

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

FILED  
2009 JUL 13 AM 10:40  
REGIONAL HEARING CLERK  
EPA REGION VI

In the Matter of	§	
	§	
	§	
CYPRUS PINOS ALTOS CORPORATION;	§	Docket No. CWA-06-2007-1813
	§	Permit No. NMR05A922
	§	
PHELPS DODGE HIDALGO, INC.;	§	Docket No. CWA-06-2008-1829
	§	Permit No. NMR05A946
	§	
FREEPORT-MCMORAN COBRE MINING COMPANY;	§	Docket No. CWA-06-2008-1820
	§	Permit No. NMR05A948
	§	
FREEPORT-MCMORAN TYRONE INC.; and	§	Docket No. CWA-06-2007-1984
	§	Permit No. NMR05A918
	§	
FREEPORT-MCMORAN CHINO MINES COMPANY	§	Docket No. CWA-06-2007-1983
	§	Permit No. NMR05A945
RESPONDENTS		

**CONSENT AGREEMENT AND FINAL ORDER**

**I. PRELIMINARY STATEMENT**

1. This Consent Agreement and Final Order ("CAFO") is issued under the authority vested in the United States Environmental Protection Agency ("EPA") pursuant to Section 309(g) of the Clean Water Act (herein "CWA") and is simultaneously commenced and concluded through the issuance of this CAFO in accordance with 40 C.F.R § 22.13(b) and § 22.18(b)(2) and (3), as described in the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits."

2. The Respondents agree that settlement of the relevant matters without litigation will save time and resources, that it is in the public's interest, and that the entry of this

CAFO is the most appropriate means of resolving such matters. Compliance with all the terms and conditions of this CAFO resolves only those violations specified in this CAFO.

3. Respondents admit the jurisdictional allegations herein; however, Respondents neither admit nor deny the specific Findings of Fact and Conclusions of Law contained in this CAFO. This CAFO states a claim(s) upon which relief may be granted.

4. Respondents expressly waive any right to contest the factual allegations or the conclusions of law contained in this CAFO and waive their right to appeal the Final Order set forth herein.

5. Notwithstanding, the Respondents retain the right to controvert in any subsequent proceeding, except a proceeding to implement or enforce this CAFO, the validity of the conclusions of law contained in this CAFO.

6. Before the taking of any testimony, and without adjudication of any issue of law or fact, the parties agree to the terms of this CAFO and to its issuance. Respondents consent to the assessment and payment of a civil penalty in the amount and by the method stated below.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

7. Cyprus Pinos Altos Corporation, Phelps Dodge Hidalgo, Inc., and Freeport-McMoRan Tyrone Inc. are organized under the laws of the State of Delaware, and Freeport-McMoRan Cobre Mining Company and Freeport-McMoRan Chino Mines Company are organized under the laws of the State of New Mexico ("Respondents"). As such, each are a "person," as that term is defined at Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

8. At all times relevant to the violations alleged herein ("relevant time period"), Respondents owned or operated the following facilities:

- a. Cyprus Pinos Altos Corporation ("CPAC"), located three miles west of Deming, NM;
- b. Freeport-McMoRan Chino Mines Company ("Chino"), located in Hurley, NM;
- c. Freeport-McMoRan Tyrone Inc. ("Tyrone"), located in Tyrone, NM;
- d. Freeport-McMoRan Cobre Mining Company ("Cobre"), located in Hurley, NM; and
- e. Phelps Dodge Hidalgo, Inc. ("Hidalgo"), including the Brockman mine, located in Playas, NM.

9. CPAC, Tyrone, Chino, Cobre and Hidalgo were therefore each an "owner or operator" within the meaning of 40 C.F.R. § 122.2.

10. Pursuant to the "Final Policy Statement on Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations" (65 Fed. Reg. 19618 (April 11, 2000)) (hereinafter referred to as the "Self-Policing Policy"), companies may participate in the self-audit/self-disclosure terms of the Self-Policing Policy. Under the Self-Policing Policy, EPA may substantially reduce and even eliminate the gravity component of civil penalties if the conditions specified are met.

11. On April 21, 2006, Respondents Tyrone and Chino submitted documentation to EPA, in which they disclosed Resource Conservation Recovery Act (hereinafter "RCRA") and CWA violations at the Tyrone and Chino facilities.

12. On September 23, 2006, Respondent Tyrone submitted documentation to EPA disclosing Toxic Substances Control Act (hereinafter "TSCA") violations and a further CWA violation at the Tyrone facility. In addition, Tyrone revised some of its April 21, 2006 RCRA disclosures.

13. On September 23, 2006, Respondent Chino submitted documentation to EPA disclosing a further CWA violation at the Chino facility. In addition, Chino revised some of its April 21, 2006 RCRA disclosures.

14. On September 28, 2006, Respondents Cobre and Hidalgo submitted additional documentation to EPA, in which Cobre and Hidalgo disclosed RCRA and CWA violations at the Cobre and Hidalgo facilities, respectively. In addition, Cobre disclosed a TSCA violation at the Cobre facility.

15. On September 28, 2006, CPAC submitted documentation to EPA, in which they disclosed a CWA violation at the CPAC facility in Deming, NM.

16. The Respondents also disclosed the above-referenced violations to the New Mexico Environment Department ("NMED").

17. The violations disclosed were as follows:

RCRA

a. Failure to conduct weekly inspections and maintain records during March 2003 and January 2005 at the Hidalgo facility; from May 12, 2005 through July 14, 2005 at the Cobre facility; and for several occasions between April 1, 2003 through April 21, 2006 at the Tyrone and Chino facilities in violation of 40 C.F.R. §§ 262.34(a), 262.34(d), 265.174 and 265.15(d);

b. Failure to provide hazardous waste training to employees during 2001 through 2003 at the Tyrone and Chino facilities and for 2005 at the Tyrone, Chino and Cobre facilities in violation of 40 C.F.R. §§ 262.34(a)(4), 262.34(d)(5)(iii) and 265.16;

c. Failure to meet the requirements for a large quantity generator in violation of 40 C.F.R. § 262.34(a)(4), 40 C.F.R. Part 265, Subpart D and 40 C.F.R. § 262.27(a) at the Cobre and Chino facilities;

- d. Hazardous waste accumulation exceedances in violation of 40 C.F.R. §§ 262.34(a), 262.34(d) and 262.34(e) at the Chino facility;
- e. Improper manifesting of hazardous waste off-site at the Chino facility in violation of 40 C.F.R. §§ 262.34(a), 262.34(d) and 262.34(e); and
- f. Failure to provide land disposal restriction notification at the Chino facility in violation of 40 C.F.R. § 268.7(a).

CWA

- a. Failure to conduct storm water training for employees for calendar year 2005 in violation of the 2000 Multi Sector General Permit ("MSGP) Parts 4.2.7.2.1.6 and 6.G.6.1.5 at the Chino, Cobre and Tyrone facilities;
- b. Failure to conduct monthly inspections of active mining sites and quarterly inspections of inactive mining sites as follows:
  - i. Chino - no forms completed in December 2004 and January 2005 through November 2005;
  - ii. Tyrone – no forms completed in December 2004 and January 2005 through May 2005, October 2005 through December 2005. Further, only partial forms were completed for June 2005 and July 2005.
  - iii. Cobre – no forms completed in 2003, January 2004 through April 2004, December 2004, January 2005 through May 2005, and July 2005 through December 2005, in violation of 2000 MSGP, Parts 4.2.7.2.1.5 and 6.G.6.1.4.
- c. Failure to document and monitor a quarterly visual examination of each representative outfall associated with active or temporary inactive mining sites for (1) all of 2004 and 2005 at the Chino facility, (2) for the third and fourth quarters in 2003, the first, second and fourth quarters in 2004, and the second, third and fourth quarters in 2005 at the Tyrone facility,

and (3) for all of 2003, 2004, and 2005 at the Cobre facility in violation of the 2000 MSGP, Part 5.1;

d. Failure to perform analytical sampling of stormwater discharges and submit discharge monitoring reports in accordance with Parts 5.1.2, 7.1 and 6.G.7 of the 2000 Multi-Sector Storm Water general permit for years 2003, 2004 and 2005 at the Chino, Cobre, and Tyrone facilities;

e. Failure to complete the form provided in the Storm Water Pollution Prevention Plan ("SWPPP") for documenting annual compliance evaluations in violation of 2000 MSGP, Part 4.9 at the CPAC facility for 2003 and 2004, at the Cobre facility for 2003 and 2005, and at the Brockman mine for 2003, 2004, and 2005; and

f. Failure to include a signed and certified waiver in violation of parts 5.1.1.4 and 5.1.2.3 of the 2000 MSGP at the Brockman mine.

#### TSCA

a. Failure to prepare and maintain a PCB Annual Document Log for the calendar years, 1999, 2000, 2001, 2002, 2003, 2004, and 2005 at its Cobre facility in violation of 40 C.F.R. § 761.180(a);

b. Failure to inspect each PCB Transformer in use or stored for reuse at least once every 3 months at its Tyrone facility in violation of 40 C.F.R. § 761.30(a)(1)(ix) and failure to inspect each PCB Transformer stored for disposal at least once every 30 days in violation of 40 C.F.R. § 761.65(c)(5) at its Tyrone facility;

c. Failure to maintain records of inspection and maintenance history of PCB Transformers for at least 3 years after disposing of the transformers at its Tyrone facility in violation of 40 C.F.R. §§ 761.30(a)(1)(xii) and 761.180(a); and

d. Failure to prepare and maintain a PCB Annual Document Log for the calendar years 1999, 2000, 2001, 2002, 2003, and 2004 at its Tyrone facility in violation of 40 C.F.R. § 761.180(a).

18. Based upon EPA's review of the April 21, 2006, September 23, 2006 and September 28, 2006 disclosures, and additional information provided by Respondents in response to requests by EPA for additional information, EPA determined the following:

a. Cobre and Tyrone satisfied all nine conditions of the Self-Policing Policy and qualified for 100% mitigation of the gravity penalty regarding the TSCA violations. Further, EPA determined that there was a de minimus economic benefit component regarding the TSCA violations. Therefore, no penalty was warranted.

b. In regard to the RCRA violations, after discussions with NMED, EPA determined that NMED would take the lead to resolve the RCRA violations disclosed at the Cobre, Hidalgo, Chino and Tyrone facilities. EPA will continue to monitor NMED's actions until the matter has been fully resolved.

c. Regarding the CWA violations EPA determined the following:

i. The Chino facility qualifies for a 50% mitigation of the CWA gravity portion of the penalty as condition D(3) – (Prompt Disclosure) of the Self-Policing Policy was not met. Further, there was a significant economic benefit component regarding the CWA violations that EPA will collect;

ii. The Hidalgo facility qualifies for a 50% mitigation of the CWA gravity portion of the penalty as conditions D(3) – Prompt Disclosure and D(7) – No Repeat Violation of the Self-Policing Policy were not met. EPA also found that the economic benefit was de minimus;

iii. The Cobre facility qualifies for a 50% mitigation of the CWA gravity portion of the penalty as conditions D(1) – Systematic Discovery, D(3) – Prompt Disclosure, and D(7) - No Repeat Violation were not met. Additionally, EPA determined that the economic benefit was de minimus;

iv. The Tyrone facility qualifies for a 50% mitigation of the gravity portion of the penalty as conditions D(1) – Systematic Discovery and D(7) – No Repeat Violation of the Self-Policing Policy were not met. EPA determined that the economic benefit was de minimus; and

v. The CPAC facility qualifies for a 50% mitigation of the gravity portion of the penalty as conditions D(1) – Systematic Discovery and D(7) – No Repeat Violation were not met. EPA also determined that the economic benefit was de minimus.

19. The State of New Mexico was notified and given an opportunity to consult with EPA regarding the proposed assessment of an administrative penalty against each Respondent.

20. EPA notified the public of the proposed CAFO and afforded the public forty (40) days to comment on the proposed penalty. At the expiration of the notice period, EPA had received no comments from the public.

### III. TERMS OF SETTLEMENT

#### A. PENALTY PROVISIONS

21. Based on the foregoing Findings of Fact and Conclusions of Law, EPA Region 6, considering the relevant criteria pursuant to Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), and acting pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. § 1319(g), hereby ORDERS that Respondents shall pay to the United States a civil penalty in the amount of \$62,564.00 to settle the violations specified in this CAFO.

22. Penalties were calculated as follows:

Cobre - \$3,118.00  
CPAC - \$7,200.00  
Hidalgo - \$4,500.00  
Tyrone - \$15,186.50  
Chino - \$32,559.50

23. Payment shall be made within thirty (30) days of the effective date of this CAFO by mailing a cashier's check or certified check, payable to "Treasurer of the United States," to the following address:

Regional Hearing Clerk  
U.S. EPA, Region 6  
P.O. Box 371099M  
Pittsburgh, PA 15251

Payment shall include the Docket No. for the corresponding facility as follows:

- CPAC - Docket No. CWA-06-2007-1813
- Hidalgo - Docket No. CWA-06-2008-1829
- Cobre - Docket No. CWA-06-2008-1820
- Tyrone - Docket No. CWA-06-2007-1984
- Chino - Docket No. CWA-06-2007-1983

24. Respondents shall send simultaneous notice of payment, including a copy of each check, to each of the following:

- (1) Regional Hearing Clerk (6RC-D)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733
- (2) Chief, Compliance Monitoring (6EN-WC)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733
- (3) Chief, Water Legal Branch (6RC-EW)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Respondent's adherence to these procedures will ensure proper credit when payment is received by EPA.

25. Respondents agree not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

26. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. See 40 C.F.R. § 13.11(b).

27. EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) day period that the penalty remains unpaid. In addition, a penalty charge of up to six percent per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. See 40 C.F.R. § 13.11(c). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. See 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

28. Pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), any person who fails to pay, on a timely basis, a civil penalty ordered or assessed under this section shall be

required to pay, in addition to such penalty and interest, the United States enforcement expenses, including but not limited to, attorneys fees and costs incurred by the United States for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be 20 percent of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of each quarter. In such a collection action, the validity, amount, and appropriateness of the penalty assessed by this CAFO, and the terms of this CAFO shall not be subject to review.

B. GENERAL PROVISIONS

29. To execute this Agreement, Respondents shall forward this copy of the CAFO, with original signature, to:

Lorraine Dixon (6RC-EW)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

30. Issuance of this CAFO does not relieve Respondents from responsibility to comply with all requirements of the Act and the requirements of any permits issued thereunder, as described in Section 309(g)(7) of the Act, 33 U.S.C. § 1319(g)(7), nor does it constitute a waiver by EPA of its right to enforce compliance with the requirements of Respondent's permits or other requirements of the Act by actions pursuant to Section 309 of the Act, 33 U.S.C. § 1319.

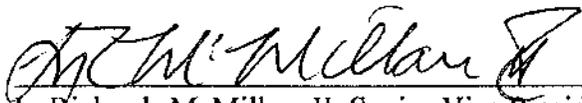
31. In any action to enforce this CAFO, Respondents shall not assert as a defense any act or failure to act by any of its officers, directors, employees, agents, servants, contractors, subcontractors, successors or assigns.

32. Each party agrees to bear its own costs and attorneys fees in this matter, except to the extent that Respondent may be responsible for reasonable costs and expenses of enforcement and collection proceedings for failure to comply with the terms of this CAFO. Furthermore, Respondents specifically waive their rights to seek reimbursement of its costs and

attorney's fees under the Equal Access to Justice Act (5 U.S.C. § 504), as amended by the Small Business Regulatory Enforcement Fairness Act (P.L.104-121), and any regulations promulgated pursuant to those Acts.

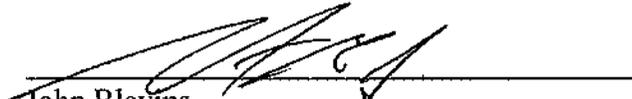
33. Each undersigned representative of the parties to this agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this agreement and to execute and legally bind that party to it.

In recognition and acceptance of the foregoing:



L. Richards McMillan, II, Senior Vice President  
For Respondents Cyprus Pinos Altos Corporation,  
Phelps Dodge Hidalgo, Inc., Freeport-McMoRan  
Cobre Mining Company, Freeport-McMoRan Tyrone  
Inc., and Freeport-McMoRan Chino Mines Company  
(on behalf of Phelps Dodge Chino, Inc. and Chino  
Acquisition Inc.)

May 13, 2009  
Date:



John Blevins  
Compliance Assurance and  
Enforcement Division

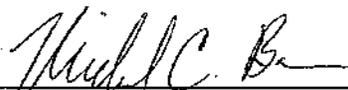
5-21-09  
Date:

FINAL ORDER

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged in the CAFO. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect Respondent's (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. The Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the Consent Agreement. This CAFO shall become effective 30 days after the issuance date specified below.

Issuance Date:

May 28, 2009

  
\_\_\_\_\_  
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2009, the original of the foregoing Consent Agreement and Final Order was hand delivered to the Regional Hearing Clerk, U.S. EPA, Region 6 (6RC-D), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733, and that a true and correct copy was placed in the United States Mail, by certified mail, return receipt requested, addressed to the following:

Copy by certified mail,  
return receipt requested:

Copy:

State

Jackie Samuel