



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

February 7, 2012

Daan Eggenberger
Tahoe House Hotel
PO Box 652
Virginia City NV 89440

Dear Mr. Eggenberger:

U.S. Environmental Protection Agency (EPA) Administrator Lisa Jackson and Regional Administrator Jared Blumenfeld have asked me to respond to your e-mails and letters regarding the activities of Comstock Mining Inc., within the Carson River Mercury Superfund Site (CRMS) in and around Virginia City, Silver City and Dayton, Nevada. EPA takes the concerns of the community seriously and in this letter we want to review with you the steps we are taking to ensure that human health and the environment are protected.

EPA has been conducting investigation and cleanup activities within the CRMS since the 1990s under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Based on sampling of soil and tailings at over 113 historic mill sites, EPA found the main risk of exposure was to children under age 6 from ingestion of mercury and arsenic contaminated soil in a residential setting. Recreational or occupational land uses did not pose a significant health risk nor did inhalation of airborne contaminants, irrespective of the land use scenario. Therefore, EPA selected a remedial action for the CRMS in a 1995 Record of Decision (ROD), with a site-specific residential cleanup level for mercury of 80 milligrams per kilogram (mg/kg) and adoption of the Nevada Contaminated Soil and Groundwater Remediation Policy soil cleanup standard of 80 mg/kg for arsenic.

Five residential areas in Dayton and Silver City exceeding the mercury cleanup level were cleaned up by EPA. To address areas where new residential developments may be constructed after the ROD, a Long-Term Sampling and Response Plan (LTSRP) was prepared. The Nevada Division of Environmental Protection (NDEP) Bureau of Corrective Actions (BCA) has been administering the LTSRP with EPA oversight. From 1995 to 2008, approximately 42 residential development proposals were reviewed by the BCA. Of those proposed developments, the BCA required sampling in 25 instances and remediation in 2 cases. In addition, NDEP and EPA have been working for several years to refine the database of all the tailings piles and mill sites within the CRMS to ensure that all the areas that require protection under the LTSRP are well defined. This also enables us to identify areas where site related contaminants do not pose a concern.

At present, EPA is analyzing the capacity of the ROD and LTSRP to appropriately capture the types of land uses now occurring within areas of the CRMS where contaminants may pose a

concern, including how mining activity should be addressed. To evaluate the current and past activities of Comstock Mining Inc., EPA has sent the company CERCLA 104(e) Request for Information letter, a copy of which is enclosed.

Also, EPA and NDEP have been working together to ensure that the mine permitting and CERCLA efforts are well coordinated. NDEP's Bureau of Mining Regulation and Reclamation (BMRR) has included provisions in Comstock Mining Inc.'s Reclamation Permit (No. 0315) to ensure that Comstock Mining's activities do not cause or threaten a release of hazardous substances. The NDEP permit requires that Comstock Mining produce detailed maps and a Sampling and Analysis Plan (SAP) to characterize areas of future and past disturbance. If sampling identifies areas of past disturbance with contaminants above the action levels of the LTSRP, Comstock Mining will be required to take appropriate remedial measures. NDEP has approved the SAP and will review and approve all sampling reports and conduct quarterly inspections of the Comstock operation. The BCA will coordinate their activities with EPA.

Your December 10, 2011 letter to EPA Remedial Project Manager Jere Johnson raises questions about how various environmental statutes other than CERCLA apply to Comstock Mining activities. Recognizing that this is a complex legal question, we are attempting to provide a relatively succinct response in this letter. Your letter queries how permits can be issued for activities within the CRMS without a "full scale EIS." Requirements of the National Environmental Policy Act (NEPA), including Environmental Impact Statements (EISs), are triggered by federal actions such as federally required permits. In this case, the current scope of activities does not involve federal lands or permits. At this time, the permitting authority for Comstock Mining is NDEP.

Regarding the Resource Conservation and Recovery Act (RCRA), the CRMS mill and tailings wastes are from the extraction and beneficiation of ores and minerals. EPA determined in the 1995 ROD that the CRMS wastes are exempt from the definition of RCRA hazardous waste and are not subject to RCRA Subtitle C requirements. The waste retains the exemption from hazardous waste management requirements even if it is moved, transported, and placed in another location. No information has been provided to EPA to call into question the determination that the mill sites and tailings piles are exempt from Subtitle C of RCRA pursuant to the Bevill amendment.

Your December 10 letter and your most recent email, dated February 2, 2012, also suggest that EPA use RCRA Section 7003 to address potential threats to human health and the environment from the disturbance of mining wastes. Section 7003 does not override the Bevill Amendment's exemption of mining wastes from hazardous waste management requirements. Instead, as the Enforcement Alert you have referenced highlights, hazardous wastes are a subset of solid wastes and, under the Bevill amendment, certain mining wastes are solid waste, but not hazardous waste. So RCRA Section 7003 can be used to address potential threats to human health and the environment from wastes, such as mining wastes, that are solid waste but not hazardous waste under RCRA. In the case of the CRMS, however, there is no advantage to using the authority under RCRA Section 7003 because, as discussed in this letter, EPA already has exercised its

authority under CERCLA to clean up contaminated residential properties within the CRMS and to impose controls over residential development activities in previously undeveloped areas. The clean up and controls address the primary risk identified by EPA, the ingestion of mercury contaminated soil by children age 6 and under in a residential context. As noted above, EPA also is evaluating whether current non-residential land uses could pose a threat to human health or the environment and will take action as appropriate.

Regarding compliance with the Clean Water Act (CWA), EPA is aware of one incident in which Comstock Mining activities adjacent to and within the streambed of Gold Canyon were investigated by NDEP's Bureau of Water Pollution Control and a Cease and Desist Order was issued. We understand that all the violations were subsequently addressed (please see enclosed letter from NDEP). Although the authority to administer the CWA has been delegated to the State of Nevada, EPA provides oversight and support for the NDEP program and retains independent enforcement authority to address Clean Water Act violations. We have forwarded your letter to NDEP to inform them of your concerns and to ascertain whether there are Clean Water Act compliance issues that require EPA's involvement.

Your letter asks whether the mobilization of contaminants into the air would be a violation of the Clean Air Act (CAA). EPA is aware of one instance in which Comstock Mining's exploratory drilling was reported by residents to have generated a significant amount of dust. It is EPA's understanding that the drilling, which was halted in response to complaints, occurred in an area which was not part of the historic mill site area. Under the NDEP permit, Comstock Mining must sample work areas that are within the CRMS prior to beginning work. Remediation will be required before the areas are disturbed, if needed.

Authority for administration of the provisions of the Clean Air Act has been delegated to NDEP, but EPA retains oversight authority. EPA has received a draft Operating Permit to Construct from NDEP's Bureau of Air Pollution Control in relation to Comstock Mining's proposed mining operations at the property formerly known as Billie the Kid/Hartford Hill Project Mine (No. AP 1041-2761FIN# A0404). The draft permit has been released by NDEP for public comment. NDEP must respond to all appropriate public comments regarding the draft permit received during the public comment period before issuing a final permit decision. The draft permit states that the source is subject to a National Emission Standard for Hazardous Air Pollutants (NESHAPS). In particular, the proposed source shall have to comply with 40 CFR 63 Subpart EEEEEEE- Gold Mine Ore Processing and Production Area Source Category, which contains specific emissions standards for mercury and other monitoring and reporting requirements. EPA has not submitted comments regarding the draft permit at this time.

I hope this information helps to address some of your concerns. It should be understood that CERCLA does not prohibit re-use of Superfund sites, but requires that re-use must be accomplished in a manner that does not compromise the integrity and protectiveness of the remedy. EPA and NDEP are working to ensure that this is the case within the CRMS.

EPA plans to release a draft of the ROD modifications and a revised LTSRP for public review and comment in the coming months. EPA is available to meet with the community to discuss the CRMS-related concerns associated with the activities of Comstock Mining. We will be contacting the Comstock Residents Association, Friends of the Comstock, and other members of the community in the near future to discuss the opportunities for a meeting. If you have any further concerns or questions, please do not hesitate to contact Roberta Blank, Chief of the CA/NV Private Sites Section at 415-972-3169 or blank.roberta@epa.gov, or Jere Johnson, Remedial Project Manager, at 415-972-3094 or johnson.jere@epa.gov.

Sincerely,

Original signed by:

Michael M. Montgomery
Assistant Director
Superfund Division

Enclosures: 1) 104(e) letter
2) NDEP letter to Comstock Mining regarding Cease and Desist Order

cc Robin Cobbey, Comstock Residents Association
Gayle Sherman, Comstock Residents Association
Greg Lovato, NDEP
Jeff Collins, NDEP
Office of Senator Harry Reid