

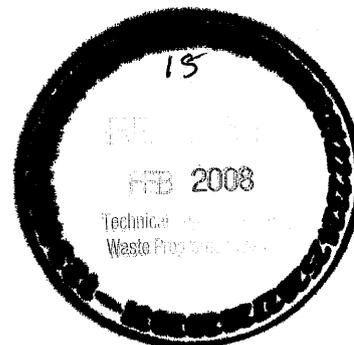
ARIZONA MINING ASSOCIATION

SYDNEY HAY
President

February 15, 2008

VIA HAND DELIVERY

Ms. Martha Seaman
Environmental Rules Specialist
Waste Programs Division
Arizona Department of Environmental Quality
1110 W. Washington Street
Phoenix, Arizona 85007



Re: *AMA Comments on Draft Solid Waste Rule*

Dear Martha:

This letter constitutes the Arizona Mining Association's ("AMA") preliminary comments on the Arizona Department of Environmental Quality's ("ADEQ's") draft solid waste rule. AMA is a non-profit business league. Its members include ASARCO LLC, BHP Copper Inc., Freeport-McMoRan Copper & Gold Inc., Carlota Copper Company, Resolution Copper Company and Chemical Lime.

AMA appreciates the challenges faced by ADEQ in promulgating a draft solid waste rule that will regulate a vast spectrum of waste management activities. AMA is concerned that the draft solid waste rule does not account for the size and type of solid waste managed at each regulated facility. For example, the type and amount of solid waste managed at AMA facilities is significantly different than at a municipal solid waste landfill. AMA also believes that the draft rule in many instances duplicates other state and federal laws. Additionally, AMA believes that the draft solid waste rule would discourage recycling and remediation of contaminated soils. Accordingly, the AMA offers the following legal and technical comments as recommendations for improvement to the draft solid waste rule.

1. Solid waste should not be subject to more stringent regulation than hazardous waste.

Under ADEQ's draft solid waste rule, there are many instances in which management of non-hazardous solid waste would appear to be subject to more burdensome regulation than management of hazardous waste. For example:

- Under the RCRA regulations, soil containing hazardous waste can be managed within an "area of contamination" without triggering any hazardous waste

requirements. However, it appears that the management of non-hazardous contaminated soil in an area of contamination could be subject to burdensome regulation under Article 6 (or perhaps Article 8) of the draft rule. As a result, non-hazardous solid waste would be subject to regulation in circumstances in which hazardous waste would not be. The same result would occur in situations involving immediate responses to releases or off-site recycling without prior storage.

- Under the RCRA “elementary neutralization unit” exemption, the neutralization of corrosive-only hazardous waste in a tank or container is exempt from hazardous waste regulation. Generators of hazardous waste are also allowed to perform other types of “treatment” in tanks and containers without being subject to TSD regulation. However, it appears that pH adjustment or other treatment of *non-hazardous* waste would be subject to regulation under Article 6 (or perhaps Article 8) of the draft rule. Again, non-hazardous solid waste would be subject to regulation in circumstances in which hazardous waste would not be. The same result would occur where non-hazardous solid waste is managed in units that – for RCRA purposes – would qualify for the “totally-enclosed treatment facility” exemption.

It would obviously be illogical to impose greater regulatory burdens on the management of solid waste than on the management of hazardous waste. It is also important to recognize that RCRA exemptions and exclusions exist to address circumstances in which regulation would be unnecessary, unreasonable, or counter-productive. A failure to incorporate such exemptions and exclusions into the solid waste program would therefore create the same kinds of problems the RCRA exemptions and exclusions were designed to alleviate. To avoid such problems, ADEQ should provide a broad exemption ensuring that solid waste regulation is not imposed on activities that would be unregulated if they involved hazardous rather than merely solid waste.

2. Recycling should generally be encouraged, not discouraged.

Recycling is generally desirable and should be encouraged. Unfortunately, the draft rule would impose burdensome regulation on virtually all waste recycling, and does not even attempt to address the issue of when material being recycled can be considered “solid waste” potentially subject to regulation. Both the extent of regulation imposed and the extent of uncertainty as to what recycling activities are regulated would create substantial deterrents to recycling. ADEQ should substantially narrow the universe of regulated waste recycling activities, and should also clarify the scope of the regulated universe in order to reduce regulatory uncertainty. This can be done by recognizing that only those wastes that have a significant adverse effect on the environment should be subject to regulation when recycled. Examples of excluded recyclable wastes include,

but are not limited to, paper, glass, wood, cardboard, household textiles, scrap metal, plastic, and vegetative waste. *See* A.R.S. § 49-701.29(d).

ADEQ has indicated that it does not intend to provide any regulatory definition of “solid waste” to clarify the circumstances under which materials being recycled can or cannot be regulated. This is unfortunate, because the “definition of solid waste” is a major source of uncertainty in the recycling context. If ADEQ does not provide a regulatory definition of “solid waste,” it should at least identify broad categories of material that *cannot be considered solid waste when recycled*, thus delineating “safe harbors” that would provide regulatory certainty for as many recycling activities as possible.

The hazardous waste regulations provide detailed regulations explaining when materials being recycled are and are not subject to regulation as hazardous waste. These regulations are not appropriate for wholesale adoption in the solid waste context, because they were specifically designed to apply to hazardous materials, and (as the courts have found) they go too far in regulating recycling activities even in the hazardous waste context. Nevertheless, the RCRA regulations could be used to define broad categories of material that – if recycled – would not be subject to solid waste regulation. Specifically, ADEQ could provide a solid waste exclusion for the recycling of any material that – if recycled – would not be subject to hazardous waste regulation if it exhibited a hazardous characteristic. This approach would identify broad categories of materials (e.g., byproducts that are reclaimed) that would not be subject to solid waste regulation, and would be consistent with the general proposition that ADEQ should not regulate material as solid waste that would not be regulated if it were hazardous waste.

Because the RCRA regulations go too far in regulating recycling activities, ADEQ should also adopt additional solid waste recycling exclusions. At a minimum, the regulations should clarify that material being recycled in a continuous process by the generating industry itself is not solid waste, as judicial precedent in the hazardous waste context has established. In addition, the regulations should clarify that material that is actually being bought and sold for recycling is not solid waste. While this seems obvious – material being bought and sold for productive use can hardly be characterized as material being “discarded” – this simple principle would provide welcome regulatory certainty that would clarify the status of many beneficial recycling activities.

In addition to identifying categories of materials that should not be considered solid waste if they are recycled, ADEQ should adopt a much narrower approach to the regulation of material that is solid waste when it is recycled. In particular, ADEQ should ensure that the regulation of recycling is a narrow and well-defined exception to the general rule that facilities engaged in recycling are not solid waste facilities.

3. **The draft rule's regulatory scheme for non-municipal solid waste landfills is inappropriate in many respects when applied to the unique circumstances of on-site landfills at mining sites.**

Background: Most active mining and/or smelting sites operate on-site landfills. These landfills do not constitute municipal solid waste landfills as defined in A.R.S. § 49-701(20), and are used for disposal of certain materials generated entirely on site. The type of waste placed in these landfills varies by facility, and may be influenced by the proximity of the facility to an urban area with trash collection services (e.g., sites located relatively near population centers may contract with a third party to collect plant trash, whereas sites in more remote locations may place at least some of that material in on-site landfills).

On-site landfills at mining sites typically possess some or all of the following characteristics, which serve to differentiate them as a class from other types of landfills:

- Materials placed in mining landfills are typically limited to one or more of the following: construction debris, asbestos-containing materials (e.g., transite pipe), solid waste PCS (as defined in A.A.C. R18-13-1601(13)), and some types of plant trash (i.e., material collected from wastebaskets on site).
- Hazardous waste and conditionally exempt small quantity generator waste is not disposed of in these on-site landfills.
- No waste generated off-site is accepted in these landfills.
- The facilities have established protocols regarding what can and cannot be placed in the on-site landfills, and these protocols are easy to implement because all of the waste is generated on the site (i.e., the generator and the landfill operator are one and the same).
- The landfills are located within the boundaries of larger facilities that allow no public access, have security present 24 hours a day/seven days a week, and are often located in remote areas.
- The mining sites within which the landfills are located are or will be governed by area-wide aquifer protection permits ("APPs") that provide comprehensive control over groundwater discharges and establish monitoring locations, points of compliance, alert levels and aquifer quality limits for the site as a whole.

- Some of the landfills are placed in manners possible only at mine sites and that provide unique levels of environmental protection (e.g., within the capture zone of hydrologic sinks created by open pit mining operations, or on top of waste rock dumps that are often relatively impermeable and are not subject to storm water run-on).

AMA concerns with draft rule provisions regarding landfills: The draft solid waste rules would establish an elaborate and relatively draconian set of regulations that is unwarranted for non-municipal solid waste landfills (“non-MSWLFs”) at mining sites that receive only certain wastes generated on-site.

Some of AMA’s *general* concerns with the manner in which the draft rules would regulate on-site landfills at mining sites are as follows:

- Given the control over wastes generated wholly on-site and the limited types and non-hazardous nature of materials being placed into mining landfills, there is no basis to regulate those landfills to the same extent as commercial MSWLFs that accept far greater volumes, and far more types, of waste from sources outside the control of the landfill operator. AMA believes that the rules should reflect a simpler, more flexible approach when it comes to the regulation of non-MSWLFs that accept only wastes generated on-site.
- Mines are heavily regulated, with numerous state, federal and local environmental regulatory programs applying to them. One of AMA’s primary goals in this rulemaking process is to avoid duplicative and potentially inconsistent regulation, and to integrate as seamlessly as possible the new solid waste requirements with similar mandates under other programs (such as APP) governing the site where the landfill is located. *See* A.R.S. § 49-203(D) (ADEQ to avoid duplication and dual permitting to the maximum extent practicable when integrating water quality programs such as the APP program with other programs affording water quality protection administered by ADEQ).
- As an example of regulatory overlap and inconsistency, the application requirements of draft Article 5 for non-MSWLFs track the APP application requirements, including the requirement to identify points of compliance (“POCs”) for the “facility.” If the “facility” is the landfill, ADEQ might interpret A.R.S. § 49-244 to require the POC to be located close to the landfill boundaries, which would be well inside the overall site boundaries. However, mine sites are subject to comprehensive area-wide APPs that establish POCs for the facility as a whole, typically near the boundaries of the mine site as a whole. Requiring installation of what amounts to an “internal” POC would be inconsistent with the intent of the area-wide permitting concept articulated in A.R.S. § 49-242(P) (which was developed largely for mining sites) and with the notion of placing

POCs at or near the edge of the pollutant management area for the site as a whole (as opposed to around individual facilities). This appears to be an example of a situation where ADEQ may not have considered how the proposed regulatory regime would apply to landfills that constitute a small part of a larger, heavily regulated facility

- Mine sites may have multiple landfills on the property, and may also have other solid waste “facilities” present. It should be clarified that a single plan can be developed for all facilities subject to plan approval requirements at a single site, rather than having to develop a separate plan for each facility.

Some of AMA’s more *specific* concerns with the draft rules and how they apply to landfills receiving waste generated on-site at mining facilities are as follows (this is not intended to be an exhaustive list):

- The requirement to “render harmless solid waste that is or contains dangerous materials” (draft R18-13-303(D)) is vague in several respects (the phrases “render harmless” and “dangerous materials”). Moreover, once ADEQ’s intent is clarified, AMA believes it may be appropriate that the requirements be different when the waste is disposed on the site of generation and not transported on public roads or through populated areas.
- It should be clarified that “collection services” and the associated requirements for persons providing those services (contained in draft Article 3) do not apply to a person collecting waste generated on-site and disposing of that waste on the same site.
- Similarly, the transportation requirements of draft R18-13-310 should not apply to a person transporting waste generated on-site for disposal on the same site.
- Many of the requirements in the draft operational plan rule (R18-13-404) and the more detailed regulations cross-referenced in that rule parallel (and in some cases are not consistent with) requirements in other regulatory programs applicable to mining sites. Examples include requirements for run-on and runoff control, contingency plans, closure and post-closure plans, financial assurance, inspections, and training.
- Additional examples of operational requirements in draft Article 4 that may be problematic or excessive for mining sites handling only limited volumes of generally low hazard wastes generated on-site (but are not limited to): (a) the requirement to maintain daily records and weigh waste on a daily basis (draft R18-13-405); (b) the apparent requirement to provide run-on and runoff control even if there is no possibility of discharge to a water of the United States or of

water leaving the site (draft R18-13-407); (c) the detailed waste screening requirements of draft R18-13-408, which are excessive where a facility handles only waste generated on-site; and (d) the signage requirements of draft A.A.C. R18-13-409(B) and R18-13-413(B). These and other provisions of Article 4 are not appropriate at non-MSWLFs that accept only waste generated on-site, including those at mines.

- The groundwater protection provisions (e.g., the application requirements of draft A.A.C. R18-13-502(C) and the design criteria of draft R18-13-1103 for new or expanded landfills) incorporate most of the BADCT provisions of the APP program but do not incorporate A.R.S. § 49-243(G), which recognizes passive containment created by a hydrologic sink at an open pit mining operation as an important element of BADCT. As a result, the solid waste rules would be significantly more stringent than the APP rules when applied to landfills at mining sites that are located within the capture zone of a hydrologic sink. This approach is not justified because the existence of a hydrologic sink provides a long-term, maintenance-free method of controlling any discharges that reach groundwater.
- Given that mining involves earth-moving as its primary activity, and that the types of waste placed in mine landfills are limited, it is unclear how the construction quality assurance and quality control requirements of draft A.A.C. R18-13-503 would apply (the work would likely be done internally), or if they are even necessary.
- Mine sites are largely unpaved, so it may not be possible to provide all weather surfaces for areas subject to vehicular traffic, as required by various provisions of the draft rules (e.g., draft A.A.C. R18-13-603(A)(3) (on-site solid waste handling facilities) and A.A.C. R18-13-1105(A)(2) (non-MSWLFs)).
- Given the nature of the material placed in them, many landfills at mining sites may not require the same sort of control features set forth in draft Article 11 (and apparently designed for MSWLFs), such as liners, hydraulic gradient control systems, leachate collection, and methane monitoring. The most obvious example where such provisions are unnecessary would be a construction debris landfill.
- The operational controls, such as random inspections of incoming loads, compaction of waste, and methane gas monitoring, should not apply to landfills at mining sites since no off-site waste is received and the type of waste placed in the landfills would not generate methane gas.

Martha Seaman, ADEQ
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The "one size fits all" approach to regulation of landfills reflected in the current draft is simply inappropriate for on-site landfills at mining sites. AMA looks forward to discussing with ADEQ opportunities for tailoring a more flexible and appropriate program for this class of landfills.

AMA appreciates the opportunity to submit comments on ADEQ's draft solid waste rule. AMA intends to participate in the rulemaking stakeholder processes with ADEQ.

Very truly yours,

A handwritten signature in cursive script that reads "Sydney Hay". The signature is written in black ink and is positioned above the printed name and title.

Sydney Hay
President, Arizona Mining Association