

August 29, 2019

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Return Receipt Requested

Ms. Rebecca Roose, Director
New Mexico Environment
Department Water Protection Division
P.O. Box 5469
Santa Fe, NM 87502

Dear Ms. Roose:

Re: Response to Follow up Chiricahua Leopard Frog Survey
Request in Support of the Ecological Risk Assessment
Lampbright Investigation Unit - Chino Administrative Order on Consent

This letter contains Freeport-McMoRan Chino Mines Company's (Chino) response to the letter dated August 14, 2019, from the New Mexico Environment Department (NMED) as follow up to its request to survey for Chiricahua Leopard Frog (CLF) habitat and presence/absence. The NMED requested the CLF survey in the Lampbright and Smelter/Tailing Soils Investigation Units (LIU and STSIU), under the Chino Administrative Order on Consent (AOC). The August 14 letter responds to Chino's concerns pertaining to the premise of the surveys, methods, locations, frequency and duration submitted in a letter dated July 12, 2019. NMED provided the CLF survey request in a letter dated June 5, 2019. Chino and NMED discussed this topic in a call on August 21, 2019, and this letter reflects that discussion.

Chino's position can be summarized as follows: Based upon the past presence of CLF in the subject areas and the possibility, however unlikely, that CLF might reoccupy the subject areas, the ecological risk assessments for the LIU and STSIU have in fact considered CLF, and the Remedial Action Criteria (RAC) approved by NMED for the STSIU have been established to protect CLF. Unless the agencies are willing to consider survey results indicating CLF are not present as a reason to change the risk assessment approach, Chino does not see how survey results would change the approach to the ecological risk assessment or the establishment of RAC. As a result, Chino is not proposing a survey within the STSIU.

With respect to the LIU, because Chino previously agreed to conduct a one-time survey for CLF within the LIU, and because the LIU ecological risk assessment was conditionally approved, and identified uncertainties concerning habitat, Chino is preparing and will submit plans for a survey in the LIU.

First, the record reflects that ample information on the CLF has been provided by Chino in areas subject to the AOC. CLF historical presence within the AOC Investigation Area have already been documented, as has CLF absence, following exposure to the fungus *Batrachochytrium dendrobatidis* (Bd) in annual reports to the NMGF between 1993 and 2017. Experts conclude that the CLF population, in areas subject to the AOC and other surrounding areas, will most likely not recover without outside reintroduction (Randy Jennings, 2005/2019).

CLF surveys were performed in 1997 and 1998 in LIU and West Lampbright Draw with no CLF observed in the LIU tributaries and by the latter year, only tadpoles were noted south of the LIU indicative of adult die-off from Bd (Randy Jennings). In its two recent letters to Chino, NMED requested a broader spatial area beyond LIU and more frequent monitoring. NMED acknowledges that “the survey involves work outside of the subject LIU area.” The ERA text also cites the critical habitat designation by USFWS in 2012 (77FR16324) and cites the 1-3-5 rule by which CLFs may travel 1 mile on land, 3 miles in a dry drainage or 5 miles in a wet drainage to disperse. The next paragraph in the ERA cites SESAT (2008) which *pre-dates* the final rule but states “the habitats to be considered are further defined as “suitable” or “marginal”. The SESAT document is specific to Section 7 consultations with USFWS for federal projects and, thus, the reference to SESAT (2008) is not applicable in this context. USFWS (2012) does not *itself* require Chino to determine “marginal” or “suitable” habitat”. USFWS (2012) listed Ash Springs and Bolton Draw and the dispersal radius (estimated based on the 1-3-5 rule) as 49 acres of critical habitat, and dispersal **does not** reach LIU. Specifically, USFWS (2012) defines the 49 acres: “included in this unit are Ash and Bolton Springs, and *ephemeral or intermittent drainages and uplands needed for movement* of frogs among these two breeding sites **as follows**: (1) From the spring box at Ash Spring downstream in a drainage to a dirt road crossing; and (2) west and overland from the ruins of an old house below Ash Spring to a low saddle, then downslope into an unnamed drainage, and downstream in that drainage to its confluence with another unnamed drainage, downstream in that unnamed drainage to its confluence with another unnamed drainage, then upstream in that unnamed drainage to the top of that drainage and directly downslope and west to another unnamed drainage, downstream in that unnamed drainage to its confluence with Bolton Canyon, and upstream in Bolton Canyon to the locally known Bolton Springs.” USFWS (2012) states that both Ash and Bolton Springs are “small aquatic sites that cannot sustain large populations” but in another part of the final rule, USFWS states that “metapopulations should include at least one large, healthy subpopulation (e.g., at least 100 adults) in order to achieve an acceptable level of viability as a larger unit”. Therefore, Ash and Bolton Springs are defined as a weak sub-population and are not a strong nucleus for a metapopulation. Moreover, USFWS determined that LIU is outside the dispersal radius from Ash and Bolton Springs.”

Second, while Chino appreciates the interest of USFWS and NMDGF in the CLF, NMED has identified no clear reason or the surveys to be conducted under the AOC. NMED states that “the goal of the survey is to locate and identify habitat and whether CLF are observed within the LIU and within adjacent areas from where the CLF may migrate. USFWS and NMDGF have observed extensive CLF migration into both new and former areas of suitable habitat.” Chino is aware that the LIU is referenced in the U.S. FWS 2012 Recovery Plan for CLF, which suggests extensive monitoring should occur for CLF. The 2007 Recovery Plan identifies Lampbright Draw in Recovery Unit 8, with aquatic path degradation listed behind predation and disease as an issue for the species and contamination identified as a “low” stressor. The Recovery Plan, a non-binding advisory document, operates independently of the Chino AOC. As discussed above, Chino does not see how on-going surveys of CLF habitat and presence will inform decision-making under the AOC.

As noted, Chino has agreed to conduct a survey to assess for CLF presence in LIU during the 2019 field season to address identified uncertainty concerning presence of habitat identified in the LIU Ecological Risk Assessment (ERA). The ERA Section 6.0 Conclusions states: “finally, exceedances of the CLF TRVs were noted for copper at several locations and zinc at one location (LBT-11), but it is unclear whether habitat at those locations is suitable as breeding and rearing pools for the leopard frogs. Updated surveys of CLFs and habitat at the Site would be helpful...” Although Chino is planning the above-

mentioned survey to expedite the LIU progression, field surveys themselves do not help resolve uncertainty within the risk assessment conclusions, as the conclusions rely heavily on conservative screening analysis that is based in toxicology, not habitat analyses, and the risk assessment conclusions indicate little to no risk. Moreover, for Tributaries 1, 2 and 2a, as indicated in Chino's July correspondence, there is essentially little to no risk identified in the ERA. Among hundreds of samples, the highest amphibian Hazard Quotient (HQ) was 1.6 and at a single location. There were only two other slight exceedances with HQs lower than 1.4. Some of these locations were sampled more than once over time and their mean concentrations were HQs less than 1. Surface water concentrations are likely within background given natural mineralization present in LIU.

If NMED has received written (including electronic) comments or requests from USFWS or NMDGF regarding the subject of this letter, please provide copies to the undersigned. In addition, if USFWS and/or NMDGF would like to discuss their need for and possible plans to conduct CLF surveys for purposes other than the AOC, Chino is willing to engage in those discussions through Freeport-McMoRan staff who handle matters relating to the Endangered Species Act. The USFWS and NMDGF stakeholders copied on this letter may contact the undersigned regarding such discussions.

This response letter was submitted today to Mr. David Mercer, NMED AOC Project Manager. Please contact Ms. Pam Pinson at (575) 912-5213 for any questions.

Sincerely,



Sherry Burt-Kested, Manager
Environmental Services

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c via email: David Mercer, NMED
Joseph Fox, NMED
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