

COPY



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

**IN THE MATTER OF PROPOSED AMENDMENTS
TO 20.6.2 NMAC, THE COPPER RULES**

WQCC 12-01(R)

**New Mexico Environment Department,
Petitioner.**

**FREEPORT-MCMORAN'S OBJECTIONS TO PROCEDURAL ORDER
AND REQUESTS FOR CLARIFICATION**

Freeport-McMoRan Tyrone Inc., Freeport-McMoRan Chino Mines Company and Freeport-McMoRan Cobre Mining Company (collectively hereinafter, "Freeport-McMoRan") object to Section 102.A of the Procedural Order issued by the Hearing Officer in this matter and request timely clarifications regarding (1) the scope of briefing and pre-hearing motion practice, and (2) that any person or party's decision not to file briefs or motions by December 14, 2012 are not intended by the Hearing Officer or the Commission to preclude a party or other participant's subsequent briefing, introduction of testimony and argument by counsel on the matters described therein.

Freeport-McMoRan objects to description of the topics identified for briefing due to the expansive language in Section 102.A of the Procedural Order, which is irregular, vague, prejudicial, and inconsistent with the discussions at the Pre-Hearing Conference before the Hearing Officer. Furthermore, Section 102.A of the Procedural Order inappropriately adopts and appears to embrace one side's characterization of the proposed rulemaking initiated by the New Mexico Environment Department ("Department") in its Petition to Adopt Proposed Copper Mine Rules, filed October 30 2012. (The proposed rules are hereafter referred to as the "Proposed Copper Mine Rules," the Department's Petition to Adopt is hereafter the "Petition.")

In the Procedural Order, the Petition and Proposed Copper Mine Rules are described as “...moving to a point of compliance regulatory scheme for groundwater discharge permits.” In so characterizing, the Hearing Officer becomes open to criticism for pre-judgment of potentially material substantive matters that, at the conclusion of the rulemaking proceeding, are within the exclusive province of the Commission.

Finally, the objections and clarifications to the Procedural Order, set forth herein, if accepted by the Hearing Officer and incorporated in a revised procedural order, will avoid any confusion or misunderstanding regarding the waiver issue. Particularly, given the current language of the Procedural Order, it is foreseeable that a party might contend that the decision of another party to not submit a brief or motion, or raise an issue within the timeframe specified in the Procedural Order, waives the right to present its views on the matters set forth in Section 102.A. The decision to file a dispositive motion or to brief any issues by the December 14 deadline should be purely voluntary, and a decision not to do so should not be considered a waiver to address any issue at other appropriate junctures during the rulemaking proceeding, including through direct or rebuttal witness testimony, in cross-examination of others’ witnesses, by proposing alternative language to the Proposed Copper Mine Rule in oral and written submissions, and/or in closing argument at or prior to the close of the hearing record.

I. BACKGROUND

Freeport-McMoRan understands that Section 102.A of the Procedural Order arose out of: (1) the Response to Petition for Rulemaking submitted by Gila Resources Information Project, Amigos Bravos, and Turner Ranches (collectively hereinafter, “GAT”), which was served on the parties but not, apparently, filed with the Water Quality Control Commission (hereinafter, “Commission”); and (2) statements made by counsel for GAT at the Commission meeting held

on November 13, 2012, that indicated GAT intended to convert its Response to Petition for Rulemaking into a motion of some sort because he claimed that the Petition should be rejected as a matter of law. Counsel for GAT confirmed his intention to file an unspecified motion during the Pre-Hearing Conference held on November 20, 2012 (“Pre-Hearing Conference”). Counsel for Freeport-McMoRan understood the argument to allow dispositive motions to be founded on a concept of efficiency—that a ruling on a dispositive motion might obviate the need for preparation of testimony regarding some part of the Petition.

At both the November 13 Commission meeting (Commission Meeting”) and the Pre-Hearing Conference, counsel for Freeport-McMoRan stated several concerns with filing and addressing dispositive motions at this stage in the rulemaking. As reflected by the Procedural Order, the Hearing Officer decided to proceed with dispositive motion briefing as suggested by counsel for GAT over the objections of Freeport-McMoRan. In addition, the Hearing Officer inappropriately invited briefing of specifically enumerated issues beyond the scope discussed at the Pre-Hearing Conference, and characterized those issues in a manner prejudicial to Freeport-McMoRan.

II. ANALYSIS

The Procedural Order should be appropriately revised and/or clarified for the reasons set forth herein thereby allowing the parties a reasonable and fair opportunity to participate in this rulemaking.

A. The invitation to brief as set forth in Section 102.A. is inappropriate and prejudicial.

Section 102.A of the Procedural Order invites a much broader “briefing” of issues than the “dispositive motions” discussed during the Commission Meeting and the Pre-Hearing

Conference. Freeport-McMoRan objects to this broad briefing of issues, which should properly be conducted as part of the post hearing submissions referenced in Section 405 of the Procedural Order.

Section 102.A of the Procedural Order expands the topic of briefing to “the basis or scope of the Commission’s legal authority to adopt the Petition.” As a preliminary matter, this language is confusing because the Commission does not “adopt” the Petition at any point in the rulemaking proceeding. The Commission’s role is to set a hearing on the Petition and hear the evidence in support of and in opposition to the proposed rule, including any proposed changes to the rule language advocated by the parties. Then, on the basis of the evidence presented, the Commission may adopt a rule. The Commission can change the text of the proposed rule, based on the evidence presented during the hearing, so the Commission is not bound to “adopt” the Petition. Accordingly, Freeport-McMoRan maintains that this reference to briefing should be deleted from the Procedural Order.

Moreover, Section 102.A of the Procedural Order further invites briefs “intended to assist the Commission in understanding the legal framework associated with moving to a ‘point of compliance’ regulatory scheme for ground water discharge permits.” The inclusion of this text in the Procedural Order suggests pre-judgment by the Hearing Officer. The Hearing Officer would not be specifically asking for briefing of the issue if the Hearing Officer had not already formed an opinion that the “point of compliance” issue is at least a colorable question. By stating that “point of compliance” is worthy of pre-hearing consideration by the WQCC, the Hearing Officer implicitly finds that, in the Hearing Officer’s judgment, the Proposed Copper Mine Rule is a “point of compliance” rule and that, as such, it implicates a facially significant legal issue under the Water Quality Act. Otherwise, there would be no reason to invite briefing of the issue before

the hearing. How the Hearing Officer arrived at this determination is a separate question. At a minimum it is clear that the determination: (1) is not based on an examination or analysis of the Proposed Copper Mine Rule, and (2) is not based on a factual record made in a rulemaking proceeding.

The confusion is exacerbated by the fact that the term “point of compliance” is not found in the Water Quality Act or in any regulation adopted pursuant to the WQA in the last 35 years. Likewise, the phrase is not found anywhere in the 40 plus pages of the Proposed Copper Mine Rule. Nor has the Department submitted testimony describing the legal and technical basis for and intent of the proposed rule. Finally, briefing on this issue at this time invites the lawyers for the parties to factually characterize the Proposed Copper Mine Rules before any testimony is taken. Simply put, there are a host of issues associated with characterizing the Proposed Copper Mine Rule as a ‘point of compliance’ rule in the procedural Order of the Commission’s Hearing Officer. Moreover, the briefing of issues at this stage of the proceeding, independent of any dispositive motion, will not make this proceeding more efficient, but will only inject confusion to the process. Freeport-McMoRan maintains that this provision of the Procedural Order needs to be removed.

B. Dispositive motions at this point in time are inappropriate, and if allowed, the Procedural Order should be clarified to address potential waiver matters.

Freeport-McMoRan continues to maintain that without consideration of testimony regarding various sections of the proposed rule, and without consideration of all of the statutory factors that the Commission must consider in adopting a rule, dispositive motions are premature, not ripe, and cannot be sustained. Briefing on any allegedly dispositive question of fact or law is better made in post-hearing closing arguments. Freeport-McMoRan is concerned that dispositive

motion practice will “put the cart before the horse” and thereby interrupt and confuse the fact-finding process that is a necessary predicate to a rulemaking.

There is no mention of motion practice in the Commission’s Guidelines for Rulemaking Hearings. The discussion at the Commission Meeting and the Pre-Hearing Conference suggested that the nature of the motion that Mr. Frederick proposes to file is a dispositive motion to be ruled on as a matter of law, in the manner of civil motions for dismissal or summary judgment under the rules of civil procedure. Consistent with the nature of such motions, a dispositive motion made and considered prior to the taking of testimony on the proposed rule presumably would have to consider the proposed rule language on its face. Such a motion should be defeated if any factual issues are raised that would have to be considered to address the legal issues. At a minimum, if the motion addresses factual issues, those issues must be viewed in the light most favorable to the Department. In the instance of a proposed rule, ambiguities in the rule language likely would have to be addressed through testimony. The Procedural Order itself sheds no light on the meaning of “dispositive motions” or how they should be made or considered.

Accordingly, Freeport-McMoRan re-asserts its previous objections to this portion of the Procedural Order and requests clarification. The Procedural Order should be clarified to indicate that the Commission has not decided that “dispositive motions” are appropriate, but to the extent parties wish to file such “dispositive motions,” they should be filed by the dates set forth in the Procedural Order. In other words, it should not be presumed that dispositive motions are appropriate at this point in time in the rulemaking process, and to the extent a party wishes to file such a motion, they need to establish why the Hearing Officer should not recommend that the

Commission deny the motion outright or defer action on the motion until after the evidentiary hearing phase of the rulemaking proceeding concludes.

Freeport-McMoRan reserves the right to raise this issue and further expand on it later in the rulemaking proceeding. Moreover, Freeport-McMoRan reserves the right to raise any appropriate motions after the hearing, including any such motion that is dispositive in nature. Nevertheless, the important clarification for this objection is that the Procedural Order needs to reflect that it has not been decided that dispositive motions are appropriate at this juncture, and the resolution of this question should be left to the Commission.

Finally, the Hearing Officer needs to clarify waiver issues if the Commission allows dispositive motions, or more expansive briefing, to be considered. Section 102.A of the Procedural Order says that motions or briefs under this section “may be filed,” but then provides a deadline which raises the question of whether failure to file a brief by the deadline waives any rights to raise or brief such issues later in the rulemaking proceeding. Freeport-McMoRan, therefore, respectfully requests that the Hearing Officer clarify that briefing of the issues identified in Section 102.A by a party or any other person is purely voluntary, and current parties and any other persons who choose to participate in the rulemaking proceeding retain and reserve all rights to file motions or briefs and address arguments on any issues, including those raised by the Hearing Officer in the Procedural Order, later in the rulemaking proceedings.

III. CONCLUSION

For the reasons set forth above, Section 102.A of the Procedural Order should be amended to address Freeport-McMoRan’s objections and requested clarifications set forth herein. At the very least, Section 102.A of the Procedural Order raises serious issues for the parties and other persons to consider regarding whether there may be any waiver of rights if they

choose not to file briefs by December 14, deciding instead to brief the issues identified in Section 102.A, later in the rulemaking proceeding. Freeport-McMoRan respectfully requests that Section 102.A of the Procedural Order be modified, amended and clarified to address the concerns set forth in these Objections to Procedural Order.

Respectfully Submitted,

GALLAGHER & KENNEDY, P.A.



Dalva L. Moellenberg
Anthony (T.J.) J. Trujillo
1233 Paseo de Peralta
Santa Fe, NM 87501
Phone: (505) 982-9523
Fax: (505) 983-8160
DLM@gknet.com
AJT@gknet.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing pleading was mailed to the following parties this December 4, 2012:

Misty Braswell
Andrew Knight
Assistant General Counsel
New Mexico Environment Department
PO Box 5469
Santa Fe, NM 87502-5469

Tannis L. Fox
Assistant Attorney General
Water, Environmental and Utilities Division
Office of the New Mexico Attorney General
PO Box 1508
Santa Fe, NM 87504

Bruce Frederick
Jonathan Block
Staff Attorneys
New Mexico Environmental Law Center
1405 Luisa Street, #5
Santa Fe, NM 87505-4074

Tracy Hughes
1836 Cerros Colorados
Santa Fe, NM 87501



Dalva L. Moellenberg