

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

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

New Mexico Environment Department,
Petitioner,

WQCC 12-01 (R)



**FREEPORT REPLY TO ATTORNEY GENERAL'S
RESPONSE TO FREEPORT MOTION TO
WITHDRAW AND FILE SUBSTITUTE TESTIMONY**

The Attorney General of New Mexico (“Attorney General” or “AG”) would have the Hearing Officer deny the Freeport McMoRan (“Freeport” or “Movant”) Motion to withdraw John Brack’s 31 page initial testimony (“Original Brack Testimony”) and file 22 pages of condensed, substitute testimony in its place (“Substitute Brack Testimony”). The AG’s grounds are that: (1) the Substitute Brack Testimony is late, (2) the Substitute Testimony although shorter than the Original Brack Testimony, must nonetheless be “reviewed” a second time in anticipation of cross examination, (3) the Substitute Testimony includes eight exhibits, and (4) the AG is prejudiced because he cannot “now file rebuttal testimony to the newly filed direct testimony.” *See*, AG Response to Motion to Withdraw and Substitute Testimony, filed March 25, 2013 (hereafter “AG Response”).

In reply, Freeport asks the Hearing Officer to exercise her discretion to permit the withdrawal of the Original Brack Testimony replacing it with the Substitute Testimony for the following reasons:

1. Consistent with the Hearing Officer’s prior orders, Freeport timely filed the Original Brack Testimony by February 22, 2013.

2. The Substitute Testimony is a condensed version of the Original Testimony, adding no new substantive information.
3. There are no new exhibits. The same eight exhibits referenced in, and filed with, the Original Testimony accompany and support the Substitute Brack Testimony.
4. No party can credibly contend that it has or will suffer prejudice given the facts and circumstances of Mr. Brack's testimony as fully discussed below.
5. Neither the Attorney General nor any other party filed rebuttal testimony to the Original Brack Testimony.
6. The Brack testimony, as initially filed and in its condensed, substitute form, is introductory in nature providing a big picture overview of the reasons why this rulemaking proceeding is important to the copper mining industry in New Mexico.

II. ARGUMENT

A. No New Substantive Information Has Been Added To The Substitute Testimony

A comparison of the Substitute Brack Testimony to the Original Testimony establishes that Freeport is condensing the testimony and has added no new substantive information. The Substitute Testimony is 22 pages in length with a word count at less than 5,000 words. The Original Testimony is 31 pages in length with a word count in excess of 7,000 words. There are nine graphs or illustrations in both the Original and Substitute versions of the testimony. Pages 1-6 are essentially the same in the Substitute Testimony as compared to the Original Testimony. The Substitute Brack Testimony removes and deletes 80% or more of pages 7-12 and pages 21-23 from the Original Testimony. Pages 13-17 of the Original Testimony are rewritten and shortened but little or no new information was added. Pages 24-31 of the Original Brack Testimony are essentially the same as pages 15-23 of the Substitute Testimony.

B. The Substitute Testimony Is Not “Late-Filed Direct Testimony”

The AG claims that the Substitute Testimony is “late-filed,” and says there will be no time between now and the hearing to prepare for cross examination. But, the Motion does not ask the Hearing Officer to permit the late-filing of direct testimony for a new witness. Nor does it ask for permission to file supplemental substantive testimony for a witness whose original testimony was timely filed. The Original Brack Testimony was timely filed and as demonstrated above, the Substitute Testimony includes no new substantive information while removing or deleting approximately eight pages. To say that the Substitute Brack Testimony is “late-filed” mischaracterizes the nature of the changes to the Original Testimony. The same testimony is being re-filed after removing 30% of the text.

C. The Attorney General’s Claim that he Will Suffer Prejudice if the Motion is Granted Rings Hollow

1. Preparing Rebuttal testimony is Not a Bona Fide Interest or Concern for the AG

The AG, having concluded that the Original 31 page Brack Testimony did not merit preparation and filing of rebuttal testimony, is less than credible complaining that he will not have an opportunity to rebut the Substitute Brack Testimony. The AG stops short of asking the Hearing Officer for additional time to prepare rebuttal testimony should the Hearing Officer grant the Freeport Motion. The same is true of the other parties. None have asked for leave to prepare and file rebuttal testimony to the Substitute Brack Testimony should the Freeport Motion be granted.

2. The Substitute Testimony Will Not Hamper the AG’s Cross Examination of Mr. Brack

The AG hints that granting the Motion will result in some inconvenience. But the AG does not state in his Response that he has already prepared his cross examination for John Brack

based on the Original Testimony. If he has done so all he need do is remove, from his cross examination outline, the questions if any that go to the subject matters in the Original Testimony that have been removed from the Substitute Testimony. If the AG has not yet prepared his cross examination outline for Mr. Brack, then Freeport has reduced the AG's workload by substituting a shortened and more condensed form of testimony. Either way, the AG will not be inconvenienced should the Hearing Officer grant the Motion.¹

D. Substituting and Condensing Mr. Brack's Testimony Is Reasonable and Fair Given the Nature of the Testimony

Mr. Brack's testimony will introduce the new members of the Water Quality Control Commission to the copper mining industry, and provide an introductory, high level explanation of why the proposed copper rule will allow the copper mining industry to grow and prosper in New Mexico. As such, the testimony is informative, but unremarkable and not controversial.

III. CONCLUSION

No party considered it necessary to strike, object to or rebut the testimony of John Brack. The parties did not rebut his testimony because it is not controversial, and all of the parties understand that only in a general sense will the final copper rule ultimately adopted by the Commission turn on Mr. Brack's testimony. By shortening and condensing the testimony, Freeport will make the hearing more efficient by reducing the material that the Commissioners have to read, by reducing the scope of Mr. Brack's direct examination, and by reducing the time spent on cross examination.

There is an adage that sometimes one cannot "see the forest for the trees," meaning that one can lose sight of the larger issue because of the details. Here, "forest" is a metaphor for the big picture effect of the new groundwater rules on the copper mining industry. The "trees" are a

¹ Indeed, whether the AG plans to cross examine John Brack, at all, is a point that is side-stepped in the AG's Response.

metaphor for the details of the rules themselves. John Brack's testimony says, in essence, let me show you the "forest," other Freeport witnesses will inform the Commission about the details of the rules.

For all the above reasons, Freeport McMoRan asks that it be granted leave to withdraw the Original Brack Testimony and in its place file the Substitute Brack Testimony.

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 hand-delivered or e-mailed to the following parties on March 28, 2013:

Andrew Knight
Kathryn Becker
Assistant General Counsel
Office of General Counsel
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87502-6110
Phone: 505-222-9540
Email: Andrew.Knight@state.nm.us
For the New Mexico Environment
Department

Bruce Frederick, Staff Attorney
Doug Meiklejohn
Jon Block
Eric Jantz
New Mexico Environmental Law Center
1405 Luisa Street, #5
Santa Fe, NM 87505-4074
Phone: 505-989-9022
Email: bfrederick@nmeic.org
For the Gila Resources Information Project
and Turner Ranch Properties

Louis W. Rose
Montgomery & Andrews
P.O. Box 2307
Santa Fe, New Mexico 87504-2307
Phone: 505-986-2506
Email: lrose@montand.com
For the New Mexico Mining Association

Tannis L. Fox, Assistant Attorney General
Water, Environmental and Utilities Division
Office of the New Mexico Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504
Phone: 505-827-6695
Email: tfox@nmag.gov
For the New Mexico Attorney General

Tracy Hughes
High Desert Energy + Environment Law
P.O. Box 8201
Santa Fe, New Mexico 87504
Phone: 505-819-1710
Email: hughes@energyenvironmentlaw.com
For Amigos Bravos


Anthony (T.J.) V. Trujillo

Jon Indall
Comeau, Maldegen, Templeman & Indall
P.O. Box 669
Santa Fe, New Mexico 87504-0669
Phone: 505-982-4611
Email: jindall@cmtisantafe.com
For the New Mexico Mining Association

Sean Cunniff, Assistant Attorney General
Civil Division
Office of the New Mexico Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504
Phone: 505-827-6469
Email: scunniff@nmag.gov
Commission Counsel

William C. Olson
14 Cosmic Way
Lamy, New Mexico 87540
Phone: 505-466-2969
Email: billjeanie.olson@gmail.com