

1 **A. THE CRA FORM #3 IS INVALID ON ITS FACE AND MUST BE DISMISSED.**

2 The CRA fails to provide the NDEP adequate notice of the CRA claims under
3 NAC 445B.891 and therefore must be dismissed. Not only does the CRA appeal fail to
4 state what law or regulation the NDEP has allegedly violated in issuing the Permit, but it
5 also fails to allege that the NDEP has erred in issuing the Permit or any basis for such
6 error. The CRA does not even allege that NDEP abused its discretion in issuing the
7 permit.¹ Form #3 is so broad that it fails to give the NDEP fair and appropriate notice of
8 what must be defended at any hearing on this matter.

9 “It goes without saying that the requirements of a fair hearing include notice of
10 the claims of the opposing party and an opportunity to meet them.” *Federal Trade*
11 *Com'n v. National Lead Co.*, 352 U.S. 419, 427, 77 S.Ct. 502 (1957) (citing *Morgan v.*
12 *United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938)). This concept is
13 reflected in the SEC rules of practice, as well as its Form #3. NAC 445.891 (2) states:

14 All of the parties must be notified by registered or certified
15 mail of the date thereof which must be no less than 5 days
 after the date of notification. The notice must include:

- 16 (a) A statement of the time, place and nature of
17 hearing;
- 18 (b) *A statement of the legal authority and*
 jurisdiction under which the hearing is to be held;
- 19 (c) *A reference to the particular sections of NRS*
20 *and NAC allegedly violated; and*
- 21 (d) *A brief and concise statement of the matters*
 asserted or the issues involved.

22 (Emphasis added) This regulation reflects similar requirements for notice in a contested
23 case under Nevada’s Administrative Procedure Act. See NRS 233B.121.

24

25

26 _____
27 ¹ See NRS 233B.135(3), which sets forth the standard for review that a district court must use upon a
28 petition for judicial review of a contested case. The judiciary’s de novo review of the agency’s
interpretation of the law and application of the same substantial evidence standard to findings of fact
implies that the Commission’s standard of review is the same as the courts. See *Helms v. State, Div. of*
Env’tl Prot., 109 Nev. 310, 313, 849 P.2d 279, 281 (1993).

1 The SEC Form #3 document requires an appellant to specify the statutory or
2 regulatory sections that constitute the basis of the appeal. In response, the CRA lists
3 the following authority: NAC 519A.010 to 519A.370 which are all of the regulations
4 applicable to the "Reclamation of Land Subject to Mining Operations or Exploration
5 Projects"; NRS 445B.100 which sets forth public policy for air quality; "NRS 445.210"
6 which does not exist; and NAC Chapter 444 which are all of the regulations regarding
7 sanitation. The citation to virtually all of the relevant regulations to any mining project,
8 and to inapplicable policy and regulations, gives the NDEP no notice of what law or laws
9 the CRA alleges the NDEP has failed to enforce. The CRA concludes its "notice" with
10 the incorporation of "all other objections identified in the written and oral comments
11 presented to the NDEP prior to and at the Public Hearing on the draft permit." See
12 Form #3 at 2. Requiring the NDEP to defend such unspecified claims is fundamentally
13 unfair. Therefore, this appeal must be dismissed for the CRA's failure to state any
14 ground upon which an appeal may be granted. Should the SEC allow this appeal to
15 proceed, the NDEP moves for an order limiting the claims to those expressly specified
16 in Form #3, and addressed individually below.

17 **B. THE PERMIT REQUIREMENTS MEET OR EXCEED THE RELIEF REQUESTED BY THE**
18 **CRA.**

19 Despite the overbroad allegations of Form #3, what is clear is CRA's
20 fundamental misunderstanding of the requirements of the Permittee under the Permit.
21 A brief outline of the Permit and its site specific requirements is illustrative. The
22 Permittee proposes mining exploration on patented lode claims on the Permittee's
23 private land. A portion of the private land subject to the Permit is located within the risk
24 area boundary of the Carson River Mercury Superfund Site ("CRMS").

25 The CRMS has long been the location of federal and state oversight. The United
26 States Environmental Protection Agency ("EPA") proposed the CRMS for listing on the
27 National Priorities List in 1989. Final remedy selection for the CRMS was published
28 after public hearing in the EPA Superfund Record of Decision for the CRMS, dated

1 March 30, 1995 (the "ROD"). The EPA has authorized the NDEP to manage Operable
2 Unit 1 ("OU-1") of the CRMS, and the NDEP delegated this responsibility to its Bureau
3 of Corrective Actions ("BCA"). Through this partnership, the BCA and the EPA prepared
4 a draft Carson River Mercury Superfund Site Long-Term Sampling and Response Plan,
5 most recently revised on December 16, 2011 (the "LTSRP"). This guidance applies
6 equally to residential landowners, developers, and mining companies, in setting forth
7 the applicable sampling and management methods that should be followed if there is
8 soil disturbance within the CRMS risk area.

9 The LTSRP specifically notifies entities wishing to mine or reprocess tailings
10 within the CRMS that "activities which result in the mobilization, increased potential for
11 exposure or worsening of the CoC ["contaminants of concern"] contamination problem
12 within the CRMS may make the miner/reprocessor a responsible party under the
13 Comprehensive Environmental Response, Compensation, and Liability Act, (CERCLA),
14 as amended." See LTSRP at 11. Although the LTSRP is a guidance document, the
15 Permit, which constitutes an agency order, *requires* the Permittee to comply with the
16 LTSRP. Specifically, the Permittee must prepare a Sampling and Analysis Plan ("SAP")
17 that incorporates the standard operating procedures set forth in the LTSRP, and this
18 SAP must be approved by the BCA "*prior to any mineral exploration activities* within the
19 CRMS." See Permit at 5 (emphasis added). Of note, the requirement to comply with
20 the LTSRP and for an approved SAP will also apply to Reclamation Permit #0196, or
21 any modification of it, issued to The Plum Mining Company, LLC on the Billie the Kid
22 Project ("Plum Mining Permit") to address past disturbances by the Permittee or its
23 predecessor in interest. See Notice of Final Decision issued December 20, 2011 at
24 Comment 12.

25 The LTSRP standard operating procedures for the SAP include, among other
26 items, the incorporation of standard CERCLA quality assurance/quality control
27 procedures. See LTSRP at 11. Under the LTSRP, if the Permittee chooses to disturb
28 soils that exceed the specified screening/action levels for CoC, they must either

1 excavate the contaminated soils for appropriate disposal, or they must cap the
2 contaminated soils with two feet of clean fill. *Id.* at 6. This requirement is entirely
3 consistent with the ROD.

4 While it appears that the CRA finds fault with the NDEP's issuance of the Permit
5 prior to approval of a SAP or related protections, the Permit is in fact *an order*, and as
6 such it allows the NDEP the ability to more effectively regulate the Permittee's activities
7 through the schedules of compliance contained within it.

8 **C. THE APPEAL SEEKS TO IMPOSE ACTIONS NOT REQUIRED BY STATUTES OR**
9 **REGULATIONS.**

10 As noted above, the remedies sought by the CRA are not appropriate under the
11 statutes and regulations governing the issuance of a Reclamation Permit. Despite the
12 vagueness of Form #3, there are several specific allegations listed, although none have
13 any basis in law, and they must be dismissed. First, the CRA alleges:

14 Because of the unique hazards that result from exploratory
15 mining within the CRMS, the contaminated soil in this project
16 area will be twice disturbed, once by the exploration
17 activities and then by the reclamation to restore the land.
18 Prior to issuing of any permit, the NDEP should determine
19 the extent of the hazard, require the development of a
20 mitigation plan and then consider whether the project should
21 go forward.

22 Form #3 at 5. There are several problems with this allegation. For instance, this project
23 does not contemplate any type of "disturbance" different than what is defined as
24 "affected" under NAC 519A.025. This definition applies to any reclamation permit: An
25 entity subject to a reclamation permit that affects the surface of the land with mining or
26 exploration must reclaim the land in accordance with the permit. Whether this is
27 characterized as one or two "disturbances" is irrelevant. The CRA cites no authority for
28 the proposition that the NDEP is precluded from issuing a reclamation permit prior to
making a determination of the extent of the hazard, if any, on the land sought to be
affected by the Permittee. Nevertheless, the Permit itself fully addresses the CRA's
concerns by utilizing schedules of compliance: While there is no evidence to suggest

1 that *all soils* within the CRMS contain CoC, the Permittee must comply with the SAP
2 prior to exploration in any given risk area within the CRMS. In so doing, the existence
3 and level of CoC will be determined at a site proposed to be disturbed. If there are CoC
4 that exceed the institutional control screening/action levels, the Permittee must then
5 decide whether to manage the area under all applicable environmental laws prior to
6 initiating exploration activities, or to avoid disturbance of the area.

7 Second, the CRA alleges that:

8 Although the Reclamation Permit requires that CMI develop
9 a Sampling and Analysis Plan (SAP) for testing of the mine
10 wastes and/or mill tailings disturbed by the exploration
11 activities, this limitation on the material to be tested does not
12 take into account that historic mercury deposits occurred in a
broad range of settings due to the stockpiling of mercury
prior to use and the disposal of mercury wherever it was
convenient to do so.

13 Form #3 at 5. The EPA and the BCA have conducted a significant amount of
14 assessment of the CRMS over the past twenty five years, and the NDEP has record of
15 over 250 mill sites where mercury was likely used in processing ore. It is through this
16 assessment, historical research and understanding of the milling process that has
17 guided the placement of the risk area boundary of the CRMS, and the boundary
18 determines what areas should be carefully considered for sampling. The EPA and the
19 BCA have no evidence that would support a permit requirement of CoC testing on virgin
20 soils on the Permittee's private property lying outside the risk area boundary of the
21 CRMS.

22 Third, the CRA alleges that:

23 NDEP's response to comments made at the Public Hearing
24 on the draft permit stated that the SAP would also be
25 applicable to historic disturbed areas, however, the permit
26 conditions provide no mechanism for assuring that the
evaluation of historic areas would continue upon the
expiration of the permit.

27 Form #3 at 5. Although the approved SAP will be incorporated into this Permit as well
28 as into any modification of the Plum Mining Permit to address all disturbances caused

1 within the CRMS by the Permittee or its predecessor in interest, the CRA has no
2 standing to appeal issues related to the Plum Mining Permit, which has been in effect
3 since September, 2000. Reclamation permits are enforceable for life of the exploration
4 and mining projects they address. NAC 519A.130; NAC 519A.145. Failure of the
5 Permittee to comply with the Permit, including the SAP, subjects their surety to forfeiture
6 and use by the NDEP to ensure proper reclamation. NAC 519A.390. Also, violation of
7 the Permit subjects the Permittee to possible civil and criminal penalties. NRS
8 519A.270. Nevertheless, the CRA cites no legal authority that grants NDEP the
9 authority to require a permittee to comply with a permit that has been terminated.

10 Fourth, the CRA requests that the Permittee be required to conduct a
11 "management plan to deal with the potential generation of RCRA and NAC 444
12 hazardous waste during this process." Form #3 at 5. There is no requirement in NRS
13 Chapter 519A or the corresponding Nevada Administrative Code that requires
14 completion of a management plan to address RCRA classified hazardous waste within
15 the confines of a reclamation permit. More importantly, the ROD specifically states that,
16 RCRA is inapplicable to CoC within the CRMS:

17 EPA has determined that requirements relating to hazardous
18 waste under the Resource Conservation and Recovery Act
19 (RCRA), Subtitle C, 42 U.S.C. §6921 et seq., and the
20 regulations promulgated thereunder, *are not ARARs for the*
21 *selected remedial action*. The basis for this determination is
22 that the wastes to be remediated under this ROD are mining
wastes that *are exempt from the definition of hazardous*
waste under RCRA Section 3001(b)(3)(A)(ii), 42 U.S.C.
§6921(b)(3)(A)(ii), and 40 C.F.R. Section 261.4(b)(7) (also
known as the "Bevill amendment").

23 See ROD. Section 9.2.2 Applicable or Relevant and Appropriate Requirements
24 (ARARS), p. 33. It is clear that the NDEP has no authority to include RCRA provisions
25 within the Permit on a site that is Bevill exempt from RCRA.

26 Fifth and finally, the CRA alleges:

27 BMRR stated that air and water issues were outside their
28 authority. However they do make reference to the BCA
which conflicts with this assertion. A narrow view of this

1 permit creates a regulatory blind spot that obscures potential
2 harm to the environment and the health and safety of the
public. Oversight by the SEC is needed to ensure global
regulatory oversight and the safety of the public.”

3 Form #3 at 5. The Permit is a reclamation permit for an exploration project proposing to
4 affect 19.75 acres of private land. The NDEP is confined to issue the Permit within the
5 parameters granted to it by the applicable statutes and regulations. The NDEP has no
6 authority to issue an air permit for an exploration project less than 20 acres. NAC
7 445B.22037. The NDEP has no authority to issue a water pollution control permit for
8 exploratory drilling. The CRA fails to provide any authority that would allow the NDEP,
9 or the SEC for that matter, to provide them the relief they now seek through this appeal.
10 There is no authority for the proposition that the SEC can provide “oversight” of the
11 project. What NDEP must consider in issuing a permit is limited by the statutes and
12 regulations governing it. Nevertheless, the BCA and the EPA do provide global
13 protections within the risk area boundary of the CRMS, and those protections are
14 specifically delineated in the Permit. Finally, any mining operation subsequently
15 initiated by the Permittee would trigger additional permitting and regulatory
16 requirements.

17 Because the appeal fails to even allege that the NDEP erred or acted in an
18 arbitrary or capricious manner – much less *how* it has done so – and because the
19 appeal seeks remedies that are not available under the statutes and regulations
20 governing the Permit, the appeal must be dismissed.

21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II. CONCLUSION

For the foregoing reasons, the NDEP respectfully requests that the appeal be dismissed. Should the SEC entertain an evidentiary hearing on this matter, the NDEP requests that the CRA's appeal be limited to the specific allegations set forth in Form #3, as reiterated herein.

RESPECTFULLY SUBMITTED this 13th day of January, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: 

CAROLYN E. TANNER
Senior Deputy Attorney General
Nevada Bar No. 5520
CASSANDRA P. JOSEPH
Deputy Attorney General
Nevada Bar No. 9845
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
Telephone: (775) 688-1818

Attorneys for the State of Nevada

Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the Office of the Attorney General of the
3 State of Nevada and that on this 13th day of January, 2012, I served a copy of the
4 foregoing **NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S MOTION TO**
5 **DISMISS APPEAL**, by mailing a true copy, postage prepaid, to:

6 The Comstock Residents Association
7 PO Box 29
8 Silver City, Nevada 89428

9 Carolyn L. McIntosh, Esq.
10 Patton Boggs, LLP
11 1801 California Street, Suite 4900
12 Denver, CO 80202

13 
14 An Employee of the Office
15 of the Attorney General
16
17
18
19
20
21
22
23
24
25
26
27
28

Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511