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BEFORE THE NEVADA STATE ENVIRONMENTAL COMMISSION

In Re: Appeal of NDEP’s Approval of the Sampling
and Analysis Plan; Comstock Mining Inc.)
)
)

APPELLANT CRA’S REPLY

The Comstock Residents Association (“CRA”) file this Reply in response to Nevada Department of Environmental Protection (“NDEP”) and Comstock Mining Inc.’s (“CMI”) briefs in opposition and motions to dismiss the instant appeal challenging the final approval of the Sampling and Analysis Plan (“SAP”) by the for CMI activities within the Carson River Mercury Superfund (“CRMS”) site. CRA replies to both in this one brief.

1. CRA’s Appeal of the NDEP’s Approval of the SAP is proper and timely

Both NDEP and CMI attempt to place CRA in a Catch-22 position by arguing that in order to challenge the SAP, CRA must have done so in its appeal of Reclamation

Permit 0315. However, NDEP only made the SAP available to the public after it approved Permit 0315. CRA, therefore, could not have included the SAP within that prior appeal. CRA properly filed a separate appeal on the approval of the SAP.

2. NDEP may not Bypass Formal Public Comment by Labeling Critical Permit Elements “Conditions of Approval”

Even though all agree that the SAP is a critical element of Permit 0315 in order to protect public safety and health and that a near final draft was available at the time, NDEP argues that it need not disclose a draft SAP to the public nor is required to allow the public to comment meaningfully on it. NDEP tacitly admits that had the SAP been attached to the draft permit, the public comment and response requirements of NAC 419A.180, 419A.185, and 419A.210 would apply. Indeed, NDEP attached to the draft permit Conditions and Protocols for reclamation and revegetation. NDEP, however, advances the position that by labeling a critical element of the permit a “condition of approval” it may legally shield the element from public review. Thus, the question before the SEC in this appeal is not whether NAC 419A.180, et seq. apply to the whole gamut of conditions of approval, but rather whether the SAP was such an essential element of the permit that by depriving the public from a meaningful comment period, it inappropriately bypassed the otherwise applicable requirement to do so. NDEP provides no rationale as to why Sampling and Analysis Plan could not have been part of the draft permit and, given its import, why it was not – other than to avoid subjecting the document to meaningful disclosure and public comment period.

3. SAP Sampling Scope Remains Murky

a. Sediments

As noted in CRA's Opening Brief, the SAP states that "sediments" will not be tested. Sediments can occur wherever deposited by forces of erosion (e.g., water or air). NDEP and CMI both supply their own definition of sediments as confined to stream channels. The SAP, however, contains no such limitation or even a definition. Since toxic materials can be found in sediments outside of defined stream channels, the SAP exclusion of sediment sampling is inappropriate, especially since the EPA's Record of Decision ("ROD") specifically includes "sediments" within the CRMS. ROD at 4.

b. CRMS Boundary

Moreover, on Map 6 of the SAP, entitled Disturbance Areas Within CRMS Zones, there are large tracks of land shown in green that are supposedly outside of the CRMS zone. The question is, who determined that these CMI owned-properties are outside of the CRMS? The majority of the areas in the SAP that are in green appear within the Gold Canyon floodplain.

In addition, the NDEP and EPA's April 2011 circular titled "Archaeological Studies of Historic Mill Sites" describes the issuance of a Request For Proposals to retain the services of archeologists to review historic records, document mill site histories and ultimately conduct field-work to identify the location and what remains of each mill site on the ground surface. This documents states that "some of the locations of mill sites are well established, but the locations of many others are less certain. Since these mill sites are the source for the mercury, arsenic and lead contamination, it is important to know as much about the geographic location, nature and history of each mill site as possible." In some instances known locations of mill sites are excluded from testing in the SAP because there was a finding by an archeological survey of no mill site foundations or

disturbance. Because the sites of mills are over 100 years old, it is not unusual for there to be no visible remnants. During the ensuing years many mill sites were cannibalized for historic artifacts and/or building remains were used in the construction of later buildings. The mill sites not included for any of the sampling are:

Stuart/Kilpatrick Mill site (figure 16)

Empire Mill site (figure 16)

Seals Mill site (figure 17)

Alpha Mill site (figure 20)

Ramsell Mill site (figure 20)

Succor Mill site (figure 20)

Globe and Lindsay Mill site (figure 21)

Bartola Mill Site (figure 24)

These Mill Sites are adjacent to other areas to be sampled or are in the Lucerne Pit where massive amounts of soil had already been disturbed by CMI. These areas should be tested for contaminants in order for the SAP to be fully protective of public health and safety.

c. Use of Undisclosed Archeological Surveys

In their own RFP, NDEP and EPA requires archeologists to review historic records, document mill site histories, and conduct fieldwork to identify the location and what remains of each mill site on the ground surface. Apparently it was important to NDEP and EPA as part of the process of determining CRMS boundaries to conduct open archeological work. However, the SAP limits the area of sampling to areas CMI designates as historically disturbed. “The scope of the sampling applies to areas of the

Site where historic disturbance has been documented by archaeological verification and aerial photo analysis.” SAP at 9; see also id at 16 (“If an area of the Site is designated as undisturbed land based upon the absence of visual evidence of disturbance (archaeological survey and aerial photo interpretation) it will not be sampled.”) The archeological survey that is the basis for these limitations were apparently never disclosed.

In addition, in the SAP known locations of mill sites are not slated for sampling because there is no evidence of disturbance. That doesn’t mean that there are no contaminants. It just means that there is no surface evidence left. For example, CMI’s motion to dismiss states “Comstock already has or will sample each one of the listed mill site areas. Specifically Figure 16 of the final SAP identifies the Stuart/Kilpatrick and the Seals mill sites as areas to be sampled at a later date.” Figure 16 does not have the Stuart/Kilpatrick and the Seals identified as to be sampled at a later date. Figure 14 clearly shows these mill sites to be outside of the boundaries for later sampling. Thus, the scope of the sites to be sampled appears to be contrary to the express boundaries of the CRMS.

CONCLUSION

The SEC should reverse NDEP’s approval of the SAP and remand it for revision to meet legal requirements and an adequate and meaningful public comment period. Additionally, all exploration and reclamation activities conducted by CMI under Permit 0315, should be suspended until such time as the proper identification and evaluation of historic and archeological resources can be completed.

Dated: April 18, 2012.

/s/

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CERTIFICATE OF SERVICE

I certify that on the 18th day of April, 2012, I electronically served the CRA's Response to NDEP's Motion to Dismiss and CMI's Joinder upon the following parties:

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