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October 14, 2003

**BY E-MAIL, FACSIMILE, AND OVERNIGHT DELIVERY**

Mr. Marvin W. Nichols, Jr.  
Director  
Mine Safety and Health Administration  
Office of Standards, Regulations, and Variances  
1100 Wilson Blvd., Room 2313  
Arlington, VA 22209-3939

**Re: Comment of Getchell Gold Corporation/Placer Dome America  
concerning MSHA's Diesel Particulate Matter ("DPM") Proposed Rule  
(68 Fed. Reg. 48668)**

Dear Mr. Nichols:

We appreciate the opportunity to submit this Comment on behalf of Getchell Gold Corporation ("Getchell") and its corporate parent, Placer Dome America, in response to the Proposed Rule on Diesel Particulate Matter ("DPM") exposure of the Mine Safety and Health Administration ("MSHA" or "Agency"), published in the *Federal Register* on August 14, 2003 (68 Fed. Reg. 48668). Getchell, an underground precious metal mine in Nevada and subject to the Agency's DPM Rule, has been an active and constructive participant throughout the entire DPM rule making process. Getchell has also been a litigant in the court challenge to MSHA's DPM Rule, and was extensively and positively involved in the remarkable settlement process that led to the present Proposed Rule.

Preliminarily, we emphasize our satisfaction that the Proposed Rule derives from and fits within the context of the two Settlement Agreements between MSHA and the litigating parties.

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More specifically, Getchell supports the Agency's decision to use elemental carbon ("EC"), as opposed to Total Carbon ("TC"), as the surrogate for DPM. The *31-Mine Study* demonstrated that interferences of Environmental Tobacco Smoke ("ETS") and oil mist are mostly eliminated if EC is used as the surrogate, as provided under the parties' Second Settlement Agreement. However, we must note that the sampling data collected pursuant to the settlement process did not adequately confirm that carbonaceous materials in host rock do not interfere with personal sampling. Accordingly, carbonaceous host rock contamination remains a serious concern at the Getchell mine and at other similarly affected mines in Nevada.

We enthusiastically support the Agency's decision to rely only upon personal samples for compliance determinations instead of a mix of area and personal sampling. Getchell is also generally pleased that the Agency will allow a miner operator to be granted an extension of time for compliance when either technological or economic feasibility problems prevent compliance with the present (interim) standard, and that the DPM Control Plan process and requirements have been somewhat streamlined. However, Getchell has several remaining critical concerns. These issues are as follows:

**Critical Problems with the Final PEL of 160  $\mu\text{g}/\text{m}^3$**

As demonstrated by MSHA's "baseline study," there are few underground metal mines that are able to meet the final 160  $\mu\text{g}/\text{m}^3$  PEL. See 68 Fed. Reg. 48677 (Table V-10). Indeed, most sampled mines could not satisfy that PEL. *Id.* Data from the *Joint MSHA/Industry Study: Determination of DPM Levels in Underground Metal and Nonmetal Mines*, also referred to as the *31-Mine Study*, and from the baseline study also demonstrate that, presently, many mines are having

difficulty meeting the  $400 \mu\text{g}/\text{m}^3$  Interim PEL. As discussed below, substantial problems remain regarding the technological feasibility of after-treatment control technology.

**Accordingly, Getchell strongly recommends that MSHA retain the  $400 \mu\text{g}/\text{m}^3$  Interim PEL as the final limit (suitably adjusted to use of the EC as the surrogate).** Getchell believes that the proposed final  $160 \mu\text{g}/\text{m}^3$  PEL is infeasible and unattainable in the foreseeable future for most affected underground metal (and for many other) mines, including its own. The data in both the baseline study and the *31-Mine Study* bear this out. Comments submitted on the record during the DPM rule making process, criticizing and documenting flaws to MSHA's Risk Assessment, the scientific basis for the DPM Standard, and the Interim and Final PELs, also are consistent with adoption of the  $400 \mu\text{g}/\text{m}^3$  level as the Final PEL. *See, e.g., MARG Diesel Coalition's Comment to MSHA's September 25, 2002 ANPR*, Record at AB29-Comm-3. Additionally, MSHA's Risk Assessment does not comply with the present legal requirements under the "Data Quality Guidelines"<sup>1</sup> to use the best available, peer-reviewed science. Although containing some valuable information, the Risk Assessment was not conducted in accordance with sound and objective scientific practices and would not pass muster under the Data Quality Guidelines.

Based on the foregoing, Getchell believes that reducing the PEL to a level below the interim level of  $400 \mu\text{g}/\text{m}^3$  is not appropriate.

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<sup>1</sup> The Data Quality Guidelines are implementing regulations of the Information Dissemination Provision of the Paperwork Reduction Act, 44 U.S.C. § 3504(d)(1) and 3516 note. *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies*. 67 Fed. Reg. 369 (January 3, 2002).

### **Single Samples**

We share the virtually unanimous view of the other parties to the Settlement Agreements, and of others in the mining industry, that the Agency's reliance upon a single sample during a single shift to determine compliance is inappropriate in the context of the DPM rule. The sampling data from the *31-Mine Study*, show a wide variability that makes reliance on single samples for compliance extremely problematic and statistically unsupportable. The paired sample analysis of the *31-Mine Study* clearly demonstrates the manifest uncertainty of using a single sample to characterize average DPM concentrations. Stated simply, single samples may fail to represent reliably the actual exposures. As a result, MSHA's present enforcement strategy will lead to enforcement disputes and possible gridlock of the DPM rule, particularly in the Metal Sector where variations in sample results have been particularly noticeable.

There are many reasonable compliance and enforcement options and alternatives available. At the least, the Agency should employ a regime of multiple samples during a single shift, as recently approved in *Secretary v. Excel Mining, LLC*, \_ F.3d \_ No. 01-1335 (D.C. Cir., July 8, 2003). We continue to urge MSHA to work with the parties and the industry to develop sound sampling strategies for compliance determinations that will bear the hallmarks of reliability and credibility and, hence, promote cooperation and progress on this issue in the affected mining community.

### **Error Factor For Compliance Determinations for Mines with Carbonaceous Ores**

In implementing the Settlement Agreement, the litigating parties agreed upon the Error Factor that would be applied for determining noncompliance with the EC limit. The adoption of EC as the surrogate for DPM is expected to eliminate interferences from oil mist and ETS. However, there remains the possibility that carbonaceous ores bodies will continue to pose a risk of interfering with

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DPM sampling. Some mines with carbonaceous ores experience high EC levels. MSHA should undertake additional research on the question of whether EC eliminates all interference problems. As explained more fully below, MSHA should also consider adopting a particularized Error Factor for mines with carbonaceous ores that is derived from the analytical results for DPM generated by the mine.

Pursuant to the Second Settlement Agreement, MSHA's enforcement policy will use an Error Factor to account for variability in sampling and analysis from such elements as pump flow rates and the NIOSH 5040 method. However, "[i]f the TC measurement is above the error factor level, ... MSHA would look at the EC measurement from the sample, and multiply EC by a factor of 1.3 to produce a statistical estimate of what TC should be without interferences." *Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners*, 67 Fed. Reg. 47296, 47298 (July 18, 2002). This approach assumes that the interferences and thus, the relationship between EC and TC, do not vary. However, MSHA has also recognized that "the EC:TC ratio *can vary significantly*, not only from mine to mine but also within a mine." 68 Fed. Reg. at 48706 (emphasis added). Until additional research is conducted, MSHA should determine the Error Factor based on the samples collected at a mine, and not the 1.3 factor, to produce a statistical estimate of TC without interferences.

### **Feasibility**

Members of the mining industry have continued efforts to implement filter systems and filter technology to reduce DPM emissions. Many mine operators have participated in filter tests that have been conducted either by the mine operator, in conjunction with NIOSH, or in conjunction with both NIOSH and MSHA. Getchell is convinced that, where filters can be sized and fitted to

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equipment, significant reductions in DPM emissions will result. However, there are applications where filters are not feasible. In addition, other problems remain that will require additional time to solve. The problems include variability with filter efficiency, filter failure, the need for useful life data, and more critically, excessive engine back pressure that may result in a voiding of the engine warranty and significant engine damage.

Based on the experience of many mines in the Metal Sector, MSHA would be mistaken in assuming that all feasibility problems have been resolved. Getchell believes that, in the short term, MSHA's insistence that a complete menu of mine-worthy, technically feasible solutions exists, is overly optimistic if not misplaced. In this regard, Getchell endorses and commends to MSHA's attention the Comment of the National Mining Association ("NMA") concerning the subject of feasibility. However, Getchell remains committed to continuing efforts to identify and use mine-worthy filter technology.

### **Process-Related Problems**

While Getchell supports the availability of the extension of time for compliance with the Interim PEL, it has consistently called for clear, simple, and transparent criteria governing the granting of such extensions. The Proposed Rule fails to specify such criteria, with the consequence that industry, at this point, is basically left to trust that MSHA will employ reasonable and fair standards in deciding whether to grant or withhold such extensions. We urge MSHA to spell out the key criteria in the Final Rule.

Similarly, while we applaud the simplification of the DPM Control Plan process, we still find the procedures somewhat burdensome. The requirement of a written plan imposes paperwork burdens and additional complexities in a field already fairly rife with similar record-making and

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keeping responsibilities. A plan may multiply, rather than limit, enforcement issues and disputes as questions arise over its interpretation and application. There exist a number of plausible, simpler alternatives. We suggest, for example, that MSHA consider allowing normal abatement processes (as with most enforcement disputes) following the first two citations for DPM overexposures, absent aggravated circumstances, and require a plan only upon a third overage and, then, upon the same terms as provided in the Proposed Rule.

Getchell and Placer Dome America generally support the comments filed by other industry litigants, and by the NMA and the National Stone, Sand, and Gravel Association. We also specifically endorse the testimony of the Nevada Mining Association presented on September 16, 2003, by Mr. Wes Leavitt, at the Salt Lake City, Utah public hearing on the Proposed Rule. We thank you again for the opportunity to comment on these issues of critical important to the underground metal mining industry and the viability of its future. We pledge our continued cooperation in seeking satisfactory answers to the remaining problems in the control of DPM exposure.

Sincerely,



L. Joseph Ferrara

Counsel for Getchell/Placer Dome America

LJF/kkt



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From: Ferrara, Joe [mailto:jferrara@jacksonkelly.com]  
Sent: Tuesday, October 14, 2003 4:06 PM  
To: 'comments@msha.gov'  
Subject: Comment on DPM Proposed Rule  
Importance: High

Dear Ms./Sir:

Please find attached, in PDF format, the Comment of Getchell Gold Corporation/Placer Dome America on MSHA's Proposed Rule regarding DPM exposure ( 68 F.R. 48668). We are also faxing a copy of the Comment to the Agency at the same time. A "hard," bond copy for your files is being transmitted by overnight Fedex delivery as well. If you have any problems with this transmission or opening the attachment, please feel free to contact the undersigned. Thank you.

Joe Ferrara

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L. Joseph Ferrara

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