

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



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**In the Matter of:** )  
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 )  
**PROPOSED AMENDMENT** )  
**TO 20.6.2 NMAC (Copper Rule)** )  
\_\_\_\_\_)

**No. WQCC 12-01(R)**

**FREEPORT- McMoRan’s RESPONSE TO ATTORNEY GENERAL’S MOTION TO  
STRIKE FMI VIDEO –BRACK EXHIBIT 4**

Freeport-McMoRan Tyrone Inc., Freeport-McMoRan Chino Mines Company, and Freeport-McMoRan Cobre Mining Company (collectively, “Freeport”) hereby submit this Response to Attorney General’s Motion to Strike FMI Video-Brack Exhibit 4, dated March 25, 2013. (“Motion to Strike”)

**I. BACKGROUND**

The Attorney General’s Motion to Strike FMI Video-Brack Exhibit 4 asserts three reasons to exclude the aforementioned video: (1) the experts appearing in the video and its producers are not available for cross-examination; (2) the inability to cross-examine witnesses creates a specific prejudice and one example of this prejudice is represented by the fact that there is “substantial discussion in the video of the FMI Morenci Mine in Arizona and *its accomplishments*”(emphasis added) and that assertion cannot be refuted without proper cross-examination; and (3) under the Water Quality Act, parties are entitled to cross-examine any person presenting data, views and arguments pursuant to Section 74-6-6(D) NMSA 1978.

In response, Freeport demonstrates that the Attorney General’s arguments are without merit. For the reasons set forth below, the FMI Video should be allowed as demonstrative

testimony to serve as illustrative background information to help inform the Commission on the basic processes utilized to produce copper and the myriad of applications that make copper indispensable in an industrial world.

## **II. ARGUMENT**

### **A. Freeport will provide John Brack as a witness, thereby providing a foundation for submission of the video exhibit and preserving the right for cross-examination.**

Although the Attorney General asserts that it is unable to cross-examine the producers or the experts that appear in the submitted video about the contents of the video, there is no evidentiary requirement that these individuals be available (1) because the video is offered in part as demonstrative evidence and (2) because John Brack is competent to testify about the video substantively. John Brack's testimony provides the necessary foundation for establishing the relevance of the video, and Freeport offers Mr. Brack as the witness prepared to answer questions regarding the video. In other words, during cross examination the Attorney General will have the opportunity to ask Mr. Brack about statements made in the video. Furthermore, Mr. Brack is qualified to discuss all elements presented in the video by virtue of his degree in mining engineering, his training as a mining engineer and his 23 years consecutive experience as a general manager of open-pit copper mines in New Mexico, Arizona and abroad. *See* Brack Exhibit 1, John D. Brack CV.

### **B. The Attorney General misstates the content of the Brack video.**

The Attorney General alleges prejudice because the FMI Video contains "substantial discussion" about the Morenci Mine in Arizona and "*its accomplishments*"(emphasis added). Motion, p. 1. This mischaracterizes the content and context of the video. The exhibit explains the processes required to produce copper, its applications, and the reasons copper is vital to

global industrialization. John Brack is competent to testify about these aspects of the video. The video does not assert any “accomplishments” with respect to the Morenci mine. Even if it did, this is an industry-wide rulemaking. To exclude the video, the Attorney General would have to demonstrate that the Morenci mine is not representative of mines in New Mexico and that John Brack is not competent to testify to that effect.

The following time/video references depict all inferences to Morenci in the video submission:

- (1) during a discussion portion of the video about geology and mineralization, the Morenci mine is referenced in caption form to preface copper mining and its processes. The caption states “mining and processes, Morenci AZ” and is visible from 4:57 – 6: 01 on the video;
- (2) during a discussion regarding rocks that are prevalent in the mining process the video references azurite as one of the minerals in the host rock, and during that discussion the video references Morenci as the location of the mineral and Freeport as the operator. The caption appears on-screen from 5:17 -5:22 on the video;
- (3) during a description of mining processes Dr. Corby Anderson references the Morenci mine as context to describe general mine operations. The accompanying caption referencing Morenci and Freeport lasts from 5:45 – 5:55 on the video;
- (4) during the summation portion of the video the azurite caption is briefly reintroduced, and it is visible from 17:42 – 17:45; and

- (5) after the conclusion of the video there is a credit component in which the producers thank Morenci, Freeport and the various staff participants; this credit portion is visible from 18:19 – 18:31.

None of the above-referenced components of the submitted video, or any other aspect, assert any accomplishments regarding Morenci or its operations. Moreover, Mr. Brack is competent to testify about the video even if it did discuss “accomplishments” at Morenci.

**C. The Attorney General did not rebut the video.**

The video contains accurate, non-controversial, factual information with limited commentary. The Attorney General declined the opportunity to rebut the video in written testimony because the video is, for all intent and purposes, a fact-based educational video that does not contain arguments or suppositions. The video simply states what products in our everyday lives contain copper, why its molecular structure makes it a great thermal conductor, the processes utilized to transform ore to usable metal, and the numerous copper applications in use today. *See* Brack, Exhibit 4.

The Attorney General is also using this pre-hearing motion practice to testify through counsel about certain operational issues at Morenci and in so doing, discredit Freeport. *See*, Motion ¶¶ 3-4 and AGO Exhibit A. The Attorney General will have the opportunity to examine Mr. Brack about the video. Whether the AG can also question Mr. Brack about matters not mentioned or referenced in the video is a question best left until cross examination. To the extent matters of interest to the AG are outside the scope of direct examination or otherwise objectionable, Freeport will make its objections at the appropriate time and the Hearing Officer may then rule on the objection with the benefit of context. While Freeport is happy to discuss the operations of the Morenci mine in the proper forum, in this video, the Morenci mine is

representative of open pit copper mines generally. Thus, the fact that some captions briefly reference Morenci rather than Chino, Tyrone or Cobre is not material.

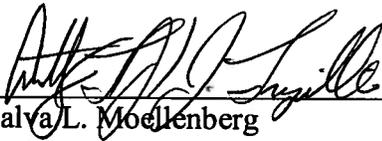
**III. CONCLUSION**

The AG has not established that the video is irrelevant or otherwise inadmissible. Nor has he established that the producers of the video are the only competent witnesses to testify about the video. Moreover, the video is principally an illustrative demonstrative exhibit supporting Mr. Brack's testimony. The video contains little or no argument and certainly makes no claims regarding the environmental record of the Morenci mine as the Attorney General incorrectly alleges. Thus the video should be allowed as both a substantive exhibit submitted by a competent technical expert and a proper demonstrative exhibit. Questions about the video should be directed to John Brack during cross examination.

**WHEREFORE**, Freeport respectfully requests that the Water Quality Control Commission accept the previously submitted video as a demonstrative exhibit.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

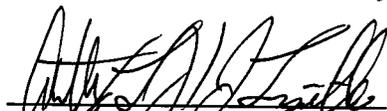
I hereby certify that a true and accurate copy of the foregoing pleading was hand-delivered or e-mailed to the following parties on March 28, 2013:

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