

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



IN THE MATTER OF:)
)
PROPOSED AMENDMENT TO)
PART 20.6.2 NMAC – COPPER RULE)
_____)

No. WQCC 12-01(R)

**JOINT RESPONSE TO FREEPORT-MCMORAN'S
OBJECTIONS TO PROCEDURAL ORDER**

The Gila Resources Information Project and Turner Ranch Properties, Inc., and Amigos Bravos, referred to collectively as “Citizens,” respectfully files this Response to Freeport-McMoRan’s Objection to Procedural Order and Request for Clarification (“FMI’s Objection”). FMI’s Objection is detrimental to this rulemaking proceeding because it characterizes bias where there is none on the part of the Hearing Officer. Additionally, FMI’s Objection is the opposite of what it argued in its November 9, 2012 Written Response to Petition for Rulemaking, in which FMI proposed “a process and timeframe for the filing of motions and responses.” FMI’s Written Response to Petition for Rulemaking filed November 9, 2012, pages 1-2.

In its Objection, Freeport-McMoRan Tyrone, Inc., Freeport-McMoRan Chino Mines Company and Freeport-McMoRan Cobre Mining Company (“FMI”) calls Section 102.A of the Procedural Order “irregular, vague, prejudicial, and inconsistent with the discussions at the Pre-Hearing Conference.” FMI’s Objection, p.1. FMI’s Objection then improperly accuses the Hearing Officer of prejudging substantive issues in this case because she gave the parties a deadline to file any dispositive motions “associated with moving to a ‘point of compliance’ regulatory scheme.” FMI’s Objection, p.2.

The Citizens circulated a dispositive draft Response to the Copper Rule Petition to the parties at the Water Quality Control Commission's ("Commission") November 13, 2012 meeting, which raised the point of compliance specifically as an issue of law. At their November meeting, the Commission discussed whether and when to hear the Citizens' draft Response. For the Hearing Officer to identify the point of compliance issue in this rulemaking does not open the door for criticism for pre-judgment. She is merely following the directive of the Commission and identifying the issues.

Section 102.A of the Procedural Order is clear that any dispositive issue a party has regarding the Commission's legal authority to adopt the New Mexico Environment Department's ("NMED") draft Copper Rule must be filed by December 14, 2012. Understandably, the Hearing Officer wants dispositive motions to be filed in advance of the hearing. As the Hearing Officer stated in her December 12, 2012 email to the parties, "the sooner that parties are compelled to set out their arguments and evidence, the sooner we are collectively able to identify the real issues for the Commission's consideration, and the better able the Commission is to parse the evidence."

FMI's Objection suggests that the Citizens' attorney recommended dispositive motion briefing and the Hearing Officer simply went along with it. This characterization is flawed. FMI itself suggested that the Hearing Officer set up "a process and timeframe for the filing of motions and responses, and to consider motions and responses in the first instance, and then to make a recommendation to the Commission for action on any motions." FMI's Written Response to Petition for Rulemaking, November 9, 2012, pages 1-2.

It is a common practice for this Hearing Officer to set a deadline for motions, especially when she knows that such motions will be filed. It is also common for a district court judge to

set a deadline for dispositive motions. *See* Rule 01-056 NMRA. It was discussed at the November 13, 2012 meeting that the Commission hear the Citizens' dispositive motion at their January meeting or a special meeting in February. For the Hearing Officer to put deadlines in her Procedural Order for dispositive motions is consistent with the authority given to her by the Commission.

FMI asks that the Procedural Order be revised and/or clarified to allow the parties a reasonable and fair opportunity to participate in the rulemaking. FMI's Objection, p.3. FMI will have ample opportunity to fully participate in the rulemaking. FMI has not specified how it cannot reasonably participate because of the Procedural Order.

FMI objects to the Procedural Order's invitation to brief "the basis or scope of the Commission's legal authority to adopt the Petition." FMI's Objection, p.4. Challenge of the authority to adopt a rule is part of a fair rulemaking process. FMI suggests that the Commission must first hold the hearing before considering whether it has the authority to act on the petition. FMI's Objection, p.4. FMI's supposition does not acknowledge that the Commission has statutory authority to reject a petition outright. Contrary to that supposition, the Water Quality Act ("Act") states "[t]he commission shall determine whether to hold a hearing within ninety days of submission of the petition. The denial of such a petition shall not be subject to judicial review." NMSA 1978, §74-6-6.B. The Act envisions precisely what is scheduled in the Procedural Order. Additionally, it is not necessary for the Commission to hold the hearing to determine whether it has authority to adopt the proposed regulations. The draft regulations are all the necessary facts to which the law applies. The regulation speaks for itself and does not need argument by counsel to interpret its meaning.

FMI blames the Hearing Officer for forming a “colorable question” on the point of compliance issue by inviting briefing. FMI’s Objection, p.4. As previously pointed out, “point of compliance” phraseology was discussed at the Commission’s November 13, 2012 meeting by counsel to the Citizens and in the Citizens’ draft Response. For the Hearing Officer to address an issue that was raised by one of the parties is necessary for an orderly rulemaking proceeding. Contrary to FMI’s contention that the point of compliance language “will only inject confusion to the process,” point of compliance is an identifiable legal issue. FMI’s Objection, p.5. FMI can call point of compliance by another name, but it is still a request to allow pollution at copper mines, except at specific points where compliance will be required.

FMI scolds the Hearing Officer that “dispositive motions are premature, not ripe, and cannot be sustained,” because “questions of fact or law are “better made in post-hearing closing arguments.” FMI’s Objection, p.5. However, the Hearing Officer has invited only legal motions on which no factual determination is necessary. The draft regulations are the only facts needed. Again, FMI fails to recognize that the Commission has the statutory authority to deny a petition that is contrary to law. NMSA 1978, §74-6-6.B.

FMI suggests that Commission Guidelines do not provide for motion practice. FMI’s Objection, p.6. In fact, motion practice is clearly contemplated by the Guidelines. See, e.g. the definition of “transcript of proceeding,” which “means the verbatim record ... including the record of any motion hearings or prehearing conferences.” WQCC Guidelines §103.P. The Guidelines obviously are just that, guidelines. They are sparse and incomplete, and it is the Hearing Officer’s duty and the purpose of the Procedural Order to fill in the necessary details as required and contemplated in the Guidelines. Further, FMI specifically requested such a motion

practice in this proceeding in its Written Response to Petition for Rulemaking, filed November 9, 2012.

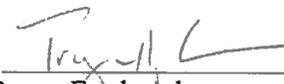
Finally, FMI states that the Commission has not decided that dispositive motions are appropriate in the Procedural Order. FMI's Objection, p.6. However, this very issue was discussed at the Commission's November 13, 2012 meeting and the Citizens clearly stated their intent to file such a motion. Such motions can be made and the Hearing Officer has put it into an orderly process.

CONCLUSION

The Hearing Officer's Procedural Order is clear on its face. It does what the Commission empowered the Hearing Officer to do. The Commission may dismiss any petition without a hearing, regardless of whether NMED or another person submits it. NMSA 1978, §74-6-6(B). Because NMED's proposed Copper Rule would license mining companies to pollute groundwater, it is appropriate for the Commission to decide dispositive motions as soon as possible in the rulemaking process. This is outlined in the Procedural Order. FMI's Objection should be disregarded as an attempt to impede the rulemaking process.

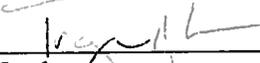
Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2013 I sent the attached Joint Response to Freeport
McMoran's Objections to the Procedural Order by first-class mail or hand delivery to the
following:

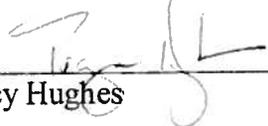
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