SOR which NMED ostensibly proposed and which this Commission ultimately adopted *in toto*. Freeport is the primary beneficiary of the Copper Mine Rule, because it purports to legitimize the existing ground water pollution and allow new pollution at Freeport's large open pit copper mines. But for the Copper Mine Rule, this pollution would violate the Water Quality Act, violate this Commission's regulations, and subject Freeport to potential penalties and permit terminations. Moreover, Freeport prepared the SOR that the Commission adopted before the Movants and the Attorney General had submitted their closing arguments, their proposed SORs, and their proposed joint rule changes. The Commission's SOR, therefore, is completely one-sided. It contains no reference to the voluminous closing materials submitted by Movants or the Attorney General or any indication that the Commission considered these materials in its deliberations.

4. Exhibit J: Proposed Testimony of Steve Dobrott, manager of the Ladder Ranch. (This testimony will be provided in affidavit form if the parties waive cross-examination.) The purpose of Exhibit J is to show irreparable harm to Ladder Ranch if the Copper Mine Rule is not stayed pending appeal.

5. Exhibit K: Proposed Testimony of William C. Olson. (This testimony will be provided in affidavit form if the parties waive cross-examination.) The purpose of Exhibit I is offered to show irreparable harm to the Movants and public if the Copper Mine Rule is not stayed pending appeal.

6. Movants also incorporate the closing arguments and proposed statements of reasons submitted by the Attorney General, William C. Olson, and Movants, Pleading Nos. 95-100, to the extent that these papers contain argument and citations to the record showing that the Copper Mine Rule is contrary to law because it allows ground water pollution at all copper mines (a) without

regard to existing or future water uses and (b) without regard to the impact of this pollution and the perpetual pumping to contain it on surface water or property rights.

Respectfully submitted:

**NEW MEXICO ENVIRONMENTAL LAW CENTER**

By:   
R. Bruce Frederick  
Douglas Meiklejohn  
1405 Luisa Street, Ste. 5  
Santa Fe, NM 87505  
(505) 989-9022  
bfrederick@nmelc.org

*Attorneys for the Gila Resources Information Project and  
Turner Ranch Properties, Inc.*

**HIGH DESERT ENERGY + ENVIRONMENT LAW  
PARTNERS, LLC**

By:   
Tracy Hughes  
P.O. Box 8261  
Santa Fe, New Mexico 87504  
505-819-1710  
hughes@energyenvironmentlaw.com

*Attorney for Amigos Bravos*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 15, 2013, I sent the forgoing paper 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  
Assistant Attorney General  
Water, Environment and Utilities Division  
Office of the NM Attorney General  
P.O. Box 1508  
Santa Fe, NM 87504

Dalva Mollenberg  
T. J. Trujillo  
Gallagher and Kennedy, PA  
1233 Paseo de Peralta  
Santa Fe, New Mexico 87501-2758

Louis Rose  
Montgomery & Andrews, PA  
P.O. Box 2307  
Santa Fe, NM 87504-2307

Jon Indall  
Comeau, Maldegen, et al.  
P.O. Box 669  
Santa Fe, NM 87504-0669

Sean Cunniff  
Assistant Attorney General  
Civil Division  
Office of the NM Attorney General  
P.O. Box 1508  
Santa Fe, NM 87504



R. Bruce Frederick

STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION

In the matter of: )  
 )  
PROPOSED AMENDMENT TO ) No. WQCC 12-01(R)  
PART 20.6.2 NMAC (Copper Rule) )  
\_\_\_\_\_ )

**PROPOSED TESTIMONY OF JAMES R. KUIPERS, P.E.**

1. My name is James Kuipers, and I have been asked to serve as an expert witness for Gila Resources Information Project (GRIP) and Turner Ranch Properties, L.P. (TRP) in this proceeding. GRIP has been deeply involved with mining issues for many years, including issues regarding the prevention and abatement of water pollution associated with the copper mines located in Grant County, New Mexico. TRP owns the Ladder Ranch, which is adjacent to the Copper Flat Mine in Sierra County, New Mexico.

2. I have a B.S. in Mineral Process Engineering from Montana College of Mineral Science and Technology (1983). I am a Professional Engineer (PE Mining/Minerals) and am currently registered in the states of Montana and Colorado. I have more than 30 years of professional experience in the mining industry and mining environmental compliance. A full and current resume is attached as Attachment 1 to this report.

3. Upon graduation from college in 1983, I worked in a succession of jobs with increasing responsibility and providing wide exposure to the mining industry. I initially worked as a mill superintendent and head metallurgist in several small gold and custom mills, followed by a job as director of metallurgy at a high purity metals manufacturing facility, and project manager at a small gold mine and mill. In 1986, I went to work as a shift foreman for a very large copper mining company in Arizona and later transferred to a new gold mine that the company was starting in Nevada,

\_\_\_\_\_

**EXHIBIT A**

eventually becoming the mill superintendent. I was promoted to the corporate office, where I held the position of project engineer and manager as well as corporate senior metallurgist. In 1991, I moved to a new company, where I served as the senior metallurgist and later, project manager. In 1993, I went to work for a consulting and equipment manufacturing firm as the manager of their process engineering department and mining and environmental wastewater treatment program, until 1995.

4. Since 1996, I have been the principal of J Kuipers Engineering, reformed as Kuipers & Associates, LLC in 2003, with offices in Wisdom and Bozeman, Montana. Kuipers & Associates provides engineering consulting and other technical services to a variety of clients including local, state, federal and tribal government and non-government public interest organizations. Kuipers & Associates specializes in hardrock mine permitting, operations, reclamation and closure. We have a particular emphasis on mine site characterization, toxic release response planning including the use of source controls as well as wastewater management and treatment, and associated cost estimation and financial assurance. I am the principal consulting engineer.

5. I have authored various reports on mine and mineral processing site reclamation and closure, provided training on wastewater treatment design and cost estimation, and am currently under contract to the U.S. Environmental Protection Agency (EPA) assisting in the development of national guidance for mine and mineral processing site reclamation/closure and financial assurance requirements. I have also been involved as a contractor in 2006 and 2012 on behalf of the U.S. EPA and U.S. State Department under the Chile America Free Trade Act (CAFTA), providing training on mine and mineral processing site reclamation and closure and financial assurance to Chile's Ministries of Mines and Environment. I am also currently assisting the Selkirk First Nation in the Yukon Territory, Canada in a similar capacity.

6. The Ladder Ranch is immediately adjacent (on the north) to the Copper Flat Mine (Copper Flat), which is located approximately six miles northeast of Hillsboro and approximately twelve miles east of Caballo Reservoir on the Rio Grande River.

7. According to the New Mexico Environment Department's (NMED) website, a discharge permit application is currently pending for Copper Flat.

8. The Copper Mine Rule (Rule) recently adopted by the Water Quality Control Commission (WQCC) includes the following provisions that allow ground water pollution above the ground water quality standards adopted by the WQCC.

A. Section 20.6.7.24 (D) NMAC provides that “[d]uring operation of an open pit, the standards of 20.6.2.3103 NMAC do not apply within the area of open pit hydrologic containment.”<sup>2</sup>

B. 20.6.7.33 (D)(1) NMAC provides that “[if] an open pit is determined to be a hydrologic evaporative sink, the standards of 20.6.2.3103 NMAC do not apply within the area of open pit hydrologic containment.”

C. 20.6.7.33 (D)(2) NMAC provides that “[in] a flow-through pit system the open pit water quality must meet ground water standards of 20.6.2.3103 NMAC or the open pit must be pumped in order to maintain an area of open pit hydrologic containment.”

D. 20.6.7.21(B) NMAC provides that for “[new] waste rock stockpiles located outside an open pit surface drainage area ... [(1)(c)] ground water impacted by waste rock stockpiles in excess of applicable standards shall be captured and contained through the construction of interceptor systems as applicable.”

---

<sup>2</sup> The “‘area of open pit hydrologic containment’ means, for an open pit that intercepts the water table, the area where ground water drains to the open pit and is removed by evaporation or pumping, and is interior to the department approved monitoring well network installed around the perimeter of an open pit pursuant to Paragraph (4) of Subsection B of 20.6.7.28 NMAC and also limited to the area of disturbance authorized by a discharge permit.” 20.6.7.7(B)(5).

E. 20.6.7.22(A)(4) (c) provides that for new tailings impoundments, “ground water impacted by the tailings impoundment in excess of applicable standards shall be captured and contained through the construction of interceptor systems designed in accordance with Subparagraph (d) of Paragraph (4) of Subsection A of 20.6.7.22 NMAC.

9. Each of the provisions above, with the exception of evaporative pits, depends on continual pumping to capture the polluted ground water.

10. The most common source of ground water pollution at open pit copper mines involving porphyry deposits is acid mine drainage (AMD). The exposed walls of open pits, leach stockpiles, tailings impoundments, and waste rock stockpiles can all be sources of AMD at such mines.

11. Copper Flat is a porphyry deposit.

12. Under the Rule, the operator of Copper Flat would be permitted to pollute ground water above WQCC water quality standards so long as NMED is satisfied that the polluted ground water is being captured by dewatering the open pit and by pumping ground water outside the open pit via an interceptor system.

13. The sources of AMD at open pit copper mines have the potential to continue polluting ground water for hundreds of years or longer.

14. SRK Consulting, Inc. (SRK) prepared a report for Copper Flat entitled *Predictive Geochemical Modeling of Pit Lake Water Quality at the Copper Flat Project, New Mexico* and dated September 2013 (Pit Chemistry Report). The full report is available on the Mining and Minerals Division’s (MMD) website at:

[http://www.emnrd.state.nm.us/MMD/MARP/documents/2013.10.01\\_PredictiveGeochemicalModelingofPitLakeWaterQuality\\_CopperFlat\\_SI025RN.pdf](http://www.emnrd.state.nm.us/MMD/MARP/documents/2013.10.01_PredictiveGeochemicalModelingofPitLakeWaterQuality_CopperFlat_SI025RN.pdf).

15. Table 3-10 (Future Predicted Pit Lake Chemistry (Base Case Scenario)) of the Pit Chemistry Report is attached to this testimony. Table 3-10 indicates that the pit water quality is predicted to exceed surface water quality standards, 20.6.4.900, for selenium and mercury.

16. The Pit Chemistry Report does not mention WQCC ground water quality standards of 20.6.2.3103 NMAC. However, according to Table 3-10, the water quality of the pit lake at Copper Flat is predicted to exceed several WQCC ground water quality standards, including the standards for boron, manganese, mercury, molybdenum, selenium, TDS, chloride, and sulfate.

17. The focus of the Pit Chemistry Report on the surface water standards, 20.6.4.900, is apparently based on the fact that the open pit is *currently* an evaporative sink. However, the Report does not indicate whether the final open pit, which will be much deeper and larger than it currently is, will continue to be an evaporative sink.

18. Shomaker and Associates, Inc. prepared a report for Copper Flat entitled *Model of Groundwater Flow in the Animas Uplift and Palomas Basin, Copper Flat Project, Sierra County, New Mexico*, dated August 2013 (Groundwater Report). The Groundwater Report is available on MMD's website at:

[http://www.emnrd.state.nm.us/MMD/MARP/documents/2013.08.22\\_ModelofGroundWaterFlow\\_CopperFlat\\_SI025RN.pdf](http://www.emnrd.state.nm.us/MMD/MARP/documents/2013.08.22_ModelofGroundWaterFlow_CopperFlat_SI025RN.pdf)

19. The Groundwater Report states:

The groundwater inflow component would increase with future pit expansion and dewatering. The post-mining open pit, larger and deeper than the existing pit, would have a larger groundwater inflow and larger evaporation.

Groundwater Report at 39, 68. The Report does not quantify the "larger groundwater inflow" or "larger evaporation" of the final pit. Instead, the Report states that the "post-mining open-pit water level and water balance" and the "down-gradient migration of potential leakage from

tailings and waste rock storage facilities” will be the subject of future reports. Groundwater Report at 79.

20. According to the *Mine Operation and Reclamation Plan, Copper Flat Mine Project*, July 2012 (MORP), the open pit at Copper Flat is expected to be 900 feet deep. The depth to ground water at the site is less than 100 feet. The MORP is available on MMD’s website at:  
[http://www.emnrd.state.nm.us/MMD/MARP/permits/documents/MORP\\_SI027RN.pdf](http://www.emnrd.state.nm.us/MMD/MARP/permits/documents/MORP_SI027RN.pdf).<sup>3</sup>

21. If the final open pit at Copper Flat is predicted to be a flow-through pit, then the Rule would allow WQCC groundwater standards to be exceeded without a variance so long as the pit is continuously pumped to maintain the “area of open pit hydrologic containment.”

22. The long-term maintenance of the area of open pit hydrologic containment will very likely lower the water table beneath Ladder Ranch, resulting in the depletion of ground water in livestock wells, baseflow to streams, and springs. As testified by Mr. Dobrott, this would irreparably harm and potentially destroy Ladder Ranch’s livestock, wildlife species, and habitat conservation programs, all of which depend on ground water.

23. But for the Rule, Copper Flat would need to obtain a variance for authorization to pollute ground water above WQCC water quality standards.

24. The Water Quality Act provides:

[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

---

<sup>3</sup>The MORP indicates that the final open pit is “expected to form a hydrologic sink ... with evaporation rates greatly exceeding precipitation and groundwater inflows *over most of the year*. MORP of 45. The subsequent Shomaker report indicates that this “expectation” has not been confirmed, nor is it clear what will happen for the remainder of the year when ground water and surface water inflow might exceed evaporation.

variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted.

NMSA 1978, 74-6-4(H) (emphasis added).

25. In the event that Copper Flat is predicted to be a flow-through pit, the Rule deprives TRP of its right to participate in a statutory variance proceeding.

26. The Rule allows Copper Flat (and all copper mines) to pollute ground water in perpetuity regardless of whether such pollution could be prevented without imposing “unreasonable burden upon any lawful business, occupation or activity,” without imposing any requirement of “abatement of water pollution within a reasonable period of time,” and without the benefit of a site-specific public hearing as to whether ground water quality standards should be exceeded.

27. Copper Flat and every other copper mine now existing in New Mexico obtained discharge permits under existing Part 20.6.2 (Part 2). Part 2 was promulgated in 1977 and does not allow pollution of ground water above WQCC standards. 20.6.2.3109(C). Neither Copper Flat nor any other mining company would be prejudiced if the Copper Mine Rule is stayed pending appeal. In this event, the permitting process would be governed, as it has since 1977, by the existing Part 2.



---

James R. Kuipers, P.E.

28. Additional References:

Copper Flat Mine Plan of Operations (revised 2011)

Sampling and Analysis Plan for Copper Flat Mine, Prepared by Intera for the New Mexico Copper Corporation (September 2010).

Virginia McLemore, GEOLOGY AND EVOLUTION OF THE COPPER FLAT PORPHYRY SYSTEM, SIERRA COUNTY, NEW MEXICO (New Mexico Bureau of Mines and Mineral Resources, February 2001).

**Bill Olson**

---

**From:** Vollbrecht, Kurt, NMENV <kurt.vollbrecht@state.nm.us>  
**Sent:** Friday, September 07, 2012 6:59 PM  
**To:** Bill Olson  
**Subject:** guidance  
**Attachments:** guidance.docx

**Flag Status:** Flagged

Kurt Vollbrecht, Geologist  
New Mexico Environment Department  
Ground Water Quality Bureau  
Mining Environmental Compliance Section  
(505) 827-0195

EXHIBIT B

**Definitions "Critical Structure" and 20.6.7.33.B Slope Stability.** This has been a primary point of concern and discussion regarding the Questa Mine rock piles. WE feel we have a defensible argument regarding the factor of safety number proposed for critical and non-critical structures, and for pseudostatic analysis. Beyond the concerns that these facilities should be designed using appropriate design criteria to minimize potential for slope failures, there is also concern that if we remove this we will set precedent and it will have profound effects on other facilities we regulate (e.g. Questa front rock piles). By putting in place it sets a strong foundation for insuring slope stability for protection of water quality (preventing uncontrolled release of contaminants) and undue risk to property.

**20.6.7.20A(1)** They have deleted the language developed as part of the Tyrone Settlement (paragraphs 36-40) that discusses the need for a variance for new leach piles within the open pit. They are required to get a variance to operate a leach stockpile in an open pit as since operating a leach pile in an open pit will result in an increase in ground water contamination. **The Water Quality Act does not allow ground water contamination and without a variance this would violate the WQA.**

**20.6.7.20.A(1)(f)** This addition is ok but added in that a variance is necessary to compensate for deletion of variance language above.

**20.6.2.20.B(2), 20.6.2.21.C(2)** Removing variance requirement for existing facilities is not in accordance with the Tyrone Settlement (paragraphs 41-43) language and continuing to discharge without a variance violates the WQA.

**20.6.2.21(B) New Waste Rock Stockpiles.** The language has been changed such that is would allow ground water contamination from new waste rock stockpiles so long as the contaminated ground water is captured. **The Water Quality Act does not allow ground water contamination and without a variance this would violate the WQA.**

**20.6.2.22(4) New Tailing Impoundment Facilities.** The language has been changed such that is would allow ground water contamination from new tailing impoundments so long as the contaminated ground water is captured. **The Water Quality Act does not allow ground water contamination and without a variance this would violate the WQA.**

**20.6.2.21A(2), 20.6.2.21.B(1)** Statements have been added regarding placement of materials inside (or outside) the open pit surface drainage area without a need for a variance. The way these were written they are essentially saying just about anything can be deposited in the open pit capture zone without engineering controls to prevent discharge of contaminants. **This is not in accordance with the Tyrone Settlement and would violate the WQA.**

**20.6.7.24(4)** As written this would violate the WQA.

**20.6.2.33C(1) and (2).** Top surface grading has been the subject of much debate. There has never been a demonstration that grading top surfaces at such a shallow gradient (0.5%) is effective at shedding water. It is also a concern that it requires a great deal of experience and expertise to grade at such shallow gradients. That said, we agreed to it at Tyrone and Chino (existing contamination and capture

systems, demonstrated capability). Not in agreement that this should be applied everywhere as an effective means to shed water from top surfaces. Infiltration into rock piles is greater concern (faster movement of water through porous waste) for ground water protection. Design needs to be such that water is shed from covers as quickly and effectively as possible, hence the slightly steeper gradient requirement for rock piles.

**20.6.7.33F(2). Cover performance standard.** The FMI language would only be acceptable for the southwest part of the state where snowfall is minimal and precipitation is monsoon dominated. The deleted language would adequately cover any precipitation pattern found within the state of New Mexico, as well as the available materials currently being used for reclamation.

**Bruce Frederick**

---

**From:** Bruce Frederick [bfrederick@nmelc.org]  
**Sent:** Thursday, August 29, 2013 4:11 PM  
**To:** 'Mascarenas, Melissa, NMENV'  
**Subject:** IPRA Requests

Dear Ms. Mascarenas:

Pursuant to the Inspection of Public Records Act, please make available for inspection all documents (including email and correspondence) regarding the copper rule that fall into any of the following specific categories (please note the date limitation):

1. All documents exchanged among Secretary Ryan Flynn and anyone from the law firm of Gallagher and Kennedy, P.A. between April 30, 2013 to the present.
2. All documents exchanged among Secretary Ryan Flynn and anyone from the law firm of Montgomery and Andrews, P.A. between April 30, 2013 to the present.
3. All documents exchanged among Secretary Ryan Flynn and any employee of Freeport-McMoRan, Inc. between April 30, 2013 to the present.
4. All documents exchanged among Kathryn Becker and anyone from the law firm of Gallagher and Kennedy, P.A. between April 30, 2013 to the present.
5. All documents exchanged among Kathryn Becker and anyone from the law firm of Montgomery and Andrews, P.A. between April 30, 2013 to the present.
6. All documents exchanged among Kathryn Becker and any employee of Freeport-McMoRan, Inc. between April 30, 2013 to the present.
7. All documents exchanged among Andrew Knight and anyone from the law firm of Gallagher and Kennedy, P.A. between April 30, 2013 to the present.
8. All documents exchanged among Andrew Knight and anyone from the law firm of Gallagher and Kennedy, P.A. between April 30, 2013 to the present.
9. All documents exchanged among Andrew Knight and any employee from Freeport-McMoRan, Inc. between April 30, 2013 to the present.

Please make the documents available for inspection as they are located.

Thank you,

R. Bruce Frederick, Staff Attorney  
New Mexico Environmental Law Center  
1405 Luisa Street, Suite 5  
Santa Fe, NM 87501  
505-989-9022

EXHIBIT C



SUSANA MARTINEZ  
Governor  
JOHN A. SANCHEZ  
Lieutenant Governor

NEW MEXICO  
ENVIRONMENT DEPARTMENT

*Office of General Counsel*

Harold Runnels Building  
1190 Saint Francis Drive (87505)  
PO Box 5469, Santa Fe, NM 87502-5469  
Phone (505) 827-2990 Fax (505) 827-1628  
[www.nmenv.state.nm.us](http://www.nmenv.state.nm.us)



RYAN FLYNN  
Cabinet Secretary-  
Designate  
BUTCH TONGATE  
Deputy Secretary

VIA E-MAIL

September 13, 2013

R. Bruce Frederick  
[bfrederick@nmelc.org](mailto:bfrederick@nmelc.org)

Dear Mr. Frederick:

The New Mexico Environment Department ("NMED") recently completed fulfillment of your Inspection of Public Records Act ("IPRA"), NMSA 1978, Sections 14-2-1 to -12, request that you submitted to the NMED records custodian Melissa Mascareñas on August 29, 2013.

Pursuant to NMSA 1978, Section 14-2-11, I am providing you with this correspondence to notify you that several documents were withheld by NMED during the fulfillment of your request. The documents were either attorney-client privileged or attorney work product, which NMED holds as exceptions to IPRA under Section 14-2-1(A)(8). Responsible for the decisions to withhold the documents that fell within these categories are Jeffrey M. Kendall, Kathryn S. Becker, and Andrew P. Knight.

If you have any questions regarding this correspondence, please feel free to contact me at (505) 827-2855. Please contact Melissa Mascareñas ([melissa.mascarenas@state.nm.us](mailto:melissa.mascarenas@state.nm.us)) to coordinate a time for you to review the documents. If there is anything further we can assist you with, please let us know.

Sincerely,

Jeffrey M. Kendall  
General Counsel

Cc: Kathryn S. Becker  
Andrew P. Knight  
Melissa Mascareñas

EXHIBIT D

**Bruce Frederick**

---

**From:** Kendall, Jeff, NMENV [Jeff.Kendall@state.nm.us]  
**Sent:** Friday, October 04, 2013 2:02 PM  
**To:** bfrederick@nmelc.org  
**Cc:** Mascarenas, Melissa, NMENV; Kendall, Jeff, NMENV  
**Subject:** RE: IPRA Request 08.29.13

Mr. Frederick,

All documents responsive to your request are available for you to review. The document I indicated to be withheld in my letter of September 13, 2013, has been sufficiently redacted to maintain the privileges indicated. Please coordinate a date and time to review the documents with Ms. Melissa Mascarenas.

Best,

Jeffrey M. Kendall  
GENERAL COUNSEL  
NEW MEXICO ENVIRONMENT DEPARTMENT  
1190 St. Francis Drive, Suite N-4050  
Santa Fe, NM 87501  
Phone (505) 827-2855  
Fax (505) 827-1628  
Email [jeff.kendall@state.nm.us](mailto:jeff.kendall@state.nm.us)

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND CONTAINS INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM PUBLIC DISCLOSURE UNDER APPLICABLE LAW.

If the recipient of this message is not the intended recipient, or an employee or agent of the intended recipient, you are hereby notified that any dissemination, distribution or copying of this message is strictly prohibited. If this message has been received in error, please notify us immediately by telephone and destroy the message you received.

-----  
No virus found in this message.  
Checked by AVG - [www.avg.com](http://www.avg.com)  
Version: 2014.0.4142 / Virus Database: 3604/6715 - Release Date: 10/01/13

EXHIBIT E

3/21/13

STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF PROPOSED AMENDMENTS  
TO 20.6.2 NMAC, THE COPPER MINE RULE  
No. WQCC 12-01 (R)

New Mexico Environment Department,  
Petitioner.

NEW MEXICO ENVIRONMENT DEPARTMENT'S  
PROPOSED STATEMENT OF REASONS

THIS MATTER comes before the Water Quality Control Commission (hereinafter, "Commission") pursuant to the Petition to Adopt 20.6.7 and 20.6.8 NMAC and Request for Hearing (hereinafter, "Petition") filed by the New Mexico Environment Department (hereinafter, "NMED" or "Department") on October 30, 2012. On February 18, 2013, NMED filed a Notice of Amended Petition (hereinafter, "Amended Petition") which: (1) withdrew proposed 20.6.8 NMAC in its entirety, and (2) revised certain portions of proposed 20.6.7 NMAC. As a result of NMED's withdrawal of proposed 20.6.8 NMAC, the Commission took no evidence on that portion of the Petition and does not adopt it.

NMED attached proposed rule provisions to both the Petition and Amended Petition. The Commission held a hearing on this matter over the course of ten days between April 9, 2013, and April 30, 2013. The Commission allowed all interested persons a reasonable opportunity to submit data, views, and arguments and to examine witnesses. Thus, the record containing pleadings, written testimony, exhibits, the hearing transcript, public comments, and hearing officer orders has been submitted to the Commission for review in compiling this Statement of Reasons.

3728883v1/25000-0382

EXHIBIT F

Based upon the evidence and argument in the record, the following Statement of Reasons sets forth how the Commission considered and weighed the evidence presented and considered legal arguments in this matter with respect to adoption of the Copper Mine Rule.

#### BACKGROUND

1. The Commission is required by the Water Quality Act (hereinafter, "WQA") to "...adopt, promulgate and publish regulations to prevent or abate water pollution in the state or in any specific geographic area, aquifer or watershed of the state or in any part thereof, or for any class of waters..." Section 74-6-4(E) NMSA 1978.
2. The Commission ~~has adopted a~~ mandate to prevent or abate water pollution has existed since 1976 and was initially satisfied in 1977 by the Commission when it adopted the Ground Water Discharge Regulations, now contained in sections 20.6.2.1 through 20.6.2.3114 NMAC. *See* Freeport-McMoRan's Consolidated Response to the Joint Motion to Dismiss Petition for Rulemaking filed January 11, 2013 at 11 [Pleadings #19], and the Attorney General's Motion to Remand the Proposed Rule to NMED (hereinafter, "Freeport Consolidated Response"), filed \_\_\_\_\_, 2013, at 11.
3. The Commission has adopted amendments to the Ground Water Discharge Permit Regulations from time to time since they originally were adopted in 1977, including amendments to conform to amendments ~~to~~in the Water Quality Act. The Commission supplemented its regulatory framework in 1996 when it adopted the Abatement Regulations, now contained in sections 20.6.2.4101 through 20.6.2.4114 NMAC. *See id.*
4. Under the Water Quality Act as it existed before amendments made in 2009, the Ground Water Discharge Permit Regulations did not contain specific requirements to control

3738883v1/25000-0382

discharges; instead, these regulations required a permit applicant to describe how the applicant ~~proposes~~proposed to control its discharges in a permit application. *See id.* at 12.

Formatted: Font: Italic

The Ground Water Discharge Regulations during this time did not contain specific requirements to control discharges because the Commission was statutorily prohibited from promulgating regulations specifying the methods to prevent or abate water pollution. *See id.*

Formatted: Font: Italic

Once the applicant submitted a permit application proposing how to control its discharges to groundwater, NMED had the option of imposing permit conditions specifying pollution control measures ~~even though the Commission was statutorily prohibited from specifying pollution control measures~~. *See id.* at 14.

5. At the conclusion of the permitting process during this time frame, NMED could approve an applicant's proposal to control its discharges, with or without permit conditions specifying pollution control measures, if NMED determined that "neither a hazard to public health nor undue risk to property will result" and if the proposal met one of three separate conditions: (1) if the ground water that has total dissolved solids concentration of 10,000 mg/l or less will not be affected by the discharge; (2) if "the person proposing to discharge demonstrates that approval of the proposed discharge plan, modification or renewal will not result in either concentrations in excess of the standards of 20.6.2.3103 NMAC or the presence of any toxic pollutant at any place of withdrawal of water for present or reasonably foreseeable future use"; or (3) if certain specific performance standards are met, as applicable. *See id.* at 13; *see also* 20.6.2.3109.C NMAC.

**Senate Bill 206 from the 2009 Regular Session:**

6. In the 2009 Regular Sessions, the Legislature considered and passed Senate Bill 206, which amended the WQA in a manner that substantially changeds the permit process described above. See Transcript Volume (hereinafter, "TRV") 1 at 44, Line (hereinafter, "L") 24-25.

7. In particular, the WQA was amended to require the Commission to adopt rules specifying the methods to prevent water pollution and to monitor water quality. ~~Prior to this amendment, the Commission was prevented from taking such actions.~~ See Freeport Consolidated Response at 14; see also Section 74-6-4(K) NMSA 1978.

Formatted: Font: Italic

8. In addition, NMED was tasked with developing industry specific rules for the dairy and copper industries. See TRV 2 at 241, L 5-19. The WQA now ~~places the onus on~~ requires that the Commission to promulgate dairy and copper mine industry rules that specify the methods for preventing water pollution and monitoring ground water quality. See NMED Exhibit 4 at 5-6.

Formatted: Font: Italic

#### DEVELOPMENT OF THE COPPER MINE RULE

9. The WQA requires that NMED develop proposed rules for the dairy and copper industries for consideration by the Commission and identifies certain requirements for rule development. The Commission is to establish a schedule for rule development and consideration. Section 74-6-4(K) NMSA 1978.

10. The Commission issued and later revised a schedule for rule development and consideration. See Order Approving Schedule for Development of Copper Regulation dated January 12, 2012 [Pleadings #1]; Order Approving Revised Schedule for Development of Copper Regulation filed September, 24, 2012 [Pleadings # 3].

#### **Formation of the CRAC and Technical Committee:**

11. The WQA requires NMED to establish an advisory committee to assist in the development of a proposed rule for the copper industry. *See* Section 74-6-5(K) NMSA 1978.

12. NMED formed a Copper Rule Advisory Committee (hereinafter, "CRAC"), as specified in the legislation, to develop ideas and draft language for a proposed rule. *See* Written Testimony of Tom Skibitski (hereinafter, "Skibitski Direct") [Pleadings #49] at 9. NMED invited representatives representing diverse interests, including other governmental agencies, academia, mine owners and operators, and environmental groups to participate on the CRAC. *See* NMED Exhibit 5 [Pleadings #49].

Formatted: Font: Italic

13. The purpose of the CRAC was to advise NMED on appropriate regulations to be proposed for adoption by the Commission. *See* NMED Exhibit 5. It was not the role or responsibility of the CRAC to set agency policy, or in this case to draft the proposed regulations ~~that NMED must submit to the Commission.~~ *See* NMED Exhibit 5.

14. NMED also established a technical committee, which served as a subgroup to the CRAC, to ~~vet~~consider technical issues and regulatory concepts of the Copper Mine Rule prior to presentation to and discussion by the CRAC. *See* NMED Exhibit 5.

15. The CRAC and technical committee met regularly over the course of seven months and reviewed draft language and different approaches to the regulation of copper mining activity in New Mexico. *See* Skibitski Direct at 10.

16. NMED received a draft Copper Mine Rule on August 17, 2012 (hereinafter, "August 17 Discussion Draft") from a contractor, William C. Olson, working for the NMED who was hired to assist with the CRAC. *See* Id. Skibitski Direct at 10; Attorney General Exhibit 5 [Pleadings #5].

Formatted: Font: Italic

**Opportunity for Public Input and Stakeholder Negotiations:**

3738883v1/25000-0382

17. NMED edited the August 17 Discussion Draft and submitted a proposed rule for public comment on September 13, 2012 (hereinafter, "September 13 Public Comment Draft"). *See* *Id.* Skibitski Direct at 10.

Formatted: Font: Italic

18. NMED held two public meetings, one in Silver City and the other in Albuquerque, New Mexico, to take public comments on the September 13 Public Comment Draft. *See* *Id.* Skibitski Direct at 10. NMED also offered to meet separately with interested stakeholders to discuss their comments on the September 13 Public Comment Draft and held at least two meetings with stakeholders. *See* Petition at 2; *Id.* at p. 10. *Skibitski Direct at [redacted] Transcript?*

Formatted: Font: Italic

Formatted: Font: Italic

**Findings of Fact and Conclusions of Law on Background:**

19. Based on the weight of the evidence, the Commission finds that the August 17 Discussion Draft was prepared and circulated by the Department's contractor, Mr. William Olson, and was not an official position or approved language of NMED or its employees.

20. Based on the weight of the evidence, the Commission finds that the September 13 Public Comment Draft represented language approved proposed by NMED.

21. The Commission finds that NMED satisfied the requirements of the Water Quality Act to form and utilize an advisory committee and to conduct stakeholder negotiations in developing the Copper Mine Rule and conducted its activities in accordance with a schedule approved by the Commission.

22. Based on the weight of the evidence, the Commission finds that the September 13 Public Comment Draft incorporates language proposed by the various parties participating in the CRAC and but does not represent unanimity on the proposed rule language the wholesale adoption of one party's proposals or rule language.

23. For the reasons set forth below and based on the weight of the evidence, the Commission considered information and rule language presented ~~into~~ the CRAC and technical subcommittee to the extent that it was introduced into evidence, ~~however,~~ The Commission finds that neither NMED nor the Commission was or is legally bound to accept rule language or information from the CRAC or technical subcommittee.

~~23-24.~~ The Commission gives the various drafts of the Copper Mine Rule some weight, considering the circumstances described above. In the absence of specific testimony given during this hearing that explains and supports or contests specific rule language, the Commission attaches no more weight to the August 17, 2012 draft than it does to the September 13, 2012 draft, the Department's proposed rule language accompanying the Petition and the Amended Petition.

#### THE PETITION AND PLEADINGS

#### Filing of the Petition and Setting the Hearing:

Formatted: Indent: Left: 0", First line: 0"

24-25. Pursuant to the approved Schedule for Development of Copper Regulations, NMED was required to file a petition for the Copper Mine Rule on September 27, 2012. *See* Motion to Approve Schedule for Development of Copper Regulations at 1-2 and Order; Order Approving Schedule for Development of Copper Regulation at 1 with attached schedule [Pleadings #1].

Formatted: Indent: Left: 0", First line: 0"

25-26. On September 11, 2012, the Commission considered a Revised Schedule for Development of Copper Regulation, set a new date of October 30, 2012 for the petition to be

filed, and set hearings to occur before the Commission on November 13, 2012 and January 8, 2013. *See* Order Approving Revised Schedule for Development of Copper Regulation at 1; and Order; Motion to Approve Revised Schedule for Development of Copper Regulations at 1-2 with attachment [Pleadings #3].

~~26-27.~~ After considering comments on the September 13 Public Comment Draft, NMED prepared a proposed rule (hereinafter, "Petitioned Rule") and filed it with a Petition on October 30, 2012, before the Commission. *See* Skibitski Direct at 10; *see also* Petition to Adopt 20.6.7 and 20.6.8 NMAC and Request for Hearing (hereinafter, "Petition") [Pleadings #4] at 1-3 with Attachments 1 and 2.

~~27-28.~~ Freeport McMoRan Tyrone Inc., Freeport-McMoRan Chino Mines Company, and Freeport-McMoRan Cobre Mining Company (collectively hereinafter, "Freeport") submitted a written response to the Petition, supported NMED's request to set a hearing on January 8, 2013 to hear the Petitioned Rule, and argued that it was inappropriate and premature to entertain dispositive motions on the Copper Mine Rule prior to the hearing. *See* Written Response to Petition for Rulemaking at 1-3, filed November 9, 2012 [Pleadings #6].

~~28-29.~~ The Gila Resources Information Project, Amigos Bravos, and Turner Ranch Properties, Inc. submitted a response to the Petition and argued that the Commission should reject the Petition because the Petitioned Rule violates the WQA. *See* Response to Petition for Rulemaking at 1-2, filed November 9, 2012 [Pleadings #8].

~~29-30.~~ The Commission voted to accept the petition at its November 2011 monthly meeting. The Commission voted to assign a hearing officer and schedule the matter for hearing for multiple days in April of 2013. *See* Meeting Minutes, New Mexico Water Quality Control Commission Regular Meeting, November 13, 2012. [Cite to WQCC Meeting Minutes]

Formatted: Font: Italic

**Pre-Hearing Motions and Briefs:**

~~30-31.~~ The Attorney General of New Mexico (hereinafter, "Attorney General" or "AG") moved to admit into the record proper portions of the record from proceedings held before the Commission dealing with In the Matter of Appeal of Supplemental Discharge Permit for Closure (DP 1341) for Phelps Dodge Tyrone, Inc., WQCC Nos. 03-12(A) and 03-13(A) (hereinafter, "Tyrone Permit Appeal"). See Attorney General's Motion to Admit Record from the Tyrone Permit Appeal into the Record Proper (hereinafter, "AG's Motion to Admit Record of Tyrone") at 1, filed November 2, 2012[Pleadings #5].

~~31-32.~~ After various parties fully briefed the Attorney General's Motion to Admit the Record of Tyrone, the Hearing Officer denied the motion with the exception of one document, the Commission's Decision and Order of February 4, 2009. In particular, the Hearing Officer determined that inclusion of the entire ~~ty~~-record from the administrative adjudication into this rulemaking, without any winnowing and without presentation by witnesses, would result in confusion and unnecessary expenditure of Commission time and resources. See Order on Attorney General's Motion to Admit Record from Tyrone Permit Appeal into Record Proper at 1-2, filed February 6, 2013[Pleadings #40].

~~32-33.~~ The Attorney General submitted a motion to remand the Proposed Copper Mine Rule to NMED on the ground that the rule as proposed would violate the Water Quality Act. See Attorney General's Motion to Remand the Proposed Copper Mine Rule to NMED at 1, filed December 14, 2012[Pleadings #16]. Gila Resources Information Project, Turner Ranch Properties, Inc., and Amigos Bravos filed a joint motion to dismiss the Petition. See Joint Motion to Dismiss Petition for Rulemaking at 1, filed on December 13, 2012[Pleadings #13]. Responses were filed by Freeport-McMoRan [Pleadings #19], the New

Mexico Mining Association [Pleadings #22], and NMED [Pleadings #23]. Replies were filed by the Attorney General [Pleadings #30 and #31] and jointly by GRIP, Turner Ranches and Amigos Bravos [Pleadings #33 and #34]. After hearing oral argument on the motions, the Commission voted to deny these motions on the first day of the hearing. See TRV Volume I at 49-51. ~~cite to Transcript and/or WQCC meeting minutes~~.

Formatted: Underline

~~33-34.~~ Amigos Bravos filed a motion to postpone the hearing on the Copper Mine Rule because the Commission decided to hear dispositive motions on NMED's Copper Mine Rule at the beginning of the hearing scheduled for April 9, 2013. See Amigos Bravos' Motion to Postpone the Hearing at 1, filed January 11, 2013 [Pleadings #26]. The Hearing Officer denied this motion. See Order on Amigos Bravos' Motion to Postpone the Hearing at 1, filed February 12, 2013 [Pleadings #44].

~~34-35.~~ Amigos Bravos filed a second motion to postpone the hearing because NMED filed an Amended Petition for Adoption of the Copper Rule four days prior to when the Notices of Intent to Present Technical Testimony were due. See Amigos Bravos' Second Motion to Postpone the Hearing at 1, filed February 19, 2013. After a telephonic hearing, the Hearing Officer denied the motion and made adjustments to the pre-hearing deadlines to address the issues raised by NMED's filing of the Amended Petition. See Order on Amigos Bravos' Second Motion to Postpone the Hearing at 1-2, filed February 21, 2013.

Formatted: Font: Italic

~~35-36.~~ NMED submitted an legal brief at the Commission's request to clarify the parameters of the Commission's rulemaking authority and to address the assertion that the Commission lacks then necessary authority to consider the amendment proposed in the Petition. See New Mexico Environment Department's Brief on Commission's Authority to consider Petition at 1, filed December 14, 2012 [Pleadings #15]. Other parties responded to the pleading

[Pleadings #21 and #25], and NMED replied. See NMED's Brief on Commission's Authority to Consider Petition filed January 11, 2013 [Pleadings #32].

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

36:37. Freeport submitted a brief on the scope of the Commission's authority to conduct a rulemaking and to adopt rules under the WQA. See Freeport-McMoRan's Brief on the Commission's Authority to Conduct a Copper Industry-Specific Rulemaking at 1, filed December 14, 2012 [Pleadings #17]. Other parties responded to the pleading, and Freeport replied. See Attorney General's Response to FMI's Brief on the Commission's Authority filed January 11, 2013 [Pleadings #20] and Citizen's Joint Response to FMI's Brief on the Commission's Authority to Conduct Rulemaking and NMED's Brief on Commission's Authority to Consider Petition filed January 11, 2013 [Pleadings #25]. Freeport replied to responses: See Freeport McMoRan's Consolidated Reply to the "Citizens" and the Attorney General's Responses to the Briefs on the Commission's Authority filed January 25, 2013 [Pleadings #35].

Formatted: Not Highlight

Formatted: Not Highlight

Formatted: Not Highlight

**Notices of Intent to Present Technical Testimony:**

37:38. The Hearing Officer established a Procedural Order to guide the conduct of the hearing. A Notice of Intent to Present Technical Testimony (hereinafter, "NOI") was due on February 22, 2013, for any party wishing to present technical testimony. See Procedural Order, filed November 21, 2012 [Pleadings #10].

38:39. In response to further reviews by NMED staff and NMED's expert witness, NMED edited the Petitioned Rule and filed a Notice of Amended Petition (hereinafter, "Amended Petition") on February 18, 2013 with a marked-up version of the proposed rule (hereinafter, "Amended Rule"). See Amended Petition at 1-2 with Attachments 1 and 2 [Pleadings #45]; see also Skibitski Direct at 11.

373803v1/25000-0382

39.40. The Amended Rule did not ~~provide for~~ include substantive changes, rather the edits were to further clarify and make consistent the rule proposals as understood by NMED staff and NMED's expert witness. *See ~~Id. Skibitski Direct~~ at 11.*

Formatted: Font: Italic

40.41. The Hearing Officer made adjustments to the pre-hearing deadlines to address the issues raised by NMED's filing of the Amended Petition. In particular, in the March 15 filings dealing with rebuttal matters, the Hearing Officer provided that the parties could revise or supplement the technical testimony and exhibits submitted on February 22, 2013, in order to address changes to the Petitioned Rule as now set forth in the Amended Rule. *See Order on Amigos Bravos' Second Motion to Postpone the Hearing at 1-2, filed February 21, 2013 [Pleadings #47].*

41.42. On February 22, 2013, NMED filed a NOI with direct testimony and exhibits. *See New Mexico Environment Department's Notice of Intent to Present Technical Testimony, filed February 22, 2013 [Pleadings #49] (hereinafter, "NMED NOI").* The direct testimony and exhibits addressed the ~~Petitioned~~ Amended Rule.

42.43. On February 22, 2013, Freeport filed a NOI with direct testimony and exhibits. *See Notice of Intent to Present Technical Testimony on Behalf of Freeport-McMoRan Tyrone Inc., Freeport-McMoRan Chino Mines Company, and Freeport-McMoRan Cobre Mining Company [Pleadings #50] (hereinafter, "Freeport NOI").* The direct testimony and exhibits addressed the Petitioned Rule. ~~The direct testimony and exhibits addressed the Petitioned Rule.~~

43.44. On February 22, 2013, the Attorney General filed a NOI with direct testimony and exhibits. *See Attorney General's Notice of Intent to Present Technical Testimony [Pleadings*

#51(hereinafter, "AG NOI"). The direct testimony and exhibits addressed the Petitioned Rule.

~~44:45.~~ On February 22, 2013, Gila Resources Information Project (hereinafter, "GRIP") and Turner Ranch Properties, L.P. (hereinafter, "TRP") filed a joint NOI. See Notice of Intent to Present Technical Testimony by GRIP and TRP [Pleadings #53] (hereinafter, "GRIP/TRP NOI"). The direct testimony and exhibits addressed the Petitioned Rule.

~~45:46.~~ On February 22, 2013, Amigos Bravos filed a NOI with direct testimony and exhibits. See Amigos Bravos' Notice of Intent to Present Technical Testimony [Pleadings #52] (hereinafter, "AB NOI"). The direct testimony and exhibits addressed the Petitioned Rule.

~~46:47.~~ On February 22, 2013, William C. Olson filed a NOI with direct testimony and exhibits. See William C. Olson Notice of Intent to Present Technical Testimony [Pleadings #54] (hereinafter, "WCO NOI"). The direct testimony and exhibits addressed the Petitioned Rule.

~~47:48.~~ The New Mexico Mining Association (hereinafter, "NMMA") filed pleadings as described above. ~~had counsel file an entry of appearance, but NMMA did not file a NOI or proposed rule language. See See Entry of Appearance, filed December 13, 2012, 2013 by Louis Rose and John Indall on behalf of NMMA. The direct testimony and exhibits addressed the Petitioned Rule.~~

~~48:49.~~ The parties that filed NOIs and NMMA will be collectively referred to as "Parties" at times.

**Rule Proposals for Petitioned Rule:**

~~49:50.~~ Under 302.A of the Procedural Order, a party filing a NOI shall "...include the text of any recommended modifications to the proposed regulatory change...."

3728883v1/25000-0382

lyp  

Formatted: Font: Italic
Formatted: Not Highlight
Formatted: Not Highlight

§0-51. Freeport included the text of its proposed rule changes to the Petitioned Rule in the Freeport NOI at 3-6 and in written testimony presented with the NOI.

§1-52. The Attorney General included the text of its proposed rule changes to the Petitioned Rule in NMAG Exhibit 2.

§2-53. GRIP and TRP jointly proposed their rule changes to the Petitioned Rule in Attachment 2 to James Kuipers direct testimony (hereinafter, "Kuipers, Attachment 2").

§3-54. Amigos Bravos included the text of proposed rule changes in Amigos Bravos Exhibit 1 (hereinafter, "AB Exhibit 1").

§4-55. Mr. Olson included the text of proposed rule language in WCO Exhibit 3.

**Rule Proposals for Amended Rule:**

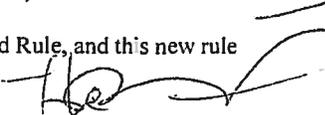
§5-56. According to the Procedural Order and Order on Amigos Bravos' Second Motion to Postpone the Hearing, parties intended ~~on to presenting~~ technical testimony rebutting testimony of another party were required to file a NOI to Present Rebuttal Technical Testimony. This NOI to Present Rebuttal Technical Testimony was required to include the text of any recommended changes to the Amended Rule.

§6-57. Freeport set forth the text of recommended changes to the Amended Rule in its NOI to Present Technical Rebuttal testimony at pages 3 through 5 [Pleadings #61].

§7-58. The Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson did not present any text of recommended changes to the new rule proposals included in the Amended Rule. See Attorney General's Notice of Filing Rebuttal Testimony and Exhibits at 1[Pleadings #63]; Notice of Intent to Present Technical Rebuttal Testimony [by GRIP and TRP] at 1[Pleadings #67]; Amigos Bravos' Notice of Intent to Present Rebuttal Technical Testimony at

2[Pleadings #66]; and William C. Olson Notice of Intent to Present Technical Rebuttal  
Testimony at 2[Pleadings #68].

58-59. Attached to NMED's draft Proposed Statement of Reasons, NMED

proposes proposed additional changes to its Amended Rule, and this new rule  
proposal will be referred to as the "Proposed Final Rule." 

#### THE HEARING AND POST-HEARING PLEADINGS

59-60. The Commission's hearing notice requirements for rule-making state that "[a]t least  
thirty days prior to the hearing date, notice of the hearing shall be published in the New  
Mexico Register and a newspaper of general circulation in the area affected and mailed to all  
persons who have made a written request to the commission for advance notice of hearings  
and who have provided the commission with a mailing address". See Section 74-6-6(C)  
NMSA 1978.

#### The Hearing:

60-61. Notice of this hearing was published in the New Mexico Register, Albuquerque Journal,  
and Silver City Daily Press sixty days prior to the hearing and sent to those persons on the  
Commission's interested party list and the NMED's stakeholder list. See Skibitski Direct at  
10.

61-62. The hearing was held between April 28 and May 3 for a total period of ten days. See  
TRV 1-11.

62-63. During the course of the hearing, there were multiple parties providing technical  
testimony and public comment offered during the day to those who appeared and at three

3738883v1/25000-0382

: 07005

evening sessions. One of the public comment periods was held in Silver City, NM on May 3, 2013. See TRV 11 at 2596, L. 13-17.

~~63-64. Adrian Brown and Thomas Skibitski~~ The following testified as technical witnesses during the hearing for NMED: Adrian Brown and Thomas Skibitski. See NMED NOI and NMED Rebuttal NOI for Rebuttal.

~~64-65. The following testified as technical witnesses~~ ~~technical witnesses testified during the~~ hearing for Freeport: John Brack, Timothy Eastep, Thomas Shelley, Lynn Lande, Michael Grass, James Scott, Jim Finley, Neil Blandford, and Lewis Munk. See Freeport NOI and Freeport NOI for Rebuttal.

~~65-66. The following technical witnesses testified as technical witnesses during the hearing for~~ the Attorney General: Ms. Connie Travers, and Dr. Bruce Thompson. See AG NOI and AG NOI for Rebuttal.

~~66-67. James Kuipers and Sally Smith~~ The following testified as technical witnesses during the hearing for GRIP and TRP: James Kuipers and Sally Smith. See GRIP/TRP NOI.

~~67-68. Brian Shields and Kathleen Garland~~ The following testified as technical witnesses during the hearing for Amigos Bravos: Brian Shields ~~Shields~~ and Kathleen Garland. See AB NOI.

~~68-69. Mr. Olson testified as a technical witness during the hearing on behalf of himself. See~~ WCO NOI.

**Post-Hearing Pleadings:**

~~69-70. At the conclusion of the hearing testimony, the Hearing Officer advised the Parties that~~ each of them could submit proposed statements of reasons and written closing arguments to the Commission prior to their deliberations. Those documents were to be submitted within 45 days after the Hearing Officer notified the Parties of receipt of the hearing transcripts.

3738883v1/25000-0382

: 07006

TRV. Volume 11 at p. 5-15 (sidebar discussion) and TRV Volume 10 at p. 2589-2590. [Cite transcript]

~~70-71.~~ Notice of receipt of the hearing transcripts was given on May 28, 2013 [Pleadings #84].

~~71-72.~~ On June 25, 2013, the Attorney General, Gila Resources Information Project/Turner Ranch Properties, Inc, and William C. Olson, jointly moved for an extension of the time to submit proposed statements of reasons and written closing arguments until August 16, 2013 [Pleadings #88]. There were no objections and the Hearing Officer granted that motion on June 26, 2013 [Pleadings #89].

~~72-73.~~ On ~~June 25, 2013~~ [date] July 30, 2013, William C. Olson moved for an additional extension of the time to submit proposed statements of reasons and written closing arguments. The Hearing Officer granted the motion in part on August 1, 2013, allowing an extension until August 22, 2013.

Formatted: Not Highlight

#### **Copper Mining In New Mexico and Importance of the Copper Mine Rule**

~~73-74.~~ Mr. John Brack, on behalf of Freeport, discussed the global demand for copper, the many uses of copper, the long-term demand for copper and the need for copper mining to produce copper products. See Written Testimony of John Brack [Pleadings #50], as modified by the Notice of Errata [Pleadings #83] (hereinafter "Brack Direct") at 2-4 and 8-14.

~~74-75.~~ Mr. Brack further discussed existing copper mines in New Mexico and presented evidence of their economic impact. Brack Direct at 6-8.

~~75-76.~~ Ms. Lande, on behalf of Freeport, discussed the existence of copper deposits in New Mexico, the history of copper mining, and the potential for finding additional deposits. Written Testimony of Lynn Lande [Pleadings #50] at 2-5.

76:77. All parties agree that copper mining is a necessary activity ~~that should not be discouraged~~ and that it is important to the State of New Mexico to allow for copper mining. Throughout the hearing there was a collective agreement by all parties that open pit copper mining should not be prohibited in NM. TRV 1 at 20, l. 2-5; TRV 1 at 22, l. 6-11; TRV 1 at 30, l. 16-20; TRV 1 at 44, l. 11-17; TRV 1 at 58, l. 10-14; TRV 1 at 67, l. 1-4; TRV 2 at 239, l. 15-20; TRV 3 at 508, l. 2-7; TRV 6 at 150, l.9.

77:78. Mr. Brack explained the nature of copper mining and the different types of mining practices and processes used to produce copper. Brack Direct at 21-31.

78:79. Mr. Brack further explained the need for the Copper Mine Rule to establish regulatory stability and predictability in order to encourage investment in copper mining. Brack Direct at 14-20.

79:80. There was general agreement among the parties that copper mines pose a high potential risk of ground water contamination if leachate, process water and impacted storm water are not stored and handled properly. See Smith Direct at 2 [Pleadings #53]. Travers Direct at 5 [Pleadings #51]. ~~Travers Direct, Smith Direct,~~ and TRV 3 at 236, l. 20-23; TRV 2 at 257, l. 10-18; TRV 3 at 507, l. 17-20; TRV 3 at 576-577, l. 23-1; TRV 3 at 577, l. 5-7; TRV 3 at 588, l. 16-22; TRV 3 at 590, l. 9-17; TRV 5 at 1036, l. 19-24.

Formatted: Font: Not Italic

Formatted: Font: Not Italic

80:81. Ms. Lande, on behalf of Freeport, described the geologic nature of copper deposits, why copper mines impact ground water, and why some impacts to water quality are unavoidable. Lande Direct at 6-10.

81:82. Mr. Blandford, on behalf of Freeport, discussed hHistorical and present copper mining, including mines operated under existing discharge permits, has impacted ground water in the vicinity of copper mines. Existing copper mines have been required to abate ground water

contamination under the Commission's abatement rules. Blandford Rebuttal at p. 6. Travers  
Direct at p. 7-8. ~~{(C-11) to Blandford, Travers and Smith}~~

Formatted: Not Highlight

### **Overview of NMED's Approach to Protect Ground Water under the Copper Mine Rule**

~~82-83.~~ The purpose of the Copper Mine Rule is to control and contain discharges of water contaminants specific to copper mine facilities and their operations to prevent water pollution so as to protect all ground water of the state of New Mexico for present and potential future use as domestic and agricultural water supply and surface water recharge. *See* Written Expert Testimony of Adrian Brown, P.E. in Support of the New Mexico Environment Department Proposed Copper Mine Rule [Pleading # 49] at 3 (hereinafter "Brown Direct"); (TR. Vol. 3, P. 551, L. 7-14).

~~83-84.~~ The purpose of the Copper Mine Rule as it relates to water quality standards is to control and contain discharges of water contaminants specific to copper mine facilities and their operations to prevent water pollution so that groundwater meets the quality standards of 20.6.2.3103 NMAC at locations of present and potential future use. *See* Brown Direct at 3.

~~84-85.~~ The Department's proposed rule was technically reviewed to determine if the Rule was protective of New Mexico's ground water during and after copper mining activities and found to be protective. *See* Brown Direct at 3; TRV 3 at 555, l. 10-16).

~~85-86.~~ Discharge control at New Mexico copper mine facilities under the Rule is regulated separately for each mining unit within the facility, such as each mine, each waste rock pile, each tailings pile, and each leach pad. *See* Brown Direct at 4. The framework of the Copper Mine Rule is a unit by unit approach that evaluates the parameters of the effectiveness of groundwater protection as it relates to its operation. TRV 3 at 661, l. 17-19; TRV 3 at 682, l. 8-17; TRV 4 at 803-804, l. 17-4; TRV 4 at 816, l. 9-14; TRV 4 at 824, l. 5-11).

3728883v1/25000-0382

86-87. During mine operation, discharge control at each unit is achieved by containment: (1) by locating the materials in the unit in impermeable tanks, pipes and ponds; (2) by locating a liner system beneath some units to substantially prevent discharge of the liquids in the unit to the underlying soil or bedrock; or (3) by collecting any discharge to ground water as close as practicable to the unit such that it does not impact present and potential future ground water use external to the mine unit. *See* Brown Direct at 4; TRV 1 at 15, l. 22-25; TRV 3 at 552-553, L. 6-25. The primary method for protecting ground water during mine operation is through discharge control at each unit by the containment of ground water in excess of applicable standards. TRV 3 at 557, l. 3-7).

87-88. During mine operation, under the Copper Mine Rule the method required for protection varies, depending on the materials contained within the unit of the mine and the threat which those contents present of exceeding standards in ground water ~~by each unit~~. ~~Those~~ units containing highly concentrated process waters and intended for long-term storage of impacted stormwater are double-lined; the units intended for short-term storage of impacted stormwater are single-lined; and the units containing waste rock and tailings may be unlined but would have active groundwater capture systems. *See* Brown Direct at 4.

88-89. In all cases, the mine water management system controls discharges of water contaminants from the copper mine units, prevents water pollution, and protects the groundwater of the State of New Mexico for present use (during the mining period) as domestic and agricultural water supply and surface water recharge. *See* Brown Direct at 4.

89-90. The effectiveness of the discharge control at each unit is determined by monitoring wells, located on the perimeter of the unit: upgradient, side gradient and downgradient. In the event that a monitor well identifies concentrations rising toward exceedance of the standards,

or an actual exceedance of the standards occurs, a contingency process is triggered. The contingency process generally comprises emergency repair of any breach or failure, corrective action, and, if appropriate, abatement of impact. See Brown Direct at 4.

90-91. After operation, the mine closes. Under the Copper Mine Rule, the operational features are dismantled, piping systems are removed or abandoned in place, and impoundments are emptied and where the foundation materials are contaminated, reclaimed with a store-and-release soil cover. The large scale materials storage units—leach stockpiles, waste rock stockpiles, and tailings impoundments—are all reclaimed the same way: any water on the piles is removed and water within the units allowed to drain, the sides are regraded to environmentally sustainable slopes, and the top and sides of each pile are enclosed in a three-foot thick store-and-release soil cover. The entire site is then re-vegetated. See Brown Direct at 4.

91-92. The store-and-release soil cover system largely prevents infiltration of precipitation through the ground surface, by intercepting and storing precipitation that infiltrates, and slowly releasing it to the atmosphere via evaporation and plant transpiration. In this way, after mine closure there is very little seepage through the soil cover to the underlying ore, waste rock, and tailings materials, and there is correspondingly little seepage through the rock and tailings materials into the underlying ground water system. This limits the transport of any contaminants that may be contained within, or released from ~~or~~ the materials in the units. The amounts of contaminants being released from beneath the units are sufficiently small that the impact on the underlying ground water is also small, and is expected to prevent water pollution. As a result, the store-and-release soil cover protects the ground water of the

State of New Mexico for potential future use as domestic and agricultural water supply and surface water recharge. *See* Brown Direct at 4-5.

92-93. The basic regulatory tool for protecting and monitoring ground water quality at copper mine facilities is a valid and enforceable discharge permit. TRV 3 at 557, l. 3-7.

93-94. The Department's proposal creates a straightforward permitting process with improved regulatory certainty that results in discharge permits that are consistent between facilities and more readily enforceable. TRV 3 at 558, l. 6-12.

94-95. The Department Rule ~~proposes~~proposed efficient measures and clear provisions to prevent and contain ground water contamination. TRV 3 at 560-561, l. 19-5.

95-96. The Department also ~~proposes~~proposed comprehensive monitoring and detection methods in its proposed Copper Mine Rule. TRV 3 at 557, l. 12-20.

96-97. Adoption of the Copper Rule will benefit the Department by no longer having the Department and applicant go through reiterative versions of asking for more and better submittals and receiving data and plans that don't meet the expectations of the Department. TRV 3 at 560-561, l. 19-5.

97-98. The Department will benefit from the Copper Mine Rule from not having to seek concurrence on a case by case basis from the courts or the Commission to require what it needs to prove groundwater will be protected. TRV 3 at 560-561, l. 19-5).

98-99. Permittees will benefit from the Copper Mine Rule by having more certainty that a permit application that meets the requirements of the rule will be approved. *See* Skibitski Direct at 11. ~~a one-time evaluation of the effectiveness of the containment, not each and every time there is a new or expanding operation.~~ TRV 3 at 561, l. 8-17.

99-100. \_\_\_\_ The specific provisions in the Copper Mine Rule are generally consistent with the conditions and requirements of discharge permits issued to copper mines by the Department up to the present, supplemented by new requirements for copper mine units to be built in the future, such as double-lined process water impoundments, which in the past have used various liner designs, and liner requirements for new leach stockpiles, which largely have been constructed without liners under existing discharge permits. There also are additional more specific requirements in the Copper Mine Rule compared to requirements imposed in existing discharge permits. ~~{The Copper Mine Rule does not backtrack from the technical requirements of existing discharge permits issued to copper mines.}~~ See Sibitski Direct at 8-12. NEED CHANGES

Formatted: Not Highlight

Formatted: Not Highlight

#### ANALYSIS OF TESTIMONY AND REASONS FOR ADOPTION OF SPECIFIC RULE PROPOSALS

100-101. \_\_\_\_ The New Mexico Water Quality Control Commission Regulations for Ground and Surface Water Protection are located at 20.6.2 NMAC. See Skibitski Direct at 3. Written Direct Testimony [Pleading #49] at 3 (Hereinafter "Skibitski Direct").

101-102. \_\_\_\_ The proposed Copper Mine Rule will be located at 20.6.7 NMAC.

102-103. \_\_\_\_ The Parties identified certain typographical, grammar, and formatting errors in the Petitioned Rule and Amended Rule. These non-substantive changes and have been addressed in the Proposed Final Rule submitted by NMED.

103-104. \_\_\_\_ The Commission finds that these changes proposed by the Parties to typographical, grammar, and formatting errors in the Petitioned Rule and Amended Rule are reflected in NMED's Proposed Final Rule.

3728863v1/25000-0382

~~104-105.~~ The Commission finds that these changes to typographical, grammar, and formatting errors are undisputed and hereby adopts such changes as reflected in NMED's Proposed Final Rule.

**Sections 20.6.7.1 through 20.6.7.6 - Compliance with 1.24.10.8:**

~~105-106.~~ Section 1.24.10.8(F) NMAC requires the first six sections of a part of a rule to set forth the issuing agency, scope, statutory authority, duration, effective date, and objective.

~~106-107.~~ The Petitioned Rule, Amended Rule, and Proposed Final Rule set forth the issuing agency, scope, statutory authority, duration, effective date, and objective at 20.6.7.1 through 20.6.7.6 NMAC.

~~107-108.~~ NMED presents testimony from Mr. Brown to support its 20.6.7.1 through 20.6.7.6 NMAC. *See* Brown Direct at 2-3.

~~108-109.~~ The Commission finds that none of the parties object to 20.6.7.1 through 20.6.7.6 NMAC as set forth in the Petitioned Rule, Amended Rule, and Proposed Final Rule. *See* Freeport NOI; AG Exhibit 2 at 1; AB Exhibit 1 at 1; Kuipers Attachment 2 at 1; WCO Exhibit 3 at 1.

~~109-110.~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.1 through 20.6.7.6 NMAC as set forth in the Proposed Final Rule.

**Section 20.6.7.7 – Definitions:**

*Section Overview*

~~110-111.~~ NMED ~~proposes~~proposed a set of definitions to be used only for purposes of the Copper Mine Rule. *See* Petition Attachment 1 at 1-4.

*Undisputed Subsection A*

~~111.112.~~ NMED proposed 20.6.7.7.A in the Petitioned Rule. *See* Petition, Attachment 1 at 1.

~~112.113.~~ Subsection A provides that terms defined in the Water Quality Act and in 20.6.7 NMAC, when used in the Copper Mine Rule, shall have the meanings as given in the Act and 20.6.7 NMAC.

~~113.114.~~ No party proposed any alternative language for subsection A, and all parties retain it in their alternative rule proposals. *See* Freeport NOI; AG Exhibit 2 at 1; AB Exhibit 1 at 1; Kuipers Attachment 2 at 1; WCO Exhibit 3 at 1.

~~114.115.~~ NMED made no changes to 20.6.7.7.A in the Amended Rule. *See* Amended Petition, Attachment 1 at 1.

~~115.116.~~ NMED made no changes to 20.6.7.7.A in the Proposed Final Rule. *See* Proposed Final Rule at 1.

~~116.117.~~ Based on the weight of the evidence, the Commission adopts 20.6.7.7.A as set forth in the Proposed Final Rule.

***Subsection B—Undisputed Definitions***

~~117.118.~~ The Commission finds that the following definitions in 20.6.7.7 set forth by NMED in the Petitioned Rule, Amended Rule, and Proposed Final Rule are undisputed because they remained unchanged through the different versions of the Copper Mine Rule and Freeport, the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson did not present alternative rule language: (1) acid mine drainage; applicant; (~~7~~) below-grade tank; (9) construction quality assurance or CQA; (~~10~~) construction quality control or CQC; (~~11~~) CQA/CQC report; (13) copper mine rule; (~~15~~) critical structure; (~~16~~) date of postal notice; (~~18~~) discharge permit amendment; (~~20~~) existing copper mine facility; (~~21~~) existing

impoundment; (223) expiration; (234) factor of safety; (245) final CQA report; (256) flow meter; (267) freeboard; (278) highway; (2930) impoundment; (304) interbench slope; (312) large copper mine facility; (323) leach stockpile; (334) liner system; (345) maximum daily discharge volume; (356) medium copper mine facility; (367) mining and minerals division; (38) new copper mine facility; (3940) non-impacted stormwater; (4044) open pit; (434) outslope; (445) owner; (456) permittee; (489) PLS; (5253) slope angle; (5455) spillway; (5556) stormwater; (5657) surface water(s) of the state; (5758) SX/EW; (5859) tailings; (5960) tailings impoundment; and (612) underground mine. ~~[numbering from Amended Petition]~~

118.119. The Commission finds that the following definitions in 20.6.7.7 set forth by NMED in the Petitioned Rule and Amended Rule were undisputed by others, were changed by NMED in the Proposed Final Rule, and the changes in the Proposed Final Rule were non-substantive amendments for consistency and clarity: (378) Mining Act, (423) operator, and (534) small copper mine facility.

119.120. The Commission finds that the following definition in 20.6.7.7 set forth by NMED in the Petitioned Rule were undisputed by others, were changed in the Amended Rule and remained undisputed by others, and remained unchanged in the Proposed Final Rule: (1920) discharge volume, (467) pipeline corridor, and (478) pipeline system.

120.121. The Commission finds that the following definitions in 20.6.7.7 set forth by NMED in the Petitioned Rule were undisputed by others, were changed in the Amended Rule and remained undisputed by others, and were changed again in the Proposed Final Rule in order to deal with non-substantive matters to reflect clarity and consistency for the definitions: (89) closure and (289) impacted stormwater.

~~121~~.122. The Commission finds that the following definitions are undisputed by the Parties because the definitions were added by NMED as new definition in the Amended Rule for the first time, were unopposed in rebuttal testimony, and carried through in the same form to the Proposed Final Rule: (5~~1~~2) slag and (6~~2~~3) unit.

~~122~~.123. The Commission finds that the following definitions were supported by testimony from Freeport witnesses: (1) acid mine drainage; (9) construction quality assurance or CQA; (10) construction quality control or CQC; (15) critical structure; (18) discharge permit amendment; (26) freeboard; (29) impoundment; (32) leach stockpile; (33) liner system; (40) open pit; (53) small copper mine facility; (56) surface water(s) of the state; and (58) tailings. See Finley Direct at 9, 15; Grass Direct at 5, 6, 7, 11, 13, 21; Shelley Direct at 15; Eastep Direct at 36; and Scott Direct at 3. Blanford Rebuttal at p. 23-24. ~~{any from Blanford}~~

Formatted: Not Highlight

~~123~~.124. The Commission finds that all of the definitions set forth above are necessary for the operation of the Copper Mine Rule.

~~124~~.125. Based on the weight of the evidence and the fact that several definitions were unopposed and/or changed for non-substantive reasons, the Commission hereby adopts the following definitions as set forth in the Proposed Final Rule: acid mine drainage; applicant; below-grade tank; closure; construction quality assurance or CQA; construction quality control or CQC; CQA/CQC report; copper mine rule; critical structure; date of postal notice; discharge permit amendment; discharge volume; existing copper mine facility; existing impoundment; expiration; factor of safety; final CQA report; flow meter; freeboard; highway; impacted stormwater; impoundment; interbench slope; large copper mine facility; leach stockpile; liner system; maximum daily discharge volume; medium copper mine facility; mining and minerals division; Mining Act; new copper mine facility; non-impacted

stormwater; open pit; operator; outslope; owner; permittee; PLS; pipeline corridor; pipeline system; slag; slope angle; small copper mine facility; spillway; stormwater; surface water(s) of the state; SX/EW; tailings; tailings impoundment; underground mine, and unit. {address renumbering-or-take-out-numbers}

**20.6.7.7 – Disputed Definitions:**

*Additional Conditions*

Formatted: Font: (Default) Times New Roman

~~125-126.~~ NMED proposed 20.6.7.7.B(2) in the Petitioned Rule which provides a definition of “additional conditions.” See Petition, Attachment 1 at 1.

~~126-127.~~ GRIP and TRP objected to this definition and added new language to require that “[c]onditions carried over from a prior discharge permit shall not be considered additional conditions.” In support, GRIP and TRP argued that conditions already contained in existing permits should not be considered as “additional conditions.” See Kuipers, Attachment 2 at 1.

~~127-128.~~ NMED made no changes to this definition in its Amended Rule or Proposed Final Rule. See Amended Petition, Attachment 2 at 1.

~~128.~~ The Commission finds that the proposal for new language by GRIP and TRP by is unreasonable because there may be some instances where the Copper Mine Rule deviates from conditions in existing permits, which allows departmental flexibility.

129. The Commission further finds that the issues raised by GRIP and TRP has been addressed by adding similar language to specific rule sections and does not need to be addressed in the definition to the extent NMED needs to carry over conditions from existing permits, the Copper Rules provide a sufficient procedural mechanism to do so through 20.6.7.10.I.

130. NMED made no changes to this definition in the Proposed Final Rule. See Proposed Final Rule at 1.

~~130-131.~~ Based on the weight of the evidence, the Commission hereby adopts the definition of “additional conditions” as set forth by NMED in the Proposed Final Rule.

*Applicable Standards*

Formatted: Font: (Default) Times New Roman

~~131.~~ NMED proposed 20.6.7.7.B(3) in the Petitioned Rule which provides a definition of “applicable standards.” See Petition, Attachment 1 at 1.

~~###~~ Freeport supported this definition through testimony from Mr. Neil Blandford, wherein he indicated that the definition of “applicable standards” is a concept that is necessary to determine if ground water impacts are mine related, and if so, if abatement or corrective action necessary. See Blandford Direct at 4.

Formatted: Normal

Formatted: Font: (Default) Times New Roman

Formatted: Font: (Default) Times New Roman

132. The Attorney General objected to this definition and proposed to delete the phrase “including, when applicable, the existing standards.” However, the Attorney General provided no specific technical evidence as to why such a change was needed. See NMAG Exhibit 2 at 2.

133. GRIP and TRP objected to this definition and proposed deleting~~deleted~~ most of the language to essentially define “applicable standards” as the standards set forth in 20.6.2.3103 NMAC. GRIP and TRP maintained that such a change to the definition is appropriate because “existing concentration” is already a part of 20.6.2.3103 NMAC, and the reference to “background” and “alternative abatement standards” are terms used in the abatement regulations and have no place in a rule designed to prevent pollution. See Kuipers, Attachment 2 at 1.

134. Amigos Bravos objected to this definition, proposed the same changes as the Attorney General to the definition, and argued that the changes are appropriate because they were in the August 17 Discussion Draft. See AB Exhibit 1 at 2.

~~135.~~ 135. NMED made changes to the definition in the Amended Rule by removing the phrase “existing copper mine facility” and references to certain NMAC ~~regulations~~ reference to the portion of the definition dealing with alternative abatement standard. See Amended Petition, Attachment 2 at 1.

~~135-136.~~ 136. During the hearing, Mr. Brown testified that it is appropriate to retain “abatement standards” within the definition of “applicable standards.” TRV 2 at 620. 1. 15-19.

~~136-137.~~ 137. NMED then made additional changes to ~~changed~~ the definition of “applicable standards” in the Proposed Final Rule, whereby NMED removed the phrase “including, when applicable, the existing standards.” This addresses the Attorney General’s comment and partially addresses GRIP’s and TRP’s proposed changes. See Proposed Final Rule at 1.

~~137-138.~~ 138. The Commission finds that the removal of the phrase “including, when applicable, the existing standards” as proposed by NMED in the Proposed Final Rule is appropriate because the language is included in 20.6.2.3103 NMAC and is therefore unnecessary.

~~138-139.~~ 139. Relying primarily on the testimonies of Mr. Brown and Mr. Blandford, and based on the weight of the evidence, the Commission hereby adopts the definition of “applicable standards” as proposed by NMED in the Proposed Final Rule.

*Area of [Open Pit] Hydrologic Containment*

Formatted: Font: (Default) Times New Roman

~~139-140.~~ 140. NMED proposed 20.6.7.7.B(5) in the Petitioned Rule which provides a definition of “area of hydrologic containment.” See Petition, Attachment 1 at 2.

~~140-141.~~ Freeport provided evidence in support of this definition through testimony from technical witness Neil Blandford. In summary, Mr. Blandford supported the definition of “area of hydrologic containment” because it is essential for dealing with the requirements for open pits. See Blandford Direct at 20-21.

~~141-142.~~ The Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson objected to the definition of “area of hydrologic containment” and proposed to delete it. See NMAG Exhibit 2 at 2; Kuipers, Attachment 2 at 2; AB Exhibit 1 at 2; and WCO Exhibit 3 at 2. The Attorney General, GRIP, TRP, and Mr. Olson provided evidence to support this objection. See Travers Direct at 23; ; Kuipers, Attachment 2 at 2; and WCO Exhibit 3 at 2.

~~142-143.~~ NMED changed the definition of “area of hydrologic containment” to “area of open pit hydrologic containment” in the Amended Rule and amended the language of the definition. See Amended Petition, Attachment 2 at 1.

~~143-144.~~ NMED supported the change to 20.6.7.7.B(5) in the Amended Rule through testimony of technical witness Adrian Brown. See Brown Direct at 11-12. In addition, Mr. Brown refuted the removal of the definition and noted that the variability of the area of open pit hydrologic containment is one of its strengths, not weaknesses, because the permittee can adjust the size of the area by installation of pumping to ensure containment. See Brown Rebuttal at 3.

~~144-145.~~ NMED then further amended 20.6.7.7.B(5) in the Proposed Final Rule to include the language “and also limited to the area of disturbance authorized by a discharge permit.” This addition further limits the definition so that it does not include areas outside of the mine. As indicated in Mr. Blandford’s testimony, existing and future copper mine facilities may have units that straddle the area of open pit hydrologic containment, and the additional

language limits the area where standard do not apply to the area of disturbance; and pointed to testimony during the hearing as support, and maintained that this new amendment to the definition is necessary. See Blandford Direct at 21, because

145. The Commission finds that deletion of the term “area of hydrologic containment” as proposed by the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson is inappropriate because the rule is essentially a monitoring and containment rule and defining this term is conceptually necessary.

146. The Commission finds that the definition as changed in the Amended Rule and Proposed Final Rule are supported by evidence and necessary to implement a proper monitoring and containment framework because

147. Relying primarily upon the testimonies of Mr. Brown and Mr. Blandford, and based on the weight of the evidence, the Commission hereby adopts the definition of “area of open pit hydrologic containment” as proposed by NMED in the Proposed Final Rule.

#### *As-Built Drawings*

Formatted: Font: (Default) Times New Roman

148. NMED proposed 20.6.7.7.B(6) in the Petitioned Rule which provides a definition of “as-built drawings.” See Petition, Attachment 1 at 2.

149. GRIP and TRP objected to 20.6.7.7.B(6) in the Petitioned Rule and argued that language needs to be added to require as-built drawing to be “signed and sealed by a qualified professional engineer registered in New Mexico.” See Kuipers, Attachment 2 at 2.

149. NMED made no changes to this definition in the Amended Rule. See Amended Petition, Attachment 2 at 2.

150. Mr. Kuipers' testimony was rebutted by testimony by Mr. Shelley. See Shelley Rebuttal at 8-9.

~~151.~~ The Commission finds that the proposal by GRIP and TRP to amend 20.6.7.7.B(6) is unnecessary, because \_\_\_\_\_.

~~152.~~ 151. Relving primarily on the rebuttal testimony of Mr. Shelley, and B based on the weight of the evidence, the Commission hereby adopts the definition of "as-built drawings" as proposed by NMED in the Proposed Final Rule.

#### ***Background***

Formatted: Font: (Default) Times New Roman

~~153.~~ 152. NMED proposed 20.6.7.7.B(7) in the Petitioned Rule which provides a definition of "background." See Petition, Attachment 1 at 2.

~~154.~~ 153. Freeport presented evidence in support of 20.6.7.7.B(7) in the Petitioned Rule through testimony of ~~Neil~~ Mr. Blandford. See Blandford Direct at 4-5.

~~155.~~ 154. The Attorney General objected to the definition of "background" and argued that language should be deleted so that it reads: "...concentration of water contaminants naturally occurring from undisturbed geologic sources ~~of water contaminants.~~" The Attorney General did not explain within the document containing its proposed rule changes why the language change was necessary. See ~~NMAG~~ Exhibit 2 at 2.

~~156.~~ 155. GRIP and TRP argued that the entire definition of "background" should be deleted. GRIP and TRP did not explain within the document containing its proposed rule changes why the deletion of the term was necessary. See Kuipers, Attachment 2 at 2.

~~157.~~ 156. Similar to the Attorney General, Mr. Olson objected to the definition of "background" and ~~and~~ argued that language should be deleted so that it reads: "...concentration of water contaminants naturally occurring from undisturbed geologic

sources of water contaminants.” Mr. Olson essentially argued that the deleted language is redundant, confusing, and technically awkward. *See* WCO Exhibit 3 at 2.

~~158~~.157. NMED makes no changes to this definition in its Amended Rule. *See* Amended Petition, Attachment 2 at 2.

~~159~~.158. NMED presented evidence in rebuttal to support the definition of background through ~~Adrian~~Mr. Brown. *See* Brown Rebuttal at 10.

~~160~~. The Commission finds that the proposal by the Attorney General and Mr. Olson is unwarranted because the language is not redundant, confusing or technically awkward.

~~161~~. The Commission finds that the proposal by GRIP and TRP to delete the definition is inappropriate. \_\_\_\_\_

~~162~~.159. Relying primarily on the testimony of Mr. Brown and Mr. Blandford, and based on the weight of the evidence, the Commission hereby adopts the definition of “background” as proposed by NMED in the Proposed Final Rule.

#### *Copper Mine Facility*

Formatted: Font: (Default) Times New Roman

~~163~~.160. NMED proposed 20.6.7.7.B(13) in the Petitioned Rule which provides a definition of “copper mine facility.” *See* Petition, Attachment 1 at 2.

~~164~~.161. Amigos Bravos objected to this definition and proposed to add language based on the August 17 Discussion Draft. *See* AB Exhibit 1 at 2-3.

~~165~~.162. Mr. Olson objected to this definition and proposed to add the same language as proposed by Amigos Bravos. Mr. Olson argued that the additional language is necessary because it is necessary to cover potential sources of any other water contaminants that may

not be foreseen in the promulgation of the Copper Mine Rule, including mine processes that may be developed in the future. See WCO Exhibit 3 at 3.

~~166~~:163. \_\_\_\_\_ NMED makes no changes to this definition in its Amended Rule. See Amended Petition, Attachment 2 at 2.

~~167~~:164. \_\_\_\_\_ NMED made additional changes to this definition in the Proposed Final Rule adding the word "copper" to clarify coverage of copper mines as opposed to other mines. See Proposed Final Rule at p.2. \_\_\_\_\_. In addition, throughout the Proposed Final Rule NMED uses this defined term to replace the word "facility" or "facilities" alone for clarification.

~~168~~:165. \_\_\_\_\_ The Commission ~~finds that~~ does not adopt the proposed language by Amigos Bravos and Mr. Olson ~~are unnecessary, because \_\_\_\_\_~~ because other particular discharging facilities as copper mines are not identified in their testimony or elsewhere in the record, so this change is not necessary.

~~169~~:166. \_\_\_\_\_ The Commission finds that the ~~amended proposed~~ language by in the Proposed Final Rule is non-substantive and clarifies the intent of the rule to apply to copper mines and not other other types of mines where copper may incidentally be recovered. ~~non-substantive and clarifies the rule provision.~~

~~170~~:167. \_\_\_\_\_ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.7.B(13) as proposed by NMED in the Proposed Final Rule.

#### Cover System

Formatted: Font: (Default) Times New Roman

168. \_\_\_\_\_ NMED ~~proposes~~ proposed 20.6.7.7.B(15) in the Petitioned Rule which provides a definition of "cover system." See Petition, Attachment 1 at 2.

~~171-169.~~ Mr. Brown testified regarding the function of cover systems. See Brown Direct at 32-39.

~~172-170.~~ Freeport presenteds technical evidence ~~en~~concerning why cover systems are important. See Munk Direct at 9.

~~173-171.~~ Amigos Bravos objected to the definition of "cover system" and proposed additional language based on the August 17 Discussion Draft. See AB Exhibit 1 at 3.

~~174.~~ The Commission finds that Amigos Bravos presents no technical evidence to support its rule change and further finds that mere references to earlier Petition drafts does not constitute persuasive evidence.

172. NMED makes no changes to this definition in its Amended Rule. See Amended Petition, Attachment 2 at 2.

~~175-173.~~ NMED made no changes to this definition in the Proposed Final Rule. See Proposed Final Rule at 2.

~~176-174.~~ Relving primarily on the testimony of Mr. Munk, and ~~B~~based on the weight of the evidence, the Commission hereby adopts 20.6.7.7.B(15) as proposed by NMED in the Proposed Final Rule.

### *Discharge*

Formatted: Font: (Default) Times New Roman

~~177-175.~~ NMED ~~proposes~~proposed 20.6.7.7.B(18) in the Petitioned Rule which provides a definition of "discharge." See Petition, Attachment 1 at 2.

~~178-176.~~ NMED presented evidence through Adrian Brown on how discharge fits into the structure of the rule. See Brown at 4-5.

~~179-177.~~ The Attorney General objected to this definition and proposed to add “surface or” before “ground water,” thereby making the term applicable to both surface and ground water. See NMAG Exhibit 2 at 2.

~~180-178.~~ GRIP and TRP proposed to completely eliminate the term “discharge” and argued that the definition is already defined at 20.6.2.1203(C)(1) NMAC, so there is not reason to have a separate definition. See Kuipers, Attachment 2 at 2.

~~181-179.~~ Mr. Olson objected to this definition and proposed a revision somewhat similar to the Attorney General, whereby he replaced “ground water” at the end of the definition with “surface or subsurface water.” See WCO Exhibit 3 at 3.

~~182-180.~~ NMED made no changes to this definition in its Amended Rule. See Amended Petition, Attachment 2 at 2.

~~183-181.~~ NMED made no changes to this definition in the Proposed Final Rule. See Proposed Final Rule at 2. ~~The Commission finds that all three alternative rule language proposals related to including surface water into the definition and how this relates to 20.6 unpersuasive, 2.1203(C)(1) NMAC, and such a concern is unwarranted because~~

~~184-182.~~ Relying primarily upon the testimony of Mr. Brown, and B based on the weight of the evidence, the Commission hereby adopts 20.6.7.7.B(18) as proposed by NMED in the Proposed Final Rule.

*Open Pit Surface Drainage Area*

Formatted: Font: (Default) Times New Roman

~~185-183.~~ NMED proposed 20.6.7.7.B(42) in the Petitioned Rule which provides a definition of “open pit surface drainage area.” See Petition, Attachment 1 at 3.

~~186-184.~~ 184. NMED presented evidence to support this definition through ~~Adrian~~Mr. Brown, wherein he indicated that the definition is necessary because it relates to the requirements for open pits. See Brown at 11.

~~187-185.~~ 185. Freeport supported this definition through technical evidence. See Finley Direct at 15-16 and Blandford Direct at 23.

~~188-186.~~ 186. The Attorney General objected to this definition and proposed to add language dealing with “continual and perpetual” pumping. See NMAG Exhibit 2 at 4.

~~189-187.~~ 187. GRIP and TRP objected to this definition and proposed to completely eliminate it because it proposes a dual system of regulation, whereby one set of requirements apply inside this area and a different set apply outside this area. See Kuipers, Attachment 2 at 4.

~~190-188.~~ 188. Amigos Bravos objected to this definition and proposed to completely eliminate the term like GRIP and TRP; this proposal by Amigos Bravos was based solely on the August 17 Discussion Draft. See AB Exhibit 1 at 5.

189. NMED made changes to this definition in its Amended Rule by replacing “pit bottom” with “open pit.” See Amended Petition, Attachment 2 at 3.

~~191-190.~~ 190. NMED made no changes to this definition in the Proposed Final Rule. See Proposed Final Rule at 3.

~~192.~~ The Commission finds that the proposal by the Attorney General is inappropriate because

\_\_\_\_\_

~~193.~~ The Commission finds that the proposals by the Attorney General, GRIP, TRP, and Amigos Bravos ~~unpersuasive to eliminate the definition are inappropriate because~~

\_\_\_\_\_

~~194-191.~~ Relying primarily on the testimonies of Mr. Brown, Mr. Finley and Mr. Blandford, and based on the weight of the evidence, the Commission hereby adopts 20.6.7.7.B(42) as proposed by NMED in the Proposed Final Rule.

*Process Water*

Formatted: Font: (Default) Times New Roman

~~195-192.~~ NMED ~~proposes~~proposed 20.6.7.7.B(50) in the Petitioned Rule which provides a definition of "process water." *See* Petition, Attachment 1 at 4. ~~NEED EVIDENCE FROM EITHER NMED OR FCX TO SUPPORT DEFINITION.~~

~~196-193.~~ GRIP and TRP objected to the definition of "process water" and propose a completely new definition. They argued that the new definition is necessary due to the dual system of regulation, whereby one set of requirements are imposed in the "open pit surface drainage area" and another set of requirements are imposed outside this area. GRIP and TRP maintain that their new definition would eliminate this dual system of regulation and prohibit pollution of ground water above standards without a variance. *See* Kuipers, Attachment 2 at 4.

194. Amigos Bravos objected to the definition of "process water" and propose new language based solely on the August 17 Discussion Draft. *See* AB Exhibit 1 at 5.

~~197-195.~~ Freeport technical witnesses Mr. Shelley and Mr. Grass discussed the need for a proper definition for process water because of the vast array of solutions utilized on site. *See* Shelley Direct at 31 and Grass Direct at p. 8

196. NMED made no changes to this definition in its Amended Rule. *See* Amended Petition, Attachment 2 at 4.

~~198-197.~~ NMED made no changes to this definition in the Proposed Final Rule. *See* Proposed Final Rule at 3.

199. ~~The Commission finds that the alternative rule language proposed by GRIP and TRP is without merit because \_\_\_\_\_.~~

Formatted: Indent: Left: 0.25", No bullets or numbering

200. ~~The Commission finds that the alternative rule language proposed by GRIP and TRP and Amigos Bravos is unnecessary and their arguments for amendments unpersuasive, alternative rule language is without merit because it is not supported by technical evidence explaining why the change is necessary.~~

204-198. Relying primarily on the testimonies of Mr. Shelley and Mr. Grass, and based on the weight of the evidence, the Commission hereby adopts the definition of "process water" as proposed by NMED in the Proposed Final Rule.

*Seepage*

Formatted: Font: (Default) Times New Roman

202-199. NMED did not propose a definition for "seepage" in the Petitioned Rule. See Petition, Attachment 1 at 1-4.

203-200. NMED proposed a new definition for "seepage" in the Amended Rule at 20.6.7.7.B(51). See Amended Petition, Attachment 2 at 4.

204-201. NMED made changes in the Amended Rule for consistency and clarity. See Amended Petition at 1.

205-202. Freeport objected to the definition of "seepage" in the Amended Rule, proposed to delete "a seep" from the definition and replace it with "water flow," and supported this change through testimony of Michael Mr. Grass. See Freeport Rebuttal NOI at 3 and Grass Rebuttal at 1-2.

206-203. In the Proposed Final Rule, NMED accepted Freeport's proposal to remove "a seep" but did not insert "water flow." See Proposed Final Rule at 4. NEED CITE ONCE PROPOSED FINAL RULE IS DONE.

~~207-204.~~ The Commission finds that the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson do not object to the definition of "seepage" as proposed by either NMED or Freeport because they did not propose alternative rule language. See Rebuttal NOI's and testimony.

~~208-205.~~ The Commission finds that changes made to the definition in the Proposed Final Rule address Freeport's objection to the definition.

~~209.~~ The Commission finds that the definition of "seepage" as set forth in the Proposed Final Rule is necessary because \_\_\_\_\_.

~~210-206.~~ Based on the weight of the evidence, the Commission hereby adopts the definition of "seepage" as proposed by NMED in the Proposed Final Rule.

#### *Unauthorized Discharge*

Formatted: Font: (Default) Times New Roman

~~211-207.~~ NMED ~~proposes~~ proposed 20.6.7.7.B(59) in the Petitioned Rule which provides a definition of "unauthorized discharge." See Petition, Attachment 1 at 4. ~~NEED EVIDENCE FROM EITHER NMED OR FCX TO SUPPORT DEFINITION.~~

~~208.~~ GRIP and TRP proposed alternative rule language for this definition and ~~basically~~ maintained that the definition needed to reference 20.6.2.1203 NMAC. See Kuipers, Attachment 2 at 5.

~~212-209.~~ ~~Bill Olson~~ Mr. Olson, the Attorney General, Amigos Bravos and Freeport do not suggest changes to this section. See Freeport NOI: AG Exhibit 2 at 4; AB Exhibit 1 at 6; WCO Exhibit 3 at 6.

~~213.~~ NMED ~~makes~~ made no substantive changes to this definition in its Amended Rule, but it is re-numbered to (61). See Amended Petition, Attachment 2 at 4.

~~214-210.~~ NMED made no changes to this definition in the Proposed Final Rule. See Proposed Final Rule at 4. The Commission finds that the proposed alternative rule language by GRIP and TRP is \_\_\_\_\_.

~~215-211.~~ Because the change in Mr. Kuipers' testimony is not well-explained and would appear to narrow the scope of the definition, and based on the weight of the evidence, the Commission hereby adopts the definition of "unauthorized discharge" as proposed by NMED in the Proposed Final Rule.

*Variance*

Formatted: Font: (Default) Times New Roman

~~216-212.~~ NMED proposes proposed 20.6.7.7.B(61) in the Petitioned Rule which provides a definition of "variance." See Petition, Attachment 1 at 4. ~~NEED EVIDENCE FOR EITHER NMED OR FCX TO SUPPORT DEFINITION.~~

~~217-213.~~ GRIP and TRP object to the definition and propose alternative rule language; however, they do not provide an explanation as to why such language is necessary. See Kuipers, Attachment 2 at 5.

~~218-214.~~ Amigos Bravos objected to the definition of "variance" and proposed new language referencing Section 79-6-4(H) NMSA. See AB Exhibit 1 at 6.

~~219-215.~~ NMED makes made no substantive changes to this definition in its Amended Rule, but it is re-numbered to (64). See Amended Petition, Attachment 2 at 4.

~~220.~~ The Commission finds that the proposed alternative rule language proposed by GRIP and TRP is \_\_\_\_\_.

~~221.~~ The Commission finds that the proposed alternative rule language proposed by Amigos Bravos is unnecessary because \_\_\_\_\_.

216. NMED made no change to this definition in the Proposed Final Rule. See Proposed Final Rule at 4.

~~222-217.~~ Based on the weight of the evidence, the Commission hereby adopts the definition of “variance” as proposed by NMED in the Proposed Final Rule.

***Waste Rock***

Formatted: Font: (Default) Times New Roman

~~223-218.~~ NMED proposed 20.6.7.7.B(62) in the Petitioned Rule which provides a definition of “waste rock.” See Petition, Attachment 1 at 4.

~~224-219.~~ Freeport presented evidence to support the definition of “waste rock” through Jim Finley. Mr. Finley’s testimony ~~asserts~~ includes, but is not limited to, a recognition that the definition is consistent with the academic and professional definition of waste rock. See Finley Direct at 3-4.

~~225-220.~~ Amigos Bravos objected to this definition and proposed to add “marketable” before ore; however, Amigos Bravos provided no technical evidence to support such a change. See AB Exhibit 1 at 6.

221. NMED ~~makes~~made no substantive changes to this definition in its Amended Rule, but it is re-numbered to (65). See Amended Petition, Attachment 2 at 4.

226-222. NMED made no change to this definition in the Proposed Final Rule. See Proposed Final Rule at 4.

~~227.~~ The Commission finds that the proposed language by Amigos Bravos is unnecessary because \_\_\_\_\_.

228-223. Based on the weight of the evidence, the Commission hereby adopts the definition of “waste rock” as proposed by NMED in the Proposed Final Rule.

***Additional Definitions Proposed by Amigos Bravos***

Formatted: Font: (Default) Times New Roman

~~229-224.~~ Amigos Bravos proposed new definitions for the following terms: (1) green infrastructure, and (2) low impact development. See AB Exhibit 1 at 4.

~~230-225.~~ The Commission finds that the new definitions proposed by Amigos Bravos are only necessary if the substantive rule provisions dealing with these definitions are adopted.

~~231-226.~~ For the reasons set forth below, the Commission finds that the substantive rule provisions dealing with the terms "green infrastructure" and "low impact development" have been rejected are not adopted.

~~232-227.~~ Based on the weight of the evidence set forth below dealing with the substantive rule provisions incorporating the new definitions proposed by Amigos Bravos, the Commission hereby declines to adopt the new definitions proposed by Amigos Bravos.

*Additional Definitions Proposed by Mr. Olson*

Formatted: Font: (Default) Times New Roman

~~233-228.~~ Mr. Olson ~~proposes~~ proposed new definitions for the following terms: (1) affected discharge site; (2) hearing clerk; (3) hearing officer; (4) hearing record; (5) party; (6) petition or variance petition; (7) record proper; and (8) variance period.

~~234-229.~~ The Commission finds that the new definitions proposed by Mr. Olson are only necessary if the substantive rule provisions dealing with variances as proposed by Mr. Olson are adopted.

~~235-230.~~ For the reasons set forth below, the Commission finds that the substantive rule provisions dealing with variances as proposed by Mr. Olson are ~~rejected~~ not adopted; therefore, the new definitions proposed by Mr. Olson are ~~rejected~~ not necessary.

~~236-231.~~ Based on the weight of the evidence set forth below dealing with the substantive rule provisions for variances incorporating the new definitions proposed by Mr. Olson, the Commission hereby declines to adopt the new definitions proposed by Mr. Olson.

**20.6.7.8 – Requirements for Discharging from Copper Mine Facilities:**

*Subsection A*

~~237-232.~~ NMED ~~proposes~~ proposed 20.6.7.8.A which sets forth the general circumstances as to when a discharge permit is needed. *See* Petition, Attachment 1 at 4.

~~238-233.~~ NMED's witness testified that this rule provision codifies and implements processes that have evolved through regulation of copper mine facilities. *See* Skibitski Direct at 12-13.

~~239-234.~~ NMED ~~ma~~ makes no changes to 20.6.7.8.A in the Amended Rule. *See* Amended Petition, Attachment 2 at 4.

~~240-235.~~ Freeport ~~supports~~ supported 20.6.7.8.A and offers evidence. ~~See Eastep Direct at 17-18.~~ In summary, Freeport's witness testified that Subsection A is necessary because it sets forth the circumstances as to when a copper mine facility needs to acquire a discharge permit. *See* Eastep Direct at 16-17.

~~241-236.~~ GRIP and TRP oppose 20.6.7.8.A and offer alternative rule language. *See* Kuipers Direct, Attachment 2 at 5. GRIP and TRP maintained that their proposed changes to 20.6.7.8.A make it consistent with 20.6.2.3104 NMAC. *See* Kuipers, Attachment 2 at 5.

~~242-237.~~ The Attorney General, Amigos Bravos, and Mr. Olson do not offer alternative rule language for 20.6.7.8.A. *See* NMAGAG Exhibit 2 at 4; AB Exhibit 1 at 6; and WCO Exhibit 3 at 6.

238. The Commission finds that the changes proposed by GRIP/TRP would have little or no effect and might be confusing. The terms "effluent" and "leachate" are used in 20.6.2.3104 NMAC as indicated by Mr. Kuipers, but are not used or defined in the proposed rule. The proposed rule defines and references different terms, particularly "process water" and

3738893v1/25000-0382

“impacted stormwater,” without indicating whether they would be “effluent” or “leachate”.  
The Copper Mine Rule specifically identifies discharging facilities at copper mines that require discharge permits, so there may be little reliance on 20.6.7.8.A to determine what facilities need a permit.

~~243:239.~~ NMED made no changes to 20.6.7.8.A in the Proposed Final Rule. See Proposed Final Rule at 4.

~~244:240.~~ Based on the weight of the evidence, the Commission declines to adopt the rule changes by GRIP and TRP and hereby adopts 20.6.7.8.A as proposed by NMED in the ~~Petitioned Rule, Amended Rule, and Proposed Final Rule.~~

*Subsections B through D*

Formatted: Font: Times New Roman

~~245:241.~~ Under 20.6.7.8 in the Petitioned Rule, NMED ~~proposes~~proposed requirements for discharging from copper mine facilities at Subsections B, C, and D. See Petition, Attachment 1 at 4.

~~—~~NMED ~~mak~~es no changes to 20.6.7.8.B, C, and D. See Amended Petition, Attachment 2 at

Formatted: List Paragraph

4.

~~242.~~

~~243.~~ Freeport witness Mr. Eastep presented testimony in support of 20.6.7.8.B, C, and D.

Formatted: List Paragraph

These sections set forth the circumstances in which a discharge permit is necessary, who is responsible for compliance, how existing groundwater regulations interact with the proposed rule (supplements or replaces 20.6.2.3103 through 20.6.2.3114) and clarifies the relationship between the proposed rule and existing regulations and specifically acknowledges that the

proposed rule does not relieve a copper mine facility from complying with other applicable laws. See Eastep Direct at 17-18

~~246.~~ See Eastep Direct at 17-18.

~~247-244.~~ The Commission finds that 20.6.7.8.B, C, and D are undisputed by undisputed by Freeport, the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson.

~~248-245.~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.8.B, C, and D as set forth in the Petitioned Rule, Amended Rule, and Proposed Final Rule.

#### **20.6.7.9 – Fees:**

~~249-246.~~ The WQA requires that the Commission, by regulation, shall “provide by regulation a schedule of fees for permits, not exceeding the estimated cost of investigation and issuance, modification and renewal of permits.” Section 74-6-5(K) NMSA 1978.

~~250-247.~~ NMED ~~proposes~~proposed a schedule of fees for permits at 20.6.7.9 in the Petitioned Rule. See Petition, Attachment 1 at 4-5. This schedule of fees would replace the fee schedule set forth in 20.6.2.3114 NMAC only for copper mine facilities as of the effective date of the Copper Mine Rule.

~~251-248.~~ NMED amended 20.6.7.9 in the Amended Rule by inserting language to clarify that the fees are paid to the department’s water quality management fund. See Amended Petition, Attachment 2 at 4.

~~252-249.~~ Freeport presented testimony through ~~Tim~~Mr. Eastep to support 20.6.7.9 as proposed by NMED. In summary, Mr. Eastep maintains that the 20.6.7.9 NMAC is predictable and consistent as opposed to the current fee structure that is irregular.

3738883v1/25000-0382

Formatted: Indent: Left: 0.25", No bullets or numbering

Consequently, Mr. Eastep asserts that 20.6.7.9 allows for proper budgeting. *See* Eastep Direct at 18-19.

~~250.~~ The Commission finds that the provisions of 20.6.7.9 are undisputed by the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson.

~~253-251.~~ NMED made no changes to 20.6.7.9 in the Proposed Final Rule. *See* Proposed Final Rule at 4-5.

~~254-252.~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.9 and 20.6.7.9.A, B, C, and D as set forth in the ~~Petitioned Rule, as changed in the Amended Rule, and as carried through to the Proposed Final Rule.~~

**20.6.7.10 – General Application Requirements for All Copper Mine Facilities:**

~~255-253.~~ 20.6.7.10 accomplishes the statutory mandate of Section 74-6-5(D) NMSA 1978 which is to adopt regulations regarding applications. The proposed rule creates three categories: (1) pre-application submission activities, (2) technical completeness activities, and (3) permit approval or denial activities. The proposed rule retains the procedural requirements while supplementing the requirements to address new technical requirements. These requirements would apply specifically to permit applications for copper mine facilities in lieu of the existing regulations regarding permit applications, 20.6.2.3106 NMAC. *See* Eastep Direct at 19-20.

*Subsection A*

~~256-254.~~ NMED proposed 20.6.7.10.A in the Petitioned Rule which sets for requirements for a pre-application meeting. *See* Petition, Attachment 1 at 5.

~~257-255.~~ NMED ~~makes~~made changes to 20.6.7.10.A in the Amended Rule. *See* Amended Petition, Attachment 2 at 5.

3728883v1/25000-0382

~~258-256.~~ Freeport presented evidence to support 20.6.7.10.A through Mr. Eastep. See Eastep Direct at 20-25. No party presented evidence disputing this subsection in their direct or rebuttal testimony or in the hearing transcript.

257. The Commission finds that the Parties do not dispute 20.6.7.10.A as set forth in the Petitioned Rule, as changed in the Amended Rule, ~~and as carried through in the Proposed Final Rule.~~

~~259-258.~~ NMED made no changes to 20.6.7.10.A in the Proposed Final Rule, except non-substantive changes to the terminology regarding copper mine facilities and units. See Proposed Final Rule at 5.

~~260-259.~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.A as set forth in the Petitioned Rule, as changed in the Amended Rule, ~~and as carried through in the Proposed Final Rule.~~

#### *Subsection B*

~~261-260.~~ NMED ~~proposes~~ proposed 20.6.7.10.B in the Petitioned Rule, which sets forth how to reconcile 20.6.2.3106.C NMAC with this provision. See Petition, Attachment 1 at 5.

~~262-261.~~ NMED ~~makes~~ made no changes to 20.6.7.10.B in the Amended Rule. See Amended Petition, Attachment 2 at 5.

~~263-262.~~ Freeport ~~presents~~ presented evidence to support 20.6.7.10.B through technical witness Mr. Eastep. See Eastep Direct at 20-25. No party presented evidence disputing this subsection in their direct or rebuttal testimony or in the hearing transcript.

263. The Commission finds that the Parties do not dispute 20.6.7.10.B.

264. NMED made no changes to 20.6.7.10.B in the Proposed Final Rule. See Proposed Final Rule at 5.

265. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.B as set forth in the ~~Petitioned Rule, Amended Rule, and the~~ Proposed Final Rule.

*Subsection C*

266. NMED ~~proposes~~ proposed 20.6.7.10.C in the Petitioned Rule which sets forth the number of days for a permittee to submit an application for renewal of a discharge permit for a copper mine facility or a portion of the facility. *See* Petition, Attachment 1 at 5.

267. NMED did not change 20.6.7.10.C in its Amended Rule. *See* Amended Petition, Attachment 2 at 5.

268. Freeport ~~supports~~ supported 20.6.7.10.C as set forth in the Petitioned Rule and Amended Rule and offers evidence for this position. *See* Eastep Direct at 20-22. In particular, Mr. Eastep maintains that the even though 20.6.7.10.C sets forth a longer time frame (270 days) than what is currently required (120 days), the Petitioned Rule implements a very different regulatory regime such that a longer time frame may be necessary while everyone is getting accustomed to the new discharge permitting program for copper mines. *See id.* However, Mr. Eastep maintains that the time frame set forth in 20.6.7.10.C may be an issue that needs to be re-visited at a later time, as long lead times may lead to staleness of information. *See id.*

269. The Attorney General contests 20.6.7.10.C as contained in the Petitioned Rule and Amended Rule and offers proposed rule language. *See* ~~NMAGAG~~ Exhibit 2 at 5. While the Attorney General does not comment on the time frame issue raised by Freeport, the Attorney General maintains that the reference to “portion” should be changed to “unit.” *See id.*

270. Amigos Bravos contests 20.6.7.10.C as contained in the Petitioned Rule and Amended Rule and offers proposed rule language that changes the time frame from 270 days to one

year. *See* AB Exhibit 1 at 6. Amigos Bravos offers no evidence to support this time frame other than maintaining the proposed language was included in the August 17 Draft Discussion Draft. *See* Shields Direct at 2.

271. GRIP, TRP, and Mr. Olson offer no alternative rule language for 20.6.7.10.C as set forth in the Petitioned Rule and Amended Rule. *See* Kuipers, Attachment 2 at 6 and WCO Exhibit 3 at 7.

272. In its Proposed Final Rule, the Department accepts the Attorney General's proposed change from "portion" to "unit" as well as adding the words "copper mine" before "facility" to refer to the defined term. This is consistent with the Department's changes throughout the Proposed Final Rule regarding "facilities" and "units." *See* Proposed Final Rule at 5.

273. The Commission finds that the proposed rule change offer by Amigos Bravos may lead to staleness of information, as discussed in Mr. Eastep's testimony, and that the time period proposed by NMED ~~and accepted by Freepart~~ is reasonable based on the evidence.

274. ~~Based~~Based on the weight of the evidence, the Commission here adopts subsection C as shown in NMED's Proposed Final Rule, which incorporates the change recommended by the Attorney General.

#### *Subsection D*

275. NMED ~~proposes~~proposed 20.6.7.10.D in the Petitioned Rule which sets forth the number of days (270 days) for a permittee to submit an application for renewal of a discharge permit for a copper mine facility that has been issued a discharge permit but has not been constructed or operated. *See* Petition, Attachment 1 at 5.

276. NMED did not change 20.6.7.10.C in its Amended Rule. *See* Amended Petition, Attachment 2 at 5.

277. Freeport ~~supports~~supported 20.6.7.10.D as set forth in the Petitioned Rule and Amended Rule and offers evidence for this position. *See* Eastep Direct at 20-22. In particular, Mr. Eastep again maintains that the even though 20.6.7.10.D sets forth a longer time frame (270 days) than what is currently required (120 days), the Petitioned Rule implements a very different regulatory regime such that longer a time frame may be necessary while everyone is getting accustomed to the new discharge permitting program for copper mines. *See id.* However, Mr. Eastep again maintains that the time frame set forth in 20.6.7.10.D may be an issue that needs to be re-visited at a later time, as long lead times may lead to staleness of information. *See id.*

278. Amigos Bravos contests 20.6.7.10.D as contained in the Petitioned Rule and Amended Rule and offers proposed rule language that changes the time frame from 270 days to one year. *See* AB Exhibit 1 at 6.

279. Amigos Bravos offers no evidence to support this time frame other than maintaining the proposed language was included in the August 17 Discussion Draft. *See* Shields Direct at 2.

280. The Attorney General, GRIP, TRP, and Mr. Olson offer no alternative rule language for 20.6.7.10.D as set forth in the Petitioned Rule and Amended Rule. *See* NMAGAG Exhibit 2 at 5; Kuipers, Attachment 2 at 6; and WCO Exhibit 3 at 7.

281. The Commission finds that the proposed rule change offered by Amigos Bravos may lead to staleness of information, as discussed in Mr. Eastep's testimony, and that the time period proposed by NMED ~~and accepted by Freeport~~ is reasonable based on the evidence.

281-282. NMED made no changes to 20.6.7.10.D in the Proposed Final Rule. See Proposed Final Rule at 5.

~~282-283.~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.D as set forth in NMED's Proposed Final Rule, ~~which incorporates the change recommended by the Attorney General.~~

***Subsection E***

~~283-284.~~ NMED ~~proposes~~proposed 20.6.7.10.E in the Petitioned Rule which sets certain submission requirements for an application. *See* Petition, Attachment 1 at 5.

~~284-285.~~ NMED ~~makes~~made no changes to 20.6.7.10.E in the Amended Rule. *See* Amended Petition, Attachment 2 at 5.

~~285-286.~~ Freeport ~~presents~~presented evidence to support 20.6.7.10.E through Mr. Eastep. *See* Eastep Direct at 20-25. No party presented evidence disputing this subsection in their direct or rebuttal testimony or in the hearing transcript.

~~287.~~ The Commission finds that the Parties do not dispute 20.6.7.10.E.

~~286-288.~~ NMED made no changes to 20.6.7.10.E in the Proposed Final Rule.

~~287-289.~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.E as set forth in the ~~Petitioned Rule, Amended Rule, and Proposed Final Rule.~~

***Subsection F***

~~288-290.~~ NMED ~~proposes~~proposed 20.6.7.10.F in the Petitioned Rule, which requires that within 60 days of NMED notifying the applicant in writing that the application is deemed administratively complete, NMED shall review the application for technical completeness. *See* Petition, Attachment 1 at 5.

~~289-291.~~ In the Amended Rule, NMED changes the "60 days" to "90 days." *See* Amended Petition, Attachment 2 at 5.

~~290. The Commission is unable to identify any specific evidence by NMED supporting the change to 20.6.7.10.F as set forth in the Amended Rule.~~

~~291, 292. Freeport opposed the "90 days" as set forth in the Amended Rule and offered evidence to support "60 days" as set forth in the Petitioned Rule. See Eastep Rebuttal at 3-4. In summary, Mr. Eastep testified that the extension of time to "90 days" of the permit review time is inconsistent with the goal of streamlining the permit process. See Eastep Rebuttal at 3-4. See id.~~

~~292, 293. The Commission finds that the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson do not offer alternative rule language for 20.6.7.10.F as set forth in the either the Final Petition Rule, Petitioned Rule or Amended Rule. See AG Exhibit 2 at 5; AB Exhibit 1 at 7; Kuipers Attachment 2 at 6; WCO Exhibit 3 at 7.~~

~~293. The Commission finds that the extension of time as proposed by NMED, is not supported by the evidence, without supporting evidence or reasons as to why the change is necessary, makes the proposed rule language unreasonable [Alternatively, go to transcript of Eastep and NMED's cross-examination on this issue, and see if Brown or Skibitski addressed it in transcript].~~

~~294. The Commission further finds that Freeport's evidence supporting 60 days is persuasive. [Alternatively, find that NMED presented enough through Eastep cross or elsewhere to get 90].~~

~~295. NMED made no changes to 20.6.7.10.F in the Proposed Final Rule.~~

~~295, 296. Based on the weight of the evidence, the Commission adopts 20.6.7.10.F as set forth in the Proposed Final Petitioned Rule. [Alternatively, adopt Amended Rule and Proposed Final Rule]~~

***Subsection G***

~~296-297~~ NMED ~~proposes~~proposed 20.6.7.10.G in the Petitioned Rule which sets forth requirements for dealing with a technically deficient application. *See* Petition, Attachment 1 at 5-6.

~~297-298~~ NMED ~~makes~~made no changes to 20.6.7.10.G, G(1), and G(2) in the Amended Rule; however, NMED does make changes to 20.6.7.10.G(3) in the Amended Rule. *See* Amended Petition, Attachment 2 at 5-6.

~~298-299~~ Freeport ~~presents~~presented evidence to support 20.6.7.10.G through Mr. Eastep. *See* Eastep Direct at 20-25. No party presented evidence in rebuttal testimony or in the hearing objecting to NMED's change to 20.6.7.10.G(3).

~~299-300~~ The Commission finds that the Parties do not dispute 20.6.7.10.G, ~~G(1)(2)~~, and G(~~3~~) in the Petitioned Rule and Amended Rule.

~~300~~ The Commission finds that the Parties do not dispute 20.6.7.10.G(3) as changed in the Amended Rule.

~~301~~ NMED made no changes to 20.6.7.10.G in the Proposed Final Rule. *See* Proposed Final Rule at 5-6.

~~301~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.G, G(1), (~~2~~) and G(~~3~~) as set forth in the ~~Petitioned Rule, Amended Rule, and Proposed Final Rule.~~

~~302~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.G(3) as set forth in the ~~Amended Rule and Proposed Final Rule.~~

***Subsection H***

~~303~~ NMED ~~proposes~~proposed 20.6.7.10.H in the Petitioned Rule which contains a requirement that within "60 days" after an application is deemed technically complete or all

3728863v1/25000-0382

information has been submitted to NMED pursuant to a technical deficiency notification, NMED is required to make available a proposed approval of a discharge permit and a draft discharge permit or a notice of denial. *See* Petition, Attachment 1 at 6.

304. In the Amended Rule, NMED changes the “60 days” to “90 days.” *See* Amended Petition, Attachment 2 at 6.

~~305. The Commission is unable to identify any specific evidence by NMED supporting the change to 20.6.7.10.F as set forth in the Amended Rule.~~

~~306-305. Freeport opposes the “90 days” as set forth in the Amended Rule and offers evidence to support “60 days” as set forth in the Petitioned Rule. *See* Eastep Rebuttal at 3-4.~~

~~307-306. In summary, Mr. Eastep ~~again testified~~ testified that the extension of time to “90 days” of the permit review time is inconsistent with the goal of streamlining the permit process. *See id.*~~

~~308-307. The Commission finds that the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson do not offer alternative rule language for 20.6.7.10.H as set forth in the either the Petitioned Rule or Amended Rule. *See* AG Exhibit 2 at 6; AB Exhibit 1 at 8; Kuipers Attachment 2 at 7; WCO Exhibit 3 at 7-8.~~

~~309. The Commission finds that the extension of time as proposed by NMED is reasonable and the objections posed by Freeport are unpersuasive, inconsistent with the goal of streamlining the permit process. [Alternatively, go to transcript of Eastep and NMED’s cross-examination on this issue, and see if Brown or Skibitski addressed it in transcript].~~

~~308. NMED made no changes to 20.6.7.10.H in the Proposed Final Rule.~~

~~310-309. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.H as set forth in the Proposed Final Rule, ~~petitioned Rule.~~ [Alternatively, find that NMED~~

~~presented enough through Eastep cross to get 90 and modify the preceding language to adopt Amended Rule and Proposed Final Rule.~~

*Subsection I*

~~3-1-3~~ 10. \_\_\_\_ NMED ~~proposes~~proposed 20.6.7.10.I in the Petitioned Rule which contains certain requirements for imposing additional conditions on a discharge permit. *See* Petition, Attachment 1 at 6.

~~3-1-3~~ 11. \_\_\_\_ NMED made no changes to 20.6.7.10.I in the Amended Rule. *See* Amended Petition, Attachment 2 at 6.

~~3-1-3~~ 12. \_\_\_\_ Freeport ~~supports~~supported 20.6.7.10.I as set forth in the Petitioned Rule and Amended Rule and offers evidence for this position. *See* Eastep Direct at 24-25.

~~3-1-3~~ 13. \_\_\_\_ Mr. Olson contests 20.6.7.10.I in the Petitioned Rule and ~~proposes~~proposed to add the following sentence to the end of the provision: "Permit conditions contained in an existing discharge permit may be included in a discharge permit issued under the copper mine rule, and such conditions shall not be considered to be 'additional conditions'." *See* WCO Exhibit 3 at 7-8.

~~3-1-3~~ 14. \_\_\_\_ Mr. Olson maintains that the new language he ~~proposes~~proposed to add to 20.6.7.10.I is contained 20.6.7.20.B(2) and 20.6.7.22.B(2); therefore, he maintains that such language should be removed from 20.6.7.20.B(2) and 20.6.7.22.B(2) and placed in 20.6.7.10.I to make this requirement applicable to all types of copper mine units rather than be limit to only certain units. *See* WCO Exhibit 3 at 7-8.

~~3-1-3~~ 15. \_\_\_\_ The Commission finds that the Attorney General, GRIP, TRP, and Amigos Bravos do not offer alternative rule language for 20.6.7.10.I as set forth in the either the Petitioned Rule or Amended Rule.

378863v1/25000-0382

~~317-316.~~ \_\_\_\_ In the Proposed Final Rule, NMED addresses Mr. Olson's comment by including the language regarding "additional conditions" in other specific sections of the Copper Mine Rule, ~~including sections 18, 21, 23, and 24 [check against final version].~~ This addresses Mr. Olson's comment, but remains consistent with the approach taken in the Petitioned Rule and Amended Rule by including this language where appropriate. The Commission finds that these changes address Mr. Olson's comment without the need to change 20.6.7.10.I.

~~318-317.~~ \_\_\_\_ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.I as set forth by NMED in the Petitioned Rule, the Amended Rule and the Proposed Final Rule.

#### *Subsection J*

~~319-318.~~ \_\_\_\_ NMED ~~proposes~~proposed 20.6.7.10.J in the Petitioned Rule which contains the necessary requirements for the Secretary of NMED to approve a discharge permit. *See* Petition, Attachment 1 at 6.

~~320-319.~~ \_\_\_\_ NMED made no changes to 20.6.7.10.J in the Amended Rule. *See* Amended Petition, Attachment 2 at 6.

~~321-320.~~ \_\_\_\_ Freeport ~~supports~~supported 20.6.7.10.J as set forth in the Petitioned Rule and Amended Rule and offers evidence for this position. *See* Eastep Dirct at 24-25.

~~322-321.~~ \_\_\_\_ GRIP/TRP and William Olson object to 20.6.7.10.J(2) and make a legal argument as to why this provision should be amended. *See* Kuipers, Attachment 2 at 6 and WCO Exhibit 3 at 7.

~~323-322.~~ \_\_\_\_ Amigos Bravos ~~supports~~supported 20.6.7.10.J(2) as set forth in the Petitioned Rule and Amended Rule because it was included in the August 17 Draft Rule. *See* AB Exhibit 1 at 8.

3738083v1/25000-0382

~~324.~~—The Commission finds that Attorney General and Mr. Olson do not dispute 20.6.7.10.J because they fail to propose alternative rule language.

Formatted: Normal

~~325-323.~~ In the Proposed Final Rule, NMED added the word “the” at the beginning of paragraph (3) as an editorial change to conform to the other paragraphs.

~~326-324.~~ GRIP and TRP argue that the language “with the exception of Subsection C of 20.6.2.3109 NMAC” should be struck because it is necessary to carry out the statutory mandate of Section 74-6-5.E(3). The Commission takes notice that it used this same language as proposed by NMED in this matter when it adopted the dairy rule, 20.6.6.10.I NMAC, and believes that the specification of measures to prevent water pollution in the Copper Mine Rule take the place of the demonstration required by section 20.6.2.3109.C NMAC of the existing regulations. Furthermore, the requirements in NMSA 1978, section 74-6-5.E(3) are addressed by paragraph (3) of subsection J (20.6.7.10.J(3)), which requires a finding by NMED that “denial of an application for a discharge permit is not required pursuant to Section 74-6-5(E) NMSA 1978.” Consequently, Section 74-6-5(E)(3) must be addressed and complied with when a permit is issued under the Copper Mine Rule.

~~327-325.~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.J, J(1) and J(2) as set forth by NMED in the Petitioned Rule, Amended Rule, and Proposed Final Rule and 20.6.7.10.J(3) as set forth in the Proposed Final Rule.

**20.6.7.11 – Application Requirements for Discharge Permits for a Copper Mine Facilities:**

~~328-326.~~ 20.6.7.11 includes a list of information necessary to include in an application for a discharge permit or a renewal. Much of this information would typically be provided as part

3738883v1/25000-0382

of the permit application or would be in NMED's files from past applications, but this section is much more specific. See Eastep Direct at 25-26.

*Undisputed Subsections A, B, E, G, I, K, L, M, N, P, Q, R, S, T, U, V and W*

~~329-327.~~ NMED ~~proposes~~proposed various application requirements for discharge permits for a copper mine facility at 20.6.7.11.A, B, E, G, I, K, L, M, N, P, Q, R, S, T, U, V, and W in the Petitioned Rule. See Petition, Attachment 1 at 6-9.

~~330-328.~~ Out of these subsections, NMED only ~~makes~~made changes to 20.6.7.11.U and V in the Amended Rule. See Amended Petition, Attachment 2 at 9.

~~331-329.~~ Freeport ~~presents~~presented evidence to support 20.6.7.11.A, B, E, G, I, K, L, M, N, P, Q, R, S, T, U, V, and W. See Eastep Direct at 25-34.

~~332-330.~~ The Commission finds that the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson do not propose alternative rule language for 20.6.7.11.A, B, E, G, I, K, L, M, N, P, Q, R, S, T, and W as set forth by NMED in the Petitioned Rule and Amended Rule.

~~331.~~ The Commission finds that the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson do not propose alternative rule language for 20.6.7.11. U and V as set forth by NMED in the Amended Rule.

~~333-332.~~ NMED made no changes to 20.6.7.11.A, -B, E, G, I, K, L, M, N, P, Q, R, S, T, U, V and W in the Proposed Final Rule, except for a non-substantive change to N. See Proposed Final Rule at 6-9.

~~334-333.~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.11.A, B, E, G, I, K, L, M, N, P, Q, R, S, T, U, V and W as set forth by NMED in the ~~Petitioned Rule, Amended Petition, and Proposed Final Rule.~~

~~335.~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.11.U and V as set forth by NMED in the Amended Rule and Proposed Final Rule.

*Subsection C*

~~336-334.~~ NMED ~~proposes~~proposed 20.6.7.11.C in the Petitioned Rule which requires certain information dealing with ownership and real property agreements to be included in the application. See Petition, Attachment 1 at 6-7.

~~337-335.~~ NMED ~~makes~~made no changes to 20.6.7.11.C in the Amended Rule. See Amended Petition, Attachment 2 at 6-7.

~~338-336.~~ Freeport ~~objects~~objected to 20.6.7.11.C(2) in the Petitioned Rule and offers alternative rule language. See Freeport NOI at 3-4.

~~339-337.~~ Freeport ~~supports~~supported its alternative rule language with testimony from Mr. Eastep. See Eastep Direct at 28.

~~340-338.~~ The Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson do not offer alternative rule language for 20.6.7.11.C. See ~~NMAGAG~~ Exhibit 2 at 6-7; Kuipers, Attachment 2 at 8; AB Exhibit 1 at 9; and WCO Exhibit 3 at 8-9.

~~341-339.~~ In its Proposed Final Rule, NMED modifies this subsection to address the comment in Mr. Eastep's testimony using slightly different language. See Proposed Final Rule at 6-7.

~~342-340.~~ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.11.C, .C(1) and .C(2) as set forth in the Final Proposed Rule.

*Subsection D*

343:341. \_\_\_ NMED ~~proposes~~proposed 20.6.7.11.D in the Petitioned Rule which requires information on setbacks to be included in an application for a new copper mine facility. *See* Petition, Attachment 1 at 7.

344:342. \_\_\_ NMED ~~makes~~made no changes to 20.6.7.11.D in the Amended Rule. *See* Amended Petition, Attachment 2 at 7.

345:343. \_\_\_ Freeport supports and offers evidence for NMED's version of 20.6.7.11.D. *See* Eastep Direct at 28.

346:344. \_\_\_ GRIP and TRP objected to 20.6.7.11.D and offer rule language that inserts a certification requirement. GRIP argue that a certification requirement is necessary because similar language is included in the Dairy Rule. *See* Kuipers, Attachment 2 at 8.

347:345. \_\_\_ The Attorney General, Amigos Bravos, and Mr. Olson do not offer alternative rule language for 20.6.7.11.D. *See* NMAGAG Exhibit 2 at 7; AB Exhibit 1 at 9; and WCO Exhibit 3 at 9.

348:346. \_\_\_ Mr. Kuipers' testimony does not explain why a certification requirement is needed for permit applications for copper mines. The Commission finds that the permit application requirements include the information needed for NMED to determine whether the setback requirements will be met and that a certification requirement is unnecessary.

349:347. \_\_\_ Based on the weight of the evidence, the Commission hereby adopts 20.6.7.11.D as set forth by NMED in the Petitioned Rule, Amended Rule, and Proposed Final Rule.

*Subsection F*

350:348. \_\_\_ NMED ~~proposes~~proposed 20.6.7.11.F in the Petitioned Rule which requires information on public notice to be included in certain applications. *See* Petition, Attachment 1 at 7.

3738863v1/25000-0382

~~351-349.~~ NMED ~~makes~~made no changes to 20.6.7.11.F in the Amended Rule. *See* Amended Petition, Attachment 2 at 7.

~~352-350.~~ Freeport ~~supports~~supported and offers evidence for NMED's version of 20.6.7.11.F. *See* Eastep Direct at 28-29.

~~353-351.~~ Amigos Bravos ~~objects~~objected to 20.6.7.11.F and offers alternative rule language that ~~proposes~~proposed a requirement that an applicant for a permit describe how it ~~proposes~~proposed to comply with new public notice requirements developed by Amigos Bravos and set forth in a new 20.6.7.15. *See* AB Exhibit 1 at 10.

~~354-352.~~ Amigos Bravos offers evidence in support of its alternative rule language through the testimony of Mr. Brian Shields. *See* Shields Direct at 3-5.

~~355-353.~~ Freeport ~~presents~~presented rebuttal testimony opposing the alternative rule language for 20.6.7.11.F proposed by Amigos Bravos. *See* Eastep Rebuttal at 17-18.

~~356-354.~~ The Attorney General, GRIP, TRP, and Mr. Olson do not offer alternative rule language for 20.6.7.11.F. *See* ~~NMAC~~NMAGAG Exhibit 2 at 7; Kuipers, Attachment 2 at 8; and WCO Exhibit 3 at 9.

355. The Commission finds that the existing public notice requirements in section 20.6.3108 NMAC are well understood, provide broad public notice of proposed permitting activities, and conform to the statutory public notice requirements. The public notice provisions in the Copper Mine Rule are designed to follow the public notice requirements in section 20.6.3108 NMAC while reflecting the additional details specified for submission and review of permit applications submitted under the Copper Mine Rule. NMED has established procedures for public notice of permit applications and it would be burdensome to NMED and potentially confusing for permit applicants and the public to specify different public notice requirements

for copper mine facilities. The Commission is not convinced that copper mine facilities are sufficiently different from other regulated facilities to warrant different public notice requirements. ~~[address any other specific points from rebuttal testimony]~~

~~357-356.~~ NMED made no changes to 20.6.7.11.F in the Proposed Final Rule. See Proposed Final Rule at 7.

~~358-357.~~ Relying primarily upon the testimony of Mr. Eastep, and based on the weight of the evidence, the Commission hereby adopts 20.6.7.11.F as set forth by NMED in the Petitioned Rule, Amended Rule, and Proposed Final Rule.

#### *Subsection H*

~~359-358.~~ NMED proposes proposed 20.6.7.11.H in the Petitioned Rule which requires certain information dealing with determination of daily discharge volume to be included in an application. See Petition, Attachment 1 at 7.

~~360-359.~~ NMED makes made no changes to 20.6.7.11.H in the Amended Rule. See Amended Petition, Attachment 2 at 7.

~~361-360.~~ Freeport supports supported and offers evidence for NMED's version of 20.6.7.11.H. ~~See Eastep Direct at 2~~ See Eastep Direct at p. 298.

~~362-361.~~ The Attorney General objects to 20.6.7.11.H(1) and proposes proposed rule language inserting "for each discharge location." See NMA-GAG Exhibit 2 at 7.

~~363-362.~~ GRIP and TRP object to 20.6.7.11.H(1) and propose the same rule language as the Attorney General. See Kuipers, Attachment 2 at 8.