

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF COPPER FLAT MINE,
DISCHARGE PERMIT DP-1840

No. GWB 18-06(P)

**NEW MEXICO COPPER CORPORATION'S RESPONSE BRIEF
IN OPPOSITION TO ELEPHANT BUTTE IRRIGATION
DISTRICT'S MOTION FOR RECONSIDERATION OF
MERITS HEARING SETTING AND RELATED DEADLINES**

INTRODUCTION

New Mexico Copper Corporation ("NMCC"), in accordance with 20.1.4.200.D(4) NMAC, submits this response to Elephant Butte Irrigation District's ("EBID") Motion for Reconsideration of Merits Hearing Setting and Related Deadlines ("Motion for Reconsideration"). As the title of EBID's motion suggests, the Hearing Officer has already considered and decided the issues raised in EBID's Motion for Reconsideration, by scheduling the hearing a full month after the week of August 20 timeframe initially proposed by the New Mexico Environment Department ("NMED"). Nothing now offered by EBID provides a compelling basis for reconsidering the Hearing Officer's decision, much less further delaying these proceedings.

Moreover, as detailed herein, EBID's claim of good cause does not withstand scrutiny, and EBID's arguments completely ignore that: (1) after EBID previously sought and was granted extension of the comment period on DP-1840, it amplified its already substantial opportunity to come up to speed on the issues it may wish to present at hearing; (2) EBID has had extended notice both of its counsel's pregnancy and the likelihood of a late summer or fall hearing, and yet, to this day, it has failed to take prudent or reasonable steps to address counsel coverage for

this proceeding; (3) DP-1840 was issued in draft by NMED on February 2, 2018, and unconscionable hearing scheduling delays that have already occurred—partly as a result of apparently coordinated comment extensions sought by EBID and other parties opposing DP-1840—would only further be compounded if EBID’s Motion for Reconsideration were to be granted, thereby adding insult to injury for NMCC, a privately held company that evidence in the hearing will show has already expended over \$50 million in pursuit of the Copper Flat mining project; and (4) the post-hearing timeline procedures already make it challenging to expect that the currently constituted agency which issued the draft DP-1840 many months ago will have the opportunity to decide whether to issue the permit itself, and the likely circumstance of a change in administrations before a permit decision can be reached portends even further delays that would be prejudicial to NMCC as a result of granting EBID’s motion (and to NMED, which no doubt was a factor in NMED’s originally opposing EBID’s Motion for Reconsideration).

Under normal circumstances, NMCC and undersigned counsel might be amenable to a continuance as a courtesy.¹ Normal circumstances do not pertain here, however. As set forth fully herein, NMCC requests that EBID’s Motion for Reconsideration be denied on the basis that it fails to establish good cause for why the request to continue the hearing should be granted and because granting the request would be highly prejudicial to NMCC and would result in further undue delays already suffered by NMCC. Although this Hearing Officer certainly has the discretion to grant EBID’s motion, NMCC submits that it has the discretion as well to deny the

¹ The supposed “concern for the health and well-being of an expectant mother and her child” expressed by a party that unreasonably urged a November hearing date in the pre-hearing conference, rings hollow. *See* Memorandum of Turner Ranch Properties, L.P. and Hillsboro Pitchfork Ranch, LLC, at p. 4, filed—somewhat tellingly—on June 27, 2018, less than one day after EBID’s Motion for Reconsideration. The unsupported health concern thus expressed is particularly unpersuasive when the Hearing Officer considers that one of NMCC’s undersigned counsel is scheduled to deliver a child on August 10, 2018, and NMCC’s other undersigned counsel is scheduled to undergo surgery on August 1, 2018. If there truly was some health and well-being concern, EBID surely would have addressed it by timely making alternative arrangements for hearing coverage, but it notably failed to do so, as discussed herein.

motion under all the circumstances. NMCC respectfully submits that a denial would be a perfectly reasonable exercise of discretion here, and would be upheld if challenged on appeal.

ARGUMENT

I. Legal Standard

EBID's Motion for Reconsideration has failed to meet the legal standard for continuing a hearing, which is set forth in NMED's regulations governing prehearing procedures for public hearings involving permit issuance. Pursuant to these regulations, "a request to continue a hearing may be granted upon a motion by a party, for good cause shown, and after consideration of prejudice to other parties and undue delay to the proceeding." 20.1.4.200(C)(3) NMAC. As explained herein, EBID's Motion for Reconsideration fails to show good cause or any reasonable basis for why the hearing should be continued, and completely fails to consider the substantial prejudice to NMCC or the undue delay in the proceeding that will result if EBID's request is granted.

II. EBID's Failure to Meet the Legal Standard

EBID fails to meet its burden under all three aspects of the legal standard—good cause, prejudice to a party, and undue delay. Each aspect is analyzed briefly here, and discussed more fully in the remainder of this Response.

First, EBID has failed to demonstrate good cause for continuing the hearing. EBID has had ample notice and opportunity to prepare for the hearing. EBID's counsel was on notice and aware of the timeframe in which the hearing was likely to occur and was well aware of the possibility that it could conflict with her due date. The failure of counsel to plan for a known and planned absence is not good cause to continue a hearing.

Second, continuing the hearing would result in significant prejudice to NMCC. NMCC has already suffered prejudice from unconscionable delays in the permitting process, which would only be exacerbated by further delays in the permitting hearing. In the normal course, a hearing in this matter should have been set for April or May. It was not. Nor was it set for June or July. Instead, NMED ultimately proposed a hearing for late August, but counsel for EBID for the first time revealed her circumstances and persuaded the Hearing Officer to set the hearing for late September instead. In a best case scenario, a late September hearing extends the Secretarial decision to the very end of December as a result of post hearing timeline procedures under NMED's rules, assuming no other slippage. EBID's proposed continuance essentially guarantees that the Secretary at the time of decision will be different from the Secretary at the time draft DP-1840 was issued. This scenario, and the potential for even further delays that are possible as the newly constituted NMED comes gains its footing under a new administration, is something that NMCC carefully sought to avoid, due to the significant potential for prejudice.

Finally, in their attempt to downplay the amount of delay, EBID and Turner, et al., narrowly interpret the meaning of "undue delay," essentially arguing in a vacuum that just a couple of weeks delay is no big deal. However, NMCC submits that "undue delay" under the legal standard should not be viewed through such a conveniently narrow prism. The delay that would be caused by granting EBID's motion is undue precisely because it exacerbates an already prolonged period of unreasonable delay, which delay is partly attributable to extension requests of EBID and Turner, et al., and because the compounding of delays herein puts the proceeding at a prejudicial tipping point with a significant risk of even further delays before a permit decision is reached. For all of these compelling reasons, EBID's Motion for Rehearing should be denied.

III. Background

The administrative record (“AR”) in this matter reflects that after earlier drafts of the DP-1840 application, NMCC provided a revised application in August of 2017. AR 15855-17076. A draft DP-1840 was sent from NMED to NMCC on February 2, 2018, AR 17360-17407, after public notice was provided in newspapers on January 31, 2018, AR 17417-17420. Counsel for EBID requested a 60 day extension on the comment period on February 14, 2018, within days of similar requests by Turner, et al., Amigos Bravos, and Gila Resources Information Project. AR 17432-17444 and 17474-17476. The next day, counsel for EBID made an inspection of public records request to NMED. AR 17457-17459. On March 29, 2018, the NMED Groundwater Quality Bureau requested a hearing determination from the NMED Secretary for DP-1840. AR 17557-17558. On May 1, 2018, EBID requested an additional 60 day extension of the public comment period. AR 17611-17612. On May 3, 2018, EBID provided over 15 pages of single-spaced public comments on draft DP-1840. AR 18154-18169.

Thereafter, undersigned counsel began making bi-weekly, and in some cases weekly, calls to NMED’s counsel to urge that a public hearing be scheduled as soon as could be done consistent with the 30 day hearing notice requirements, first in early June, then in late June, then in early July, etc. Meanwhile, on June 7, 2018, NMCC provided notice of Hearing Officer assignment to preside over the discharge permit proceeding. AR 18661-18662.

Throughout the entire period of time from the late January 2018 public notice to date, including through EBID’s comment period extension requests made on February 14, 2018 and May 1, 2018, EBID’s counsel no doubt knew of her pregnancy and due date. Upon information and belief, she also knew by June 5 that NMED wished to schedule a hearing on the week of August 20, 2018. Yet EBID neither initiated a procurement process at that time nor initiated one

at any time since. Instead, she waited for the June 14, 2018 prehearing conference that was held to determine the schedule related to the public hearing for DP-1840, and used her pregnancy and due date to urge pushing back the hearing from the week of August 20 to later in the fall, although not as late as November as urged by counsel for Turner, et al. At the prehearing conference counsel for EBID indicated that her due date is August 19, 2018. The parties and the Hearing Officer discussed that revelation and, after fully taking it into account and hearing arguments from counsel, the Hearing Officer made scheduling decisions for this proceeding. As a result of that prehearing conference, the Hearing Officer entered a scheduling order on June 15, 2018. Pursuant to the scheduling order, hearing on the merits for draft DP-1840 is to begin September 24, 2018 and proceed through September 28, 2018 as necessary (in the event the hearing is not completed, it will continue beginning October 9, 2018 through October 12). *See* PTO at 2. Additionally, the scheduling order directs that prehearing filings for technical testimony are due by August 24, 2018 and motions related to the prehearing filings are due September 7, 2018, which will be discussed at a teleconference on September 14, 2018. *See* PTO at 3.

NMED' s regulations governing prehearing procedures for public hearings involving permit issuance clearly provide that hearings can be held thirty days after the hearing clerk issues a notice of hearing. 20.1.4.200.C(2)(b) NMAC. In this instance, all parties at the prehearing conference had one hundred and two (102) days advance notice of the hearing, well over the thirty (30) day regulatory notice requirement. Additionally, as EBID itself indicates, EBID was well aware of the existence of draft DP-1840 and began requesting documents associated with draft DP-1840 in mid-February, 2018, two hundred and twenty-two days (222) before the currently schedule hearing that EBID seeks to move through its Motion for Reconsideration.

Moreover, EBID provided over 15 single-spaced pages of public comments on DP-1840 on May 3, 2018, well over four months ahead of the currently scheduled hearing. Notwithstanding, EBID argues in its Motion for Reconsideration that there will be inadequate opportunity for its counsel to prepare witnesses, file a notice of intent and be ready to participate in the hearing it has known was inevitably coming in summer or early fall for literally months and months.

IV. EBID's Motion for Reconsideration Fails to Demonstrate Good Cause

EBID's Motion for Reconsideration fails to state a viable reason why the Hearing Officer should continue the September 24, 2018 hearing. As evidenced by the administrative record for this permit hearing, the issues that are to be discussed at the permit hearing have been percolating for years. The administrative record reveals that citizen groups and public entities, such as the Rio Grande Compact Commission in addition to EBID, have been actively preparing to address these issues over a long period of time and are in no way prejudiced by the September 24, 2018 hearing date, which is more than a month after the recently announced due date of EBID's counsel.

EBID had a minimum one hundred and two (102) day advanced notice of the hearing. This advanced notice provides parties ample opportunity to organize and prepare for the hearing that all parties have been actively preparing for even longer, as evidenced by EBID's two requested comment period extensions dating back to mid-February, and 15 pages of single-spaced public comments provided in early May. Every party to this hearing, including EBID, has been preparing their cases on the draft discharge permit for months. All parties have had equal notice and opportunity to prepare for this hearing, and it has been ample notice. EBID's request seeks a continuation of the hearing based on poor planning and a failure to properly prepare for a hearing that all parties could reasonably anticipate would take place in the summer

or fall of 2018. Furthermore, EBID has not demonstrated why the hearing extension it has requested would be useful to it in preparing for the hearing, which it has had years to prepare for and has prepared for during that time. Without such evidence, there has been no adequate showing of good cause. Accordingly, the Hearing Officer should deny EBID's request.

NMCC recognizes that EBID is a political subdivision of the State of New Mexico subject to the Procurement Code, which prescribes a specific process in which to acquire counsel. However, EBID's Motion to Reconsider fails to recognize that EBID had ample notice that a hearing on Draft DP-1840 could reasonably be scheduled for summer/early fall 2018 and should have had notice that its current counsel was pregnant and might not be able to represent them for some period of time following delivery. EBID, knowing of their environmental counsel's planned maternity absence, should have responsibly planned to obtain representation in her absence. EBID's counsel should have made EBID aware of the potential that a hearing on Draft DP-1840 could be scheduled in her absence and should have presented them with the information in a timely manner, such that they would have the opportunity to procure co-counsel or new counsel if EBID determined it to be necessary.

The prescribed timeline for permit hearings is stated directly in 20.1.4 NMAC. EBID's counsel was aware of the public notices that NMED was issuing throughout the spring and, again, at least as early as two hundred and twenty-two (222) days before the hearing could reasonably anticipate a hearing would be scheduled during her planned absence. EBID's only basis for seeking a continuance in the hearing date is an absence she was aware of and her clients should have prepared for. Failure to properly prepare for a planned and foreseeable absence is not a sufficient basis to continue the hearing.

V. EBID's Request Would Significantly Prejudice NMCC

EBID's Motion to Reconsider does not acknowledge or address the substantial prejudice to NMCC that will result from the continuation of a hearing. NMCC has already suffered administrative delays in the issuance of Draft DP-1840. The permit application process for Draft DP-1840 has been a lengthy one. Given the more recent permit history, including issuance of the draft permit on February 2, 2018, NMCC reasonably anticipated that it would easily have a hearing in May, June or July 2018. NMCC has already suffered moving NMED's preferred date of the week of August 20 back more than a month to September 24, 2018, leaving barely enough time to get through the permitting process to a permit decision by the end of 2018. There is insufficient reason to further delay this hearing and thereby impose compounded prejudice on NMCC in the form of uncertainties and inevitable delays from the change of administrations that the post-hearing schedule is already up against based on the currently scheduled hearing.

VI. Granting EBID's Motion Would Unduly Delay the Hearing for Draft DP-1840

During the prehearing conference on June 14, 2018, undersigned counsel bemoaned attempts of other counsel to seek "delay for delay's sake," in particular the notions offered that the hearing in this matter should be pushed all the way back to November. After receiving the Hearing Officer's fully considered decision, EBID's Motion for Reconsideration and the supporting brief filed by counsel for Turner, et al. less than a day later no longer advances a November hearing date, and the two week continuation requested may seem modest, but it nonetheless would delay this proceeding for delay's sake, and the delay would be undue and unjustified given the prejudicial consequences for NMCC (and, for that matter, for NMED, despite its politic withdrawal of its initial opposition to NMED's motion). Whether that prejudicial consequence was intended or not, or was something coordinated among NMCC's

opposition or not, EBID's Motion for Reconsideration seeks undue delay that compounds time delay EBID already previously sought through its comment period extension requests, and EBID has simply failed to establish the extension now requested would measurably improve EBID's readiness to participate in a hearing for which it literally has had months already to effectively plan and prepare, not to mention the additional month or more between the time of this filing and counsel's only recently revealed due date.

CONCLUSION

EBID's effort to continue the hearing is not supported by reasonable arguments demonstrating good cause to revise the scheduling order. Expressly absent from EBID's motion is any consideration of the significant prejudice NMCC would sustain with further undue delay of the hearing. NMCC respectfully requests that the Hearing Officer deny EBID's Motion for Reconsideration, proceed to a hearing on the week of September 24, and otherwise hold the parties to the proceeding dates previously ordered.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2018, a copy of the foregoing was hand delivered to the following:

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