

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



IN THE MATTER OF PROPOSED AMENDMENTS
TO 20.6.2 NMAC, THE COPPER MINE RULE

WQCC 12-01 (R)

New Mexico Environment Department,
Petitioner.

ORDER AND STATEMENT OF REASONS

THIS MATTER came 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”) that amended the Petition in two ways: (1) it withdrew proposed 20.6.8 NMAC in its entirety, and (2) it 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 eleven 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.

During a public meeting on September 10, 2013, the Commission heard final oral argument from the parties and after deliberation, adopted the Department's Proposed Statement of Reasons, and adopted the Department's Proposed Final Rule as set out in Attachment 2 to the Proposed Statement of Reasons with one minor change. 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...." *See* Section 74-6-4(E) NMSA 1978.
2. The Commission's mandate to prevent or abate water pollution was given legal force in 1977 when the Commission 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 ("Freeport's Consolidated Response") at 11 (Pleading 19).
3. The Commission has adopted amendments to the Ground Water Discharge Permit Regulations from time to time since 1977, including changes intended to conform to amendments in the WQA. 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 WQA as it existed before 2009, the Ground Water Discharge Permit Regulations did not contain specific requirements to control discharges; instead, these regulations required a permit applicant to propose measures to control its discharges in a permit application. *See id.* at 12. 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.* Once the applicant submitted a permit application proposing how to control its discharges to ground water, NMED had the option of imposing permit conditions 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 Session, the Legislature considered and passed Senate Bill 206, which amended the WQA in a manner that substantially changed 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. *See* Section 74-6-4(K) NMSA 1978.

8. In addition, the Department was tasked with developing industry specific rules for the dairy and copper industries. *See* TRV 2 at 241, L 5-19. The WQA now requires that the Commission promulgate dairy and copper mine industry rules that specify the methods for preventing water pollution and monitoring ground water quality. *See* NMED, Notice of Intent to Present Technical Testimony (“NMED NOI”), Exhibit 4 at 5-6 (Pleading 49).

DEVELOPMENT OF THE RULE

9. The WQA requires that the Department develop proposed rules for the dairy and copper industries for consideration by the Commission and identifies certain requirements for rule development. The Commission is required 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 (Pleading 1); Order Approving Revised Schedule for Development of Copper Regulation, filed September, 24, 2012 (Pleading 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* NMED, Written Testimony of Tom Skibitski (hereinafter, “NMED Skibitski Direct”), at 9 (Pleading 49). NMED invited representatives with diverse interests, including other governmental agencies, academia, mine owners and operators, and environmental groups to participate on the CRAC. *See* NMED NOI, Exhibit 5 (Pleading 49).

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

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

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* NMED 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 NMED, who was hired to assist with the CRAC. *See id.*; Attorney General Notice of Intent to Present Technical Testimony, (“AG NOI”), Exhibit 5 (Pleading 5).

Opportunity for Public Input and Stakeholder Negotiations:

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.* at 10.

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.* 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 id.* at p. 10; *See also* Petition at 2.

Findings of Fact and Conclusions of Law on Background and Development of the Rule:

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 of NMED.

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

21. The Commission finds that NMED satisfied the requirements of the WQA 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 but does not represent unanimity on the proposed 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 in the CRAC and technical subcommittee to the extent that it was introduced into evidence. 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.

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 Discussion Draft than it does to the September 13 Public Comment Draft.

THE PETITION AND PLEADINGS

Filing of the Petition and Setting the Hearing:

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 filed January 1, 2012 (Pleading 1); Order Approving Schedule for Development of Copper Regulation at 1, filed September 24, 2012 (Pleading 3).

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 (Pleading 3).

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* NMED Skibitski Direct at 10; *see also* Petition to Adopt

20.6.7 and 20.6.8 NMAC and Request for Hearing (hereinafter, "Petition") filed October 30, 2012 (Pleading 4) at 1-3 with Attachments 1 and 2.

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 (Pleading 6).

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 (Pleading 8).

30. The Commission voted to accept the Petition at its November 2012 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.

Pre-Hearing Motions and Briefs:

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 (Pleading 5).

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 dated February 4, 2009. In particular, the Hearing Officer determined that inclusion of the entire 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 (Pleading 40).

33. The Attorney General submitted a motion to remand the Petitioned Rule to NMED on the ground that the rule as proposed would violate the WQA. *See* Attorney General’s Motion to Remand the Proposed Copper Mine Rule to NMED at 1, filed December 14, 2012 (Pleading 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 (Pleading 13). Responses were filed by Freeport-McMoRan (Pleading 19), the New Mexico Mining Association (Pleading 22), and NMED (Pleading 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 the motions on the first day of the hearing. *See* TRV Volume 1 at 49-51.

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 (Pleading 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).

35. Amigos Bravos filed a second motion to postpone the hearing because NMED filed its 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 (Pleading 46). 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 (Pleading 47).

36. NMED submitted a 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 the 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 (Pleading 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 25, 2013 (Pleading 32).

37. Freeport submitted a brief on the scope of the Commission's authority to conduct rulemaking and to adopt rules under the WQA. *See* Freeport's Brief on the Commission's Authority to Conduct a Copper Industry-Specific Rulemaking at 1, filed December 14, 2012 (Pleading 17). Other parties responded to the pleading. *See* Attorney General's Response to Freeport's Brief on the Commission's Authority filed January 11, 2013 (Pleadings 20) and

Citizen's Joint Response to Freeport'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 (Pleading 25). Freeport replied to responses. *See* Freeport's Consolidated Reply to the "Citizens" and the Attorney General's Responses to the Brief's on the Commission's Authority filed January 25, 2013 (Pleading 35).

Notices of Intent to Present Technical Testimony:

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 (Pleading 10). (hereinafter, "Procedural Order").

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 underline-strikethrough version of the Petitioned Rule (hereinafter, "Amended Rule") showing all changes. *See* Amended Petition at 1-2 with Attachments 1 and 2 (Pleading 45); *see also* NMED Skibitski Direct at 11.

40. The Amended Rule did not 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.* at 11.

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 (Pleading 47).

42. On February 22, 2013, NMED filed an NOI with direct testimony and exhibits. *See* New Mexico Environment Department's Notice of Intent to Present Technical Testimony, filed February 22, 2013 (Pleading 49) (hereinafter, "NMED NOI"). The direct testimony and exhibits addressed the Amended Rule.

43. On February 22, 2013, Freeport filed an NOI with direct testimony and exhibits. *See* Notice of Intent to Present Technical Testimony on Behalf of Freeport (Pleading 50) (hereinafter, "Freeport NOI"). The direct testimony and exhibits addressed the Petitioned Rule.

44. On February 22, 2013, the Attorney General filed an NOI with direct testimony and exhibits. *See* Attorney General's Notice of Intent to Present Technical Testimony (Pleading 51) (hereinafter, "AG NOI"). The direct testimony and exhibits addressed the Petitioned Rule.

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 (Pleading 53) (hereinafter, "GRIP/TRP NOI"). The direct testimony and exhibits addressed the Petitioned Rule.

46. On February 22, 2013, Amigos Bravos filed an NOI with direct testimony and exhibits. *See* Amigos Bravos' Notice of Intent to Present Technical Testimony (Pleading 52) (hereinafter, "AB NOI"). The direct testimony and exhibits addressed the Petitioned Rule.

47. On February 22, 2013, William C. Olson filed an NOI with direct testimony and exhibits. *See* William C. Olson Notice of Intent to Present Technical Testimony (Pleading 54) (hereinafter, "WCO NOI"). The direct testimony and exhibits addressed the Petitioned Rule.

48. The New Mexico Mining Association (hereinafter, “NMMA”) filed pleadings as described above, but NMMA did not file a NOI or proposed rule language.

49. The parties that filed NOIs and NMMA will be collectively referred to as “Parties” at times.

Rule Proposals for Petitioned Rule:

50. Under 302.A of the Procedural Order, a party filing an NOI was required to “...include the text of any recommended modifications to the proposed regulatory change....”

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.

52. The Attorney General included the text of its proposed rule changes to the Petitioned Rule in AG NOI, Exhibit 2.

53. GRIP and TRP jointly proposed their rule changes to the Petitioned Rule in Attachment 2 to James Kuipers’ direct testimony (hereinafter, “GRIP Kuipers Direct, Attachment 2”).

54. Amigos Bravos included the text of proposed rule changes to the Petitioned Rule in Amigos Bravos Exhibit 1 (hereinafter, “AB Exhibit 1”).

55. Mr. Olson included the text of proposed rule changes to the Petitioned Rule in WCO Exhibit 3.

Rule Proposals for Amended Rule:

56. According to the Procedural Order and Order on Amigos Bravos’ Second Motion to Postpone the Hearing, parties that intended to present technical testimony rebutting testimony of another party were required to file an NOI to present rebuttal technical testimony, which was required to include the text of any recommended changes to the Amended Rule.

57. Freeport set forth the text of recommended changes to the Amended Rule in its NOI to Present Technical Rebuttal Testimony (Freeport Rebuttal NOI”) at pages 3 through 5 (Pleading 61).

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 (AG Rebuttal NOI”) at 1 filed March 15, 2013 (Pleading 63); NOI to Present Technical Rebuttal Testimony [by GRIP and TRP] (“GRIP/TRP Rebuttal NOI”) at 1, filed March 15, 2013 (Pleading 67); Amigos Bravos’ NOI to Present Rebuttal Technical Testimony (“AB Rebuttal NOI”) at 2, filed March 15, 2013 (Pleadings 66); and William C. Olson NOI to Present Technical Rebuttal Testimony (“WCO Rebuttal NOI”) at 2, filed March 15, 2013 (Pleading 68).

59. Attached to NMED’s Proposed Statement of Reasons, NMED 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

60. The Commission’s hearing notice requirements for rulemaking 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:

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 NMED's stakeholder list. *See* NMED Skibitski Direct at 10.

62. The hearing was held between April 9 and May 3 for a total period of ten days. *See* TRV 1-11.

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

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

65. The following testified as technical witnesses 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 Rebuttal NOI.

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

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

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

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

Post-Hearing Pleadings:

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. TRV, Volume 11 at p. 5-15 (sidebar discussion) and TRV Volume 10 at p. 2589-2590.

71. Notice of receipt of the hearing transcripts was given on May 28, 2013 (Pleading 84).

72. On June 25, 2013, the Attorney General, GRIP/TRP, 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 (Pleading 88). There were no objections and the Hearing Officer granted that motion on June 26, 2013 (Pleading 89).

73. On 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.

Copper Mining in New Mexico and Importance of the Copper Mine Rule:

74. 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, filed February 22, 2013

(Pleading 50), as modified by the Notice of Errata (Pleading 83) (hereinafter “Freeport Freeport Brack Direct”) at 2-4 and 8-14.

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

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, filed February 22, 2013 (Pleading 50) at 2-5.

77. All Parties agree that copper mining is a necessary activity and that it is important to the State of New Mexico to allow copper mining. Throughout the hearing there was a collective agreement by the Parties that open pit copper mining should not be prohibited in New Mexico. *See* 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.

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

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. *See* Freeport Brack Direct at 14-20.

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* GRIP Smith Direct at 2 (Pleading 53), *See also* NMAC; AG Travers Direct at 5 (Pleading 51); 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.

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. *See* Freeport Lande Direct at 6-10.

82. Mr. Blandford, on behalf of Freeport, discussed historical and present copper mining, including mines operated under existing discharge permits, and 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. *See* Blandford Rebuttal at p. 6, AG Travers Direct at p. 7-8.

Overview of NMED's Approach to Protection of Ground Water under the Copper Mine Rule:

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, filed February 22, 2013 (Pleading 49) at 3 (hereinafter "NMED Brown Direct"); (TR. Vol. 3, P. 551, L. 7-14).

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 ground water meets the quality standards of

20.6.2.3103 NMAC at locations of present and potential future use. *See* NMED Brown Direct at 3.

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* NMED Brown Direct at 3; TRV 3 at 555, L. 10-16).

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* NMED 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 ground water protection as it relates to its operation. *See* 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).

87. During mine operation, discharge control at each unit is achieved through 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* NMED 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. *See* TRV 3 at 557, L. 3-7).

88. During mine operation under the Copper Mine Rule, the method required for protection varies, depends on the materials contained within the unit of the mine and the threat

which those contents present of exceeding standards in ground water. 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 ground water capture systems. *See* NMED Brown Direct at 4.

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 ground water of the State of New Mexico for present use (during the mining period) as domestic and agricultural water supply and surface water recharge. *See* NMED Brown Direct at 4.

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* NMED Brown Direct at 4.

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 re-graded 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* NMED Brown Direct at 4.

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, ore released from, or 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* NMED Brown Direct at 4-5.

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

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. *See* TRV 3 at 558, L. 6-12.

95. The Petitioned Rule proposed efficient measures and clear provisions to prevent and contain ground water contamination. *See* TRV 3 at 560-561, L. 19-5.

96. The Department also proposed comprehensive monitoring and detection methods in its proposed Copper Mine Rule. *See* TRV 3 at 557, L. 12-20.

97. Adoption of the Copper Mine Rule will benefit the Department by preventing the Department and applicant from having to go through a reiterative process whereby versions of a permit are submitted and rejected until the applicant submits a permit that meets the expectations of the Department. *See* TRV 3 at 560-561, L. 19-5.

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 ground water will be protected. *See* TRV 3 at 560-561, L. 19-5).

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* NMED Skibitski Direct at 11.

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. *See* NMED Skibitski Direct at 8-12.

ANALYSIS OF TESTIMONY AND REASONS
FOR ADOPTION OF SPECIFIC RULE PROPOSALS

101. The New Mexico Water Quality Control Commission Regulations for Ground and Surface Water Protection are located at 20.6.2 NMAC. *See* NMED Skibitski Direct at 3.

102. The proposed Copper Mine Rule will be located at 20.6.7 NMAC.

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.

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.

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:

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.

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.

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

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; GRIP Kuipers Direct Attachment 2 at 1; WCO Exhibit 3 at 1.

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

111. NMED 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

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

113. Subsection A provides that terms defined in the WQA and in 20.6.7 NMAC, when used in the Copper Mine Rule, shall have the meanings as given in the WAQ and 20.6.7 NMAC.

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; GRIP Kuipers Direct Attachment 2 at 1; WCO Exhibit 3 at 1.

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

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

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

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: acid mine drainage; applicant; below-grade tank; 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; existing copper mine facility; existing impoundment; expiration; factor of safety; final CQA report; flow meter; freeboard; highway; impoundment; interbench slope; large copper mine facility; leach stockpile; liner system; maximum daily discharge volume; medium copper mine facility; mining and minerals division; new copper mine facility; non-impacted stormwater; open pit; outslope; owner; permittee; PLS; slope angle; spillway; stormwater; surface water(s) of the state; SX/EW; tailings; tailings impoundment; and underground mine.

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: Mining Act; operator; and small copper mine facility.

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: discharge volume; pipeline corridor; and pipeline system.

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: closure and impacted stormwater.

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: slag and unit.

123. The Commission finds that the following definitions were supported by testimony from Freeport witnesses: acid mine drainage; construction quality assurance or CQA; construction quality control or CQC; critical structure; discharge permit amendment; freeboard; impoundment; leach stockpile; liner system; open pit; small copper mine facility; surface water(s) of the state; and tailings. *See* Freeport Finley Direct at 9, 15; Freeport Grass Direct at 5, 6, 7, 11, 13, 21; Freeport Shelley Direct at 15; Freeport Eastep Direct at 36; and Freeport Scott Direct at 3; Freeport Blandford Rebuttal at 23-24.

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

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.

20.6.7.7 – Disputed Definitions:

Additional Conditions

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.

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* GRIP Kuipers, Attachment 2 at 1.

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

129. The Commission 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 definitions.

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

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

132. 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.

133. Freeport supported this definition through testimony from Mr. 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* Freeport Blandford Direct at 4.

134. 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* AG Exhibit 2 at 2.

135. GRIP and TRP objected to this definition and proposed deleting 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* GRIP Kuipers Direct, Attachment 2 at 1.

136. 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.

137. NMED made changes to the definition in the Amended Rule by removing the phrase “existing copper mine facility” and references to certain NMAC regulations *See* Amended Petition, Attachment 2 at 1.

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

139. NMED 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.

140. 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.

141. 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

142. 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.

143. 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* Freeport Blandford Direct at 20-21.

144. 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* AG Exhibit 2 at 2; GRIP Kuipers Direct, 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* AG Travers Direct at 23; GRIP Kuipers Direct, Attachment 2 at 2; and WCO Exhibit 3 at 2.

145. 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.

146. NMED supported the change to 20.6.7.7.B(5) in the Amended Rule through testimony of technical witness Adrian Brown. *See* NMED 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* NMED Brown Rebuttal at 3.

147. 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.

148. 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

149. 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.

150. 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* GRIP Kuipers Direct, Attachment 2 at 2.

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

152. Mr. Kuipers’ testimony was rebutted by testimony by Mr. Shelley. *See* Shelley Rebuttal at 8-9.

153. Relying primarily on the rebuttal testimony of Mr. Shelley, and 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

154. NMED proposed 20.6.7.7.B(7) in the Petitioned Rule which provides a definition of “background.” *See* Petition, Attachment 1 at 2.

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

156. 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* AG Exhibit 2 at 2.

157. 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* GRIP Kuipers Direct, Attachment 2 at 2.

158. Similar to the Attorney General, Mr. Olson 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.~~” Mr. Olson argued that the deleted language is redundant, confusing, and technically awkward. *See* WCO Exhibit 3 at 2.

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

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

161. 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

162. 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.

163. 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.

164. 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.

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

166. 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.

167. The Commission does not adopt the proposed language by Amigos Bravos and Mr. Olson because other particular discharging facilities at copper mines are not identified in their testimony or elsewhere in the record, so this change is not necessary.

168. The Commission finds that the amended language in the Proposed Final Rule is non-substantive and clarifies the intent of the rule to apply to copper mines and no other types of mines where copper may incidentally be recovered. .

169. 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

170. NMED 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. Mr. Brown testified regarding the function of cover systems. *See* NMED Brown Direct at 32-39.

172. Freeport presented technical evidence concerning why cover systems are important. *See* Freeport Munk Direct at 9.

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

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

176. Relying primarily on the testimony of Mr. Munk, and 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

177. NMED proposed 20.6.7.7.B(18) in the Petitioned Rule which provides a definition of “discharge.” *See* Petition, Attachment 1 at 2.

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

179. 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* AG Exhibit 2 at 2.

180. 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 no reason to have a separate definition. *See* GRIP Kuipers Direct, Attachment 2 at 2.

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

183. NMED made no changes to this definition in the Proposed Final Rule. *See* Proposed Final Rule at 2.

184. Relying primarily upon the testimony of Mr. Brown, and 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

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

187. Freeport supported this definition through technical evidence. *See* Freeport Finley Direct at 15-16; Freeport Blandford Direct at 23.

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

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

190. 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.

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

192. NMED made no changes to this definition in the Proposed Final Rule. *See* Proposed Final Rule at 3.

193. 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

194. NMED proposed 20.6.7.7.B(50) in the Petitioned Rule which provides a definition of “process water.” *See* Petition, Attachment 1 at 4.

195. 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* GRIP Kuipers Direct, Attachment 2 at 4.

196. 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. Freeport 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* Freeport Shelley Direct at 31; Freeport Grass Direct at p. 8

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

199. NMED made no changes to this definition in the Proposed Final Rule. *See* Proposed Final Rule at 3.

200. 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

201. NMED did not propose a definition for “seepage” in the Petitioned Rule. *See* Petition, Attachment 1 at 1-4.

202. 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.

203. NMED made changes in the Amended Rule for consistency and clarity. *See* Amended Petition at 1.

204. 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 Mr. Grass. *See* Freeport Rebuttal NOI at 3; Freeport Grass Rebuttal at 1-2.

205. 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..

206. 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.

207. The Commission finds that changes made to the definition in the Proposed Final Rule address Freeport's objection to the definition.

208. 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

209. NMED proposed 20.6.7.7.B(59) in the Petitioned Rule which provides a definition of "unauthorized discharge." *See* Petition, Attachment 1 at 4.

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

211. 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.

212. NMED 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. NMED made no changes to this definition in the Proposed Final Rule. *See* Proposed Final Rule at 4.

213. 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

214. NMED proposed 20.6.7.7.B(61) in the Petitioned Rule which provides a definition of "variance." *See* Petition, Attachment 1 at 4.

215. 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* GRIP Kuipers Direct, Attachment 2 at 5.

216. 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.

217. NMED 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.

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

219. 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

220. 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.

221. Freeport presented evidence to support the definition of “waste rock” through Jim Finley. Mr. Finley’s testimony asserts that the definition is consistent with the academic and professional definition of waste rock. *See* Freeport Finley Direct at 3-4.

222. 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.

223. NMED 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.

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

225. 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

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

227. 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.

228. For the reasons set forth below, the Commission finds that the substantive rule provisions dealing with the terms “green infrastructure” and “low impact development” are not adopted.

229. 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

230. Mr. Olson 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.

231. 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.

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

233. 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

234. NMED 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.

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

236. NMED made no changes to 20.6.7.8.A in the Amended Rule. *See* Amended Petition, Attachment 2 at 4.

237. Freeport supported 20.6.7.8.A and offers evidence 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* Freeport Eastep Direct at 16-17.

238. GRIP and TRP opposed 20.6.7.8.A and offered alternative rule language. *See* GRIP 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* GRIP Kuipers Direct, Attachment 2 at 5.

239. The Attorney General, Amigos Bravos, and Mr. Olson did not offer alternative rule language for 20.6.7.8.A. *See* AG Exhibit 2 at 4; AB Exhibit 1 at 6; and WCO Exhibit 3 at 6.

240. 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 “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.

241. NMED made no changes to 20.6.7.8.A in the Proposed Final Rule. *See* Proposed Final Rule at 4.

242. 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 Proposed Final Rule.

Subsections B through D

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

244. NMED makes no changes to 20.6.7.8.B, C, and D in the Amended Rule. *See* Amended Petition, Attachment 2 at 4.

245. Freeport witness Mr. Eastep presented testimony in support of 20.6.7.8.B, C, and D. These sections set forth the circumstances in which a discharge permit is necessary, who is responsible for compliance, how existing ground water 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* Freeport Eastep Direct at 17-18

246. The Commission finds that 20.6.7.8.B, C, and D are undisputed by the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson.

247. 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:

248. 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.” *See* Section 74-6-5(K) NMSA 1978.

249. NMED 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.

250. 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.

251. Freeport presented testimony through 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. Consequently, Mr. Eastep asserts that 20.6.7.9 allows for proper budgeting. *See* Freeport Eastep Direct at 18-19.

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

254. 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 Proposed Final Rule.

20.6.7.10 – General Application Requirements for All Copper Mine Facilities:

255. 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* Freeport Eastep Direct at 19-20.

Subsection A

256. 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. NMED made changes to 20.6.7.10.A in the Amended Rule. *See* Amended Petition, Attachment 2 at 5.

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

259. 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.

260. 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.

261. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.A as set forth in the Proposed Final Rule.

Subsection B

262. NMED 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.

263. NMED made no changes to 20.6.7.10.B in the Amended Rule. *See* Amended Petition, Attachment 2 at 5.

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

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

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

267. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.B as set forth in the Proposed Final Rule.

Subsection C

268. NMED 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.

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

270. Freeport supported 20.6.7.10.C as set forth in the Petitioned Rule and Amended Rule and offered evidence for this position. *See* Freeport Eastep Direct at 20-22. In particular, Mr. Eastep maintained 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 the Department and permittees get accustomed to the new discharge permitting program for copper mines. *See id.* However, Mr. Eastep maintained 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.*

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

272. Amigos Bravos contested 20.6.7.10.C as contained in the Petitioned Rule and Amended Rule and offered proposed rule language that changes the time frame from 270 days to one year. *See* AB Exhibit 1 at 6. Amigos Bravos offered no evidence to support this time frame

other than maintaining the proposed language was included in the August 17 Draft Discussion Draft. *See* AB Shields Direct at 2.

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

274. In its Proposed Final Rule, the Department accepted 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.

275. 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 is reasonable based on the evidence.

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

Subsection D

277. NMED 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.

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

279. Freeport supported 20.6.7.10.D as set forth in the Petitioned Rule and Amended Rule and offered evidence for this position. *See* Freeport Eastep Direct at 20-22. In particular, Mr. Eastep again maintained 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 maintained 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.*

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

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

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

283. 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 is reasonable based on the evidence.

284. NMED made no changes to 20.6.7.10.D in the Proposed Final Rule. *See* Proposed Final Rule at 5.

285. 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.

Subsection E

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

287. NMED made no changes to 20.6.7.10.E in the Amended Rule. *See* Amended Petition, Attachment 2 at 5.

288. Freeport 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.

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

290. NMED made no changes to 20.6.7.10.E in the Proposed Final Rule.

291. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.E as set forth in the Proposed Final Rule.

Subsection F

292. NMED 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.

293. In the Amended Rule, NMED changed the "60 days" to "90 days." *See* Amended Petition, Attachment 2 at 5.

294. 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. 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* Freeport Eastep Rebuttal at 3-4.

295. 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. *See* AG Exhibit 2 at 5; AB Exhibit 1 at 7; GRIP Kuipers Direct Attachment 2 at 6; WCO Exhibit 3 at 7.

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

297. Based on the weight of the evidence, the Commission adopts 20.6.7.10.F as set forth in the Proposed Final Rule.

Subsection G

298. NMED 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.

299. NMED 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.

300. Freeport 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).

301. The Commission finds that the Parties do not dispute 20.6.7.10.G(1)(2) and G(3) in the Petitioned Rule and Amended Rule.

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

303. 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 Proposed Final Rule..

Subsection H

304. NMED 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 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.

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

306. 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* Freeport Eastep Rebuttal at 3-4.

307. In summary, Mr. Eastep again 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. 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 either the Petitioned Rule or Amended Rule. *See* AG Exhibit 2 at 6; AB Exhibit 1 at 8; GRIP Kuipers Direct, Attachment 2 at 7; WCO Exhibit 3 at 7-8.

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

310. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.10.H as set forth in the Proposed Final Rule.

Subsection I

311. NMED 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.

312. NMED made no changes to 20.6.7.10.I in the Amended Rule. *See* Amended Petition, Attachment 2 at 6.

313. Freeport supported 20.6.7.10.I as set forth in the Petitioned Rule and Amended Rule and offered evidence for this position. *See* Freeport Eaststep Direct at 24-25.

314. Mr. Olson contests 20.6.7.10.I in the Petitioned Rule and 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.

315. Mr. Olson maintained that the new language he 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 maintained 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 id.*

316. 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.

317. In the Proposed Final Rule, NMED addressed Mr. Olson’s comment by including the language regarding “additional conditions” in other specific sections of the Copper Mine

Rule. 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. 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. NMED 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. NMED made no changes to 20.6.7.10.J in the Amended Rule. *See* Amended Petition, Attachment 2 at 6.

321. Freeport supported 20.6.7.10.J as set forth in the Petitioned Rule and Amended Rule and offers evidence for this position. *See* Freeport Eastep Direct at 24-25.

322. GRIP/TRP and William Olson objected to 20.6.7.10.J(2) and made a legal argument as to why this provision should be amended. *See* GRIP Kuipers Direct, Attachment 2 at 6 and WCO Exhibit 3 at 7.

323. Amigos Bravos 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 Discussion Draft. *See* AB Exhibit 1 at 8.

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. 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.

325. GRIP and TRP argued 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.

326. 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 Copper Mine Facilities:

327. 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 of the permit application or would be in NMED’s files from past applications, but this section is much more specific. *See* Freeport 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

328. NMED 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.

329. Out of these subsections, NMED only made changes to 20.6.7.11.U and V in the Amended Rule. *See* Amended Petition, Attachment 2 at 9.

330. Freeport 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* Freeport Eastep Direct at 25-34.

331. The Commission finds that the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson did 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.

332. 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. 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. 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 Proposed Final Rule.

Subsection C

335. NMED 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.

336. NMED made no changes to 20.6.7.11.C in the Amended Rule. *See* Amended Petition, Attachment 2 at 6-7.

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

338. Freeport supported its alternative rule language with testimony from Mr. Eastep. *See* Freeport Eastep Direct at 28.

339. The Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson did not offer alternative rule language for 20.6.7.11.C. *See* AG Exhibit 2 at 6-7; GRIP Kuipers Direct, Attachment 2 at 8; AB Exhibit 1 at 9; and WCO Exhibit 3 at 8-9.

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

341. 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

342. NMED 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.

343. NMED made no changes to 20.6.7.11.D in the Amended Rule. *See* Amended Petition, Attachment 2 at 7.

344. Freeport supported and offered evidence for NMED's version of 20.6.7.11.D. *See* Freeport Eastep Direct at 28.

345. GRIP and TRP objected to 20.6.7.11.D and offered rule language that inserted a certification requirement. GRIP argued that a certification requirement is necessary because similar language is included in the Dairy Rule. *See* GRIP Kuipers Direct, Attachment 2 at 8.

346. The Attorney General, Amigos Bravos, and Mr. Olson did not offer alternative rule language for 20.6.7.11.D. *See* AG Exhibit 2 at 7; AB Exhibit 1 at 9; WCO Exhibit 3 at 9.

347. Mr. Kuipers' testimony did 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.

348. 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

349. NMED 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.

350. NMED made no changes to 20.6.7.11.F in the Amended Rule. *See* Amended Petition, Attachment 2 at 7.

351. Freeport supported and offered evidence for NMED's version of 20.6.7.11.F. *See* Freeport Eastep Direct at 28-29.

352. Amigos Bravos objected to 20.6.7.11.F and offers alternative rule language that proposed a requirement that an applicant for a permit describe how it 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.

353. Amigos Bravos offered evidence in support of its alternative rule language through the testimony of Mr. Brian Shields. *See* AB Shields Direct at 3-5.

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

355. The Attorney General, GRIP, TRP, and Mr. Olson did not offer alternative rule language for 20.6.7.11.F. *See* AG Exhibit 2 at 7; GRIP Kuipers Direct, Attachment 2 at 8; and WCO Exhibit 3 at 9.

356. 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.

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

358. 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. NMED 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. NMED made no changes to 20.6.7.11.H in the Amended Rule. *See* Amended Petition, Attachment 2 at 7.

361. Freeport supported and offered evidence for NMED's version of 20.6.7.11.H. *See* Freeport Eastep Direct at p. 29

362. The Attorney General objected to 20.6.7.11.H(1) and proposed rule language inserting "for each discharge location." *See* AG Exhibit 2 at 7.

363. GRIP and TRP objected to 20.6.7.11.H(1) and proposed the same rule language as the Attorney General. *See* GRIP Kuipers Direct, Attachment 2 at 8.

364. GRIP and TRP argued that their proposed rule language for 20.6.7.11.H(1) takes into consideration that a single discharge permit may cover multiple discharging facilities. *See* GRIP Kuipers Direct, Attachment 2 at 8.

365. Amigos Bravos and Mr. Olson did not offer alternative rule language for 20.6.7.11.H. *See* AB Exhibit 1 at 10 and WCO Exhibit 3 at 9.

366. In its Proposed Final Rule, NMED accepted a portion of the alternative language by adding the words “for each discharge location” to 20.6.7.11.H(1). This change appears to address the comments and testimony of the Parties. *See* Proposed Final Rule at 7.

367. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.11.H as set forth by NMED in the Proposed Final Rule.

Subsection J

368. NMED proposed 20.6.7.11.J in the Petitioned Rule which requires certain information dealing with the identification and physical description of the copper mine facility to be included in an application. *See* Petition, Attachment 1 at 7-8.

369. Freeport supported and offered evidence for NMED’s version 20.6.7.11.J set forth in the Petitioned Rule. *See* Freeport Eastep Direct at 30-31.

370. GRIP and TRP objected to NMED’s version of 20.6.7.11.J(2) and (6) as set forth in the Petitioned Rule and offered rule language and evidence for these changes. *See* GRIP Kuipers Direct, Attachment 2 at 9. The alternative rule language for 20.6.7.11.J(2) would add “ore-stockpile” to the list of facilities to be described and would replace “ground water” with “water.” In turn, the alternative rule language for 20.6.7.11.J(6) would change language relating to management of stormwater runoff and runoff. No technical testimony was given as an explanation, other than that “ore-stockpile” is included in the August 17 Discussion Draft and that “manage stormwater” is ambiguous.

371. The Attorney General, Amigos Bravos, and Mr. Olson did not offer alternative rule language for 20.6.7.11.J. *See* AG Exhibit 2 at 7-8; AB Exhibit 1 at 10-11; and WCO Exhibit 3 at 9-10.

372. NMED made a change to 20.6.7.11.J(2) in its Amended Rule, but the change does not relate to the rule language proposed by GRIP and TRP for 20.6.7.11.J(2). *See* Amended Petition, Attachment 2 at 7-8.

373. NMED made no further changes in the Proposed Final Rule except for non-substantive changes regarding facility and unit terminology. *See* Proposed Final Rule at 7-8.

374. The Commission finds that the rule language proposed by GRIP and TRP for 20.6.7.11.J(2) is not well-explained and confusing. The term “ore-stockpile” is not defined or used elsewhere in the proposed rules. Based upon the evidence in the record, a leach stockpile is a type of ore stockpile, and that is listed separately. The language “protect each area that may generate water contaminants from stormwater runoff and runoff” is not explained and is confusing. To the extent that the phrase “manage stormwater” is vague, its meaning is addressed more specifically in 20.6.7.17.C, particularly paragraph (4) of that subsection, and 20.6.7.18.D, which provide sufficient detail to define the objectives and requirements for stormwater management under the Copper Mine Rule.

375. The Commission finds that the rule language proposed by GRIP and TRP for 20.6.7.11.J(6) is not necessary and not sufficiently explained by the testimony, and that reading 20.6.7.11.J(6) in conjunction with other parts of the rule address the concerns raised in Mr. Kuipers’ exhibit.

376. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.11 J and J(1) through (11) as set forth by NMED in the Proposed Final Rule.

Subsection O

377. NMED proposed 20.6.7.11.O in the Petitioned Rule which imposes requirements for an application to include information on a material characterization plan and, if applicable, a material handling plan. *See* Petition, Attachment 1 at 8.

378. NMED made no changes to 20.6.7.11.O in the Amended Rule. *See* Amended Petition, Attachment 2 at 8.

379. Freeport supported and offered evidence for NMED's version of 20.6.7.11.O set forth in the Petitioned Rule and Amended Rule. *See* Freeport Eastep Direct at 32-33.

380. The Attorney General objected to 20.6.7.11.O and proposed rule language referencing 20.6.7.19.A; however, the Attorney General offers no specific evidence in support of the change, and 20.6.7.19.A does not address the topic identified in 20.6.7.11.O. *See* AG Exhibit 2 at 9.

381. GRIP, TRP, Amigos Bravos, and Mr. Olson did not offer alternative rule language for 20.6.7.11.O. *See* GRIP Kuipers Direct, Attachment 2 at 10; AB Exhibit 1 at 12; WCO Exhibit 3 at 10.

382. The Commission finds that the Attorney General's proposed rule language is not adopted because it appears to reference the wrong rule section and is not explained by testimony.

383. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.11.O as presented by NMED in the Petitioned Rule, Amended Rule, and Proposed Final Rule.

Environmental Compliance History

384. Amigos Bravos proposed a new Subsection X dealing with environmental compliance history. *See* AB Exhibit 1 at 13.

385. Amigos Bravos offered evidence in support of Subsection X to 20.6.7.11 through testimony from Mr. Shields. *See* AB Shields Direct at 5-6.

386. NMED and Freeport opposed the Subsection X dealing with environmental compliance history as proposed by Amigos Bravos and offered evidence in support of their opposition. *See* Skibitski Rebuttal at 4 and Eastep Rebuttal at 18.

387. The Commission finds that the WQA specifically addresses the requirements for environmental compliance history, the Copper Mine Rule requires compliance with the statute, and no evidence was offered that explains why a different rule is needed for the copper industry compared with other permit applicants. The Commission accepts the testimony on behalf of NMED that it does not need a permit applicant to provide additional information in order for NMED to satisfy the requirements of the Act.

388. Based on the weight of the evidence, the Commission declines to adopt 20.6.7.11(X) as proposed by Amigos Bravos.

20.6.7.12 – Reserved:

389. NMED proposed to reserve 20.6.7.12 for future rule amendments in the Petitioned Rule. *See* Petition, Attachment 1 at 9.

390. NMED did not make changes to 20.6.7.12 in the Amended Rule. *See* Amended Petition, Attachment 2 at 9.

391. The Commission finds that there are no objections from the other Parties to reserving 20.6.7.12 for future rule amendments.

392. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.12 as proposed by NMED in the Petitioned Rule, Amended Rule, and Proposed Final Rule.

20.6.7.13 – Reserved:

393. NMED proposed to reserve 20.6.7.13 for future rule amendments in the Petitioned Rule. *See* Petition, Attachment 1 at 9.

394. NMED did not make changes to 20.6.7.13 in the Amended Rule. *See* Amended Petition, Attachment 2 at 9.

395. The Commission finds that there are no objections from the other Parties to reserving 20.6.7.13 for future rule amendments.

396. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.13 as proposed by NMED in the Petitioned Rule, Amended Rule, and Proposed Final Rule.

20.6.7.14 – Requirements for a Discharge Permit Amendment:

Undisputed Subsections A, B, C and D

397. NMED proposed requirements for a discharge permit amendment at 20.6.7.14.A, B, C, and D in the Petitioned Rule. *See* Petition, Attachment 1 at 9.

398. NMED made no changes to 20.6.7.14.A, B, C, and D in the Amended Rule. *See* Amended Petition, Attachment 2 at 9.

399. Freeport presented evidence to support 20.6.7.14.A, B, C, and D. *See* Freeport Eastep Direct at 36-38.

400. The Commission finds that 20.6.7.14.A, B, C, and D are undisputed because they are supported by Freeport and the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson did not provide alternative rule language. *See* Freeport NOI, AG Exhibit 2 at 9-10; AB Exhibit 1 at 13-15; GRIP Kuipers Direct, Attachment 2 at 11; WCO Exhibit 3 at 11.

401. NMED made no changes to 20.6.7.14.A, B, C and D in the Proposed Final Rule. *See* Proposed Final Rule at 9.

402. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.14.A, B, C, and D as set forth by NMED in the Proposed Final Rule.

Subsection E

403. NMED proposed 20.6.7.14.E in the Petitioned Rule which provides that NMED shall provide notice of all discharge permit amendment approvals or denials to those persons requesting notice. *See* Petition, Attachment 1 at 9.

404. NMED made no changes to 20.6.7.11.E in the Amended Rule. *See* Amended Petition, Attachment 2 at 9.

405. Freeport supported 20.6.7.14.E and offered evidence for this provision. *See* Freeport Eastep Direct at 37-38.

406. Amigos Bravos objected to 20.6.7.14.E and requested new language; however, Amigos Bravos failed to present any evidence to support this new language. *See* AB Exhibit 1 at 14; Freeport Eastep Rebuttal at 18.

407. The Attorney General, GRIP, TRP, and Mr. Olson did not offer alternative rule language for 20.6.7.14.E. *See* AG Exhibit 2 at 9; GRIP Kuipers Direct, Attachment 2 at 11; and WCO Exhibit 3 at 11.

408. The Commission finds that copper mining companies need the ability to make minor changes in a quick and efficient manner while keeping the public informed, and 20.6.7.14.E, as proposed by NMED, accomplishes this objective.

409. NMED made a non-substantive change to 20.6.7.14.E in the Proposed Final Rule regarding terminology. *See* Proposed Final Rule at 9.

410. Relying primarily on the testimony of Mr. Eastep, and based on the weight of the evidence, the Commission adopts 20.6.7.14.E as set forth by NMED in Proposed Final Rule.

20.6.7.15 – Reserved [Additional Public Notice Requirements]:

411. In both the Petitioned Rule and Amended Rule, NMED proposed to reserve 20.6.7.15 for future amendments. *See* Petition, Attachment 1 at 9 and Amended Petition, Attachment 2 at 9.

412. The Attorney General and Mr. Olson proposed to change 20.6.7.15 from a reserved section to a section implementing additional public notice requirements, and the proposed rule language is identical. *See* AG Exhibit 2 at 10 and WCO Exhibit 3 at 11-13.

413. Amigos Bravos also proposed public notice requirements that are basically similar to those public notice requirements proposed by the Attorney General and Mr. Olson. *See* AB Exhibit 1 at 14.

414. The Attorney General offered no technical evidence to support its proposed change to 20.6.7.15. *See* AG Travers Direct at 1-24.

415. Mr. Olson offered evidence to support his changes to 20.6.7.15. *See* WCO Exhibit 3 at 11-13.

416. Amigos Bravos offered evidence to support its changes to 20.6.7.15. *See* AB Shields Direct at 3-5.

417. Freeport offered evidence to oppose the changes to 20.6.7.15 proposed by the Attorney General, Mr. Olson, and Amigos Bravos. *See* Freeport Eastep Rebuttal at 11-12 and 16-18.

418. GRIP and TRP offered no alternative rule language for 20.6.7.15. *See* GRIP Kuipers Direct, Attachment 2 at 11.

419. The Commission finds that there are at least two rounds of public notice provided in multiple forms and an opportunity to submit comments and request a public hearing under

20.6.2.3108 NMAC. As a result, the public participation requirements are already met through the continued applicability of 20.6.2.3108 to copper mine facilities, and additional public notice requirement would impose additional burdens on permit applicants and NMED without any clear benefit. Also, the Commission finds that it is appropriate and efficient for NMED to have a single procedure for public notice for discharge permits for all types of facilities.

420. NMED made no changes to 20.6.7.15 in the Proposed Final Rule. *See Proposed Final Rule at 9.*

421. Relying primarily on the testimony of Mr. Eastep, and based on the weight of the evidence, the Commission declines to adopt 20.6.7.15 as proposed by the Attorney General, Amigos Bravos, and Mr. Olson and adopts the 20.6.7.15 as reserved for future rule provisions as proposed by NMED in the Proposed Final Rule.

20.6.7.16 - Reserved:

422. In both the Petitioned Rule and Amended Rule, NMED proposed to reserve 20.6.7.16 for future amendments. *See Petition, Attachment 1 at 10; Amended Petition, Attachment 2 at 19.*

423. The Attorney General and Amigos Bravos opposed reserving 20.6.7.16 and, instead, proposed procedures for requesting public hearings on permitting actions for copper mine facilities. *See AG Exhibit 2 at 10 and AB Exhibit 1 at 14.*

424. The Commission is unable to identify any evidence presented by the Attorney General to support its amendment to 20.6.7.16.

425. Amigos Bravos did not present any technical testimony in support of its proposed changes to 20.6.7.6 other than pointing out that such language was included in the August 17 Discussion Draft.

426. Amigos Bravos' proposed change was rebutted by Mr. Eastep on behalf of Freeport. *See* Freeport Eastep Rebuttal at 18.

427. The Commission finds a lack of substantial evidence to support the proposed changes to 20.6.7.16 set forth by the Attorney General and Amigos Bravos. They also appear unnecessary because subsection A as they propose simply references 20.6.2.3108.K NMAC, which applies as described in Mr. Eastep's testimony and by virtue of 20.6.7.8.C, and the language in subsection B appears to be addressed by a combination of sections 20.6.7.8, 20.6.7.10.I, and 20.6.2.3108.J and K NMAC.

428. NMED made no changes to 20.6.7.16 in the Proposed Final Rule. *See* Proposed Final Rule at 9.

429. Relying primarily on Mr. Eastep's testimony, and based on the weight of the evidence, the Commission declines to adopt changes to 20.6.7.16 as proposed by the Attorney General and Amigos Bravos and adopts the Section as reserved for future rule changes as proposed by NMED in its Proposed Final Rule.

20.6.7.17 – General Engineering and Surveying Requirements:

Subsection A – Practice of Engineering

430. NMED proposed 20.6.7.17.A in the Petitioned Rule which requires that plans, drawing, reports, and specifications requiring the practice of engineering shall bear the seal and signature of a licensed New Mexico professional engineer pursuant to the New Mexico Engineering and Surveying Act and its rules. *See* Petition, Attachment 1 at 10.

431. Freeport testified regarding 20.6.7.17.A in the testimony of Michael Grass. *See* Freeport Michael Grass Direct Written Testimony at 4.

432. NMED made no changes to 20.6.7.17.A in the Amended Rule. *See* Amended Petition, Attachment 2 at 10.

433. GRIP and TRP proposed to add “qualified” before “licensed new Mexico professional engineer” in 20.6.7.17.A. *See* GRIP Kuipers Direct, Attachment 2 at 11.

434. Freeport provided rebuttal testimony to Mr. Kuipers’ proposal through Mr. Freeport Shelley’s testimony. *See* Shelley Rebuttal at 8-10.

435. The Commission finds that no testimony is offered regarding the proposed change to explain what “qualified” would mean or who would determine when a licensed professional is “qualified.” Mr. Shelley’s testimony explained that an engineer’s qualifications are determined by the requirements of the Engineering and Surveying Practices Act.

436. NMED made no changes to 20.6.7.17.A in the Proposed Final Rule other than changes to citation form. *See* Proposed Final Rule at 9.

437. Relying primarily on the testimony of Mr. Shelley and Mr. Grass, and based on the weight of the evidence, the Commission adopts 20.6.7.17.A as set forth in the Proposed Final Rule.

Subsection B – Practice of Surveying

438. NMED proposed 20.6.7.17.B in the Petitioned Rule which requires that plans, drawing, reports, and specifications requiring the practice of surveying shall bear the seal and signature of a licensed New Mexico professional surveyor pursuant to the New Mexico Engineering and Surveying Act and its rules. *See* Petition, Attachment 1 at 10.

439. Freeport presented evidence to support 20.6.7.17.B in the testimony of Michael Grass. *See* Freeport Grass Direct at 4.

440. NMED made no changes to 20.6.7.17.B in the Amended Rule. *See* Amended Petition, Attachment 2 at 10.

441. NMED made no changes to 20.6.7.17.B in the Proposed Final Rule other than changes to citation form. *See* Proposed Final Rule at 10.

442. Based on the weight of the evidence, the Commission adopts 20.6.7.17.B as set forth by NMED in the Proposed Final Rule.

Subsection C – Engineering Plans and Specification Requirements

443. NMED proposed 20.6.7.17.C which sets forth requirements for engineering plans and specifications. *See* Petition, Attachment 1 at 10.

444. Freeport presented testimony in support of 20.6.7.17.C, except as discussed below regarding 20.6.7.17.C(3). *See* Freeport Grass Direct at 4-10.

445. GRIP and TRP objected to 20.6.7.17.C(1)(b) and argued that “qualified” should be inserted before “licensed New Mexico professional engineer.” *See* GRIP Kuipers Direct, Attachment 2 at 11.

446. For the reasons set forth above dealings with 20.6.7.17.A, the Commission does not adopt the proposal to amend 20.6.7.17.C(1)(b) by GRIP and TRP.

447. Freeport objected to and proposed rule language for 20.6.7.17.C(3) which deals with process water or impacted stormwater treatment system plans and specifications. *See* Freeport NOI at 4.

448. Freeport offered evidence to support its proposed rule language through testimony by Mr. Thomas Shelley. *See* Freeport Shelley Direct at 50-51

449. NMED made no changes to 20.6.7.17.C(3) in its Amended Rule. *See* Amended Petition, Attachment 2 at 11.

450. The Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson offered no alternative rule language for 20.6.7.17.C(3). *See* AG Exhibit 2 at 11-12; GRIP Kuipers Direct, Attachment 2 at 12; AB Exhibit 1 at 16; WCO Exhibit 3 at 14.

451. NMED made changes to the language of 20.6.7.17.C(3) in its Proposed Final Rule in response to the changes requested by Freeport through Mr. Shelley's testimony.

452. Based on the weight of the evidence, the Commission adopts 20.6.7.17.C(3) as proposed in the Proposed Final Rule.

453. Amigos Bravos objected to 20.6.7.17.C(4)(a)(iii) in the Petitioned Rule, proposed amendments to this provisions, requested the addition of a new subparagraph (b), and argued that these changes are appropriate because they were in the August 17 Discussion Draft. *See* AB Exhibit 1 at 17.

454. NMED made no changes to 20.6.7.17.C(4)(a)(iii) and did not add the requested subparagraph (b) in the Amended Rule. *See* Amended Petition, Attachment 2 at 11.

455. Freeport objected to the changes to 20.6.7.17.C(4)(a)(iii) and the new subparagraph (b) proposed by Amigos Bravos and argued that Amigos Bravos did not present any technical testimony in support of its proposed changes other than pointing out that such language was included in the August 17 Discussion Draft. *See* Freeport Eastep Rebuttal at 18.

456. Relying on the testimony of Mr. Eastep, and based on the weight of the evidence, the Commission adopts 20.6.7.17.C(4)(a)(iii) and (b) as proposed by NMED in the Proposed Final Rule.

457. GRIP, TRP, and Amigos Bravos objected to 20.6.7.17.C(4)(e) in the Petitioned Rule and proposed to strike the phrase "where practicable." GRIP and TRP argued that the phrase needs to be stricken because it is ambiguous, while Amigos Bravos argued that the

change is appropriate because it was contained in the August 17 Discussion Draft. *See* GRIP Kuipers Direct, Attachment 2 at 13 and AB Exhibit 1 at 17.

458. NMED made no changes to 20.6.7.17.C(4)(e) in the Amended Rule. *See* Amended Petition, Attachment 2 at 11.

459. Freeport objected to the changes to 20.6.7.17.C(4)(e) proposed by Amigos Bravos and argued that Amigos Bravos did not present any technical testimony in support of its proposed changes other than pointing out that such language was included in the August 17 Discussion Draft. *See* Freeport Eastep Rebuttal at 18.

460. The Commission finds that NMED proposed revised language for 20.6.7.17.C(4)(e) in its Proposed Final Rule for clarity, although it does not address the proposed changes discussed above.

461. The Commission finds that 20.6.7.17.C(4)(e) is not ambiguous and that mere reliance on the August 17 Discussion Draft is unpersuasive without additional evidence supporting the proposed change. Accordingly, the Commission declines to adopt the change to 20.6.7.17.C(4)(e) as proposed by GRIP, TRP, and Amigos Bravos.

462. Based on the weight of the evidence, the Commission adopts 20.6.7.17.C(4)(e) as proposed by NMED in the Proposed Final Rule.

463. Amigos Bravos objected to 20.6.7.17.C(5) in the Petitioned Rule, proposed rule language, and argued that its rule language is appropriate because such language was included in the August 17 Discussion Draft. *See* AB Exhibit 1 at 17.

464. NMED made no changes to 20.6.7.17.C(5) in the Amended Rule. *See* Amended Petition, Attachment 2 at 11-12.

465. Freeport objected to the changes to 20.6.7.17.C(5) proposed by Amigos Bravos and argued that Amigos Bravos does not present any technical testimony in support of its proposed changes other than pointing out that such language was included in the August 17 Discussion Draft. *See* Freeport Eastep Rebuttal at 18.

466. The Commission finds that mere reliance on the August 17 Discussion Draft is unpersuasive without additional evidence supporting the proposed change. Accordingly, the Commission declines to adopt the change to 20.6.7.17.C(5) as proposed by Amigos Bravos.

467. Based on the weight of the evidence, the Commission adopts 20.6.7.17.C(5) as proposed by NMED in the Proposed Final Rule.

468. Except as discussed above with regard to specific language that was disputed by one or more parties, the Commission finds that the remainder of 20.6.7.17.C as presented in the Petitioned Rule and the Amended Rule was not disputed.

469. For these reasons, the Commission adopts 20.6.7.17.C as set forth in NMED's Proposed Final Rule.

Subsection D – New Impoundment Engineering Design Requirements

470. NMED proposed 20.6.7.17.D which sets forth requirements for new impoundment engineering design. *See* Petition, Attachment 1 at 10.

471. Freeport supported 20.6.7.17.D through the testimony of Michael Grass. *See* Freeport Grass Direct at 11-21.

472. Amigos Bravos objected to 20.6.7.17.D and D(1)(a) in the Petitioned Rule, proposed rule language, and argued that such rule language is appropriate because it was included in the August 17 Discussion Draft. *See* AB Exhibit 1 at 17-18.

473. NMED made no changes to 20.6.7.17.D and D(1) in the Amended Rule. *See* Amended Petition, Attachment 2 at 11-12.

474. NMED presented testimony through Mr. Adrian Brown to support 20.6.7.17.D(1)(a). *See* NMED Brown Direct at 15.

475. Freeport objected to the changes to 20.6.7.17.D and D(1)(a) proposed by Amigos Bravos. *See* Freeport Eastep Rebuttal at 18.

476. The Attorney General, GRIP, TRP, and Mr. Olson did not offer alternative rule language for 20.6.7.17.D and D(1)(a). *See* AG Exhibit 2 at 11-12; GRIP Kuipers Direct, Attachment 2 at 13; WCO Exhibit 3 at 15.

477. The Commission finds NMED's evidence on 20.6.7.17.D(1)(a) to be persuasive. Accordingly, the Commission declines to adopt the change to 20.6.7.17.D and D(1)(a) as proposed by Amigos Bravos.

478. NMED made no changes to 20.6.7.17.D and D(1)(a) in the Proposed Final Rule. *See* Proposed Final Rule at 12-15.

479. Based on the weight of the evidence, the Commission adopts 20.6.7.17.D and D(1)(a) as proposed by NMED in the Proposed Final Rule.

480. Amigos Bravos objected to 20.6.7.17.D(2)(a), (b) and (f) in the Petitioned Rule, proposed rule language or to strike language, and argued that such rule language is appropriate because it was included or not included in the August 17 Discussion Draft. *See* AB Exhibit 1 at 17-18.

481. GRIP and TRP objected to 20.6.7.17.D(2)(a) through (e), proposed alternative rule language for (a) through (e) to clarify sections and allow use of an open pit for secondary

containment subject to Department approval. *See* GRIP Kuipers Direct, Attachment 2 at 14-15. The reasons for these proposed changes are not explained in Mr. Kuipers' testimony.

482. The Attorney General objected to 20.6.7.17.D(2)(a) and struck some language without any supporting technical testimony. *See* Attorney General Exhibit 2 at 13.

483. NMED made changes to 20.6.7.17.D(2)(a), (b), (c), (d), and (e) in the Amended Rule. *See* Amended Petition, Attachment 2 at 11-12.

484. NMED presented testimony through Mr. Adrian Brown to support 20.6.7.17.D(2). *See* NMED Brown Direct at 14.

485. Freeport objected to the changes to 20.6.7.17.D(2) proposed by Amigos Bravos. *See* Freeport Eastep Rebuttal at 18. Freeport further explained the basis for NMED's version of 20.6.7.17.D(2) in the testimony of Mr. Grass as discussed above.

486. Mr. Olson does not offer alternative rule language for 20.6.7.17.D(2). *See* WCO Exhibit 3 at 15.

487. Relying primarily on the evidence presented by NMED and Freeport, the Commission declines to adopt the rule proposals suggested by the Attorney General, GRIP, TRP, and Amigos Bravos for the rule provisions of 20.6.7.17.D(2).

488. The Commission finds that the changes to 20.6.7.17.D(2)(a), (b), (c), (d), and (e) as proposed by NMED in the Amended Rule are changes for consistency and clarity. *See* Amended Petition at 1.

489. The Commission finds that the changes to the provisions 20.6.7.17.D(2) as proposed by NMED in the Proposed Final Rule are non-substantive.

490. Based on the weight of the evidence, the Commission adopts 20.6.7.17.D(2) as set forth in the Proposed Final Rule.

491. GRIP and TRP propose a change to 20.6.7.17.D(3) to delete an exception from the requirements for impoundments constructed within an open pit surface drainage area. *See* GRIP Kuipers Direct, Attachment 2 at 15.

492. Amigos Bravos proposed changes to 20.6.7.17.D(3)(a) based solely on the August 17 Discussion Draft. *See* AB Exhibit 1 at 20.

493. The Attorney General and Mr. Olson proposed no changes to 20.6.7.17.D(3), except for an Attorney General change to a cross-reference that does not appear to be correct. *See* AG Exhibit 2 at 14-15; WCO Exhibit 3 at 16-17.

494. NMED made no changes to 20.6.7.17.D(3) in the Amended Rule. *See* Amended Rule at 13-14.

495. NMED presented testimony through Mr. Brown to support 20.6.7.17.D(3). *See* Brown Direct at 14.

496. Freeport objected to the changes to 20.6.7.17.D(3) proposed by Amigos Bravos. *See* Freeport Eastep Rebuttal at 18. Freeport further explained the basis for NMED's version of 20.6.7.17.D(3) in the testimony of Mr. Grass as discussed above.

497. The Commission finds that the changes to 20.6.7.17.D(3) as proposed by GRIP and TRP are unwarranted because the open pit surface drainage area is a key element of the Copper Mine Rule.

498. The Commission finds that Amigos Bravos changes to 20.6.7.17.D(3)(a) are unsupported by technical testimony.

499. The Commission finds that 20.6.7.17.D(3) remained unchanged in the Proposed Final Rule.

500. Based on the weight of the evidence, the Commission adopts 20.6.7.17.D(3) in its entirety as set forth in the Proposed Final Rule.

501. GRIP and TRP proposed a change to 20.6.7.17.D(4) to delete an exception from the requirements for impoundments constructed within an open pit surface drainage area. *See* GRIP Kuipers Direct, Attachment 2 at 16.

502. Amigos Bravos proposed to strike 20.6.7.17.D(4)(e) on the grounds that it was not in the August 17 Discussion Draft. AB Exhibit 1 at 21.

503. The Attorney General and Mr. Olson proposed no changes to 20.6.7.17.D(4), except for an Attorney General change to a cross-reference that does not appear to be correct. *See* AG Exhibit 2 at 14-15; WCO Exhibit 3 at 16-17.

504. NMED made changes to 20.6.7.17.D(4) in the Amended Rule for purposes of clarity and consistency. *See* Amended Petition at 1 and Amended Petition, Attachment 2 at 14.

505. Freeport objected to the changes to 20.6.7.17.D(4) proposed by Amigos Bravos and argued that Amigos Bravos did not present any technical testimony in support of its proposed changes other than pointing out that such language was included in the August 17 Discussion Draft. *See* Freeport Eastep Rebuttal at 18. Freeport further explained the basis for NMED's version of 20.6.7.17.D(4) in the testimony of Mr. Grass as discussed above.

506. The Commission finds that the evidence presented by Freeport on 20.6.7.17.D(4) is persuasive and does not adopt amendments to this rule provision as proposed by GRIP, TRP, and Amigos Bravos.

507. NMED made no substantive changes to 20.6.7.17.D(4) in the Proposed Final Rule.

508. Based on the weight of the evidence, the Commission adopts 20.6.7.17.D(4) in its entirety as set forth in the Proposed Final Rule.

509. Freeport presented testimony in support of 20.6.17.D(5), (6) and (7). *See* Freeport Grass Direct at 20-21.

510. NMED made changes to 20.6.7.17.D(5) in the Amended Rule for clarity and consistency, and NMED made no changes to 20.6.7.17.D(6) and (7) in the Amended Rule. *See* Amended Petition, Attachment 2 at 13-14.

511. The Commission finds that 20.6.7.17(D)(5), (6), and (7) are undisputed because the Attorney General, GRIP/TRP, Amigos Bravos, William Olson proposed no changes to 20.6.7.17.D(5), (6) and (7). *See* AG Exhibit 2 at 15; AB Exhibit 1 at 21-22; GRIP Kuipers Direct, Attachment 2 at 16; WCO Exhibit 3 at 18.

512. NMED made no changes to 20.6.7.17.D(5), (6) and (7) in the Proposed Final Rule.

513. Based on the weight of the evidence, the Commission finds that 20.6.7.17.D(5), (6) and (7) are undisputed and adopts these provisions as set forth in the Proposed Final Rule.

514. To the extent not specifically addressed above, the Commission adopts all of 20.6.7.17.D as set forth in the Proposed Final Rule.

20.6.7.18 – General Operational Requirements:

Subsection A

515. NMED proposed 20.6.7.18.A in the Petitioned Rule which contains requirements to plan for closure. *See* Petition, Attachment 1 at 15.

516. NMED did not make changes to 20.6.7.18.A in the Amended Rule. *See* Amended Petition, Attachment 2 at 15.

517. 20.6.7.18.A requires units to be designed and operated in a manner that considers implementation of the closure plan submitted pursuant to 20.6.7.33, and NMED presented evidence on closure issues through Adrian Brown. *See* NMED Brown Direct, at 32-44.

518. Freeport, the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson did not dispute 20.6.7.18.A because none proposed alternative rule language. *See* Freeport NOI, at 3-6; AG Exhibit 2 at 15; AB Exhibit 1 at 22; GRIP Kuipers Direct, Attachment 2 at 16-17; WCO Exhibit 3 at 18.

519. NMED made a change in subsection A in the Proposed Final Rule to add the words “copper mine” before “facility,” consistent with changes to other provisions as discussed above.

520. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.18.A in its entirety as set forth by NMED in the Proposed Final Rule.

Subsection B

521. NMED proposed 20.6.7.18.B in the Petitioned Rule which sets forth the requirements for construction of a liner system for the containment of water contaminants, including repair or relining of a liner system. *See* Petition, Attachment 1 at 15.

522. NMED did not make changes to the Amended Rule to include Amigos Bravos proposal set forth at 20.6.7.18.B. *See* Amended Petition, Attachment 2 at 15.

523. GRIP and TRP objected to 20.6.7.18.B(2) in the Petitioned Rule and proposed alternative language to insert “qualified” before “licensed New Mexico professional engineer.” *See* GRIP Kuipers Direct, Attachment 2 at 17.

524. GRIP and TRP provided no testimony as to why such a change is necessary. *See* GRIP Kuipers Direct, Attachment 2 at 17.

525. Freeport presented rebuttal testimony regarding the additional of the term “qualified” as it relates to licensed professionals. *See* Freeport Shelley Rebuttal at 8-10.

526. Based on the weight of the evidence, the Commission declines to adopt this rule changed 20.6.7.18.B(2) as proposed by GRIP and TRP.

527. Amigos Bravos requested insertion of a new provision as 20.6.7.18.B(4) which deals with low impact development and green infrastructure development approaches. *See* AB Exhibit 1 at 22.

528. In support of the new language for 20.6.7.18.B(4), Amigos Bravos offered testimony from Brian Shield. *See* AB Shields Direct at 2-3.

529. In response to this new proposal by Amigos Bravos, Freeport presented rebuttal testimony from Tim Eastep. *See* Freeport Eastep Rebuttal at 16-17.

530. The Commission finds that Freeport’s evidence against a requirement on low impact development and green infrastructure development approaches to be persuasive and that the change proposed by Amigos Bravos would be advisory only and is not needed for the Copper Mine Rule.

531. Based on the weight of the evidence, the Commission hereby declines to adopt 20.6.7.18.B(4) as proposed by Amigos Bravos.

532. NMED made no changes to 20.6.7.17.B in the Proposed Final Rule. *See* Proposed Final Rule at 15.

533. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.18.B in its entirety as set forth by NMED in the Proposed Final Rule.

Subsection C

534. NMED proposed 20.6.7.18.C in the Petitioned Rule which contains requirements regarding notices for mining operations and discharge. *See* Petition, Attachment 1 at 15.

535. NMED did not make changes to 20.6.7.18.C in the Amended Rule. *See* Amended Petition, Attachment 2 at 15.

536. The Commission finds that Freeport, the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson did not dispute 20.6.7.18.C because none proposed alternative rule language. *See* Freeport NOI at 3-6; AG Exhibit 2 at 16; AB Exhibit 1 at 22-23; GRIP Kuipers Direct, Attachment 2 at 17; WCO Exhibit 3 at 18-19.

537. NMED made non-substantive changes to 20.6.7.18.C in the Proposed Final Rule replacing the word “facilities” with “unit” in 20.6.7.18.C(1)(a) and (2)(b), and replacing the word “facility” with “impoundment” in 20.6.7.18.C(1)(b) and (2)(a). *See* Proposed Final Rule at 15.

538. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.18.C as set forth by NMED in the Proposed Final Rule.

Subsection D

539. NMED proposed 20.6.7.18.D in the Petitioned Rule which contains requirements for stormwater management. *See* Petition, Attachment 1 at 15-16.

540. Mr. Brown summarized the stormwater requirements set forth in 20.6.7.18.D in his direct testimony. *See* NMED Brown Direct at 6.

541. Mr. Brown testified that based on his review of mining regulations and guidance from other states, the stormwater requirements in the Copper Mine Rule are functionally the same as Arizona’s requirements. In addition, Mr. Brown summarized such requirements for Nevada to allow for a comparison. *See* NMED Brown Direct at 6.

542. Mr. Brown testified that the stormwater requirements of the Copper Mine Rule, set forth at 20.6.7.18.D, protect ground water by minimizing the mobilization of contaminants by precipitation and by maximizing the availability of unimpacted stormwater for infiltration to ground water in uncontaminated locations. *See* NMED Brown Direct at 6.

543. NMED made no changes to 20.6.7.18.D in the Amended Rule. *See* Amended Petition, Attachment 2 at 15.

544. Freeport, the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson did not dispute 20.6.7.18.D because none proposed alternative rule language. *See* Freeport NOI at 3-6; AG Exhibit 2 at 16; AB Exhibit 1 at 23; GRIP Kuipers Direct, Attachment 2 at 17; and 17; WCO Exhibit 3 at 19.

545. NMED made no changes to 20.6.7.18.D in the Proposed Final Rule.

546. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.18.D as set forth by NMED in the Proposed Final Rule.

Subsection E

547. NMED proposed 20.6.7.18.E regarding flow meter requirements in the Petitioned Rule. *See* Petitioned Rule at 16.

548. NMED made no changes to 20.6.7.18.E in the Amended Rule.

549. Freeport, the Attorney General, GRIP, TRP, Amigos Bravos, and Mr. Olson did not dispute 20.6.7.18.E because none proposed alternative rule language. *See* Freeport NOI at 3-6; AG Exhibit 2 at 16-17; AB Exhibit 1 at 23-24; GRIP Kuipers Direct, Attachment 2 at 17-18; WCO Exhibit 3 at 19.

550. NMED made no changes to 20.6.7.18.E in the Proposed Final Rule.

551. Based on the weight of the evidence, the Commission hereby adopts 20.6.7.18.E as set forth by NMED in the Proposed Final Rule.

Subsection F

552. NMED proposed 20.6.7.18.F in the Petitioned Rule. *See* Petition, Attachment 1 at 16-17.

553. NMED changed 20.6.7.18.F(2)(a) in its Amended Rule. *See* Amended Petition, Attachment 2 at 16.

554. Freeport proposed no changes to 20.6.7.18.F. *See* Freeport NOI at 3-6.

555. The Attorney General, GRIP, TRP, and Amigo Bravos proposed alternative rule language for 20.6.7.18.F(2) which addresses continued operation of existing impoundments; they proposed to strike the phrase “or the impoundment is located within the open pit surface drainage area.” *See* AG Exhibit 2 at 17; AB Exhibit 1 at 24; GRIP Kuipers Direct, Attachment 2 at 18.

556. The Attorney General did not offer specific evidence to support its proposed change to 20.6.7.18.F(2). *See* AG Exhibit 2 at 17.

557. GRIP and TRP argued that their change to 20.6.7.18.F(2) is appropriate because the reference to open pit surface drainage area provides relaxed requirements as opposed to areas outside this boundary. *See* GRIP Kuipers Direct, Attachment 2 at 18.

558. Amigos Bravos argued that the change to 20.6.7.18.F(2) is appropriate because it was included in the August 17 Draft Discussions. *See* AB Exhibit 1 at 24.

559. On behalf of NMED, Mr. Brown testified regarding the function of the Open Pit Surface Drainage Area to capture and contain various materials. *See* NMED Brown Direct at 11-12.

560. Ms. Lande and Mr. Blandford testified for Freeport regarding the function of open pits and the lack of evidence that plumes of contaminated ground water migrate from open pits. *See* Freeport Lande Rebuttal at 5; Freeport Blandford Direct at 20-21; Freeport Blandford Rebuttal at 6.

561. The Commission finds that it is appropriate to have different requirements for existing impoundments within the open pit surface drainage area relative to the requirement of 20.6.7.18.F(2) for continued operation of existing impoundments.

562. NMED made no changes to 20.6.7.18.F(2) in the Proposed Final Rule.

563. Based on the weight of the evidence, the Commission adopts 20.6.7.18.F(2) as set forth by NMED in the Proposed Final Rule.

564. GRIP, TRP, and Amigos Bravos objected to 20.6.7.18.F(2)(a) and proposed alternative rule language. *See* GRIP Kuipers Direct, Attachment 2 at 18 and AB Exhibit 1 at 24.

565. GRIP and TRP argued that its amendment to 20.6.7.18.F(2)(a) is necessary because the existing language is ambiguous and the appropriate language is from the August 17 Discussion Draft, while Amigo Bravos indicates that the proposed changes to the rule provision should be taken from the August 17 Discussion Draft. *See* GRIP Kuipers Direct, Attachment 2 at 18 and AB Exhibit 1 at 24.

566. NMED made changes in the Proposed Final Rule to address the comments of GRIP, TRP, and Amigos Bravos. To eliminate the double negative, NMED proposed that 20.6.7.18.F(2)(a) read: “Ground water monitoring data from monitoring wells downgradient of the impoundment indicates that the impoundment is functioning as designed.” *See* Proposed Final Rule at 16.

567. The Commission finds that 20.6.7.18.F(2)(a) as set forth in the Proposed Final Rule adequately addresses the comments of GRIP, TRP, and Amigos Bravos.

568. Based on the weight of the evidence, the Commission adopts 20.6.7.18.F(2)(a) as set forth in the Proposed Final Rule.

569. Mr. Olson objected to 20.6.7.18.F(2)(c) in the Petitioned Rule and Amended Rule and proposed alternative rule language that deals with variance issues. *See* WCO Exhibit 3 at 19-20.

570. For the reasons set forth herein dealing with variance issues, the Commission declines to adopt Mr. Olson's proposed rule change to 20.6.7.18(F)(2)(c). *See* Amended Petition, Attachment 2 at 11-12 and Subsections 31 and 32 set forth herein

571. NMED proposed 20.6.7.18.F(3) in the Petitioned Rule which deals with impoundment inspection and maintenance. *See* Petition, Attachment 1 at 16.

572. GRIP and TRP objected to 20.6.7.18.F(3) in the Petitioned Rule and proposed to delete the phrase "during active operations" because it is ambiguous. *See* GRIP Kuipers Direct, Attachment 2 at 18.

573. Based on the weight of the evidence, the Commission finds that the objection by GRIP to TRP to 20.6.7.18.F(3) is without merit and declines to adopt the proposed change.

574. Amigos Bravos objected to 20.6.7.18.F(3) in the Petitioned Rule and proposed rule changes based solely on the August 17 Discussion Draft.

575. For the reasons set forth herein dealing with the August 17 Discussion Draft, the Commission declines to adopt the change to 20.6.7.18.F(3) proposed by Amigos Bravos.

576. GRIP, TRP, and Amigos Bravos proposed various changes to 20.6.7.18.F(5)(a), including a proposal to insert a requirement where an automatically activated pump must be used

within the context of 20.6.7.18.F(5)(a) in the Petitioned Rule. GRIP and TRP did not provide evidence as to why such a requirement is necessary, and Amigos Bravos proposed such a requirement because it was in the August 17 Discussion Draft. *See* GRIP Kuipers Direct, Attachment 2 at 18 and AB Exhibit 1 at 25.

577. In the Proposed Final Rule, NMED modified 20.6.7.18.F(5)(a) to address the comments of GRIP, TRIP, and Amigos Bravos.

578. Based on the weight of the evidence, the Commission adopts 20.6.7.18.F(5)(a) as proposed by NMED in the Proposed Final Rule.

579. GRIP, TRP, and Amigos Bravos objected to 20.6.7.18.F(5)(b) in the Petitioned Rule and proposed to strike language. GRIP and TRP argued that deletion of the language is necessary to give meaning to the 30-day requirement, while Amigos Bravos relied on the August 17 Discussion Draft for the proposed deletion. *See* GRIP Kuipers Direct, Attachment 2 at 18-19 and AB Exhibit 1 at 25.

580. The Commission finds that the 30-day requirement has meaning contrary to the assertion of GRIP and TRP.

581. Based on the weight of the evidence, the Commission declines to adopt the proposed changes to 20.6.7.18.F(5)(b) as proposed by GRIP, TRP, and Amigos Bravos.

582. Based on the weight of the evidence, and for the reasons discussed above, the Commission adopts 20.6.7.18.F as set forth in the Proposed Final Rule.