

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

IN THE MATTER OF:)
)
PROPOSED AMENDMENT TO) **No. WQCC 12-01(R)**
PART 20.6.2 NMAC - COPPER RULE)
_____)

TESTIMONY OF SALLY SMITH

My name is Sally Smith. Thank you for the opportunity to present my testimony as a member of the Copper Rule Advisory Committee (CRAC), a thirty five year resident of Grant County, and the President, Director of Responsible Mining, and co-founder of Gila Resources Information Project, otherwise known as GRIP.

GRIP is a non-profit organization established in 1998 to ensure that adequate closure and reclamation plans and financial assurance bonding are in place at the local Chino, Cobre, and Tyrone Mines, now all owned by Freeport-McMoRan Copper and Gold Inc. GRIP has members (including myself) who live in the vicinity of the extensive copper mines in Grant County, which impact our water, air, and land and which have the potential to greatly affect the quality of our lives.

GRIP's mission over the last 15 years has been to promote healthy communities by protecting our environment. Mining impacts have long been a very critical part of the work GRIP does, which has expanded to encompass oversight of not just closure and reclamation, but also exploration and operational permits, corrective actions, abandoned mines, tailings, acid rock drainage and groundwater contamination.

I cannot emphasize enough the importance of the matters now pending before you. If we as fellow citizens of the state of New Mexico do not get these Copper Rules right the first time, the consequences will be felt for generations to come. In a desert, water is the most precious resource, more so than jobs or a healthy economy, which simply will not exist without usable water to support them. Your legacy therefore, both as individuals and as a Commission, will be determined by whether you protect our precious water resources, or if you choose to let mining companies pollute them.

And there is no doubt that copper mines can and do pollute groundwater above water quality standards. For the last 16 years I have been a member of the Community Work Group, a citizen's advisory committee associated with the NMED Administrative Order on Consent, a CERCLA quality investigation and remediation with EPA over-site of historic mining impacts in a 55 square mile area at and around Chino Mine. Ecological and Human Health Risk Assessments were required for large areas of unregulated pre-1970 mining impacts. Interim remediation in the smelter town of Hurley involved soil removal and replacement in 523 of the 680 residential yards to prevent incidental ingestion of copper. The Record of Decision for the Hurley Soils Unit, one of four Investigative Units, is the only one completed. Investigation as well as Feasibility Studies and potential Remedial Actions for three other areas, including over 25 miles of Hanover and Whitewater Creeks that run through the mining district towns of Vanadium, Bayard, North Hurley and Hurley, are ongoing and will take years to complete. The Investigations include impacts to soils, surface, and groundwater due to windblown tailings, dumping, crushing, milling, pipeline breaks, seeps, spills and other releases. Approximately two thirds of Grant County residents live within 10-15 miles of Tyrone, Cobre and Chino Mines.

Groundwater damages from mining activities at the Chino, Cobre and Tyrone mines have been significant. As summarized in the Office of the Natural Resources Trustee's Final Groundwater Restoration Plan (RP) for the Chino, Cobre, and Tyrone Mine Facilities released in January 2012,¹ the areal extent of groundwater damages covers more than 20,000 acres at the three mine sites (19,299 acres of regional aquifer; 1,444 acres of alluvial aquifer), with most or all of the shallow (alluvial) aquifers at all mine sites injured from mining contamination. Hazardous substances released from the mines and detected in injured groundwater at concentrations above human health-based standards include: Antimony, Arsenic, Beryllium, Cadmium, Chromium, Cobalt, Copper, Ferrous and ferric sulfate, Lead, Manganese, Nickel, Selenium,

¹ Available online at:

[https://docs.google.com/viewer?a=v&q=cache:yrwZGrgaGqAJ:www.gilaresources.info/pdfs/Final.Groundwater.Restoration.Plan.Chino.Cobre.Tyrone_1.4.2012.pdf+Final+Groundwater+Restoration+Plan+\(RP\)+for+the+Chino,+Cobre,+and+Tyrone&hl=en&gl=us&pid=bl&srcid=ADGEEShpKhimNN4QU-a73LAoPCmeX-otLamww2pJjs2g-CZ-oBPowRlAIUmztysC6SfFOPy9WUk-iG0ci5RpLsp7IM-2intN5FgTnIMoDP_ZfS5QUcVYd5DX93nkzJx8YrxfZp_PLUn-&sig=AHIEtbR4yk3r76JTJj-11ktVP4cD_qhv6Q](https://docs.google.com/viewer?a=v&q=cache:yrwZGrgaGqAJ:www.gilaresources.info/pdfs/Final.Groundwater.Restoration.Plan.Chino.Cobre.Tyrone_1.4.2012.pdf+Final+Groundwater+Restoration+Plan+(RP)+for+the+Chino,+Cobre,+and+Tyrone&hl=en&gl=us&pid=bl&srcid=ADGEEShpKhimNN4QU-a73LAoPCmeX-otLamww2pJjs2g-CZ-oBPowRlAIUmztysC6SfFOPy9WUk-iG0ci5RpLsp7IM-2intN5FgTnIMoDP_ZfS5QUcVYd5DX93nkzJx8YrxfZp_PLUn-&sig=AHIEtbR4yk3r76JTJj-11ktVP4cD_qhv6Q).

Sulfate, Sulfuric acid, Thallium, Toluene and Zinc. The ONRT assumed that these groundwater injuries would continue for at least 100 years given that "the sources of sulfate and metals at the Sites still remain and are still leaching contaminants to groundwater and it is highly unlikely that concentrations of these constituents will decrease markedly over time." Freeport -McMoRan settled these groundwater damages for \$13M.

The Tyrone discharge permit for closure, DP-1341, Stage 2 Abatement Plan Proposal also documents the areas where perched and regional groundwater at the Tyrone Mine exceeds WQCC standards. Alternative Abatement Standards for local FMI mines are expected for the various areas where standards will likely never be met.

I was honored to be asked to serve on the Copper Rule Advisory Committee to develop water quality regulations for copper mining for our State. As a member of the Advisory Committee I not only participated in Advisory Committee meetings but participate in all but one of the Technical Group meetings as well, 18 of the 19 meetings in all. These meetings were dominated by Freeport-McMoRan (FMI), their employees, attorneys, secretaries, and, many of their consultants. Still I was optimistic that we were working collaboratively and developing regulations that were based on industry best management practices and yet had flexibility, and were reasonable yet protective. It seemed by late July that we had reached agreement on a draft rule that all parties could accept with just some minor details left to work out.

Despite the NMED guidelines given to the Committee at the beginning of the process (see Attachment 1), which state that "NMED intends to maintain the CRAC and associated Technical Group until copper mining discharge regulations are adopted....," at our August 2nd 2012 combined Advisory and Technical meeting Mr. Jim Davis of NMED abruptly thanked us for our service and dismissed the Committees well before the release of NMED's petition now pending before you.

NMED's consultant, Bill Olson, led the Advisory Committee meetings and formulated successive draft regulations based on input from the Committee and NMED technical staff. On August 17, 2012, Mr. Olson produced the last Committee draft, which is attached to my testimony as Attachment 2. Although

GRIP had some issues with the draft, we were satisfied that overall it would be protective of groundwater, yet not unreasonably burden the copper mining industry.

In response to Mr. Olson's request, GRIP, FMI and others provided written comments on the August 17th draft. FMI's comments are attached to my testimony as Attachment 3. As shown by comparing Attachment 2 with NMED's proposed copper rule, much of NMED's proposed rule came directly from FMI after the Advisory Committee was terminated. Many (but not all) of FMI's contributions to NMED's proposed rule are also highlighted on Attachment 1 to Mr. Kuipers' testimony.

The areas of greatest concern regarding the post-CRAC changes that NMED made, mostly at FMI's request, are the following:

1. The elimination of the requirement for a variance for existing and new waste rock stockpiles, tailings stockpiles, and other facilities that have contaminated or will contaminate groundwater above standards.
2. The elimination of requirements that would prevent pollution above groundwater standards inside the so-called "open pit surface drainage area."
3. The elimination of mandatory liner requirements for waste rock piles and tailing impoundments.
4. The addition of "points of compliance," which are referred to as "designated monitoring wells" in the rule.

We do not know for sure who at NMED made these post-CRAC changes, which were suggested by and which clearly benefit FMI. Although we have asked repeatedly, NMED will not confirm whether NMED's general counsel, Ryan Flynn, or someone else made these changes. Attachment 4 (letter to Secretary Martin). We do know that the changes contradict NMED technical staff's representations at the Advisory Committee meetings. The removal of the variance requirements is contrary to NMED and FMI's agreement in the original Tyrone Settlement Agreement. And the "point of compliance" model is inconsistent with NMED's long-held position and this Commission's decision in the Tyrone Appeal. I

understand that both the Tyrone Settlement and the WQCC decision in the Tyrone Appeal are already in record in this proceeding.

GRIP and other members of the Committees were shocked, bitterly disappointed, and felt betrayed to see that the final draft of NMED's regulations had been so radically altered from previous drafts, i.e., the August 17, 2012 draft (Attachment 2) and reflected almost the entirety of FMI's comments made after the August 17th draft and the dismissal of the Advisory Committee.

It is no secret that despite FMI's oft-stated commitment to sustainability and community, their bottom line is profit, and, what best serves profit in terms of regulation. BUT the WQCC's responsibility is to prevent and abate water pollution in the state and create standards that "at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act." NMSA 1978, § 74-6-4(D) (2009). The citizens of New Mexico are depending on you, this Committee, to do so.

Given the uncertainty of climate and the scarcity of precious water resources now already plaguing this state, we simply cannot afford to countenance the misuse and abuse of this most precious of our natural resources. Those who made the regulations in the first place understood this fundamental and inescapable fact, and the importance of protecting our vital water resources is more evident now than ever. We cannot maintain or attract or sustain industry or workers and the communities that support both without clean water.

The very integrity of this Commission itself, as well as the Environment Department, depends on upholding the Water Quality Act. These regulations should not be written at the request of and for one corporation. You must consider the possibility of new mines and different aquifers. They must be written for the protection of the future health and safety of all New Mexicans.

Thank you.



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**Copper Regulation Advisory Committee
to
New Mexico Environment Department
Ground Water Quality Bureau**

I. Background of the Copper Regulation Advisory Committee

The Water Quality Act at NMSA 1978, Section 74-6-4.K (2009) directs the Water Quality Control Commission to adopt regulations for the copper industry and requires that the New Mexico Environment Department ("NMED") "establish an advisory committee composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders to advise the constituent agency [NMED] on appropriate regulations to be proposed for adoption by the commission."

The authority to create advisory committees is derived from the Executive Reorganization Act (Sections 9-1-1 through 9-1-13 NMSA 1978) and the Department of Environment Act (Sections 9-7A-1 through 9-7A-15 NMSA 1978):

- Section 9-1-9 NMSA 1978:
 - "Advisory committees may be created. Advisory shall mean furnishing advice, gathering information, making recommendations and performing such other activities as may be instructed or delegated and as may be necessary to fulfill advisory functions or to comply with federal or private funding requirements, and shall not extend to administering a program or function or setting policy unless specified by law."
 - "The governor or a department secretary, with approval of the governor, may create advisory committees."
 - "The creating authority shall prescribe the composition and functions of each advisory committee created; appoint its members, who shall serve at the pleasure of the creating authority; and specify a date when the existence of each advisory committee ends."
- Section 9-7A-10 NMSA 1978:
 - "Advisory committees may be created. Advisory means furnishing advice, gathering information, making recommendations and performing such other activities as may be instructed or delegated and as may be necessary to fulfill advisory functions or to comply with federal or private

funding requirements and does not extend to administering a program or function or setting policy unless specified by law. Advisory committees shall be appointed in accordance with the provisions of the Executive Reorganization Act.”

II. Purpose of the Copper Regulation Advisory Committee

According to the Water Quality Act at NMSA 1978, Section 74-6-4.K (2009), the purpose of the Copper Regulation Advisory Committee (“CRAC”) is “to advise (emphasis added) the constituent agency [NMED] on appropriate regulations to be proposed for adoption by the commission.” Consistent with state statutes, it is not the role or responsibility of the CRAC to set agency policy, or in this case to draft the proposed regulations that the NMED must submit to the Water Quality Control Commission. Rather, the CRAC should discuss and debate regulatory concepts and water quality protection and monitoring measures for the copper mining industry. The debate among the diverse perspectives of the members on the CRAC will inform NMED’s proposal and drafting of copper mining discharge regulations.

III. Composition of the Copper Regulation Advisory Committee

NMED has developed a CRAC that is composed of principal copper mining stakeholder interests related to water quality protection:

- Mine owners/operators (2 representatives):
 - Freeport McMoRan
 - New Mexico Copper Corporation
- New Mexico Energy, Minerals and Natural Resources Department – Mining and Minerals Division (1 representative)
- Environmental groups (2 representatives): Public stakeholders with interests in environmental and public health protection
 - Gila Resources Information Project (GRIP)
 - Amigos Bravos
- New Mexico Institute of Mining and Technology (1 representative)

IV. Advisory Committee Technical Group

A Technical Group, which shall serve as a subgroup to the Advisory Committee, will be established by NMED that is composed of a broad and diverse range of stakeholder interests and technical expertise. The purpose of the Technical Group will be to vet the technical issues and regulatory concepts of the draft Copper Regulations prior to presentation to and discussion by the Advisory Committee. NMED will solicit input from the Technical Group for use in preparing regulation drafts. The Technical Group

will provide NMED with information and documentation relevant to the development of copper mining discharge regulations. Membership of the Technical Group will include:

- Technical Specialists: Consultants or others selected by NMED, industry and environmental groups with technical skills relevant to water quality protection during operation and closure of copper mines, including prevention and control of acid rock drainage.
- State/Federal Agencies: Agency stakeholders having involvement with environmental regulation of copper mines including MMD, the Bureau of Land Management, and the Forest Service.
- Academics: Academics affiliated with universities having expertise relevant to water quality protection at copper mines.
- Mine owner/operators
- Environmental group representatives

V. Scope of the Copper Regulation Advisory Committee Activities

NMED requests that the CRAC perform the following activities:

- Provide well-reasoned advice and recommendations to NMED on the scope and content of proposed regulations for protection of water quality at copper mining and processing facilities.
- Utilize proposals and concepts developed by the Technical Group as discussion points towards NMED's development of the copper mining discharge regulations.
- Solicit recommendations and advice from other stakeholders and convey this information to NMED.

VI. Objectives of the Copper Regulation Advisory Committee and Technical Group Activities

NMED expects that the establishment of the CRAC and associated Technical Group will achieve the following objectives:

- A multitude of perspectives and recommendations relevant to copper mining discharge regulations will be provided to, and thoroughly evaluated by, NMED.
- Proposed regulations will be developed that incorporate or consider recommendations and advice representing a broad range of stakeholder perspectives.
- Proposed regulations will be developed through a process that invites critical evaluation and input by stakeholders of proposed regulatory requirements.
- A greater understanding of the diversity of perspectives regarding the appropriate scope and content of copper mining discharge regulations will be achieved by NMED staff.

VII. Meeting logistics and rules of conduct

NMED will host six CRAC meetings to discuss and debate regulatory concepts and drafts of the proposed Copper Regulations. NMED shall additionally host six Technical Group meetings which will be held on a day consecutive to the CRAC meetings. These meetings will be held in Albuquerque at the NMED District 1 office, or, if warranted, an alternative location determined by NMED, and will run from 9 AM to 4 PM. If deemed necessary by NMED, additional meetings of the CRAC will be scheduled.

In accordance with state statutes, advisory committee members may receive compensation for travel and per diem expenses associated with meeting attendance within budgeted amounts and in accordance with the provisions of the Per Diem and Mileage Act.

The CRAC and Technical Group meetings will be chaired by NMED. A trained meeting facilitator may be provided by NMED to conduct the CRAC or the Technical Group meetings. As the CRAC is not a policy-making body, the CRAC shall not elect individuals to leadership positions, make motions, or vote on motions. Rather, all members of the CRAC are encouraged to express their individual perspectives, provide advice, and make recommendations to NMED on the scope and content of copper discharge regulations. Consensus of CRAC members is not required or expected. Perspectives, advice, and recommendations may be conveyed to NMED in multiple ways, including verbal input provided at CRAC meetings and written input provided through e-mail submittals or postal mail. Discussion and debate of contrasting perspectives is encouraged, however such discussion and debate must be conducted in a respectful manner and individuals should provide information and evidence to support their positions.

Members of the public who are not CRAC members may attend the advisory committee and Technical Group meetings; such individuals may observe the proceedings but may not actively participate in the meetings between NMED personnel and CRAC or Technical Group members.

VIII. Term of existence

NMED intends to maintain the CRAC and the associated Technical Group until copper mining discharge regulations are adopted by the Water Quality Control Commission, which is anticipated to occur in December 2012. The Secretary may extend the term of the CRAC.