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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.)
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)

APPELLANT CRA’S OPENING BRIEF AND WITNESS LIST

INTRODUCTION

On February 8, 2012, the Comstock Residents Association (“CRA”) filed the instant appeal challenging the final approval of the Comstock Mining Inc. (“CMI”) Sampling and Analysis Plan (“SAP”) by the Nevada Department of Environmental Protection (“NDEP”) for CMI activities within the Carson River Mercury Superfund (“CRMS”) site. The area is adjacent to town of Silver City where many members of the CRA live, work and recreate. The CRMS exists because prior mining activities in the Comstock contaminated the soils in the area with mercury, arsenic, lead and other toxic materials. Mercury, arsenic and lead pose substantial threats to public health, air quality and water quality.

Under NDEP Reclamation Permit 0315 (the subject of a prior appeal dismissed by the SEC), CMI will disturb soils within the CRMS to explore again for gold and silver. In conducting such exploration activities within the CRMS, CMI will encounter toxic, chemical-laden soils. To address the very real threat of release of mercury contamination adjacent to residential areas, the United States Environmental Protection Agency (“EPA”) and NDEP required CMI to prepare a SAP consistent with the CRMS Long-Term Sampling and Response Plan (“LTSRP”) in order to protect the citizens of the Comstock, as part of Reclamation Permit 0315.

However, when the NDEP published draft Permit 0315 on October 12, 2011, the critical SAP was not included as part of the permit because it was not yet prepared by CMI. Instead, NDEP simply included a permit condition requiring the subsequent submission of an acceptable SAP to NDEP. See Permit 0315 at 5 (Special Condition A: “The permittee shall submit to the Division Bureau of Corrective Actions, Superfund Branch, for review and approval, a Sampling and Analysis plan (SAP) which includes a standard operating procedure in the Long Term Sampling and Response Plan (LTSRP) guidance document for exploration activities that may disturb mine wastes and/or mill tailings within the Carson River Mercury Superfund Site (CRMS). The Division approved SAP shall be implemented prior to any mineral exploration activities within the CRMS.”) Although the NDEP provided a 30-day comment period for the draft permit and general conditions, it did not include the SAP in this official public review, comment and appeal process. NDEP affirmatively chose not to subject the full permit to public review and instead stated that CRA “*will have an opportunity to review and comment on the SAP prior to final approval, even though there is no formal public comment process*

for this type of document. The [NDEP] has informed the CRA that the Division is not obligated to incorporate the comments, but would appreciate input.” NDEP Permit 0315 Final Decision at Response 3 (italics original).

CRA members provided written and oral comments on the deficiencies of NDEP’s draft permit, including as a result of absence of a draft or final SAP, thereby being deprived of a meaningful opportunity to comment on this critical aspect of NDEP’s permit. After holding a public hearing on the draft permit prior to availability of the SAP, NDEP issued the final permit on December 20, 2011. The SAP still had not been prepared.

The NDEP only made the SAP available as a courtesy to CRA members after NDEP issued the final Permit 0315 and after CRA filed its prior appeal. On January 7, 2012, NDEP provided a link to an “ftp” website on which the draft SAP was housed. The SAP however is a massive document (over 600 pages in length) which CRA members could not reasonably download as it was loaded onto the ftp site as a single document. Despite the size of the document, NDEP demanded that CRA provide any comment on this huge technical document within 7 days. On January 10, 2012, a CRA member visited NDEP and obtained paper copies of the narrative text; NDEP only provided those portions of the draft SAP that NDEP staff deemed relevant for CRA to review. In response to CRA’s request for more time to review this critical part of the reclamation permit, NDEP begrudgingly provided CRA with the weekend to conduct its review, making comments due January 17, 2012 (“I told Gail Sherman that I would give you through this coming weekend for the review.”)

At 2:30 p.m. on January 17, 2012, the CRA submitted quickly prepared, brief comments on the draft SAP to NDEP via hand-delivery. Two hours later, NDEP emailed to a CRA member a copy of a previously prepared NDEP letter to CMI requiring only a few minor alterations. On February 2, 2012, NDEP informed CRA members that CMI's SAP satisfied the requirements for final approval. CRA filed this appeal on February 8, 2012.

Under the NAC, NDEP must protect Nevada's land air, water and other resources when issuing reclamation permits. See e.g., NRS 519A.010(b) ("Proper reclamation of . . . areas of exploration . . . is necessary to prevent undesirable land and surface water conditions detrimental to the ecology and to the general health, welfare, safety and property rights of the residents of this state . . ."); NAC 519A.260. NDEP failed to do this when it approved the SAP.

As described below, CMI's SAP suffers from a variety of flaws; some procedural, some substantive. NDEP failed to provide a meaningful opportunity to comment as required under the provisions of the NRS and NAC. The SAP itself illegally restricts the scope of CMI sampling by revising the boundaries of the CRMS, excluding sampling of "sediments" regardless of whether they may be contaminated, permitting CMI to exclude territory from the CRMS, and restricting sampling based on an undisclosed, unreviewed CMI archeological survey. Finally, the SAP was developed without the necessary coordination and protection of historic resources. Because of these errors, the SEC should withdraw the SAP and remand it to the NDEP SAP for full public disclosure, comment and reanalysis.

A. NDEP Failed To Provide A Meaningful Opportunity to Comment

The provisions of NAC Chapter 419A and NRS Chapter 233B require that NDEP must provide the public and the applicant certain minimum processes. First, NDEP must provide notice of reclamation permitting actions, including issuing a draft of the proposed permit. See NAC 419A.180. NDEP must then provide the public and applicant with 30 days to comment on the draft permit. NAC 419A.185. Upon issuance of its final decision on the draft permit, NDEP must respond in writing to all substantial public comments in order to justify its decision. NAC 419A.210.

In this case, it is undisputed that NDEP's draft permit did not include the SAP; instead it only included a condition that CMI must develop one and submit it for NDEP approval. It is also undisputed that NDEP in conjunction with CMI had been developing the SAP for months and that a draft SAP was available to receive public comment during that time. NDEP's unofficial 7-day opportunity to review the draft SAP did not meet the 30-day requirement and that NDEP did not respond to the comments CRA submitted as required by law. Finally, it is undisputed that residents of the Comstock possess a strong and legitimate interest in fully participating in the preparation and approval of this essential part of the Permit given that proposed exploration activities are to take place in the CMRS and the sampling and analysis plan is critical to guiding the location of land disturbances and reclamation activities. NDEP therefore violated the NAC and the NRS by failing to provide a meaningful opportunity for citizen review and comment upon the actual permit issued to CMI.

B. The SAP Illegally Restricts The Scope Of Sampling

NDEP improperly restricted the scope of the SAP so that the program fails to meet the requirements of the NAC.

1. NDEP Narrowed CRMS Boundaries

As set forth in CRMS Record of Decision (“ROD”) and the LTSRP, the boundaries of the CRMS includes “tailing piles, sediments and soil in Gold Canyon, Sixmile Canyon and Sevenmile Canyon . . .” ROD at 4 (Site Definition). The LTSRP defined property to be within the CRMS boundaries, “and thus be subject to the [LTSRP] requirements, if: . . . [i]t is in Six-Mile, Daney or Gold Canyons and the their associated flood plains” LTSRP at 4.

There is no definition of the CRMS in the SAP except for Page 11 of the SAP: “The USEPA divided the CRMS into two Operable Units (OU’s): OU1 consists of the mill sites and those areas where tailings have contaminated surface soil (generally the sources areas), and OU2 is the Carson River itself, including sediments and biota (generally the depositional/ecological areas). Areas likely to have the highest levels of COC’s include former mill sites and associated drainage pathways down-gradient of mill sites as well as within the Carson River system itself. *This statement supports the original boundaries stated in the ROD and the LTSRP but appears to be in conflict with the areas identified in the SAP for sampling*

2. The SAP Excludes “Sediments”

As demonstrated above, the CRMS ROD and LTSRP both include “sediments” as a key part of the CRMS – indeed, a place where toxic contaminants concentrate. However, the SAP expressly excludes sediments: “Sampling of sediments is not included

in the scope of this investigation.” SAP at 20. Since CMI’s SAP excludes a significant potential location of toxic materials, NDEP improperly approved it.

3. CMI Limited Sampling to Sites in its Undisclosed Historic Survey

The NDEP-approved SAP limits the area of CMI 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.”)

However, the sampling rationale is based on data and information that is referred to but not included in the SAP. Assumptions are made based on whether there is evidence of disturbance or not according to the unavailable information. In some instances known locations for mill sites are excluded from testing because there is a finding of no mill site foundations or disturbance. 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), and the Bartola Mill Site (figure 24).

In addition, it appears that NDEP never even consulted the State Historic Preservation Office (“SHPO”) for an expert review of CMI’s survey. As a result, NDEP failed to adequately protect the residents of the Comstock from potential toxic exposure by insuring that the SAP covers all appropriate areas.

4. Removal of Sites from CRMS without Sampling

One of CMI's express purposes in the SAP is to remove areas from the CRMS. See SAP at 6 ("The purpose of the SAP is satisfy the following goals . . . [i]dentify Site areas with no historic milling infrastructure or mill tailings that can be excluded from the CRMS.") However, under the SAP as indicated above, CMI will not be sampling any areas they have determined to be recently or historically undisturbed. CMI therefore intends to remove areas from the CRMS without sampling them for the presence of toxic material based solely on its assessment – unreviewed by NDEP, the public or state archeological experts – of whether the area is previously disturbed.

5. Lack of Air Sampling

NDEP's Permit 0315 allows CMI to cause multiple disturbances of potentially toxic laden soils. This activity will likely disperse contaminate laden dust negatively impacting the health and welfare of the community yet monitoring of the air is not part of the SAP. The exclusion of air testing is not explained in the SAP. Ingestion by inhalation of COC contaminated soil is not addressed. Air quality testing should be a part of the SAP.

C. Failure to Protect Historic Resources

NDEP failed to consider the potential for adverse effects of exploration and reclamation actions required in Permit 0315 could have on historic and archeological resources. The reclamation permit requirements involve additional ground surface disturbances. Just as with the initial disturbance, these additional disturbances have the potential to damage historic and archeological resources. The Secretary of Interior Standards for Historic Preservation provides specific guidelines for appropriate actions

relating to historic resources. These standards have a long-standing history of providing appropriate actions to be taken when those actions affect historic and archeological resources. These standards were ignored by NDEP when reviewing and approving the SAP.

EPA Region 9 provides funding for the administration costs associated with the NDEP's management of the CRMS. NDEP is responsible for implementing the LTSRP for the CRMS. The SAP contained in Permit 0315 issued to CMI was issued pursuant to coordination with BCA. The NAC requires that the NDEP protect not only air and water resources but also the public's general welfare and necessitates the responsibilities for the identification, evaluation, and protection of cultural resources on the part of any actions taken by NDEP. In addition, if the federal EPA approved the NDEP state statutes as complying with Federal law and therefore relegated permit issuing responsibility to the NDEP but failed to recognize the lack of protection for cultural resources within those state statutes, then the federal EPA actions are noncompliant with Federal law and regulation. NDEP should have consulted with appropriate parties under the National Preservation Act of 1966 as amended.

Moreover, CMI has performed testing and remedial actions continuously since the initial approval of Permit 0315 on January 17, 2012. All activities have occurred within the boundaries of the Virginia City National Landmark Historic District. Historic and archeological resources are fragile and surface ground disturbance more often than not causes irreversible damage. CMI's activities have included the construction of roads, drill pads and sumps causing significant surface ground disturbance and subsurface vibrations. These activities have not been assessed for potential damage to historic

and/or archeological resources. It is unclear if any specific historic and/or archeological resources have been affected. It is clear that inappropriate landscape alteration is recognized as an adverse effect to historic districts. Disregard for potential effects to cultural resources by the NDEP within the permitting process has led to a situation that has allowed CMI to potentially damage these resources without consequence. CMI should be required to assess all completed work for effects on historic and archeological resources and in consultation with SHPO, ACHP and NPS develop a mitigation plan to correct this error.

D. Witness List

1. Bruce Holmgren, NDEP-BMRR
2. Paul Comba, NDEP-BMRR
3. Todd Process, NDEP-BMRR
4. Jeff Collins, NDEP- BCA
5. Jack Yates, NDEP-BCA
6. David Friedman, NDEP-BCA
7. Gayle Sherman
8. Robert Elston
9. Larry Wahrenbrock
10. Any witnesses listed or called by Appellant
11. Any witnesses that may become necessary for impeachment and/or rebuttal

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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: March 20, 2012.

/s/

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CERTIFICATE OF SERVICE

I certify that on the 20th day of March, 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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