

1 **BEFORE THE STATE ENVIRONMENTAL COMMISSION**

2 **STATE OF NEVADA**

3 In Re:)
4 Appeal of the Mercury Operating Permit to)
Construct, Permit No. AP1041-2690, issued to)
5 The Plum Mining Company, LLC, by The)
Comstock Residents Association.)
6)
7)

**NEVADA DIVISION OF
ENVIRONMENTAL PROTECTION'S
MOTION TO DISMISS APPEALS, OR
ALTERNATIVELY, FOR BRIEFING
SCHEDULE**

8 The Nevada Division of Environmental Protection, Bureau of Air Pollution Control
9 ("NDEP-BAPC"), by and through counsel, Catherine Cortez Masto, Attorney General for the
10 State of Nevada, and Jasmine K. Mehta, Deputy Attorney General, hereby moves to dismiss
11 the appeal from issuance of the Mercury Operating Permit to Construct, Permit No. AP1041-
12 2690, issued to the Plum Mining Company, LLC. On July 27, 2011, the NDEP-BAPC issued
13 the Mercury Operating Permit to Construct ("MOPTC") to the Plum Mining Company, LLC.
14 The Comstock Residents Association ("CRA") appealed the permit issuance on August 5,
15 2011.

16 **I. MOTION TO DISMISS THE APPEAL**

17 The CRA has not alleged a failure to comply with either the Commission's general
18 operating permit rules, the permit itself, or that NDEP-BAPC failed to fulfill its statutory and
19 regulatory duty in issuing the permit. Therefore, the appeals should be dismissed.

20
21 **A. The Appeal Alleges No Facts That Would Constitute a Legal Error or
Arbitrary and Capricious Action by the NDEP-BAPC.**

22 The CRA's appeal fails to state what law or regulation NDEP-BAPC has allegedly
23 violated in issuing the permit. Nor does it allege that NDEP-BAPC has erred in issuing the
24 permit or any basis for such error. It does not even allege that NDEP-BAPC abused its
25 discretion in issuing the permit.¹ In fact, the only statute to which the appeal cites is NRS

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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 court's. See *Helms v. State, Div. of Env't'l Prot.*, 109 Nev.
310, 313, 849 P.2d 279, 281 (1993).

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1 445B.100, which sets forth public policy for air quality. It sets forth no statutes or regulations
2 that NDEP-BAPC allegedly violated in issuing the permit, and therefore should be dismissed
3 for failure to state any ground upon which an appeal may be properly based.

4 **B. The Appeal Seeks to Impose Actions Not Required by Statutes or**
5 **Regulations.**

6 The remedies sought by CRA are not appropriate under the statutes and regulations
7 governing issuance of a Mercury Operating Permit to Construct. First, the CRA requests that
8 the Commission impose a requirement to conduct an Environmental Impact Statement ("EIS"),
9 or an evaluation similar in scope to an EIS. An EIS, as noted in the Response to Public
10 Comments, is triggered by a federal action. There is no requirement in NRS Chapter 445B or
11 the corresponding Nevada Administrative Code that requires completion of an EIS prior to
12 issuance of a mercury operating permit to construct. NRS 445B.300; NAC 445B.3611-
13 445B.3689. The CRA does not allege that NDEP-BAPC failed to complete the evaluations
14 required by those portions of the statutes and regulations to evaluate the environmental
15 impacts of issuance of the permit.

16 Second, the CRA alleges that "each permitting agency typically takes the same narrow
17 stance regarding the limits of their [sic] review parameters." Appeal at 2. There is no
18 allegation that NDEP-BAPC even could lawfully take a broader view of its review parameters.
19 What NDEP-BAPC must consider in issuing a permit is limited by the statutes and regulations
20 governing it.

21 Third, the CRA alleges that the size of the Carson River Mercury Superfund Site is
22 larger than NDEP-BAPC's research into the issue has revealed. The CRA cites no authority
23 whatsoever for its proposition that the site encompasses a larger area. Even if the site is as
24 the CRA describes, the CRA does not provide any basis for how NDEP-BAPC erred or acted
25 arbitrarily and capriciously in issuing the permit.

26 Fourth, the CRA seeks to impose a requirement that a third party, not the permittee, be
27 responsible for monitoring and reporting at the facility. There is no basis in the statutes and
28 regulations for imposing such a requirement, and were NDEP-BAPC to do so, it could be

1 subject to allegations that it erred legally and acted arbitrarily and capriciously by imposing
2 such a requirement on the applicant. NRS 445B.300; NAC 445B.3611-445B.3689. Moreover,
3 the CRA provides no explanation whatsoever why such a requirement would be necessary.

4 Fifth, the CRA alleges that noncompliance issues from 2001 and 2007 should
5 "influence [the] agency's review process and provide justification for more comprehensive
6 stipulations regarding the operational aspects of the permit." Appeal at 2. The CRA does not
7 allege that NDEP-BAPC erred or acted arbitrarily and capriciously in any way.

8 The CRA's sixth point merely reiterates its desire for an EIS. Again, it cites to no law or
9 regulation that would allow NDEP-BAPC to impose such a requirement or to consider
10 permitting issues outside of the purview of its regulatory authority.

11 Because the appeal fails to even allege that NDEP erred or acted in an arbitrary or
12 capricious manner – much less how it has done so – and because the appeal seeks remedies
13 that are not available under the statutes and regulations governing NDEP-BAPC, the appeal
14 should be dismissed.

15 **C. The Appeal is Not Properly Signed.**

16 Since the appeal is not signed by any person representing or acting on behalf of the
17 CRA, it should be stricken. The Nevada Supreme Court has previously applied the Nevada
18 Rules of Civil Procedure to administrative proceedings to fill in regulatory gaps. *See Nyberg*
19 *v. Nevada Indus. Com'n*, 100 Nev. 322, 324, 683 P.2d 3, 5 (Nev. 1984). Nevada Rule of Civil
20 Procedure 11 requires that:

21 [e]very pleading, written motion, and other paper shall be signed by
22 at least one attorney of record in the attorney's individual name, or, if
23 the party is not represented by an attorney, shall be signed by the
24 party. Each paper shall state the signer's address and telephone
25 number, if any. . . . An unsigned paper shall be stricken unless
26 omission of the signature is corrected promptly after being called to
27 the attention of the attorney or party.

(Emphasis added.)

28 Since the Appeal is not signed, it should be stricken.²

² The appeal must be stricken unless the CRA immediately corrects the omission upon service of this brief. Since the CRA failed to provide a telephone number as required by NRCP 11, counsel could not call the CRA and draw attention to this omission.

1 **II. MOTION FOR BRIEFING SCHEDULE AND MORE DEFINITE STATEMENT**

2 In the event that the Commission decides not to dismiss the appeal, NDEP-BAPC
3 requests a briefing schedule pursuant to NAC 445B.8925. Specifically, NDEP-BAPC requests
4 that the Appellant be instructed to file a brief that contains facts and supporting authorities on
5 the specific statutory act or omission that it alleges NDEP-BAPC violated in issuing the permit.
6 After Appellant files its brief, NDEP-BAPC requests an opportunity to file a responsive brief
7 and/or motion to Appellant's brief. NDEP-BAPC proposes the following briefing and hearing
8 schedule:

- 9 • Opening brief by Appellant to be filed by Friday, September 9, 2011;
- 10 • Responsive brief to be filed by Friday, September 30, 2011;
- 11 • Hearing to be scheduled within two weeks after responsive brief.

12 **III. CONCLUSION**

13 For the foregoing reasons, NDEP-BAPC respectfully requests that the appeal be
14 dismissed, or, alternatively, that a briefing schedule be set and the CRA be required to file an
15 opening brief with facts and legal authorities that demonstrate how NDEP-BAPC has failed to
16 comply with its legal obligations, has erred, or has acted arbitrarily and capriciously.

17 DATED this 15th day of August 2011.

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19 Attorney General

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CERTIFICATE OF SERVICE

I, Sandra L. Geyer, certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 15th day of August 2011, I deposited for mailing a true and correct copy of the foregoing **NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS APPEAL, OR ALTERNATIVELY, FOR BRIEFING SCHEDULE**, via United States Postal Service in Carson City, Nevada, by first class mail, postage prepaid, to the following:

The Comstock Residents Association
P.O. Box 29
Silver City, Nevada 89428



Sandra L. Geyer, Legal Secretary II