

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



_____)
In the Matter of:)
)
)
PROPOSED AMENDMENT)
TO 20.6.2 NMAC (Copper Rule))
_____)

No. WQCC 12-01(R)

**FREEPORT'S MOTION FOR EXENTION OF TIME TO RESPOND
TO JOINT REQUEST FOR STAY OF 20.6.7 NMAC AND
REQUEST FOR SCHEDULING CONFERENCE AND ORDER**

Freeport-McMoRan Chino Mines Company, Freeport-McMoRan Tyrone Inc. and Freeport-McMoRan Cobre Mining Company (collectively "Freeport") move for an extension of time to respond to the Joint Request for Stay of 20.6.7 NMAC filed on October 23, 2013. Freeport has consulted with all counsel for the parties and advised of its intent to file a motion for an extension until we have more clarity on the process and schedule, including a more complete understanding of all of the information and arguments that may be offered in support of the request for stay. The Attorney General, GRIP, Amigos Bravos and Turner Ranch Properties do not object to an extension of time to file responses to the Request for Stay on this basis. The length of the extension is predicated upon the establishment of a schedule for briefing and a hearing on the Request for Stay, as discussed in more detail below.

Freeport further moves for a scheduling conference and/or a procedural or scheduling order regarding the Request for Stay. The purpose of a scheduling conference and order is to establish a fair and efficient process for a hearing on the Request for Stay, including clarifying the time for movants time to submit any supporting affidavits and to establish a hearing date. There obviously is an extensive record already made in the rulemaking proceeding, and the

Request for Stay filed on October 23 relies in part upon that record. Freeport is not suggesting that any of the parties must submit affidavits if citations to or submissions of copies of portions of the existing record will suffice. Freeport suggests that the following points be addressed:

1. Establish a date for all parties in favor of a Stay to join in or otherwise support the pending Request for Stay and to file all affidavits, certificates or other evidence in support of the Request for Stay. Freeport suggests that this date be set for November 7, 2013, which is 15 days after the date of the Request and the normal time to file responses.

2. Provide for public notice of the hearing under section 302.C of the Commission Guidelines for Regulation Hearings.

3. Establish a date for parties opposing a stay to file responses and all supporting materials. Freeport suggests that this date be set for November 22, 2013 or fifteen days after the deadline for parties in favor of the stay.

4. Establish a date for replies. Freeport suggests that this be ten days after the deadline for responses, or December 2, 2013. Freeport acknowledges that adjustments to the schedule may be needed to accommodate a December 9, 2013 hearing date, as further discussed below.

5. Establish a date for parties to notify all other parties whether they intend to cross-examine any witnesses offering affidavits or to waive such cross-examination.

6. Set a hearing on the Request for Stay for the Commission's December 9, 2013 meeting. The hearing would consist of any cross-examination of witnesses offering affidavits, unless waived, and oral argument by each side. Freeport suggests that each side (one side being all parties who support the Request for Stay and the other side being all parties who oppose the

Request) have ten minutes for oral argument, to be divided by agreement of counsel for the parties on each side.

In support of these motions, Freeport offers the following. Three parties, the Gila Resources Information Project, Turner Ranch Properties, L.P., and Amigos Bravos filed a Joint Request for Stay of 20.6.7 NMAC on October 23, 2013. These three parties have filed a Joint Notice of Appeal of the Copper Rule. Two other parties, the Attorney General and William Olson, filed separate Notices of Appeal but have not yet indicated whether they intend to support the Request for Stay.

The Water Quality Act provides that “. . . a person who is adversely affected by a regulation adopted by the commission . . . may appeal to the court of appeals for further relief.” § 74-6-7.A NMSA 1978. The Act further provides that “[a]fter a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted pending the outcome of the judicial review. The stay of the action may be granted by the commission or by the court of appeals if the commission denies a stay within ninety days after receipt of the application.” § 74-6-7.C NMSA 1978. As of the date of this motion, some, but not all, of the appellants have sought a stay of the Commission’s action adopting the Copper Rule.

The Commission’s Guidelines for Rulemaking address the process for a party seeking a stay.

502. STAY OF COMMISSION REGULATIONS. - -

A. The Commission may grant a stay pending appeal of any regulatory change promulgated by the Commission. The Commission may only grant a stay if a motion is filed, a hearing is held and good cause is shown.

B. In determining whether good cause is present for the granting of a stay, the Commission shall consider:

(1) the likelihood that the movant will prevail on the merits of the appeal;

(2) whether the moving party will suffer irreparable harm if a stay is not granted;

(3) whether substantial harm will result to other interested persons; and

(4) whether harm will ensue to the public interest.

C. If no action is taken within ninety (90) days after filing of the motion, the Commission shall be deemed to have denied the motion for stay.

Neither Section 502 of the Commission's Guidelines nor the rest of the Guidelines specifically address motion practice. In the absence of any guideline, applicable rule or Procedural Order regarding motions, the parties in this proceeding generally have used the Commission's rules for adjudicatory proceedings, 20.1.3.15 NMAC, as guidance. Those rules provide fifteen days after service of a motion for responses, and ten days after service of a response for a reply. The rule also requires that any affidavit, certificate, or other evidence relied upon for the motion be attached to the motion.

Based on the 15-day deadline, responses to the Request for Stay would be due on November 7, 2013. That date also reasonably could be viewed as a deadline for the other two appellants, the Attorney General and William Olson, to respond in support of the Request for Stay, including, potentially, joining in the request for stay and filing any supporting evidence.

Freeport opposes a stay of the rules and intends to respond to the Request for Stay. Freeport understands that the Environment Department also intends to respond in opposition to the stay. However, without the procedure proposed in this Motion, if the Attorney General and William Olson file responses joining in the Request for Stay and submit additional information in support of a stay, Freeport and the Environment Department would then have an opportunity to respond to those pleadings, potentially resulting in multiple responses and then additional replies.

It would be more efficient and convenient for the Commission if all parties intending to support or join in the Request for Stay were first required to file their responses and any supporting affidavits, certificates or other evidence before responses opposing the Request for Stay are filed. After all of the arguments and evidence are filed in support of the Request for Stay, those parties in opposition to a stay could then file complete responses to the Request for Stay, including anything to be filed in addition to the original Request. The final step before the hearing would be an opportunity for the parties who support the Request for Stay to file replies. This would reduce the number of written pleadings and back-and-forth among the parties.

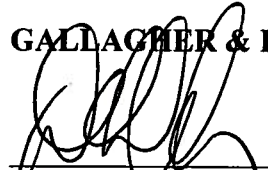
Regarding the timing of a Commission hearing, if the Commission denies a stay within 90 days after the filing of an “application,” then an appellant may seek relief from the Court of Appeals. Under the Commission’s guidelines, if the Commission fails to act on a motion for stay within 90 days after the motion is filed, the Commission is deemed to have denied the motion for stay, such that an appellant could then seek relief before the Court of Appeals. Consequently, it is important for the Commission to hold a hearing and take action within the 90 days period.

The Commission could hear the matter and take action at its January 14, 2014 hearing and still fall within the 90 day period. The Copper Rule, however, will go into effect on December 1, 2013, and there are a number of pending discharge permit applications for copper mines, for which the Department’s review and decision will be affected by whether the Copper Rule is in effect or is stayed. Consequently, Freeport has a direct interest in seeing that action is taken on the Request for Stay by the Commission and, if relief is sought from the Court of Appeals, by the Court, as soon as reasonably possible. Consequently, the proposed elements of a procedural order set forth above are designed to complete the briefing process in time for a hearing on December 9 and to make that process as efficient as possible.

By email dated October 30, 2013 to the Hearing Officer and all parties, counsel for the Department requested that the Hearing Officer issue a Procedural Order on this matter. Freeport's counsel responded to that email on that same date, responding to the Department's proposal to limit the hearing to legal argument. Due to the impending deadlines and for the reasons set forth herein, Freeport requests that the Hearing Officer schedule a scheduling conference, if deemed necessary, and issue a Procedural Order as soon as possible.

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 to the following parties on Monday, November 04, 2013:

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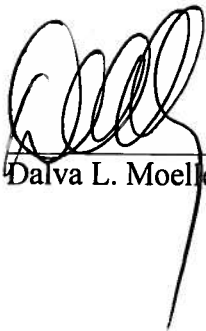
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