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June 28, 2010

Mr. Chuck French
Air and Radiation Docket and Information Center
Environmental Protection Agency
Mailcode: 2822T
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Attention: Docket ID No. EPA-HQ-OER-2010-0239

Re: National Emission Standards for Hazardous Air Pollutants: Gold Mine Ore Processing and Production Area Source Category and Addition to Source Category List for Standards

Dear Mr. French:

The Northwest Mining Association (NWMA) appreciates the opportunity to comment on the Environmental Protection Agency's (EPA) proposed rule for National Emission Standards for Hazardous Air Pollutants (NESHAP): Gold Mine Ore Processing and Production Area Source Category and Addition to Source Category List for Standards.

NWMA is a 115 year old, 2,000 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 40 states and are actively involved in exploration and mining operations on public and private lands, especially in the West. Our diverse membership includes every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. NWMA's broad membership represents a true cross-section of the American mining community from small miners and exploration geologists to both junior and large mining companies. More than 90% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

NWMA members are involved in the production and processing of gold mine ore and are directly impacted by this proposed rulemaking.

I. GOLD MINE DEFINITION SHOULD BE SIMPLIFIED

The proposed rule provides an overly complicated definition for what constitutes a gold mine subject to this rule. The proposed rule appropriately references in the preamble the North America Industry Classification System (NAICS) and the NAICS Code 21221 which is specific to gold ore mining. However, the definition in the proposed rule is then complicated by the suggestion that any facility engaged in the processing of gold mine ores that uses any of the listed specific techniques also could be covered. This definition adds unnecessary confusion to what is a potentially covered facility. The definition should be clarified that a gold mine ore

processing and production facility means any facility *within NAICS Code 212221* that uses any of the following processing roasting operations, autoclaves, carbon kilns, pregnant tanks, electrowinning, retorts, or melt furnaces.” This is a much clearer definition and we urge the EPA to simplify the definition accordingly in the final rule.

The proposed rule is intended to address primary gold production facilities (NAICS 21221). For example, EPA provides where gold is only a secondary metal product (where copper is 95 percent or more of the total metal production but also may recover some gold as a byproduct) that facility is not considered a gold mine ore processing and production facility. 75 Fed. Reg. 22495. As the rule focus is on primary gold mines, other hard rock mineral production (other than copper) that meets a similar byproduct production of gold should equally qualify for this exemption (e.g. primary silver production). We suggest the rule be clarified that a metal mine or production facility would not be subject to this rule when recovered gold is less than 5% of the total metal production.

II. EPA DOES NOT PROVIDE AN ADEQUATE BASIS FOR LISTING GOLD MINING AS A SOURCE CATEGORY UNDER SECTION 112(C)(6) OF THE CLEAN AIR ACT.

EPA does not mention in its proposed rule that it is listing gold mining as a source category and promulgating standards as part of a *quid pro quo* for receiving extended deadlines to issue emission standards in litigation challenging EPA’s failure to discharge its mandatory duty to issue standards to regulate 90% of the aggregate emissions of each of the seven pollutants identified in section 112(c)(6) of the Clean Air Act (CAA). Order, *Sierra Club v. Johnson*, Case No. 1:01-CV-01537 (D.D.C. 2008). Prior to EPA’s surprise agreement with Sierra Club in late 2008, EPA had never indicated that it planned to list gold mining under section 112(c)(6) and the proposed rule provides neither an adequate legal nor an appropriate technical basis for listing gold mining as a source category necessary to control 90% of 1990 aggregate mercury emissions.

A. EPA Does Not Have the Authority to List Gold Mining As a Source Category Under Section 112(c)(6)

EPA’s proposed rule states that it is listing gold mining as a source category and proposing standards under section 112(c)(6) of the CAA. 75 Fed. Reg. 22,471. Section 112(c)(6) requires EPA to list, by 1995, categories of sources that make up 90% of 1990 emissions for a subset of Hazardous Air Pollutants (“HAP”), including mercury. EPA concluded its statutory listing obligation for mercury in 1998 with the publication of a list of source categories and subcategories constituting 90% of aggregate mercury emissions. Gold mining was not included on that list in 1998 and EPA does not have the authority to retroactively add a source category now.

1. Section 112(c)(6) Does Not Contemplate Revision of the Source Category List

The CAA provides in pertinent part that with regard to mercury and six other specified pollutants:

The Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsections (d)(2) and (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990.

42 U.S.C. 7412(c)(6). As with other listing provisions of section 112, EPA has a mandatory duty to issue an emission standard regulating a source category only if that source category is listed under section 112(c)(6). Unlike the other section 112 listing provisions, however, there is no language requiring, or even advising, EPA to update the list of section 112(c)(6) source categories once EPA published the list.

CAA section 112(b)(2), for example, requires the Administrator to review, and where appropriate, revise the list of HAPs listed under 112(b). 42 U.S.C. § 7412(b)(2). EPA also must review the list of source categories issued under section 112(c)(1):

[T]he Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources . . . of the air pollutants listed pursuant to subsection (b) of this section.

42 U.S.C. § 7412(c)(1). Similarly, section 112(c)(5) directs EPA to add source categories to the list of “major sources” prepared pursuant to section 112(c)(1), and to the list of area sources prepared pursuant to section 112(c)(3). *Id.* § 7412(c)(5).

In direct contrast to the language requiring revision of lists in other areas of section 112, Congress made no provision for the review of source categories under section 112(c)(6). Indeed, the statute required EPA to list all categories and subcategories by 1995 and complete issuance of standards for all listed sources listed under section 112(c)(6) by 2000, a task that would be impossible if EPA had the authority to add source categories ad infinitum. The contrast in language between section 112(c)(6) and the other listing provisions of section 112 evinces a deliberate congressional intent to withhold the authority to revise the source category list as a means to ensure the prompt regulation of these seven pollutants. *See Beach v. Ocwen Fed'l Bank*, 523 U.S. 410, 418 (1988) (use of different language in separate parts of a statute is presumed to be intentional).

The most recent complete list of section 112(c)(6) source categories was published by EPA in 1998. 63 Fed. Reg. 17,838 (Apr. 10, 1998). That list was based on an inventory of emissions for the year 1990 and included tables identifying the relative percentage contribution of each category to the total of aggregate emissions for each pollutant. *Id.* at 17,839. EPA stated that the list “documented all sources for which emissions data could be found and has indicated all source categories for which emissions are suspected but no data to estimate emissions could be found.” *Id.* at 17,841. In response to comments, EPA argued that commenters had not provided

any data “which would contradict or refute EPA’s belief that all source categories have been identified.” *Id.* at 17,841.

EPA concluded in the 1998 notice that its list included sufficient source categories already subject to standards to satisfy the statutory requirement to regulate 90% of the aggregate emissions of mercury. *Id.* at 17,845. The list did not include gold mining. In contrast, for other pollutants, including polycyclic organic matter and alkylated lead, EPA stated that it was listing additional source categories, but indicated that “the list may be subject to change.” *Id.* at 17,846. For those pollutants without sufficient source categories to meet the 90% threshold, EPA acknowledged that “[a]ny future evaluation of the 90 percent requirement would have to be based on 1990 emissions in order to maintain consistency.” *Id.* EPA has never published a revised inventory of 1990 emissions, although EPA has published notices since 1998 of amendments to the section 112(c)(6) list and on one occasion has added a source category to the 1998 list. 72 Fed. Reg. 53,814, 53,817 (Sept. 20, 2007) (addition of electric arc furnace steelmaking facilities as source category contributing to 90% of 1990 mercury emissions). *See also* 67 Fed. Reg. 68,124, 68,125 (Nov. 8, 2002) (removal of source categories with negligible emissions); 65 Fed. Reg. 47,725 (Aug. 3, 2000) (removal of tire production manufacturing for HCB).

Importantly, EPA did not provide any legal rationale for its addition of electric arc furnace (“EAF”) steelmaking facilities to the section 112(c)(6) source category list for mercury, stating only that EPA had “collected additional data on mercury emissions in 1990 and performed another review of information on the 1990 baseline inventory,” and determined the EAF steelmaking facilities contributed to 90% of 1990 mercury emissions. 72 Fed. Reg. at 53,817. EPA neither republished, as part of the EAF steelmaking facility NESHAP or at any other time, an amended list of section 112(c)(6) source categories, nor has EPA provided updated information on its calculations of the relative percentage contributions of each category to total emissions. In fact, as of 2005 EPA appeared to be wrapping up its statutory obligations under section 112(c)(6): EPA represented in 2005 pleadings filed in the District Court for the District of Columbia that there were only four remaining source categories requiring regulation for all section 112(c)(6) pollutants: industrial boilers, commercial/institutional boilers, gasoline distribution stage 1, and stainless and non-stainless electric arc furnaces.

The 1998 list did not include gold mining operations as a source category for mercury emissions. 63 Fed. Reg. 17,489-17,490. In 1997, EPA had reported to Congress that no estimate of mercury emissions from gold mining could be made because there were no published emission data. Mercury Study Report to Congress, December 1997, at 4-68 to 4-69. Indeed, in the proposed rule, EPA acknowledges that there “was very little available information on mercury emissions from gold mine ore production and processing in 1998.” 75 Fed. Reg. at 22,471. Presumably, the information that EPA did have in hand in 1998 could have formed the basis for listing gold mines based on suspected emissions for which no data to estimate emissions could be found. *See* 63 Fed. Reg. at 17,841. But EPA chose not to include gold mining on the source category list and concluded that it had already listed adequate categories and subcategories of sources to meet the 90% threshold. *Id.* at 17,845.

2. EPA Added Gold Mining to the Section 112(c)(6) Source Category List Pursuant to a Secret Litigation Agreement That Provided the

Agency with Additional Time to Issue Standards for Already-Listed Categories.

EPA had never proposed adding gold mining to the section 112(c)(6) list prior to November of 2008. Yet without notifying the affected industry, EPA agreed to list gold mining as a section 112(c)(6) source category pursuant to a litigation agreement with Sierra Club that provided EPA with additional time to discharge its statutory duty to issue standards for already-listed source categories.

In 2001, Sierra Club sued EPA for its failure to promulgate standards for source categories making up 90% of aggregate emissions of the seven section 112(c)(6) pollutants by the statutory deadline of November 15, 2000. As a result of this litigation, EPA is under court order to issue emission standards for source categories listed under section 112(c)(6). This order set a date certain to meet that obligation, but it did not contemplate that EPA would add source categories to the section 112(c)(6) list. By 2003, EPA had issued emissions standards for approximately 30 of the 50 source categories listed.

EPA's deadline to issue all standards for the listed source categories was extended several times to November 20, 2008. Within two weeks of this deadline, EPA sought yet another extension, reciting that it would need more time because it would have to propose emission standards for industrial, commercial and institutional boilers and process heaters as well as commercial and industrial solid waste incineration units, and because EPA might have to propose a standard for gold mining production processes, which was not on the source category list. EPA did not notify the gold mining companies that it had made this agreement and requested expedited consideration of its motion. On November 13, 2008, the Court granted the motion and amended the order exactly as EPA had requested.

EPA's last minute litigation strategy of listing gold mining as a section 112(c)(6) source category in order to garner additional time to promulgate standards for already-listed source categories was outside its authority under the CAA and cannot be the basis for issuing emission standards for gold mines under section 112(c)(6).

III. GOLD MINING SHOULD BE SUBJECT TO GACT AND NOT A MACT STANDARD.

A. Gold Mining Facilities are All Area Sources of Mercury

As EPA acknowledges in the preamble to the Proposed Rule, all gold mining operations are area sources of mercury emissions. Thus, rather than subjecting these area sources to the MACT requirements of sections 112(d)(2) or (d)(4), which are required for major sources, section 112 allows EPA to adopt generally achievable control technology (GACT) for such smaller sources of HAPs. Section 112(d)(5) expressly provides:

With respect only to categories and subcategories of area sources listed pursuant to subsection (c), the Administrator may, in lieu of the authorities provided in paragraph (2) and subsection (f), elect to promulgate standards or requirements applicable to sources in

such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

The plain language of section 112(d)(5) includes all area sources listed under section 112(c)(6). Section 112(d)(5) does not restrict from which paragraph in subsection (c) the source listing must originate. Absent such a limitation, section 112(d)(5) vests EPA with the authority to use a GACT standard for an area source listed under any of the paragraphs of subsection (c), including section 112(c)(6).

B. Section 112 Allows GACTs for Area Sources Listed in Section 112(c)(6).

While EPA has indicated that it interprets section 112(c)(6) as not allowing it to promulgate a GACT for area sources, EPA reads an exception into section 112(d)(5) that does not exist. Rather, section 112(d)(5) is itself an exception to the mandatory provisions of section 112(c)(6). Under the proper reading, section 112(c)(6) requires EPA to use a MACT standard for major sources, while giving the EPA the authority to use a GACT standard for area sources. This reading is supported by both the legislative history and EPA's early comments regarding the interpretation of the CAA. In the House Report on the 1990 Clean Air Act Amendments, under which sections 112(c)(6) and (d)(5) arise, the Committee stated that:

Controls under subsection 112(d) for area source categories and subcategories may require the use of generally available control technologies or management practices by sources to reduce emissions, as elected by EPA, in lieu of MACT and residual risk provisions of subsection 112(f). The Committee, in establishing the area source provisions of this section, has given EPA discretion to use this standard in all appropriate cases.

H. Rep. No.101-490, Part 1, at 329 (1990). There is no language in the report indicating that Congress intended to prohibit the application of section 112(d)(5) to area sources listed under section 112(c)(6). Rather, the Committee indicated that all area source categories were subject to EPA's discretion to use a GACT standard. As such, section 112(d)(5) should be read to apply to all area sources listed under section 112(c), including area sources listed under section 112(c)(6).

EPA originally shared this understanding of section 112(d)(5) when promulgating MACT standards under section 112(c)(6) for several HAPs, including mercury, for hazardous waste combustors. In preamble language, EPA has stated that "[f]or area sources, section 112(c)(6) requires the Agency to establish either MACT standards under section 112(d)(2), or generally available control technology (GACT) standards under section 112(d)(5)." Revised Technical Standards for Hazardous Waste Combustion Facilities, 62 Fed. Reg. 24212, 24214, fn. 1 (May 2, 1997). EPA recognized that the language of section 112(d)(5) permitted the Agency to establish GACT standards for all area sources listed under section 112(c).

In later rulemakings, however, EPA shifted its position. In a 1999 rulemaking under section 112(c)(6), EPA stated that a "permissible" reading of the statute was to ignore the language in section 112(d)(5) providing EPA with discretion for all area sources listed under section 112(c)

and instead read section 112(c)(6) as imposing a mandatory MACT standard which was not subject to the exception contained in section 112(d)(5). EPA reasoned that because the language providing for the exception was not located in section 112(c)(6) and section 112(c)(6) contained specific standards, the exception contained in the section 112(d) should not be read to apply to subsection (c)(6). EPA also cited the policy-based rationale that the purpose of section 112(c)(6) was to “assure that the maximum available control technology is applied to control the emission of the most dangerous HAPs.” National Emission Standards for Hazardous Air Pollutants for Source Categories; Portland Cement Manufacturing Industry, 64 Fed. Reg. 31,898, 31,911 (June 14, 1999).

EPA’s reasoning, however, ignores the plain reading of the statute. While section 112(c)(6) creates a default position of subjecting all sources listed under it to a MACT standard, section 112(d)(5) explicitly creates an exception for the limited subset of area sources listed pursuant to section 112(c). Furthermore, the congressional intent behind section 112(d)(5) and cited by EPA, namely, that area sources should be treated differently than major sources owing to their smaller size and emission levels, supports this interpretation. Accordingly, EPA’s reading of section 112 is erroneous and EPA should recognize that section 112(d)(5) allows EPA to use a GACT standard for area sources listed under section 112(c)(6).

C. Good Environmental Policy Favors Applying a GACT to Gold Mining Mercury Emissions.

Furthermore, from a policy perspective EPA should use its discretion to apply GACT standards to the gold mine ore processing and production area source category. Congress, in allowing EPA to use a GACT standard for area sources, recognized that area sources are different from major sources in both the level of emissions and the level of scrutiny to which their emissions should be subject. National Emission Standards for Hazardous Air Pollutants for Area Sources: Chemical Preparations Industry, 74 Fed. Reg. 69194, 69199 (Dec. 30, 2009). The costs of applying a MACT standard to area source gold mines are simply not justified where all but a handful of mines with mercury emissions are already well-controlled.

The MACT standards required for major sources run a distinct risk of imposing excessive economic burdens on area sources. Congress considered this burden when drafting section 112 and provided EPA with the discretion to issue a GACT standard. When making a GACT determination, for example, EPA may consider costs in setting the GACT floor. *Id.* (“Congress plainly recognized that area sources differ from major sources, which is why Congress allowed EPA to consider costs in setting GACT standards for area sources under section 112(d)(5)...”). EPA often has cited this rationale when opting to use a GACT standard. *See e.g.*, National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Prepared Feeds Manufacturing, 75 Fed. Reg. 522, 528 (Jan. 5, 2010); National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources, 74 Fed. Reg. 56008, 56020 (Oct. 29, 2009). Because area sources are by definition smaller sources of emissions than major sources, it is reasonable for EPA to consider costs in determining the level of technology required to reduce emissions.

The adequacy of state regulation regimes also is an important factor in addressing the cost effectiveness of technology standards. EPA often looks to the effectiveness of state programs

when determining whether area sources should be subject to a GACT versus a MACT standard. National Emission Standards for Hazardous Air Pollutants for Area Sources: Polyvinyl Chloride and Copolymers Production, Primary Copper Smelting, Secondary Copper Smelting, and Primary Nonferrous Metals- Zinc, Cadmium, and Beryllium, 71 Fed. Reg. 59302, 59304 (Oct. 6, 2006) (“[L]egislative history suggests that we may consider costs and economic impacts when determining GACT, which is particularly important . . . when determining whether additional control is necessary for sources with emissions that are already well controlled as a result of other existing or applicable standards.”). For most gold ore processing and production facilities, the state standards to which they are subject reduce mercury emissions to the same levels as the proposed MACT. In Nevada, for example, where all but a handful of gold mines are located, mercury is already substantially controlled and the added costs of compliance with a MACT provide no additional environmental benefit. From a cost-benefit perspective, there is little added value. Because the reductions in emissions would not be proportionate to the higher costs of subjecting gold ore processing and production to a MACT standard, EPA should use its discretion to issue a GACT, rather than a MACT, standard for gold ore processing and production mercury emissions.

IV. EXISTING SOURCES SHOULD HAVE THREE YEARS TO COMPLY WITH THE MACT STANDARD

EPA’s proposed two-year compliance period for existing sources subject to the NESHAP (*see* 75 Fed. Reg. at 22476) should be extended to the three years allowed under the Clean Air Act. Section 112(i)(3)(A) of the Clean Air Act requires EPA to establish a compliance date for existing sources which provides for compliance with the applicable standards as expeditiously as practicable but no later than three years after the effective date of the standards. *See* 42 U.S.C. § 7412(i)(3)(A). While in some circumstances a compliance period shorter than three years may be appropriate, such a shortened timeframe it is not practicable for sources covered by this NESHAP. Gold ore processing facilities face technical challenges for compliance with EPA’s proposed emission standards that will require more than two years to overcome.

V. GOLD MINE ORE PROCESSING AND PRODUCTION AREA SOURCES SHOULD BE EXEMPT FROM TITLE V REQUIREMENTS.

EPA solicited comment on whether a title V exemption for gold mine ore processing and production area sources “is appropriate under section 502(a) for any particular sources in this category.” 75 Fed. Reg. at 22479. NWMA does not believe it is necessary or appropriate for EPA to subject gold mine ore processing and production area sources to title V requirements.

Section 502(a) of the CAA gives EPA the discretion to exempt area sources subject to section 112 of the CAA from title V requirements at the time the MACT standard is promulgated if EPA determines that compliance with title V is impracticable, infeasible, or unnecessarily burdensome for area sources and that such an exemption would not adversely affect public health, welfare, or the environment. *See* 42 U.S.C. § 7661a; 40 C.F.R. § 70.3(b)(2). For the reasons discussed below, EPA should exercise its discretion and exempt the gold mine ore processing and production area source category from the title V requirements as impracticable, infeasible, or unnecessarily burdensome.

A. Title V Permitting Is Unnecessarily Burdensome for Gold Mine Ore Processing and Production Area Sources and Granting an Exemption Will Not Adversely Affect Public Health, Welfare or the Environment.

When determining whether a title V exemption is appropriate, EPA first looks to whether all facilities in the source category are already subject to title V for other reasons. “Under today’s proposal, an area source is only exempt from title V permitting if it is not required to get a permit for other reasons.” 70 Fed. Reg. 15250, 15252 (March 25, 2005). There are only a few facilities subject to the proposed NESHAP that are already covered by title V and these facilities would naturally not be eligible for any exemption. *See* 72 Fed. Reg. 53838, 53849 (Sept. 20, 2007). Otherwise, the majority of facilities covered by the proposed NESHAP are not subject to title V for other reasons and should remain free of title V burdens.

If the source category includes facilities that are not already subject to title V, then EPA determines if title V compliance is “impracticable, infeasible, or unnecessarily burdensome” on an area source category. *See* 72 Fed. Reg. 53838, 53849 (September 20, 2007). To date, EPA’s analysis has focused primarily on the “unnecessarily burdensome” criterion of this delegation of agency discretion. *See* 70 Fed. Reg. 15250, 15253 (March 25, 2005). “In December 2005, in a national rulemaking, EPA interpreted the term “unnecessarily burdensome” in CAA section 502 and developed a four-factor balancing test for determining whether title V is unnecessarily burdensome for a particular area source category, such that an exemption from title V is appropriate.” 72 Fed. Reg. 53838, 53849 (September 20, 2007) (citing 70 Fed. Reg. 75320, December 19, 2005 (“Exemption Rule”)).

Finally, once EPA determines that title V would be unnecessarily burdensome, impracticable or infeasible for area sources, it must also confirm that a title V exemption would not adversely affect public health, welfare or the environment. *See* 72 Fed. Reg. 73180, 73188 (December 26, 2007).

1. The Four Factors of the Exemption Rule Favor a Title V Exemption for Gold Mines.

The four-factor test prescribed by the Exemption Rule for determining whether title V is “unnecessarily burdensome” on a particular area source is described in the following subsections. As a preliminary matter EPA has explained that “[n]ot all four factors must weigh in favor of exemption for EPA to determine that title V is unnecessarily burdensome for a particular area source category. Instead, the factors are to be considered in combination, and EPA determines whether the factors, taken together, support an exemption from title V for a particular source category.” 72 Fed. Reg. 53838, 53849 (September 20, 2007). Moreover, EPA has determined that once an exemption is granted, the affected source category is exempt from title V permitting under permitting authorities, including State and local agencies and EPA. *See* 70 Fed. Reg. 15250, 15252 (March 25, 2005). In this application of the Exemption Rule, all four factors support granting an exemption of area sources from title V coverage.

a) Title V would not result in significant improvements to the compliance requirements, including monitoring,

recordkeeping, and reporting that are already required by the NESHAP.

The first factor of the Exemption Rule is whether title V would result in significant improvements to the compliance requirements, including monitoring, recordkeeping, and reporting, that are proposed for an area source category. As EPA explained in the Exemption Rule:

This preamble refers to this evaluation as probing whether title V is ‘unnecessary’ to improve compliance for these NESHAP requirements at area sources. Thus, a finding that title V does not result in significant improvements to compliance, as compared to operating subject to the NESHAP without a title V permit, is described as supporting a conclusion that title V permitting is ‘unnecessary’ for area sources in that category, consistent with the ‘unnecessarily burdensome’ criterion of section 502(a) of the Act.

70 Fed. Reg. at 75,323. *See also* 74 Fed. Reg. at 30, 388 (in considering the title V exemption for aluminum, copper, and other nonferrous foundries, EPA looked to “whether title V monitoring requirements would lead to significant improvements in the monitoring requirements in the proposed NESHAP . . .”). EPA also clarified in the Exemption Rule that “[i]t has been EPA’s consistent position that *post-1990 NESHAP include all monitoring required under the Act.*” *Id.* at 75,324, n. 5 (emphasis added).

The proposed NESHAP for the gold mine ore processing and production area source category includes extensive monitoring, recordkeeping, and reporting requirements that are more comprehensive than title V requirements. The proposed standards require comprehensive annual compliance testing, submission of a monitoring plan and extensive monitoring, as well as specific recordkeeping and notification requirements in addition to those provided for in the General Provisions. *See* Proposed 40 C.F.R. §§ 63.11646, 63.11647, and 63.11648. As an example, and as noted below relative to the fourth factor, Nevada’s comprehensive mercury emissions control program imposes sampling and monitoring requirements and requires that permit holders retain monitoring and supporting information for five years after sample collection. NAC 445B.3679. Recent permits issued for comment by the Nevada Division of Environmental Protection (NDEP) require permit holders to monitoring, additional sampling, and recordkeeping from NDEP proposed permits under the Nevada Mercury Control Program (“NMCP”). The additional layering of title V does not “significantly improve” upon the proposed and existing compliance requirements.

- b) Title V permitting would impose significant burdens on these area sources and these burdens would be aggravated by difficulty they may have in obtaining assistance from permitting agencies.**

The second factor in the Exemption Rule is whether title V permitting would impose significant burdens on the area source category and whether the burdens would be aggravated by any difficulty the sources may have in obtaining assistance from permitting agencies. That is, this

factor assesses “whether title V satisfies the ‘burdensome’ component of the ‘unnecessarily burdensome’ criterion of section 502(a) of the Act.” 70 Fed. Reg. at 75,324. There are extensive administrative burdens and costs associated with the title V permitting process. In the June 2010 proposal for the area source industrial commercial and institutional boilers NESHAP, EPA stated that while it did not have specific estimates for the costs of title V permitting for the area source category, these are “mandatory” activities that impose burdens on any facility. 75 Fed. Reg. 31,896, 31,912 (June 4, 2010). These activities include:

[R]eading and understanding permit program guidance and regulations; obtaining and understanding permit application forms; answering follow-up questions from permitting authorities after the application is submitted; reviewing and understanding the permit; collecting records; preparing and submitting monitoring reports on a 6-month or more frequent basis; preparing and submitting prompt deviation reports, as defined by the State, which may include a combination of written, verbal, and other communications methods; collecting information, preparing, and submitting the annual compliance certification; preparing applications for permit revisions every 5 years; and, as needed, preparing and submitting applications for permit revisions.

Id. at 31,912. Area source gold mines in Nevada, for example, if also subject to title V permitting, would be complying with three layers of time- and cost-intensive permit requirements, including the NMCP, the NESHAP requirements, and title V permitting requirements, which would involve performance of duplicative source testing and monitoring and maintenance of duplicative records.

c) Title V does not confer any potential compliance benefits that justify the costs of title V permitting for these area sources.

The third factor in the Exemption Rule “is closely related to the second factor” and examines whether the costs of title V permitting for the area source category “would be justified, taking into consideration any potential gains in compliance likely to occur for such sources.” 70 Fed. Reg. at 75,325.

Based on the lack of significant improvements in compliance requirements discussed in the first and fourth factors, and the substantial additional costs and burdens associated with title V compliance discussed in the second factor, there do not appear to be any – yet alone sufficient – gains to justify the additional costs that would be imposed on area sources for title V compliance. Imposing title V permit requirements on area sources covered by EPA’s proposed MACT for the gold mine ore processing and production area source would only serve to increase costs burdens on these facilities without any environmental benefits that are not already conferred under existing programs and the proposed NESHAP.

d) Existing state programs assure compliance with the NESHAP, without relying on title V permitting.

The fourth factor in the Exemption Rule analysis is “whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP for the area source category, without relying on title V permits.” 70 Fed. Reg. at 75,326. This factor is easily satisfied based on prior EPA interpretations and existing programs that govern this source category at the state level.

In prior NESHAP rulemaking processes EPA has determined that the statutory requirements for implementation and enforcement of NESHAP standards by the delegated States and EPA, along with additional assistance programs are together sufficient to assure compliance with these proposed standards without relying on title V permitting. As discussed above, the proposed rulemaking includes all necessary monitoring, recordkeeping and reporting to effectively implement its requirements.

Additionally, the area sources for the gold mine ore processing and production already are permitted under State permit programs, such as the NMCP for sources in Nevada. The other states where gold mine ore processing and production area source are located either would be covered by a comparable delegated State air program or by EPA. For example, the Colorado Air Pollution Control Division (APCD) in the Department of Public Health and Environment has obtained primacy of the CAA program for the State of Colorado. The Colorado APCD’s program provides extensive compliance and enforcement infrastructure for assuring compliance with the NESHAP.

In California, as authorized by California Health and Safety Code § 42300, each local or regional air pollution control or air quality management district has adopted an air quality permit program that requires a permit before any person “builds, erects, alters, replaces, operates, or uses any article, machine, equipment, or other contrivance which may cause the issuance of air contaminants.” Although the details of each district’s permit program vary, in general they require a permit applicant to demonstrate compliance with all applicable district, state and federal rules and regulations and statutory requirements, and for the district to evaluate the applicability of and compliance with local, state and federal requirements, including MACT standards under 40 CFR Part 63. *See, e.g.*, North Coast Unified Air Quality Management District Rule 103. These requirements are then either included in permits directly or incorporated by reference.

Based on the foregoing, title V permitting would be “unnecessarily burdensome” for the gold mine ore processing and production area source category. As such, EPA should exercise the discretion it poses under section 502(a) of the CAA and exempt the gold mine ore processing and production area source category from title V permitting requirements as they are unnecessarily burdensome.

2. Public Health, Welfare, and the Environment Will Not Be Affected By a Title V Exemption for Gold Mine Ore Processing and Production Area Sources.

Exempting the gold mine ore processing and production area source category from title V permitting will not adversely affect public health, welfare, or the environment, consistent with

the legislative history of section 502(a) of the CAA. EPA has stated that exempting area sources will not adversely affect public health, welfare or the environment if the level of emissions control would be the same even if title V applied. *See* 74 Fed. Reg. 30366, 30390 (June 25, 2009).

As noted previously by EPA, title V permits are designed to ensure that procedural requirements be followed, but do not generally impose substantive air quality control requirements. 74 Fed. Reg. at 30,390. In this case, the procedural requirements in the proposed rule are entirely adequate to protect public health and the environment. Moreover, in Nevada, which is home to the largest number of mines subject to the proposed MACT, the state is implementing a comprehensive regulatory program that EPA acknowledges would provide “an additional level of control” for these facilities. 75 Fed. Reg. at 22,473. Requiring title V permits for those gold mine ore processing and production facilities that presently have duly issued non-title V permits actually has the potential to adversely affect public health, welfare, or the environment by shifting State agency resources away from ensuring compliance with a program that is reducing mercury emissions from gold mines.

B. Exempting Gold Mine Ore Processing and Production Area Sources from Title V is Consistent with Recent Similar Final Rules Promulgated by EPA.

EPA regularly provides title V exemptions for area sources similar to gold mine ore processing and production area sources. Over the last year, EPA has routinely provided title V exemptions to area sources subject to NESHAPs. *See* 75 Fed. Reg. 522 (Jan. 5, 2010 (final rule, prepared feeds manufacturing); 74 Fed. Reg. 63,504 (Dec. 3, 2009) (final rule, paints and allied products manufacturing); 74 Fed. Reg. 63,236 (Dec. 2, 2009) (final rule, asphalt processing and asphalt roofing manufacturing); 74 Fed. Reg. 69,194 (Dec. 30, 2009) (final rule, chemical preparations industry).

In the two cases in which EPA required area sources to obtain title V permits, EPA carved out certain area sources that are synthetic minor sources with high levels of previously uncontrolled HAPs, which installed air pollution control devices in order to reduce HAP emissions to below major source thresholds. *See* 75 Fed. Reg. at 31,911 (proposed rule industrial, commercial, and institutional boilers) (June 4, 2010); 74 Fed. Reg. 56,008 (Oct. 29, 2009) (final rule for chemical manufacturing area sources). The gold mine ore processing and production area sources are not synthetic minor sources that installed control technology solely to reduce emissions below major source thresholds. Indeed, in the preamble to the proposed rule, EPA noted that HAP emissions, “including mercury, are individually significantly lower than the 10 ton per year threshold for a single HAP and the 25 ton per year threshold for a combination of HAP.” 75 Fed. Reg. at 22,479-80. The gold mine ore processing and production area sources are far more similar to those area sources for which EPA has provided title V exemptions; in fact, the existing and proposed compliance and monitoring requirements for the gold mines are generally more stringent than those found in the other NESHAPs for which EPA has granted an exemption.

In summary, applying the Exemption Rule, which as it has been consistently interpreted by EPA, to the gold mine ore processing and production area source category makes a clear and convincing basis for EPA to exercise its discretion and exempt area sources from title V requirements pursuant to CAA section 502(a).

VI. IT WOULD BE INAPPROPRIATE AND UNNECESSARY FOR EPA TO INCLUDE CERTIFICATION OR MANAGEMENT PRACTICES FOR HCN EMISSIONS IN A NESHAP BEING DEVELOPED TO ADDRESS MERCURY EMISSIONS.

In the preamble of the proposed rule, EPA has requested comment on whether EPA should include provisions for employing cyanide management practices and certifying area source status for hydrogen cyanide (HCN) (or some alternative approach). NWMA believes that it would be inappropriate for EPA to impose such requirements as part of the proposed mercury MACT rule and urges EPA not to do so.

As EPA notes, there are no major sources of any HAP emissions including HCN from gold mining operations. Furthermore, EPA's TRI program provides a mechanism for EPA to assess HCN emissions from the gold mining industry on an annual basis. CAA 112(c)(6), the authority that EPA has relied upon to regulate the gold mining industry, does not provide any basis for regulating HCN emissions. Additionally, EPA has not made a finding that HCN emissions from mining operations present a threat of adverse effects to human health or the environment. Such a finding would be necessary for EPA to otherwise regulate HCN emissions. *See, e.g., 112(c)(3).*

While mining operations currently implement HCN management practices as an integral part their operations, there is no single set of cyanide management practices and operating limits that can be universally applied to all mines for limiting HCN emissions due to the uniqueness of each mine's mineralogy and cyanide leaching processes. It would simply not be technically practical to establish a single set of cyanide management practices and operating limits for all mines.

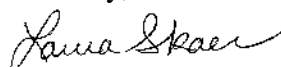
VII. CONCLUSION

NWMA believes EPA does not provide an adequate basis for listing gold mining as a source category under section 112 (c)(6) of the Clean Air Act and urges EPA to refrain from doing so. Furthermore, all gold mining operations are area sources of mercury emissions and should be subject to generally achievable control technology (GACT) rather than maximum achievable control technology (MACT).

Additionally, as noted above, gold mine ore processing and production area sources should be exempt from title V requirements. Title V permitting is unnecessarily burdensome while providing no significant improvements to compliance, and granting an exemption will not adversely affect public health, welfare or the environment.

Thank you for your consideration of our comments.

Sincerely,



Laura Skaer
Executive Director