Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City

Office of the General Counsel

11 November 2011
SEC Opinion No. 11 - 46
Re: Authority to Engage
in Mining Activities

Atty. Jaime T. De Veyra, MNSA
BAC Chairman
Philippine Mining Development Corporation
Unit 2904-B Philippine Stock Exchange Centre
West Tower, Exchange Road
Ortigas Center, Pasig City

Dear Atty. De Veyra:

This refers to your request for clarification on whether or not Century Peak Metals Holdings Corporation (CPMHC) is authorized to **engage in mining activities by itself** under its primary purpose, as stated in its Articles of Incorporation. (Emphasis supplied)

Philippine Mining Development Corporation (PMDC) is registered with the Commission, under Company Registration No. CS 200314923.[1] To develop its properties, the PMDC enters into partnership agreements with qualified mining entities that are selected through a competitive selection process.

To determine if the interested bidders for PMDC's North Davao Mining Property is authorized to engage in the mining activities, the Bids and Awards Committee (BAC) of the PMDC requested for the Opinion of the Commission on whether the bidders listed in its 23 October 2009 letter were qualified.

In its 09 December 2009 letter, the Company Registration and Monitoring Department (CRMD) of the Commission replied that "except for CPMHC which is a holding corporation although specific to mining companies, all other corporations are considered mining corporations per its purpose stated in their Articles of Incorporation and thus, can engage in mining activities."

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[1] PMDC's current capital structure is as follows: Natural Resources Development Corporation (NRDC) - 44%; Philippine National Oil Company (PNOC) - 36%; National Development Corporation (NDC) - 20%. On December 27, 2007, the PMDC was transferred from the Office of the President to the Department of Energy and Natural Resources through Executive Order No. 689. (source: PMDC website accessed 14 October 2011).

Nevertheless, in a letter to CPMHC dated 19 February 2010, CRMD confirmed that CPMHC can engage in the business of operating and mining mineral resources, and wrote:

> "We confirm that the above-mentioned corporation can engage in the mining business as expressly provided in the Second Article of its Articles of Incorporation which provides as follows:
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> 'To promote, **establish, operate, manage**, hold, **own**, or invest in **corporations or entities that are engaged in mining activities or mining-related activities**, or assist or participate in the organization, merger, or consolidation thereof and in connection with such activities to subscribe, to purchase, or otherwise acquire shares of stock xxx in any such business or enterprise xxx.' **(Emphasis supplied by CRMD)**"

In a letter dated 02 March 2010, PMDC sought to clarify the apparent discrepancy between the 09 December 2009 letter to the PMDC and the 19 February 2010 letter to CPMHC of the CRMD. In the 02 March 2010 letter, PMDC expressed its understanding that based on the CRMD 09 December 2009 letter, CPMHC has the authority invest in corporations engaged in mining activities, but it is not a mining corporation and cannot, by itself, engage in mining activities. Thus PMDC sought CRMD's opinion on whether CPMHC can be considered a mining corporation which can engage in mining activities by itself.

CPMHC also wrote CRMD a letter dated 05 March 2010 stating its opposition to the issue raised by PMDC in its 02 March 2010 letter. It disclosed that the issue on whether or not CPMHC may engage in mining activities pertains specifically to PMDC's "Joint Venture Partner's Eligibility & Qualification Requirements" for the selection of a prospective partner for the mining operation of its Higanteng Bato Property. Accordingly, one of the qualifications for the partner's eligibility among others is, "(1) Must be authorized to engage in mining activities." Based on this, the position of CPMHC is that item (1) of the qualifications **does not specify** that the applicant – bidder must be capable of engaging in mining activities "**by itself**," and that the determination required for purposes of applying the cited qualification extends only to an applicant-bidder's capacity to engage in mining activities as provided in its Articles of Incorporation (AOI).

Reacting to the letter of CPMHC, PMDC wrote the CRMD another letter, dated 10 March 2010, stating its interpretation, that the tenor of the letter dated 05 March 2010 of CPMHC illustrates that it acknowledges the fact that it is not authorized to engage in mining and related activities and a conduit corporation would be required for CPMHC to engage in mining. PMDC informed the Commission that indeed, it is looking for an operator/partner to operate its mining properties which must be a "Philippine or Foreign Mining Corporation(s)" authorized to engage in mining activities. Confirming CPMHC's position, PMDC reiterated that the qualification "extends only to the applicant-bidder's capacity to engage in mining activities as provided under its Articles of Incorporation," not to the capacity of its subsidiaries nor that of the conduit corporation. PMDC thus concluded that the prospective operator/partner must be a mining corporation which is authorized to

engage in mining activities by itself and under its own name not through a subsidiary nor a conduit corporation.

On 27 May 2010, CRMD responded to PMDC's letters dated 02 March 2010 and 10 March 2010 which seek clarification on the issue of whether or not CPMHC has the authority to engage in mining activities by itself. CRMD referred to its opinions in its letters dated: 1) 02 December 2009 stating that "CPMHC is a holding corporation which is not a mining company;" and 2) 19 February 2010 stating that CPMHC can engage in the mining business as expressly provided in its Articles of Incorporation." Thus CRMD concluded that it "bears stressing that the purpose clause of the Articles of Incorporation of CPMHC is susceptible to differing interpretations. Thus, it is understandable if the said corporation will be considered either as a holdings corporation specific to mining companies, or a company that operates as a mining company."

The matter was later brought to the Commission's Office of the General Counsel (OGC), seeking further clarification, on whether or not CPMHC may engage in mining activities **by itself** under its primary purpose, as stated in its AOI.

PMDC pointed out Section 14 of the Corporation Code[2] and paragraph 2 of SEC Memorandum Circular No. 5 Series of 2008,[3] (Guidelines and Procedures on the Use of Corporate and Partnership Names) and opined that CPMHC is a holding company and not a mining company. Therefore, it cannot engage in mining activities by itself.

Mindful of CRMD's position, articulated in its letter to PMDC dated 27 May 2010, "that the purpose clause of the Articles of Incorporation of CPMHC is susceptible to differing interpretations," the OGC takes the position that **CPMHC is a holding company, and thus cannot engage in the business of mining by itself.**

The OGC agrees with CRMD's position in its 09 December 2009 letter to PMDC, that CPMHC is a holding corporation specific to mining companies, per its purpose stated in its Articles of Incorporation, and thus cannot engage in mining activities, unlike the other corporations that submitted their bids for the North Davao Mining Project, whose purposes stated in their AOI allow them to engage in mining activities.

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[2] Batas Pambansa Blg. 68 (May 1, 1980). "Section 14. Contents of the articles of incorporation. — All corporations organized under this Code shall file with the Securities and Exchange Commission articles of incorporation in any of the official languages duly signed and acknowledged by all of the incorporators, containing substantially the following matters, except as otherwise prescribed by this Code or by special law: xxxx 2. The specific purpose or purposes for which the corporation is being incorporated. Where a corporation has more than one stated purpose, the articles of incorporation shall state which is the primary purpose and which is/are the secondary purpose or purposes: Provided, That a non-stock corporation may not include a purpose which would change or contradict its nature as such;xxx."

[3] "A term that describes the business of a corporation in its name should refer to its primary purpose. xxx."

The Corporation Code prescribes that the second paragraph of the Articles of Incorporation should provide the specific purpose or purposes for which the corporation is being incorporated.[4] It is the corporation's purpose clause that confers, as well as limits, the powers that a corporation may exercise[5] and the character of a corporation is usually determined by the objects of its formation and the nature of its business as stated in the articles.[6]

The Certificate of Filing of Amended Articles of Incorporation of CPMHC dated 18 March 2010, shows that the corporation amended its AOI from:

> "To promote, establish, operate, manage, hold, own, or invest in corporations or entities that are engaged in mining activities or mining-related activities, or assist or participate in the organization, merger, or consolidation thereof and in connection with such activities to subscribe, to purchase, or otherwise acquire shares of stock or other evidence of equity participation in any such business or enterprise or to purchase or otherwise acquire all or part of the assets, franchise, concession, licenses or goodwill of said firm or establishment and assume or otherwise provide for the settlement of its obligation and liabilities."

to:

> "To promote, establish, operate, manage, hold, own, or invest in corporations or entities that are engaged in mining activities or mining-related activities, **in power and energy activities or power and energy related activities and real estate business** or assist or participate in the organization, merger, or consolidation thereof and in connection with such activities to subscribe, to purchase, or otherwise acquire shares of stock or other evidence of equity participation in any such business or enterprise or to purchase or otherwise acquire all or part of the assets, franchise, concession, licenses or goodwill of said firm or establishment and assume or otherwise provide for the settlement of its obligation and liabilities."

This amendment does not enable CPMHC to engage in mining by itself. It merely added the kind corporations that it can promote, establish, operate, manage, hold, own, or invest in, *i.e.,* power and related activities and real estate. Compare CPMHC's purpose clause with the usual clauses approved by CRMD for companies that engage in mining:

> MINING (SURFACE ONLY)
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> "To engage in the business of quarrying, mining, cutting strip, finishing, setting, purchasing, selling and dealing in non-metallic ore, limestone, aggregates, marbles, other stones and any other minerals as may be incidentally developed, and to manufacture the same into various products."

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[4] Batas Pambansa Blg. 68 (1980), Section14, par. 2.
[5] SEC Opinion dated February 2, 2006 to Atty. Aissa V. Encarnacion Philippine Stock Exchange, Inc. citing Campos, J., et al., The Corporation Code, Vol. I, p. 74.
[6] *Id.,* citing 18A Am Jur 2d, Corporations § 204.

MINING EXPLORATIONS

> "To engage in and carry on the business of mining exploration, feasibility, development, utilization, extraction of ferrous and non-ferrous mineral ores and quarrying of a mining area; to deal in, purchase, lease, locate, apply for, or otherwise acquire, own, exchange, sell, lease to otherwise dispose of mines, mining claims, mining rights, applications, all to the extent allowed by law."

The above-quoted purpose clauses for mining illustrate that the purpose clause of CPMHC fails to establish that it can engage in mining by itself. Note that the CRMD-prescribed purpose clauses of mining companies state unambiguously: "To engage in and carry on the business of mining exploration..." and "To engage in the business of quarrying, mining, xxx," but the purpose clause of CPMHC states, "To promote, establish, operate, manage, hold, own, or invest in corporations or entities that are engaged in mining activities or mining-related activities, xxx."

The Commission has set forth the principle in interpreting the purpose clause of the AOI, as follows:

> "The purpose of a corporation as set forth in the articles of incorporation is not to be limited by the words of a single clause, but is **to be ascertained by the reading of the entire declaration**. All the clauses are to be considered together and in association with one another in determining what the corporation may do." [7] (Emphasis ours)

CPMHC's AOI does not specifically state that it shall engage in the business of mining by itself, but merely **promote**, **establish**, operate, manage, **hold**, **own**, or invest in corporations or entities that are engaged in mining activities or mining-related activities. The phrase "to promote, establish, operate, manage, hold, own, or invest in corporations or entities xxx" taken as a whole, strongly shows the primary purpose to engage in holding interests in the said companies. This is reinforced by the fact that the CPMHC can "assist or participate in the organization, merger, or consolidation" of these companies, and that, "in connection with such activities," it is authorized "to subscribe, to purchase, or otherwise acquire shares of stock or other evidence of equity participation in any such business or enterprise or to purchase or otherwise acquire all or part of the assets, franchise, concession, licenses or goodwill of said firm or establishment and assume or otherwise provide for the settlement of its obligation and liabilities." The use of the words "manage" and "operate" in CPMHC's AOI is not inconsistent with the idea of a holding company. In a previous opinion,[8] the Commission, in ruling that the subject corporations are holding companies rather than investment companies, interpreted the words "manage" and "operate" to mean that their intention is not merely to invest in securities but to manage their subsidiaries or affiliates.

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[7] Opinion dated 19 December 1995 addressed to Atty. Tomas F. Tuason IV, citing 1A Fletcher, sec. 100.

[8] SEC Opinion dated 03 November 1983 addressed to Senior Deputy Governor Gabriel Singson.

Moreover, paragraph 2 of SEC Memorandum Circular No. 5 Series of 2008[9] provides that "a term that describes the business of a corporation in its name should refer to its primary purpose. xxx" CPMHC's name, Century Peak Metals **Holdings** Corporation, does, in fact refer to its primary purpose, which is that of a holding company.

CPMHC was a **holding corporation** specific to mining companies, prior to the amendment of its purpose clause adding power and energy related activities and real estate business. In a previous opinion,[10] the OGC explained that,

> "A holding company has been aptly defined as "a corporation organized to hold the stock of another or other corporations."[11] Its essential feature is that it holds stock.[12] The term "holding company" is equivalent to a parent corporation, having such an interest in another corporation, or power of control, that it may elect its directors and influence its management. xxx
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> As a general rule, the primary purpose of the corporation determines its classification. **However, where the corporation actually engages in one of its secondary purpose, it may also be classified in accordance with said secondary purpose.**[13]"

The primary purpose of CPMHC stated above shows that it is a holding company, but its AOI does not state any secondary purpose. Outside of the primary purpose, the secondary purposes might determine a corporation's classification on the condition that the corporation is actually engaged in the business stated therein.[14] Inasmuch as CPMHC's AOI does not state that it shall engage in mining activities, it is thus a mere holding company of corporations or entities that are engaged in mining activities or mining-related activities, including power and energy related activities and real estate business. Therefore, CPMHC cannot engage in mining by itself.

It shall be understood that the foregoing opinion is rendered based solely on the facts disclosed in the query and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the

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[9] Guidelines and Procedures on the Use of Corporate and Partnership Names.
[10] SEC- OGC Opinion No. 11-15 to Mr. Rodolfo Ma. A. Ponferrada dated 10 February 2011.
[11] SEC Opinion dated July 27, 1987 to Director R.P. Lirio SES Department IV Central Bank of the Philippines citing 6A Fletcher Cyc. Corps., 1981 rev. vol., sec. 2821 at 300.
[12] *Id.*, citing Fletcher, sec. 2821, citing Noyes, Inter-corporate Relations, (2nd ed.), sec. 285.
[13] SEC Opinion dated December 19, 1995 to Atty. Tomas F. Tuason IV, Philippine Stock Exchange, Inc.
[14] SEC OPINION NO. 08-06 to The Philippine Stock Exchange, Inc. dated February 2, 2006, citing SEC Opinion Letters to Atty. Juan Ricardo B. Tan of Romulo Mabanta Buenaventura Sayoc & De Los Angeles dated June 6, 1995; Mr. Salvador C. Martin of the Dept. of Environment & Natural Resource (DENR), February 7, 1994; The Acting Director of the Bureau of Mines dated March 22, 1974; and Mr. Sixto S. de Guzman, Jr., August 29, 1972.

courts, or upon the Commission in other cases of similar or dissimilar circumstances. If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Very truly yours,

VESPER JULIUS B. GARCIA
Officer-in-Charge