



Gila Resources Information Project

Promoting Healthy Communities by Protecting Our Environment Since 1998

January 27, 2013

Mr. F. David Martin, Secretary
New Mexico Environment Department
PO Box 5469
Santa Fe, New Mexico 87502-5469

RE: NMED's Proposed Rules for Copper Mines

Dear Secretary Martin:

I am writing as a member of the Copper Rules Advisory Committee, asking you to (1) make clear to the Committee who at NMED made the radical changes to the final draft of the Proposed Rules for Copper Mines, and (2) withdraw NMED's copper rule petition from the WQCC so that the Advisory Committee can complete its legislatively mandated responsibility.

First off, it is critical to the integrity of the Advisory Committee process and indeed, the Environment Department itself, that the person responsible for the changes be revealed, because these changes have caused the Petition to become divergent from and contrary to the previous drafts, concepts, and discussions of the Committee.

Based on information available to us, we assume that Ryan Flynn is responsible for the changes. This assumption is quite logical, since at a meeting with you, Mr. Flynn, Jim Davis, Rachel Conn, Bruce Frederick, and me on October 3, 2012, not only did Mr. Flynn not deny making the changes, he said he was prepared to defend them all the way up to the Supreme Court if necessary.

Since that meeting, Doug Meiklejohn and Susanne Hoffman-Dooley met with Mr. Flynn on January 10, 2013, at which time he claimed he did not make the changes, rather that "Staff" did. Having sat through the Advisory Committee and most of the Technical committee meetings, I do not believe that NMED technical staff would have made such dramatic and contrary changes, because, as addressed next, the issue of "place of withdrawal" was strictly off the table for discussion. The final draft of the Proposed Rules that is now before the WQCC is dramatically contrary to previous draft language and was not considered by your technical staff or your consultant, or, indeed, the Advisory Committee itself.

There is no reason for NMED not to disclose who was responsible for accepting FMI's suggested changes to the August 17th Advisory Committee draft.

Furthermore, the subjects of "place of withdrawal" and "point of compliance" were strictly taken off the table for all purposes of discussion at both the Tyrone Settlement talks and the Copper Rule discussions. Each and every time "place of withdrawal" or "point of compliance" was mentioned, we were clearly told by NMED that these concepts were not to be discussed. And yet these very concepts were adopted in and form the crux of the NMED proposed rule dated October 30, 2012.

Moreover, the Advisory Committee Guidelines furnished to the Committee by NMED provide, in Section VIII, Terms of Existence: "NMED intends to maintain the CRAC and associated Technical Group until copper mining discharge regulations are adopted by the Water Quality Control Commission which is anticipated to occur in December 2012. The Secretary may extend the term of the CRAC."

However, this was not the case. Jim Davis summarily ended the Advisory Committee proceedings at our August 2, 2012 meeting, thanking us for our participation.

As a result of the above, the whole purpose of the Advisory Committee process has been frustrated, and its work has been circumvented by the current Proposed Copper Rules. Not only do we not know definitively who altered these Rules, we know that it was not the result of the Advisory Committee process, inasmuch as the proposed rules reflect neither the tenor nor the substance of the matters discussed during that process.

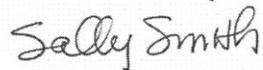
I believe therefore that you should strongly reconsider NMED's Proposed Rules as currently drafted, and should instead withdraw NMED's petition so that the Advisory Committee can come up with a new draft that comports with the Water Quality Act, to avoid future protracted litigation and appeals. No one wishes to tax and possibly exhaust scarce agency resources in arriving upon satisfactory copper rules. We thought the Advisory Committee was on a path to accomplish that.

A plain reading of the proposed rules as currently constituted makes it evident that, in fact, most or all of the changes to the final draft are substantive changes made by and highly favorable to Freeport-McMoRan, and that someone from NMED has accepted and incorporated into the current draft the Freeport language almost verbatim, line-by-line, giving the distinct appearance of having become a "captive agency."

I therefore urge you in the strongest possible terms to (1) clarify for all stakeholders who at NMED was responsible for the last-minute changes to the petition that circumvent and frustrate the Advisory Committee's work, and (2) to withdraw NMED's petition and reconvene the Advisory Committee to offer the full measure of advice and consent required by the Legislature to comply with the Water Quality Act, all ultimately aimed at assuring the people of the State of New Mexico that their health and safety and our irreplaceable natural resources will be protected both now and for generations to come.

Thank you for your prompt attention to my requests.

Sincerely,

A handwritten signature in cursive script that reads "Sally Smith". The signature is written in black ink on a light-colored background.

Sally Smith
President

Cc: Tom Skibitski, Acting Director, Resource Protection Division
Jerry Schoeppner, Chief, Ground Water Quality Bureau
Ryan Flynn, General Counsel
Misty Braswell, Office of General Counsel
Clint Marshall, Program Manager, Mining Environmental Compliance Section
Kurt Vollbrecht, Mining Environmental Compliance Section
Joe Marcoline, Mining Environmental Compliance Section
Bruce Frederick, NM Environmental Law Center
Tracy Hughes, High Desert Energy + Environment Law Partners, L.L.C.
Rachel Conn, Amigos Bravos